



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

File Ref No: WC/1314/0095

In the matter between:

Social Justice Coalition

COMPLAINANT

and

City of Cape Town

RESPONDENT

REPORT

1. Introduction

1.1 The South African Human Rights Commission (hereinafter referred to as the "Commission") is an institution established in terms of section 181(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the "Constitution").

1.2 In terms of Chapter 9, section 184 of the Constitution provides that:

"184.(1) The South African Human Rights 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.*

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power -

- (a) to investigate and to report on the observance of human rights;*
- (b) to take steps to secure appropriate redress where human rights have been violated;"¹*

1.3 The Human Rights Commission Act, 54 of 1994 (hereinafter referred to as the "HRC Act") as promulgated in terms of section 184(4) of the Constitution, further supplements the powers of the Commission.

1.4 Section 9(6) of the HRC Act and Complaints Handling Procedures issued in terms of it (Gazette, 27 January 2012, No. 34963) determine the procedure to be followed in conducting an investigation regarding the alleged violation of or a threat to a fundamental right.

¹ Constitution of the Republic of South Africa, 1996 (hereinafter "Constitution"), Section 184(1), (2).

2. The Parties

2.1 The Social Justice Coalition (hereinafter referred to as the "Complainant") is a nongovernmental organisation (hereinafter referred to as the "NGO") with its headquarters at Shawco Centre, K2, G323 Mongezi Road, Khayelitsha, Cape Town, Western Cape Province, Republic of South Africa. The Complainant's Public Benefit Number is 930 031 506 and its Non Profit Organisation Number is 067 089.

2.2 The City of Cape Town (hereinafter referred to as the "Respondent") is a Category A Municipality established in terms of the Local Government Municipal Structures Act, 117 of 1998, with its Head Office situated in the Civic Centre, 112 Hertzog Boulevard, Cape Town, Western Cape Province, Republic of South Africa. The Respondent is cited as the local government authority with jurisdiction over Khayelitsha responsible for the delivery of basic municipal services to its residents.

3. The Complaint

The Commission received the complaint on 14 May 2013 wherein the Complainant alleged that:

3.1 The Respondent contracted with a company known as Mshengu Services to supply and service portable chemical toilets in various areas around Cape Town, including Khayelitsha, for a total cost of approximately R165 million (one hundred and sixty five million rands) .

3.2 Over the week of April 22 to 27, the Complainant conducted an exercise referred to as a “social audit,” which consisted of:

3.2.1 Counting portable chemical toilets supplied by Mshengu Services in four areas of Khayelitsha, namely RR Section, CT Section/Taiwan, Greenpoint and Emsindweni;

3.2.2 Observing the state of portable chemical toilets in the four areas, specifically with regard to cleanliness, accessibility, door functioning and stability;

3.2.3 Asking residents in all four areas about their experiences in using the portable chemical toilets; and

3.2.4 Asking residents how many people use each chemical toilet.

3.2.5 A total of 256 toilets were counted in the four areas (89 in CT Section, 52 in Emsindweni, 23 in Greenpoint and 92 in RR Section).

3.2.6 Of these 256, 138 had waste overflowing, locked doors, no doors, extreme uncleanliness, instability, or severe damage.

3.2.7 Residents reported that 32% of the toilets had not been emptied² in the week prior to the social audit and none of the toilets were cleaned³ on a daily basis.

3.2.8 Residents raised issues regarding the locations where toilets were situated.

3.2.9 Residents reported that they were not consulted before services were instituted.

3.3 On 10 May 2013, the Complainant released a report of its social audit.⁴ In the report, the Complainant stated that the social audit:

"... exposes egregious maladministration by the City of Cape Town in relation to outsourced services. In addition, we believe that Mshengu Services acted unlawfully by not fulfilling its contractual obligations. To prevent such occurrences in the future the SJC will now ask the Auditor General to investigate the contract, the Public Protector to investigate maladministration and the South African Human Rights Commission to investigate the rights violations."

² For purposes of this report, the term "emptying" refers to the process of removing the human waste accumulated in the receptacle beneath the toilet seat and sanitising the same.

³ For purposes of this report, the term "cleaning" is used to mean cleaning and sanitising of the toilet seat, the area surrounding the seat, the floor inside the chemical toilet and the area around the outside of the toilet.

⁴ Report of the Khayelitsha 'Mshengu' Toilet Social Audit, page 22. Available at <http://www.sjc.org.za/wp-content/uploads/2013/05/Social-Justice-Coalition-Report-of-the-Khayelitsha-Mshengu-Toilet-Social-Audit-10-May-2013.pdf> [accessed 21 May 2014].

4. Human Rights Under Investigation

The Complainants alleged that the Respondent violated the rights to:

4.1 Equality (Section 9 of the Constitution).

4.2 Human dignity (Section 10 of the Constitution).

4.3 Privacy (Section 14 of the Constitution).

4.4 An environment not harmful to health or well-being (Section 24(a) of the Constitution).

4.5 Basic sanitation (Section 3(1) of the Water Services Act, 108 of 1997).

5. Investigation Undertaken by the Commission

5.1 *Steps Taken During the Investigation*

5.1.1 After receiving the complaint, the Commission assessed the situation and determined that the allegations of the complaint would, if substantiated, constitute a violation of the rights to equality, dignity, privacy, an environment not harmful to health or well-being as contained in sections 9, 10, 14, and 24 of the

Constitution, respectively, and of the right to basic sanitation set out in section 3 of the Water Services Act.

5.1.2 On 29 May 2013, the Commission requested further information from the Complainant about matters set out in the social audit report.

5.1.3 On 20 June 2013, the Commission received further information from the Complainant.

5.1.4 On 11 July 2013, the Commission met with the Office of the Public Protector (hereinafter referred to as the "OPP"), which informed that it had received the complaint and had advised the Complainant that it must first exhaust internal remedies with respect to the contractual compliance and maladministration claims. It was agreed that OPP would address the contract management and service delivery aspects of the complaint if and when required as they relate to issues that fall within the mandate of the OPP. The Commission advised that it would focus its investigation on the human rights issues, particularly with regard to progressive realisation of the right to basic sanitation.

5.1.5 On 12 July 2013, the Commission sent a letter to the Respondent requesting a response to the Complainant's allegations as well as additional information including the following:

- i. How distribution ratios of chemical toilets were determined in the four named communities;

- ii. How servicing schedules were determined in the four named communities;
- iii. Basic sanitation services provided in the four areas from 1 November 2010 until 30 June 2013 other than chemical toilets supplied and serviced by Mshengu;
- iv. How sanitation services in the four areas from 1 November 2010 until 30 June 2013 were assessed in regard to the requirements set forth in Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water;
- v. A description of sanitation service provision in CT Section, Emsidweni, Greenpoint, and RR Section in effect since 30 June 2013;
- vi. Sanitation service provision in CT Section, Emsidweni, Greenpoint, and RR Section planned from 1 July 2013; and
- vii. Community engagement efforts undertaken by the City in CT Section, Emsidweni, Greenpoint, and RR Section regarding sanitation services to be provided in those areas.

5.1.6 On 13 August 2013, the Respondent responded to the allegations letter.

5.1.7 On 21 August 2013, the Commission sent the Respondent's response to the Complainant for comment.

5.1.8 On 19 September 2013, the Commission received the Complainant's comments on the Respondent's response.

5.2 Information Received from the Respondent

5.2.1 Basic Sanitation Service

- i. The contract at issue in the complaint, entitled "*Rental, Delivering and Servicing of Portable Non-Flushing Chemical Toilet Units for Informal Settlements and Public Transport Interchange Sites Within the City of Cape Town*" was in effect from 1 November 2010 to 30 June 2013.⁵ Under the contract, Mshengu was to supply and service 3 841 chemical toilets in 107 informal settlements throughout the metropolitan area.⁶ The number of toilets supplied per settlement ranged from 1 to 292.⁷ According to the terms of the contract, 36 of the settlements had more than 25 chemical toilets supplied. In total, these 36 settlements had 3 242 of the total 3 841 chemical toilets (84.4%).⁸
- ii. Prior to 1 November 2010, the Respondent had had at least two other contracts with Mshengu for supplying and servicing chemical toilets in informal settlements in the City

⁵ 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 1, 17.

⁶ 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 15-16.

⁷ 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 15-16.

⁸ 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 15-16.

of Cape Town. One ran from July 2005 to June 2008 with a total cost of R133.2 million; the other from July 2008 to October 2010 with a total cost of R117.6 million.⁹

- iii. The contract with Mshengu that expired in June 2013 was extended on 24 June 2013 for an additional period of up to 6 months (December 2013).¹⁰
- iv. The Respondent determines what sanitation services will be provided in informal settlements using guidelines contained in Part 3 of The National Housing Code: 2009 (Incremental Interventions: Emergency Housing Programme (hereinafter referred to as the "EHP")).¹¹
- v. *"The City's first priority is to provide an emergency level of service to households in all settlements, but as funds allow it also extends the coverage and density of services in each settlement beyond the basic level."*¹²
- vi. Chemical toilets are one of several sanitation options used in informal settlements within the Respondent's jurisdiction.¹³ Because they can be used in a flexible manner, they *"are in widespread use."*¹⁴

⁹ 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 58, 60.

¹⁰ 13 August 2013 letter from the Respondent to the Commission, Annexure 6.

¹¹ 13 August letter from the Respondent to the Commission, page 2.

¹² 13 August letter from the Respondent to the Commission, page 3.

¹³ 13 August letter from the Respondent to the Commission, page 3.

¹⁴ 13 August letter from the Respondent to the Commission, page 4.

- vii. In response to the Commission's request for information regarding how sanitation services were assessed in regard to the requirements set forth in Regulation 2 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water, the Respondent replied that:

"chemical toilets are designed to provide the minimum standard of basic sanitation by means of

- *Enclosed design, providing privacy and protection from weather;*

Reducing smells and inhibiting fly-attraction through the addition of neutralising chemicals to the containers;

- *Not harming the environment as the content is disposed of at wastewater treatment plants."*¹⁵

- viii. The Respondent has attempted to achieve a ratio of service provision of five households per sanitation point. The Respondent uses this ratio as its norm for basic sanitation. It does not include a consideration of either distance from the home to the toilet or the number of people using a particular toilet. Rather, the Respondent states that:

"[t]he numbers are determined by taking into consideration a combination of multiple factors, including:

¹⁵ 13 August letter from the Respondent to the Commission, page 4.

- *the number of households in a specific informal settlement;*
- *the type of sanitation technologies already available;*
- *the availability of space to position toilet structures,*
- *historic locations which prevailed;*
- *infrastructure and land suitability;*
- *the type of sanitation technology in the area*
- *the usage frequency of current technologies already available;*
- *the sustainability of the sanitation technologies, and*
- *community acceptance of current or planned sanitation technologies.*

Distribution ratios are then determined by providing what is practically feasible while keeping all factors in mind.”¹⁶

- ix. The Respondent further states that “[t]he capacity of chemical toilets is such that many more than five households can utilise them. The servicing schedule of three times per week is not predicated by volume but rather to ensure that the toilet is cleaned regularly as several households may be utilising them.”¹⁷ (emphasis added)

- x. However, the Respondent has also “acknowledged that it cannot guarantee on a daily basis the quality of cleanliness

¹⁶ 13 August 2013 letter from the Respondent to the Commission, pages 4–5.

¹⁷ 13 August 2013 letter from the Respondent to the Commission, page 5.

of each toilet...due to the huge number of Informal Settlements and toilets and the frequency of use of the toilets. The cleanliness of a toilet depends on the user and can be spoiled immediately after it has been cleaned.¹⁸ (emphasis added)

- xi. Table 1 shows the total sanitation services provided by the Respondent in the four areas at issue in the complaint between 1 November 2010 and 30 June 2013.¹⁹

Area	Number of toilets				Servicing Ratio per Household	Avg No of People per Toilet ²⁰
	Communal flush ²¹	Chemical	Portable ²²	Total		
RR	299	100	579	978	1:9	26
CT/Taiwan	411	110	1248	1769	1:8	28
Emsindweni	50	50	0	100	1:2	7
Greenpoint	86	79	0	165	1:10	32

Table 1

In Table 1, the term “servicing ratio” indicates the number of toilet facilities with respect to the number of households, taking into account all available toilet facilities in the specified area.²³ By way of example, according to this ratio, there is one toilet facility for every 10 households in Greenpoint. This toilet may be a chemical toilet or some other type. The ratio does not capture the number of people per household, the distance from the various households to the toilet or whether all deployed toilets are functioning.

¹⁸ 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 4.0.

¹⁹ 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 7.0.

²⁰ These data are derived by multiplying the number of toilets provided in the area by the average household size in the respective wards of the four areas as shown at http://www.capetown.gov.za/en/stats/Pages/wards_2011census.aspx [accessed 26 May 2014].

²¹ Communal flush refers to full-flush toilets connected to a sewerage system that are used by multiple households on a communal basis.

²² Portable flush refers to individual portable toilets where waste is collected in a holding tank that must then be detached for emptying and cleaning.

²³ 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 7.0.

- xii. Figures 1-3 show the placement of the chemical toilets within the four areas.



Figure 1 – Chemical toilet placement in Greenpoint. Settlement area outlined in yellow. Toilets shown in green. Scale: 1 cm = 50 m.²⁴

²⁴ 13 August letter from the Respondent to the Commission, Annexure A to Annexure 1.



Figure 2 – Chemical toilet placement in CT Section/Taiwan and RR Section. Settlement areas outlined in yellow. Toilets shown in green with overall placement area outlined in white. Scale: 1 cm = 62.5 m.²⁵

²⁵ 13 August letter from the Respondent to the Commission, Annexure B to Annexure 1.



Figure 3 – Chemical toilet placement in Emsindweni. Settlement area outlined in yellow. Toilets shown in green. Scale: 1 cm \approx 22 m.²⁶

- xiii. Sanitation services in effect from 30 June 2013 to 31 December 2013 were the same as they were between 1 November 2010 to 30 June 2013 with the exception of 20 additional chemical toilets placed in RR Section after 1 July 2013.²⁷

²⁶ 13 August letter from the Respondent to the Commission, Annexure C to Annexure 1.

²⁷ 13 August letter from the Respondent to the Commission, page 8. The letter notes an additional 140 communal flush toilets in RR Section that were installed by the end of 2012, but this figure appears to have been included in the general numbers described above. The letter also reports that RR Section was planned to receive an additional 10 communal flush toilets and Emsidweni was planned to have an additional 20 communal flush toilets installed. No further plans were indicated for Greenpoint or CT Section/Taiwan.

- xiv. According to the Respondent, the number and type of sanitation services are continually improved where practically possible in light of the multiple factors set out by the Respondent.²⁸

5.2.2 Community Engagement

- i. With regard to community engagement, the Respondent stated that *"the variety of services is discussed with communities."*²⁹
- ii. The Respondent states that *"[c]ommunity engagement is of high priority when sanitation services are to be provided. The service provider liaises with the community through the community leadership whenever placing toilets. The City makes it mandatory for service providers to consult with the community. Proof of such consultation can be provided."*³⁰
- iii. *"[T]he City makes it mandatory to the service provider to consult with the community. In emergency situations, consultation with communities is limited. In certain instances, demand for service is done through the Councillors or Health Inspectors with pre-determined location areas. For toilets that are installed by the City directly, full consultation with the Councillor, Community Members and Community*

²⁸ 13 August letter from the Respondent to the Commission, page 8.

²⁹ 13 August letter from the Respondent to the Commission, page 2.

³⁰ 13 August 2013 letter from the Respondent to the Commission, page 9.

*Leadership is done since the infrastructure will be of a permanent nature.*³¹

- iv. Though the contract makes provision for Community Liaison Officers to facilitate ongoing engagement between communities and the Respondent, “[t]he City opted to use Janitors and Community Workers instead of Community Liaison Officers who are more expensive to sustain.”³²
- v. Lastly, the Respondent notes that community members employed through the Extended Public Works Programme to clean full flush toilets in the areas are asked to monitor contractor performance on an ad hoc basis through the use of quality control sheets in addition to their primary janitorial duties.³³ In the Respondent’s view, this is a type of community engagement.

5.3 *Response Received from the Complainant*

- 5.3.1 The Complainant stated that the number of toilets that the Respondent listed does not accurately depict the lived reality as many of the toilets counted do not function as a result of a lack of proper maintenance. The Respondent’s records fail to reflect this issue when offering data.

³¹ 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 9.0.

³² 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 8.0.

³³ 13 August 2013 letter from the Respondent to the Commission, page 9.

5.3.2 The Complainant found the Respondent's claims that it will install more toilets to be inconsistent with the Respondent's statements regarding the limited number of toilets that can be installed.

5.3.3 The Complainant requested proof of meaningful engagement between the Respondent and the affected communities.

5.4 Other Information Gathered by the Commission

5.4.1 According to data from the 2011 national census, 12,341 households in the City of Cape Town reported that chemical toilets were their primary toilet facilities.³⁴ Of those, 10,664 (86.4%) were in areas classified as *"informal dwellings (shack; not in backyard; e.g., in an informal/squatter settlement or on a farm."*³⁵ Table 2 shows the number and percentage of the 10,664 households by population group.³⁶

Population Group	Number (Percentage) of Households
Black African	9959 (93.40%)
Coloured	644 (6.04%)
Other	31 (0.29%)
White	17 (0.16%)
Indian or Asian	14 (0.13%)
Total	10,664 (100.00%)

Table 2

³⁴ http://interactive.statssa.gov.za/superweb/loadDatabase.do?db=HouseholdServices11_wd. Fields: Geography (CPT: City of Cape Town) and Population group of head of household. Filter: Toilet facilities (Chemical toilet). [accessed 19 May 2014]

³⁵ http://interactive.statssa.gov.za/superweb/loadDatabase.do?db=HouseholdServices11_wd. Fields: Geography (CPT: City of Cape Town) and Population group of head of household and Type of dwelling (Informal dwelling (shack; not in backyard; e.g. in an informal/squatter settlement or on a farm). Filter: Toilet facilities (Chemical toilet). [accessed 19 May 2014]

³⁶ http://interactive.statssa.gov.za/superweb/loadDatabase.do?db=HouseholdServices11_wd. Fields: Geography (CPT: City of Cape Town) and Population group of head of household and Type of dwelling (Informal dwelling (shack; not in backyard; e.g. in an informal/squatter settlement or on a farm). Filter: Toilet facilities (Chemical toilet). [accessed 19 May 2014]

5.4.2 Table 3 shows the number of households living in informal settlements (dwelling not in another's backyard) in the wards where the Mshengu contract shows more than 25 chemical toilets in use for the contact period from November 2010 to June 2013.³⁷ As stated above, the total number of chemical toilets called for in these areas by the contract was 3 242 (84.4%) of 3 841 toilets in all areas covered by the contract.³⁸

Ward number	Number of Households by Population Group				
	Black	Coloured	Indian	White	Total
4	690	13	3	8	714
6	1099	217	1	0	1317
11	50	21	0	5	76
14	1010	358	2	5	1375
31	6	107	1	0	114
33	6941	19	5	2	6967
37	1054	2	0	0	1056
40	5427	27	3	0	5457
43	32	123	0	0	155
48	117	276	5	0	398
67	1225	1008	9	4	2246
74	3460	216	10	5	3691
80	7984	651	20	3	8658
86	1641	153	0	2	1796
87	5808	12	4	1	5825
89	8005	8	5	6	8024
90	5677	8	2	2	5689
93	4598	6	1	3	4608
95	11218	21	10	8	11257
96	2729	6	0	1	2736
104	6143	37	0	8	6188
105	1551	177	3	3	1734
111	1360	83	1	0	1444
Total	77825 (95.5%)	3549 (4.4%)	85 (1%)	66 (0.08%)	81525

Table 3

Though chemical toilets are not the only toilet facility used in the wards listed in Table 3, it is notable that the percentages of the population groups of residents of informal settlements are quite

³⁷ Statistical data in Table 2 are derived from ward profiles of the Respondent, available at http://www.capetown.gov.za/en/stats/Pages/wards_2011census.aspx [accessed 16 May 2014].

³⁸ 13 August 2013 letter from the Respondent to the Commission, Annexure 4, pages 15 and 16.

similar to the percentages shown in Table 2 for the households reporting that chemical toilets are their primary toilet facility.

5.4.3 The Respondent's integrated development plan for 2007–2011 set access to sustainable urban infrastructure and services as a strategic focus area for the period during which the contract at issue was executed (2010).³⁹ Among the key objectives in this focus area was universal access to basic sanitation.

5.4.4 On 26 May 2014, the Respondent awarded an additional contract to Mshengu and another supplier for "*Rental, Delivering, Placement, Servicing and Maintenance of Portable Non-Flushing Chemical Toilet Units for Informal Settlements and Public Transport Interchanges Citywide.*"⁴⁰ The overall value of the awarded tender is listed as R205 million, which indicates that the levels of use of chemical toilets is either maintained or increased for the new contractual period, the duration of which is not specified in the tender award announcement.

6. Issues to Be Determined by the Commission

6.1 After consideration of the information placed before it and obtained during the investigation, the Commission is called upon to make a determination

³⁹Five-Year Plan for Cape Town, Integrated Development Plan (IDP), pages 27, 28, 30; available at http://www.capetown.gov.za/en/IDP/Documents/idp/Previous_IDP/coct_IDP_20072008.pdf (accessed 28 May 2014).

⁴⁰CITY OF CAPE TOWN, Tenders awarded in May 2014; available at http://www.capetown.gov.za/en/SupplyChainManagement/Awarded%20Tenders%202014/Tenders%20Awarded%20May_2014.pdf (accessed 5 June 2014).

of whether the following rights of the residents of the affected communities were infringed by the Respondent. In doing so the Respondent has to address the following questions, namely:

- 6.1.1 Whether the Respondent's programme for providing basic sanitation services in the affected communities meets the requirements for reasonable action to progressively realise the right;
- 6.1.2 Whether the Respondent's programme for providing basic sanitation services in informal settlements with long-term use of chemical toilets violates the residents' right to equality; and
- 6.1.3 Whether the Respondent's programme for providing basic sanitation services in informal settlements with long-term use of chemical toilets violated the residents' right to dignity.

7. Legal Framework

- 7.1 Section 39(1)(b) of the Constitution mandates that whenever a court, tribunal or forum is interpreting rights contained in the Bill of Rights, it *"must consider international law."*⁴¹

⁴¹ Constitution, Section 39(1)(b).

7.1.1 Universal Declaration of Human Rights 1948⁴²

"Article 1.

*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*⁴³

"Article 25.

*"(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control..."*⁴⁴

7.1.2 International Covenant on Economic, Social & Cultural Rights 1966 (ICESCR)⁴⁵

⁴² Universal Declaration of Human Rights (hereinafter UDHR) G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (10 December 1948), available at <http://www.un.org/en/documents/udhr/> [accessed 13 May 2014]. South Africa ratified the UDHR on 10 December 1948.

⁴³ UDHR, Article 1.

⁴⁴ UDHR, Article 25.

⁴⁵ UN General Assembly, International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 16 October 2013]. South Africa has signed but not ratified the ICESCR.

Article 2(1) explains the nature of the obligation resting on States Parties with regard to the provision of socioeconomic rights, highlighting that minimum core and progressive realisation are hallmarks of this obligation, while provision of the right is subject to the state's available resources.⁴⁶

Article 11 recognises the right of everyone to an adequate standard of living.⁴⁷

7.1.3 United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitation (2010)⁴⁸

On 28 July 2010, through Resolution 64/292, the UN General Assembly adopted a resolution explicitly recognising the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of all human rights.

The Resolution called on all Member States and international organisations to provide financial resources help capacity building and technology transfer to help countries, specifically developing countries to provide safe, clean, accessible and affordable drinking water and sanitation for all.

South Africa voted in favour of this Resolution.

⁴⁶ ICESCR, Article 2(1).

⁴⁷ ICESCR, Article 11.

⁴⁸ Resolution 64/292.

7.2 *The Constitution of the Republic of South Africa, 1996*

"Rights

7. ...

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.⁴⁹

"Application

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.⁵⁰

"Equality

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

⁴⁹ Constitution, Section 7(2).

⁵⁰ Constitution, Section 8(1).

National legislation must be enacted to prevent or prohibit unfair discrimination.

- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

“Limitation of rights

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

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”⁵¹

“Developmental duties of municipalities

⁵¹ Constitution, Section 36.

153. A municipality must -

- (a) *structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community;*⁵²

"Powers and functions of municipalities

156. (1) *A municipality has executive authority in respect of, and has the right to administer—*

- (a) *the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and*
- (b) *any other matter assigned to it by national or provincial legislation.*⁵³

Part B of Schedule 4 of the Constitution sets out that local government is inter alia responsible for *"water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems."*⁵⁴

7.3 Domestic Legislation

⁵² Constitution, Section 153.

⁵³ Constitution, Section 156(1).

⁵⁴ Constitution, Schedule 4B.

7.3.1 Promotion of Equality and Prohibition of Unfair Discrimination Act⁵⁵

The Promotion of Equality and Prohibition of Unfair Discrimination (hereinafter referred to as the "Equality Act") gives expression to the equality right set out in Section 9 of the Constitution.

Section 6 of the Equality Act makes it unlawful for the State or any person to unfairly discriminate against any person.⁵⁶

Section 1 of the Equality Act provides the following definitions relevant to this complaint:

"'discrimination' means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—

(a) imposes burdens, obligations or disadvantage on; or

*(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;"*⁵⁷

"'prohibited grounds' are-

⁵⁵ No. 4 of 2000

⁵⁶ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter "Equality Act"), Section 6.

⁵⁷ Equality Act, Section 1.

(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or

(b) any other ground where discrimination based on that other ground-

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);⁵⁸

"the State' includes

(a) any department of State or administration in the national, provincial or local sphere of government;⁵⁹

"6. Neither the State nor any person may unfairly discriminate against any person."⁶⁰

⁵⁸ Equality Act, Section 1.

⁵⁹ Equality Act, Section 1.

⁶⁰ Equality Act, Section 6.

Section 13 establishes the burden of proof for claims made under the Equality Act:

"13.(1) If the complainant makes out a prima facie case of discrimination—

(a) the respondent must prove, on the facts before the court that the discrimination did not take place as alleged: or

(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.

(2) If the discrimination did take place—

(a) on a ground in paragraph (a) of the definition of "prohibited grounds" then it is unfair, unless the respondent proves that the discrimination is fair..."⁶¹

Section 14 specifies factors that are relevant to a determination of fairness.

"14.(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair

⁶¹ Equality Act, Section 13.

discrimination or the members of such groups or categories of persons.

(2) In determining whether the respondent has proved that the discrimination is fair the following must be taken into account:

(a) The context;

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2)(b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) the impact or likely impact of the discrimination on the complainant;

(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

- (d) *the nature and extent of the discrimination;*
- (e) *whether the discrimination is systemic in nature;*
- (f) *whether the discrimination has a legitimate purpose;*
- (g) *whether and to what extent the discrimination achieves its purpose;*
- (h) *whether there are less restrictive and less disadvantageous means to achieve the purpose;*
- (i) *whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—*
 - (i) *address the disadvantage which arises from or is related to one or more of the prohibited grounds; or*
 - (ii) *accommodate diversity.”⁶²*

7.3.2 Water Services Act⁶³

Section 3 of the Water Services Act states that:

“3.(1) Everyone has a right of access to basic water supply and basic sanitation.

⁶² Equality Act, Section 14.

⁶³ 108 of 1997

(2) Every water services institution must take reasonable measures to realise these rights.

(3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.”⁶⁴

Section 1 of the Water Services Act defines “basic sanitation” as:

““basic sanitation” means the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste-water and sewage from households, including informal households.”⁶⁵

7.3.3 Local Government: Municipal Systems Act⁶⁶ (hereinafter referred to as the “Systems Act”)

The definition of basic municipal services according to the Systems Act is:

“A municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.”⁶⁷

⁶⁴ Water Services Act, Section 3.

⁶⁵ Water Services Act, Section 1.

⁶⁶ No. 32 of 2000

⁶⁷ Local Government: Municipal Systems Act No. 32 of 2000 (hereinafter “Systems Act”), Section 1.

The Systems Act explicitly establishes the importance of provision of basic municipal services:

“(1) A municipality must give effect to the provisions of the Constitution and—

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

(b) Promote the development of the local community; and

(c) Ensure that all members of the local community have access to at least the minimum level of basic municipal services.”⁶⁸

Section 81 of the Systems Act provides that:

“(1) If a municipal service is provided through a service delivery agreement...the municipality remains responsible for ensuring that that service is provided to the local community in terms of the provisions of this Act, and accordingly must—

(a) regulate the provision of the service, in accordance with section 41;

⁶⁸ Systems Act, Section 73(1).

- (b) monitor and assess the implementation of the agreement, including the performance of the service provider in accordance with section 41...*⁶⁹

Section 41 of the Systems Act addresses

“Core components —(1) A municipality must in terms of its performance management system and in accordance with any regulations and guidelines that may be prescribed—

(a) set appropriate key performance indicators as a yardstick for measuring performance, including outcomes and impact, with regard to the municipality’s development priorities and objectives set out in its integrated development plan;

(b) set measurable performance targets with regard to each of those development priorities and objectives;

(c) with regard to each of those development priorities and objectives and against the key performance indicators and targets set in terms of paragraphs (a) and (b)—

(i) monitor performance; and

⁶⁹ Systems Act, Section 81.

(ii) measure and review performance at least once per year;

(d) take steps to improve performance with regard to those development priorities and objectives where performance targets are not met;...”⁷⁰

7.4 Regulatory Standards

7.4.1 Basic Sanitation

The definition of basic sanitation service in Regulation 2(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water states that “[t]he minimum standard for basic sanitation services is:

“a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.”⁷¹ (emphasis added)

This definition is primarily echoed in the Respondent’s Water Services Development Plan, which defines a basic sanitation facility as one with

⁷⁰ Systems Act, Section 41(1).

⁷¹ Regulation 2(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water issued in terms of Sections 9(1) and 73(1)(j) of the Water Services Act (Gazette, 8 January 2011, No 509).

"[e]asy access to a safe, reliable, private toilet facility which is protected from the weather, ventilated, low smell, hygienic, minimises the risk of spreading diseases and enables safe treatment and/or removal of human waste and wastewater in an environmentally sound manner including communicating hygiene."⁷²

7.5 Case Law

7.5.1 Socioeconomic Rights

A number of key judgements have provided guidelines in assessing state action in realising socioeconomic rights such as the right to basic sanitation. In *Government of the Republic of South Africa and Others v Grootboom and Others*⁷³ (hereinafter referred to as "*Grootboom*"), the Constitutional Court examined many important components of legislative measures, policies and programmes. Two of those components are reasonableness of government action and progressive realisation of rights.

A reasonable government programme must have at least the following components:

*"A reasonable programme therefore must...ensure that the appropriate financial and human resources are available..."*⁷⁴

⁷² Water Services Development Plan (WSDP) for City of Cape Town 2012/13 – 2016/17 Executive Summary, November 2012, page 4.

⁷³ 2001 (1) SA 46 (CC)

⁷⁴ *Grootboom* paragraph 39.

"The programme must be capable of facilitating the realisation of the right."⁷⁵

"These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations."⁷⁶

"The programme must be balanced and flexible and make appropriate provision for attention to ... crises and to short, medium and long term needs."⁷⁷

"To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test."⁷⁸

⁷⁵ Grootboom paragraph 41.

⁷⁶ Grootboom paragraph 42.

⁷⁷ Grootboom paragraph 43.

⁷⁸ Grootboom paragraph 44.

The Court also noted that “[i]t is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings.”⁷⁹ In other words, the Court explained, “human beings are required to be treated as human beings.”⁸⁰

With regard to progressive realisation, the Court explained that:

*“The term “progressive realisation” shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. [The object of the right] must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.”*⁸¹

In *Mazibuko and Others v City of Johannesburg and Others*⁸² the Constitutional Court explained that:

[W]hat [a] right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry

⁷⁹ *Grootboom* paragraph 83.

⁸⁰ *Grootboom* paragraph 83.

⁸¹ *Grootboom* paragraph 45.

⁸² 2010 (4) SA 1 (CC).

and permits an assessment of context to determine whether a government programme is indeed reasonable.

7.5.2 Meaningful Engagement

The Court has also emphasised that another important component of reasonable state action, particularly in the context of realisation of socioeconomic rights, is timeous and meaningful engagement efforts with communities and individuals likely to be affected by government action.⁸³ Like reasonableness, there is no exhaustive list of what is required to make engagement with a community meaningful. However, the Constitutional Court has identified illustrative examples of components of meaningful engagement such as:

- i. requiring government to engage with the community rather than simply imposing decisions made unilaterally;⁸⁴
- ii. that all parties to the engagement be treated as equals, without preconceived notions of the persons within the community;⁸⁵
- iii. good faith, reasonableness, willingness to listen and understand concerns on the part of all parties, whether from the government or the community;⁸⁶ and

⁸³ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* (hereinafter 'Olivia Road') 2008 (3) SA 208 (CC) at paragraphs 10–13.

⁸⁴ *Residents of Joe Slovo Community v Thubelisha Homes* (hereinafter 'Joe Slovo I') 2010 (3) SA 454 (CC) paragraph 166.

⁸⁵ *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC) at paragraphs 46, 49.

- iv. proactive, respectful and honest efforts by all parties to find solutions that are mutually acceptable;⁸⁷

7.5.3 Equality

The Constitutional Court has considered and elaborated upon the right to equality in several cases. The Court has noted that, within the constitutional order of South Africa post-1994, equality *"is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance."*⁸⁸

*"[Within the South African constitutional order] crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework."*⁸⁹

"This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on

⁸⁶ *Joe Slovo I* at paragraph 244.

⁸⁷ *Port Elizabeth Municipality v Various Occupiers* 2004 (1) SA 217 (CC) at paragraph 39.

⁸⁸ *Minister of Finance and Other v van Heerden (van Heerden)* 2004 (6) SA 121 (CC) at paragraph 22.

⁸⁹ *van Heerden* at paragraph 25.

*courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but "situation-sensitive" approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society."*⁹⁰

*"Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow."*⁹¹

The interrelated nature of equality and dignity was explained in *President of the Republic of South Africa and Another v Hugo*⁹² where the Court noted that:

"At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply

⁹⁰ *van Heerden* at paragraph 27.

⁹¹ *van Heerden* at paragraph 31.

⁹² 1997 (4) SA 1 (CC).

inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."⁹³

In *Harksen v Lane NO and Another*⁹⁴ the Constitutional Court provided a framework in which to examine claims of unfair discrimination under Section 9 of the Constitution. The first step of a *Harksen* enquiry involves an examination of whether the challenged action differentiates "*between people or categories of people*" and whether it is rationally connected to "*the legitimate governmental purpose it is designed to further or achieve.*"⁹⁵ However, if the differentiation is done on the basis of criteria set out in section 9(3) of the Constitution, which includes race, it can constitute unfair discrimination even if it is rationally connected to a legitimate governmental purpose.⁹⁶ The impact of the discrimination on the complainant is the determining factor in analysing whether the discrimination is unfair.⁹⁷ Factors to be considered, objectively and cumulatively, regarding impact include:

"(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage...;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a

⁹³ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at paragraph 41.

⁹⁴ 1998 (1) SA 300 (CC),

⁹⁵ *Harksen v Lane NO and Another (Harksen)* 1998 (1) SA 300 (CC) at paragraph 42.

⁹⁶ *Harksen* at paragraph 43.

⁹⁷ *Harksen* at paragraph 50.

worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question...;

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.”⁹⁸

Discrimination that is determined to be unfair can be upheld as lawful only if it can be justified under section 36, which explains the permissible instances in which a right (such as the right to equality) can be limited.⁹⁹

Discrimination need not be direct to be unlawful; section 9 prohibits unfair discrimination whether it is directly or indirectly done. In *City Council of Pretoria v Walker*¹⁰⁰ the Constitutional Court was required to examine an instance of indirect discrimination.¹⁰¹ The Court explained that the Constitution’s prohibition of both direct and indirect discrimination “evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-

⁹⁸ Harksen at paragraphs 49-50.

⁹⁹ Harksen at paragraph 51.

¹⁰⁰ 1998 (2) SA 363 (CC).

¹⁰¹ *City Council of Pretoria v Walker (Walker)* 1998 (2) SA 363 (CC).

*discriminatory may nonetheless result in [unlawful] discrimination...*¹⁰²

The organ of state under scrutiny in *Walker* had behaved differently towards residents of different geographical areas under its jurisdiction. Though this system of differentiation was not directly based on race, the Court recognised that

*"[t]he effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. In this case, its impact was clearly one which differentiated in substance between black residents and white residents. To ignore the racial impact of the differentiation is to place form above substance."*¹⁰³

In support of the actions it had taken, the organ of state presented evidence that they were reasonable, convenient and practical under the circumstances in the area, circumstances that were not the doing of the council.¹⁰⁴ The Court, while acknowledging that the new council had not created the situation, emphasised that the council was nevertheless responsible for ending the differentiation.¹⁰⁵

Further, the Court was not persuaded by the fact that the council's actions were not motivated by an intent to unfairly discriminate.

¹⁰² *Walker* at paragraph 31.

¹⁰³ *Walker* at paragraph 33.

¹⁰⁴ *Walker* at paragraphs 24, 34.

¹⁰⁵ *Walker* at paragraph 24.

Rather, it emphasised that the purpose of the Constitution's anti-discrimination clause

*"... is to protect persons against treatment which amounts to unfair discrimination; it is not to punish those responsible for such treatment. In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a discriminatory purpose involved in the conduct or action to which objection is taken."*¹⁰⁶

In line with the Court's dignity jurisprudence, *Walker* emphasised that constitutional prohibition of unfair discrimination based on race is based upon the notion that *"[n]o members of a racial group should be made to feel that they are not deserving of equal "concern, respect and consideration"...*"¹⁰⁷

In *Mvumvu and Others v Minister of Transport and Others*¹⁰⁸ the Court revisited the issue of indirect discrimination in a case where a geographically neutral act was challenged on the basis that it had a disproportionate adverse effect on a particular racial group.¹⁰⁹ In concluding that the challenged provisions amounted

¹⁰⁶ *Walker* at paragraph 43.

¹⁰⁷ *Walker* at paragraph 81.

¹⁰⁸ 2011 (2) SA 473 (CC)

¹⁰⁹ *Mvumvu and Others v Minister of Transport and Others* (Mvumvu) 2011 (2) SA 473 (CC)

to indirect unfair discrimination that violated the section 9 equality right, the Court explained:

*"It will be observed that the applicants do not assert that the impugned provisions discriminate against black people in a manner that is direct...What is established by the applicants' evidence though is the fact that at a practical level the majority of the victims affected by the cap are black people. This in turn shows that indirectly the provisions discriminate against black people in a manner that is disproportionate to other races."*¹¹⁰

*"To the extent that the impugned provisions in this case overwhelmingly affect black people, they create indirect discrimination that is presumptively unfair."*¹¹¹

7.5.4 Unconditional Applicability of Bill of Rights to Government

In *AAA Investments (Pty) Limited v The Micro Finance Regulatory Council and The Minister of Trade and Industry*¹¹² the Constitutional Court made clear that a municipality has the legal responsibility to carry out constitutional duties regardless of whether it is directly performing a function that it is legally required to perform:

¹¹⁰ *Mvumvu* at paragraph 29.

¹¹¹ *Mvumvu* at paragraph 32.

¹¹² 2007 (1) SA 343 (CC),

*[t]he applicability of the Bill of Rights to the legislature and to the executive is unconditional as to function; the Bill of Rights is applicable to it regardless of the function it performs. Our Constitution ensures... that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity.*¹¹³

In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*¹¹⁴ the Constitutional Court reiterated that a private entity performing a public function is an organ of state as defined in the Constitution and therefore has constitutional duties and is “accountable to the people of South Africa.”¹¹⁵ The fact that the governmental entity continues to also have constitutional duties does not absolve the entity to whom a public function is delegated of constitutional responsibility for the public functions it has agreed to perform.¹¹⁶ The Court made clear that a contract between a government entity and private entity to perform a public function, particularly where the public function impacts on the daily lives of a large number of people, cannot be viewed through the same lens as conventional business contracts.¹¹⁷

7.5.5 Limitation of Rights

¹¹³ *AAA Investments (Pty) Limited v The Micro Finance Regulatory Council and The Minister of Trade and Industry* 2007 (1) SA 343 (CC) at paragraph 40.

¹¹⁴ [2014] ZACC 12 (CC),

¹¹⁵ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (hereinafter *AllPay*) [2014] ZACC 12 (CC) at paragraphs 58, 59.

¹¹⁶ *AllPay* at paragraphs 64, 66, 67.

¹¹⁷ *AllPay* at paragraph 63.

The Constitutional Court has made clear that an organ of state seeking to rely on Section 36 to justify a limitation of a right must act in terms of a law of general application.¹¹⁸ A practice does not qualify as a law of general application.¹¹⁹

7.6 Policy Documents

7.6.1 National Housing Code, Part 3

Volume 4 of Part 3 of the National Housing Code sets out programmes pertaining to incremental interventions. Section 2 describes the Emergency Housing Programme, which was instituted by government to:

“address the needs of households who for reasons beyond their control, find themselves in an emergency housing situation such as the fact that their existing shelter has been destroyed or damaged, their prevailing situation poses an immediate threat to their life, health and safety, or they have been evicted, or face the threat of imminent eviction.

This Programme is instituted in terms of section 3(4)(g) of the Housing Act 1997 and will be referred to as the National Housing Programme for Housing Assistance in Emergency Housing Circumstances. Essentially, the objective is to provide for temporary relief to people in urban and rural

¹¹⁸ *August and Others v Electoral Commission and Others* 1999 (3) SA 1 (CC) at paragraph 23.

¹¹⁹ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at paragraphs 7, 41.

areas who find themselves in emergencies as defined and described in this Chapter.”¹²⁰

The term “emergency” is thereafter defined and described as follows:

“An emergency exists when the MEC, on application by a municipality and or the [provincial department], agrees that persons affected owing to situations beyond their control:

- a) Have become homeless as a result of a declared state of disaster, where assistance is required...to alleviate the immediate crisis situation;*
- b) Have become homeless as a result of a situation which is not declared as a disaster, but destitution is caused by extraordinary occurrences such as floods, strong winds, severe rainstorms and/or hail, snow, devastating fires, earthquakes and/or sinkholes or large disastrous industrial incidents;*
- c) Live in dangerous conditions such as on land being prone to dangerous flooding, or land which is dolomitic, undermined at shallow depth, or prone to sinkholes and who require emergency assistance;*

¹²⁰ National Housing Code 2009, volume 4, part 2 (hereinafter EHP) section 1, page 9.

- d) *Live in the way of engineering services or proposed services...and who require emergency assistance;*
- e) *Are evicted or threatened with imminent eviction from land or from unsafe buildings ...;*
- f) *Whose homes are demolished or threatened with imminent demolition ...;*
- g) *Are displaced or threatened with imminent displacement as a result of a state of civil conflict or unrest ...; or*
- h) *Live in conditions that pose immediate threats to life, health and safety and require emergency assistance.*
- i) *Are in a situation of exceptional housing need, which constitutes an Emergency that can reasonably be addressed only by resettlement or other appropriate assistance, in terms of this Programme.”¹²¹*

Section 2.5 sets out applicable norms and standards. Subsection A pertains to “*Municipal Engineering Services in Temporary Settlement Areas*.” (emphasis added). Table 2 of this subsection is entitled “*Guidelines on maximum level of basic engineering services to be provided*.” According to this table, the maximum level of sanitation services is as follows:

¹²¹ EHP section 2.3.1, page 15.

- "i. Temporary sanitary facilities must be provided. Due to varying geographical and similar conditions, facilities to be provided may vary from area to area. Where conditions permit the use of Ventilated Improved Pit Latrines (VIP toilets) must be provided as a first option. The Municipality must therefore ensure that the system employed is suitable for the particular conditions.*
- ii. An acceptable standard will be one VIP toilet per five families. Cost should be estimated per family on a shared basis in the suggested dense settlement pattern. In circumstances where soil and other site conditions do not allow for the use of VIP toilets, alternative systems must be investigated. A small bore sewerage or other appropriate system (to be used on a shared basis with one toilet per five families within the suggested settlement pattern) could be provided.*

The sewerage system must as far as possible be usable in a permanent configuration or layout in situations where future upgrading is envisaged as a first option towards a permanent housing situation."

7.6.2 National Sanitation Strategy: Accelerating Sanitation Sector Delivery

In August 2005, the Department of Water Affairs and Forestry National Sanitation Programme Unit issued, on behalf of the National Sanitation Task Team, a policy document entitled

“National Sanitation Strategy: Accelerating Sanitation Sector Delivery.” Section 7.6.3 addressed the use of emergency sanitation programmes in informal settlements.

“Emergency sanitations [sic] programmes should be limited to very short term [sic] interventions that last a few days to a few weeks. Long term informal settlements must not be treated as emergency situations for the purpose of this strategy but should be provided with viable and sustainable solutions. Solutions such as communal facilities and chemical toilets should not be used where the system is expected to have a duration of more that [sic] one month.”¹²² (emphasis added)

7. Legal Analysis

7.1 Basic Sanitation

Several issues are relevant to a determination of whether the residents’ right to basic sanitation has been compromised, namely, whether the right is being progressively realised and whether the Respondent’s programme to realise the right of the residents is reasonable in its implementation.

7.1.1 Progressive Realisation

- i. A significant portion of the Respondent’s programme for realising the right to basic sanitation from 2005 through 2013

¹²² Department of Water Affairs, National Sanitation Strategy: Accelerating Sanitation Sector Delivery

consisted of the provision of chemical toilets. In the Respondent's words, chemical toilets "*are in widespread use*" within the Respondent's jurisdiction.¹²³

- ii. The contracts to supply the chemical toilets were of a long-term nature (3 years, 2 years, and 3 years with at least an additional 6-month extension).
- iii. Under *Grootboom*, in progressively realising socioeconomic rights, government measures must flexibly take account of the degree and extent of the denial of the right that is to be realised. The long-term contracts used in this instance, particularly in that they were used one after another, reduce the Respondent's ability to adjust to changing circumstances flexibly. Rather, the effect of these contracts appears to be one where the Respondent considers that sanitation needs of residents are being served, so efforts to progress beyond the service they provide slows down or does not occur at all. It is significant in this regard to note that over the course of 2010–2013 only one significant increase was made in the four areas specifically at issue in this complaint – namely 140 full-flush toilets installed in RR Section in 2012. Two other minor increases were planned (20 chemical toilets for Emsindweni and 10 more full-flush toilets in RR Section). Otherwise, the Respondent appears to have erroneously concluded that basic sanitation services were in place in these areas, so planning or effectuating further efforts were not a priority.
- iv. In response to the Commission's request to specify planning going forward, the Respondent cited only the two minor increases and a plan to introduce janitorial services. As stated

¹²³ 13 August 2013 letter from the Respondent to the Commission, page 4.

above, another apparent long-term contract has been put in place for informal settlements throughout the city. Therefore, all information provided by the Respondent regarding its plans for residents of the informal settlements covered by the contract indicates that little if any progression will occur for these residents with respect to the Respondent's efforts to realise their right to basic sanitation.

- v. In addition, the mathematical emphasis within the Respondent's approach that is reflected in the fixed distribution ratios and set weekly servicing schedules of the contract at issue. The approach is contrary to the teaching of *Mazibuko* against fixing quantities in a rigid and counter-productive way that prevents changing contexts from being taken into account. A reasonable programme to realise the right of basic sanitation must treat all persons affected, including residents of informal settlements, with "*care and concern*" rather than merely an exercise of statistical compliance or a cold problem-solving endeavour.¹²⁴

- v. The use of long-term, repeated or extended contracts such as the ones seen in connection with this complaint stymies efforts to examine and lower the legal, administrative, operational and financial hurdles *Grootboom* specified were key to progressive realisation. Rather than lowering these impediments, the long-term contracting practices seen in this matter, which incorporate minimal monitoring and no apparent review mechanisms to test whether implementation is successful, institutionalise fundamentally inadequate practices, thus impeding realisation of the right to basic

¹²⁴ *Grootboom* at paragraph 44.

sanitation on a progressive basis. This institutionalisation also prevents adjustment to changing context mandated by *Mazibuko*, echoing the statement in *Grootboom* that a reasonable programme must be flexible.

7.1.2 Reasonableness in Implementation

- i. In order to be consistent with the Respondent's constitutional obligations, its programmes must be reasonable in their implementation. A significant portion of the Respondent's overall programme for realising the right to access basic sanitation within its jurisdiction involves the use of the EHP in nonemergency settings. In fact, the Respondent often treats "basic" and "emergency" as interchangeable terms, despite the clearly defined circumstances that qualify as "emergencies" under the EHP. Read together, the Water Services Act, the Systems Act, the Compulsory National Standards and Measures to Conserve Water and the Respondent's Water Services Development Plan conceive of basic sanitation as an ongoing, sustainable and healthy means of human excreta removal. Emergency sanitation, by its own terms and the commonly accepted meaning of the term, has an immediate, crisis-type quality; it is not a situation that is desirable to prolong by using it in a long-term programme.
- ii. The difference between emergency, temporary situations and informal, long-term, basic needs is well illustrated by the fact that the 1:5 ratio of toilets to households is a maximum amount under the EHP guidelines, i.e. a ceiling not to be

exceeded. Under the Respondent's programme for realising the right to basic sanitation, this ratio is viewed as a target, a milestone of sorts. The ratio is discussed at greater length below, at this point it is sufficient to note that it indicates that despite the Respondent's tendency to portray these situations as equivalent, in substance they are not, as shown even by Respondent's own interpretations. The Respondent's use of the EHP to guide its actions in nonemergency, long-term situations is not reasonable.

- iii. The Respondent's reliance upon the EHP is contrary to the Constitutional Court's judgment in *Nokotyana* that the EHP applies only in situations fitting the Code's definition of "emergency" and the DWA policy that chemical toilets should not be used in situations expected to last longer than a month. Both the *Nokotyana* decision (issued 19 November 2009) and the promulgation of the DWA policy (issued August 2005) predated the contract at issue in this complaint. The fact that the contract did not take these two legal pronouncements into account is not reasonable.
- iv. The criteria the Respondent reports having taken into account for determining that chemical toilets were a viable long-term option in realising the right to basic sanitation within the affected areas do not satisfy either its own definition of basic sanitation or that contained in Regulation 2 of the Compulsory National Standards and Measures to Conserve Water. According to the Respondent, chemical toilets provide privacy and protection from weather, smell reduction and fly inhibition from use of chemicals in the containers, and lessening of environmental impact because the waste that is captured in

the container is emptied for disposal at a wastewater treatment plant. Absent from this examination is an explanation of how these toilets are considered reliable and easy to keep clean under the circumstances of their actual use. As the Respondent notes, the quality of cleanliness cannot be guaranteed on a daily basis due to the huge number of informal settlements and toilets and the frequency of use of the toilets. Moreover, the Respondent's assertion that smells are reduced by the addition of chemicals does not speak to the requirement of Regulation 2 that smells be kept to a minimum or the corresponding notation in the Respondent's own definition that the toilet be "low smell." It is unlikely a coincidence that many of the specific issues raised in the social audit pertain to reliability and cleanliness, including bad smell. Particularly by taking into consideration that the measures used are primarily intended for emergencies or other short-term events, it is not surprising that their ability to cope with long-term continuous use is less than ideal. The selection of a sanitation technology that does not meet mandatory national and local criteria without further explanation is not reasonable.

- v. With respect to distribution ratios set out in the contract, the Respondent provides a general list of factors that can be taken into consideration. Missing from the list are distance from the home to the toilet (contrary to the Respondent's definition of a basic sanitation service as providing "easy access") or the number of people using a particular toilet despite the Respondent's own recognition and the common sense conclusion that the levels of use of a particular toilet installation impact on its cleanliness and ability to be used for its intended purpose.

- vi. Moreover, despite the Commission's request for an explanation of the manner in which distribution ratios were determined for the four named areas, the Respondent did not explain how the factors it cited were taken into consideration, preventing an assessment of whether the Respondent is engaging in the context-sensitive approach that is mandated by *Mazibuko* in determining the appropriate content of the right to basic sanitation in this instance. Without such an explanation and in light of the other factors discussed above, the balance of the probabilities indicates that the Respondent took significant unreasonable actions in implementing its programme to realise basic sanitation with respect to long-term use of chemical toilets in informal settlements.

7.1.3 Meaningful Engagement

- i. The Respondent is aware of its obligations to engage meaningfully with communities regarding realisation of basic rights.
- ii. The descriptions the Respondent gives regarding the substance of how it fulfils those obligations are primarily of a general nature. The Respondent states that it discusses the variety of services with the community but does not provide any specifics of those discussions, where and when they took place with regard to the communities at issue in this complaint, how the information gathered was factored into decision making, or other details that would allow an assessment of whether engagement can be considered

meaningful. The Respondent further states that the service provider liaises with community leaders but does not state how those leaders are identified, how information is then passed on to community members, how needed follow-up is identified and accomplished, etc. Interestingly, the Respondent describes consultation done when the Respondent is installing permanent sanitation infrastructure as “full”, involving councillors and community members as well as community leadership. The juxtaposition of this description with the consultation done by service providers who supply sanitation infrastructure that the Respondent deems to not be of a permanent nature implies that service providers perform a lesser level of consultation. In any event, the lack of any further descriptive detail prevents actual determination of whether engagements were meaningful. Finally, and perhaps most importantly, as is made clear in the Systems Act and cases such as *AAA Investments* and *AllPay Consolidated Investment Holdings*, the fact that the contract may require the service provider to consult with communities does not absolve the Respondent of its constitutional responsibilities of meaningful engagement. The Respondent must remain an active participant in order to ensure that engagement is meaningful and ongoing.

- iii. It is notable that the two specific instances cited by the Respondent with regard to community engagement indicate that engagement has not been taken. First, the Respondent decided not to employ Community Liaison Officers under the 2010–2013 Mshengu contract because Community Liaison Officers “are more expensive to sustain.”¹²⁵ According to the contract, Community Liaison Officers work at a rate of R20,

¹²⁵ 13 August 2013 letter from the Respondent to the Commission, Annexure 1 at paragraph 8.0.

00 per hour, R5, 00 more an hour than Cleaners. Second, the Respondent cites ad hoc monitoring activities assigned to persons employed by the Respondent in a separate capacity, namely to clean full flush toilets, as a type of meaningful community engagement. There is no indication how much information these ad hoc activities generate. In addition, the ad hoc nature of the activity counsels against rather than supporting a conclusion that it is meaningful with respect to the community at large.

- iv. Lastly, the photographs shown in Figures 1 to 3 demonstrate that toilet facilities are primarily placed in rows adjacent to roadways or other access lanes. The most likely explanation for these configurations is convenience of the provider in accessing the toilets for servicing. It is difficult to believe that communities would, during a period of meaningful engagement, request that toilets be placed in full view of passing traffic as in the case of CT Section/Taiwan and RR Section, up to 100 m from a person's home. The exception to that is seen in Greenpoint, where toilets are distributed throughout the middle section of the settlement area. However, no explanation is given as to why the upper and lower third of the settlement were excluded from the distribution. Without such background, it is difficult to conclude that residents of those areas, who are also of course a part of the community, would request a like configuration during meaningful engagement with decision makers.

7.2 Equality

- 7.2.1 A primary purpose of the contract at issue in this complaint is to provide non-flushing chemical toilets in the City of Cape Town.

This service provision, when implemented as a long-term measure (at least 3 and possibly more than 8 years) violates the right to basic sanitation of the residents of the informal settlements involved as set forth above.

- 7.2.2 The vast majority of the chemical toilets (84.4%) are in informal settlements with populations that are overwhelmingly “Black African” (95.5%). This trend is borne out by census data for the City of Cape Town stating that persons living in informal settlements (not in another’s backyard) who report that chemical toilets are their primary sanitation facility are also overwhelmingly “Black African” (93.4%).
- 7.2.3 The above numbers indicate that the effect of the violation of the right of access to basic sanitation falls very disproportionately on a particular racial group in comparison to other groups.
- 7.2.4 Though this component of the Respondent’s programme is not overtly directed at any racial group, the evidence set forth above indicates that its adverse impact overwhelmingly falls on a single racial group in comparison to others. As was the case in *Mvumvu* and *Walker*, this disproportionate impact constitutes indirect discrimination on the basis of race, which is presumptively unfair.
- 7.2.5 Once discrimination is determined to be unfair on a specified ground, the Equality Act shifts the burden onto the Respondent to prove that the discrimination is fair despite being based upon a prohibited ground.¹²⁶ The reasons given by the Respondent for its

¹²⁶ Equality Act, Section 13(2)(a).

actions taken in regard to provision of basic sanitation via widespread, long-term use of chemical toilets in informal settlements primarily consist of issues of feasibility, convenience and practicality from the Respondent's perspective. However, as the Court made clear in *Walker*, these reasons may indicate fairness in discrimination that is not based on one of the constitutionally prohibited grounds, but they are insufficient to override a presumption of unfairness when a prohibited ground is involved.

7.2.6 The fact that there is no evidence to support a conclusion that the Respondent intended that its actions would unfairly discriminate against a particular racial group is of no moment. There can be no doubt of the impact of the discriminatory treatment described above on this racial group. As explained in *Walker*, the impact of the action is the critical inquiry, not the intent behind the action.

7.2.7 Furthermore, the more direct differentiating characteristic used by the Respondent in this instance, namely providing significantly different levels of service to persons living in informal settlements compared with those living in formal areas brings to mind the Court's words in *van Heerden* regarding the need to dismantle levels and forms of social differentiation and systematic under-privilege that lead to new patterns of disadvantage aside from those caused by uneven treatment on one of the prohibited grounds. Residents of informal settlements are historically and currently vulnerable and marginalised, as well as having much greater difficulty in accessing many benefits and advantages available to persons living in formal areas. These include basic service provision, personal safety, educational opportunities and economic opportunities. Though it is unnecessary in this instance

to examine this aspect thoroughly, it is important to note that the treatment of informal dwellers, even without the overwhelming racial statistics seen in this complaint, often reflects the “*hurtful discrimination and stereotypical response*” that the *van Heerden* Court cautioned against.

- 7.2.8 Given that the treatment in this situation consists of unfair discrimination on the basis of race, a constitutionally and statutorily prohibited ground, the final step of the analysis requires an examination of whether the rights at issue have been permissibly limited under Section 36 of the Constitution. Because the Respondent is acting pursuant to policy and practice rather than a law of general application, Section 36 will not apply. Consequently, the Commission concludes that the Respondent has violated the residents’ right to equality in this circumstance.

7.3 Human Dignity

- 7.3.1 To promote and protect human dignity, government must take actions that treat human beings as human beings, which accord them with equal respect regardless of group membership. Government must act with care and concern and shy away from stereotyping or devaluing of persons who will be affected by decisions taken. Unfair discrimination in any context is inherently detrimental to human dignity, and when the discrimination takes place in a long-term, institutionalised manner, the effect on human dignity cannot be denied.

- 7.3.2 Furthermore, whether consciously or not, the Respondent has engaged in a consistent and misleading practice of equating fundamentally non-equivalent concepts and terms relevant to the

issues in this complaint. Most egregiously, the Respondent equates “informal” with “temporary,” which conveniently glosses over the reality that many informal settlements within its jurisdiction have been in existence for years if not decades. The Respondent’s programme to realise the right to basic sanitation for the residents of informal settlements continually makes reference to guidelines pertaining to emergency situations. To conceive of life in informal settlements as equivalent to emergencies, constant states of crises, is a fundamental affront to the dignity of the residents of those areas.

7.4 *Area of Concern in Addition to Allegations of Complaint*

7.4.1 In reviewing the contract at issue in this complaint, the Commission noted the following language in the Definitions portion of the “*Conditions Pertaining to Targeted Procurement: Major (Over R2 000 000)*”:

“1.12 Woman

A female person who is a South African citizen and a female at birth.”¹²⁷

7.4.2 On its face, the reference to a person being “*female at birth*” has implications for transgender and intersex persons. In addition, the relevance of such a categorisation to targeted procurement is not apparent.

¹²⁷ 13 August letter from the Respondent to the Commission, Annexure 4, page 49, paragraph 1.12.

8. Findings

8.1 *Basic Sanitation*

The Commission finds that:

8.1.1 The Respondent's programme for provision of basic sanitation services in the four areas at issue in this complaint was inadequate and unreasonable for the following reasons:

- i. The Respondent's use of temporary sanitation technology such as chemical toilets as a type of long-term solution is not a reasonable component of a programme for realisation of the right to basic sanitation.
- ii. The Respondent's use of the Emergency Housing Programme guidelines to determine levels of sanitation provision in nonemergency circumstances is not reasonable.
- iii. The Respondent's use of fixed ratios and servicing schedules rather than a context-specific assessment of whether actual services provided satisfy set definitions of basic sanitation services is not a reasonable component of a programme for realisation of the right to basic sanitation.

- iv. The Respondent's failure to ensure that the service provider meaningfully engaged with communities where services were to be provided or to independently engage meaningfully with those communities was unreasonable.

8.1.6 The Respondent violated the right to basic sanitation of the residents of the informal settlements where chemical toilets were deployed on a long-term basis.

8.2 *Equality*

The Commission finds that:

8.2.1 Use of the long-term contracts for provision of chemical toilets in informal settlements within the City of Cape Town significantly and adversely affected black African people (who make up the majority of the occupants of informal settlements) in comparison with white, Indian and coloured persons.

8.2.2 This violation indirectly unfairly discriminates against persons of the specified racial group.

8.3 *Human Dignity*

The Commission finds that:

8.3.1 The Respondent's institutionalisation of disparate, inadequate basic sanitation service provision to residents of informal settlements violated residents' right to dignity.

8.3.2 The Respondent's conceptualisation of informal settlements as temporary living conditions despite the reality of their long-term existence and the characterisation of life in informal settlements as equivalent to a constant state of crisis ignores the reality of the residents and their humanity and therefore violates the residents' right to dignity.

9. Recommendations

Based on the above discussion and findings, the Commission recommends:

9.1 That the Respondent immediately cease its use of the guidelines set out in the Emergency Housing Programme of the National Housing Code to inform the provision of basic sanitation in informal settlements and develop norms and standards for basic sanitation that are not based upon the guidelines set out in the Emergency Housing Programme portion of the National Housing Code within 6 (six) months. These norms and standards should instead incorporate human rights principles and take into account the social context and lived reality of the persons who will be provided with services. Specifically, these norms and standards must ensure that services are available, accessible, acceptable to users, and of appropriate quality. That the norms and standards developed incorporate the context in which a sanitation facility is used into its determination of whether it meets all aspects of the applicable definitions of basic sanitation facility.

- 9.2 That the Respondent, within 6 (six) months hereof develop its own Emergency Housing Programme which incorporates human rights principles and which takes realistic account of the housing backlog and the implications which this has for the time period that people will inevitably spend in emergency housing which will ensure compliance with the applicable definition of basic sanitation facility and ensures that the service provided is available, accessible, acceptable to users and of appropriate quality.
- 9.3 That the provision of a particular technology in a particular area be informed by an analysis, performed on a predetermined periodic basis not to exceed 6 months, of whether the technology employed complies with the norms and standards described in recommendation at 9.1.
- 9.4 That the Department of Water and Sanitation in the newly created national Ministry of Water and Sanitation and the South African Local Government Association provide training and/or materials designed to assist municipalities with devising norms and standards such as those described in recommendations 9.1 and 9.2.
- 9.5 That the National Department of Human Settlements define and regulate the acceptable extent of the use of the Norms and Standards for Municipal Engineering Services in Temporary Settlement Areas set out in the Emergency Housing Programme and monitor compliance by municipalities.
- 9.6 That the National Department of Human Settlements develop and monitor compliance with norms and standards for sanitation in settlements that

are not temporary settlement areas as defined in the Emergency Housing Programme, that are not informal settlements suitable for upgrading in situ, but that are also not permanent formal housing. The current lack of such norms and standards for such settlements creates a policy vacuum in which violations such as those seen in this complaint can easily occur.

9.7 That the Respondent take significant measures to reinforce provisions relating to community engagement in its sanitation-related tenders.

9.8 That the Respondent revisit the language of its “Conditions Pertaining to Targeted Procurement: Major (Over R2 000 000)” to ensure compliance with human rights standards and principles such as those discussed in recommendation 9.1.

9.9 That the Respondent review their current programme of realising the right to basic sanitation, to ensure it complies with the requirements of progressive realisation, as defined by the Constitutional Court in cases as cited above.

9.10 That a copy of this report be forwarded to the Office of the Public Protector.

10. Appeals Clause

Should any party not be satisfied with this decision, that party may lodge an appeal, in writing within 45 days of receipt of this report. A copy of the appeal

form is available at any office of the Commission. The appeal should be lodged with the Head Office of the Commission – contact details are as follows:

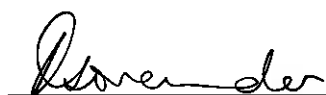
Appeals Section

Physical Address:
33 Hoofd Street
4th Floor, Forum 3
Braampark
Braamfontein
2017

Postal Address:
Appeals Section
Private Bag X2700
Houghton
2041

Fax number: 011 403 0567 (Attention – Appeals Section)
Telephone number: 011 877 3654 / 3653

SIGNED AT Johannesburg ON THIS THE 9th DAY OF
July 2014



P. Govender

Deputy Chairperson

SOUTH AFRICAN HUMAN RIGHTS COMMISSION