Local Government: Municipal Systems Act 32 of 2000

The Act defines basic municipal services as:

"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."

Section 73(1) of the Act states that 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.

Sections 106 and 107 are relevant to the extent that they deal with provincial and national monitoring.

Section 106 provides that if an MEC has reason to believe that a municipality in the province cannot or does not perform a statutory obligation binding on that municipality, or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must:

d) "By written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or
e) If the MEC considers it necessary, designate a person or persons to investigate the matter."

Section 107 states that "[t]he Minister, by notice in the Gazette, may require municipalities of any category or type specified in the notice, or of any other kind described in the notice, to submit to a specified national organ of state such information concerning their affairs as may be required in the notice, either at regular intervals or within a period as may be specified."

Local Government: Municipal Finance Management Act 56 of 2003 (MFMA)

Section 28(1) of the Act directs that municipalities may revise and approve their annual budget through an adjustments budget.

Section 27(5) is also relevant to the extent that it permits provincial executives to intervene in terms of Section 139 of the Constitution if a municipality cannot or does not comply with the provisions of Chapter Four of the Act.

Promotion of Access to Information Act 2 of 2000

This Act protects and upholds the rights of people to access information, and seeks to enhance the transparency, accountability and effectiveness of government. Public bodies are obliged to give information needed to the public in order to facilitate the process of enabling people to exercise the rights that are enshrined in the Constitution.

(E) Applicable Regulatory Framework

Regulations Relating to Compulsory National Standards and Measures to Conserve Water[17]

These Regulations provide that the minimum standard of basic sanitation service is:

a) "[T]he provision of appropriate health and hygiene education; and
b) a toilet that "is safe, reliable, environmentally sound, easy to clean, provides privacy and protection against the weather, is well ventilated, keeps smell to a minimum and prevents the entry and exit of flies and other disease-carrying pests."

[17]Published under GN R509 in GG 22355 of 8 June 2001.

In terms of Regulation 3, a municipality is obliged to provide each resident with access to at least 25 litres per day at a water user connection within 200 metres of each of the residents' households.

(F) Applicable Policy Framework

White Paper on Water

Government's white paper entitled "Water is Life, Sanitation is Dignity"[18] articulates government's commitment to the provision of at least a basic water and sanitation service to all people living in South Africa. It states further that the provision of water and sanitation remains an important policy concern. The government is also committed to reducing the backlog in services by 2008 in the case of water and 2010 in the case of sanitation. The policy of free basic water and sanitation services means that everybody in South Africa has a right to a basic amount of water and a basic sanitation service that is affordable.

National Sanitation Policy[19]

The National Sanitation Policy defines sanitation as "the principles and practices relating to the collection, removal or disposal of human excreta, refuse and waste water, as they impact on users, operators and the environment."

The policy lists the main types of sanitation systems used in South Africa, namely:

a) Traditional unimproved pits;
b) Bucket toilets;
c) Portable chemical toilets;
d) Ventilated Improved Pit toilets;
e) Low flow on-site sanitation (LOFLOS);
f) Septic tanks and soakaways;

[18]Department of Water Affairs and Forestry, October 2002.
[19]Department of Water affairs and Forestry, 1996.

g) Septic tank effluent drainage (solids-free sewerage) systems; and
h) Full water-borne sewerage.

White Paper on Basic Household Sanitation[20]

According to the 2001 White Paper on Basic Household Sanitation, the Department of Water Affairs and Forestry had the following responsibilities, together with other national role-players:

a) Developing norms and standards for the provision of sanitation;
b) Providing support to the provinces and municipalities in the planning and implementation of sanitation improvement programmes;
c) Coordinating the development by the municipalities of their Water Services Development Plans as a component of their Integrated Development Plan;
d) Monitoring the outcome of such programmes and maintaining a database of sanitation requirements and interventions;
e) Providing capacity building support to provinces and municipalities in matters relating to sanitation;
f) Providing financial support to sanitation programmes until such time as these are consolidated into a single programme; and
g) Undertaking pilot projects in programmes of low cost sanitation.

White Paper on Health[21]

The White Paper on the Transformation of the Health System sets out key policy issues. It aims to:

a) Unify the national health system to address the effects of apartheid on health;
b) Re-organise the health service to give priority to primary health care through the district health care system, where certain aspects of health service delivery takes place at district (instead of national or provincial) level. A clear

[20]Department of Water Affairs and Forestry, 2001.
[21]White Paper on the Transformation of the Health System, 1997.

advantage of the district health model is that it seeks to bring health care services closer to people on the ground;

c) Promote health;
d) Strengthen disease prevention;
e) Ensure that there are safe, good quality essential medication available in all health facilities;
f) Recognise the need to increase access to services by making primary health care services available to all people;
g) Give special attention to health services reaching people most in need of these services – the poor, the elderly, women and children;
h) Promote the participation of community structures in health care delivery.

(G) Applicable strategic framework

The Strategic Framework for Water Services[22]

This Framework defines a basic sanitation facility as:

"The infrastructure necessary to provide a sanitation facility which is safe, reliable, private, protected from the weather and ventilated, keeps smells to the minimum, is easy to keep clean, minimises the risk of the spread of sanitation related diseases by facilitating the appropriate control of disease carrying flies and pests, and enables safe and appropriate treatment and/or removal of human waste and waste water in an environmentally sound manner."

It further defines a basic sanitation service as:

"The provision of a basic sanitation service facility which is easily accessible to a household, the sustainable operation of the facility, including the safe removal of human waste and wastewater from the premises where this is appropriate and necessary, and the communication of good sanitation, hygiene and related practices."

[22] Department of Water Affairs and Forestry, 2003.

Free Basic Sanitation Implementation Strategy[23]

According to this Strategy, municipalities are required to ensure that every household has access to basic sanitation, as per the Constitution, Water Services Act and the Municipal Systems Act. It acknowledges that there is a "right of access to a basic level of sanitation service" enshrined in the Constitution.

(H) Applicable sector codes

The National Housing Code[24]

The National Housing Code was adopted in terms of s 4(6) of the Housing Act. The provisions of the Code are binding on all three spheres of government.

The central objective of the National Housing Code is to encourage the development of social capital by supporting the active participation of communities in the design, implementation and evaluation of projects. In this regard, the Code places certain injunctions on service delivery agents, stating that:

"To ensure that fragile community survival networks are not compromised and to empower communities to take charge of their own settlements, one of the basic tenets of the programme is that beneficiary communities must be involved throughout the project cycle. All members of the community, even those who do not qualify for subsidies, should be included."

(I) Applicable Programmatic Framework

The Upgrading of Informal Settlements Programme[25]

[23]Department of Water Affairs and Forestry, April 2009.
[24]The National Housing Code, Technical and General Guidelines (Vol 2) 2009.
[25]Breaking New Ground Policy Document, Department of Housing, 2004.

This Programme is published in terms of section 3(4)(g) of the Housing Act and contained in the National Housing Code, and was established by the Department of Housing in 2004 as part of its Breaking New Ground Policy Document. The broad objectives of the programme are to facilitate access to basic services, transform communities through upgrading and to engender local economic development through the improvements in infrastructure.

(J) Relevant Case Law

7.4. Regional case law

***Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) – The right to health**

In dealing with an alleged violation of the rights to health and environment contained in the African Charter, the African Commission on Human and Peoples Rights held that:

"The right to enjoy the best attainable state of physical and mental health enunciated in article 16(1) of the African Charter . . . obligate[s] governments to desist from directly threatening the health and environment of their citizens. The state is under an obligation to respect these rights and this largely entails non-interventionist conduct from the state; for example, to desist from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual."[26]

***Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) – The right to health and health care**

In this decision, the Commission gave content to the right to health (in the context of access to health care service for mentally ill patients) in the following manner

[26] Paras 51-52.

"Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind."[27]

The Commission nevertheless applied this right in the greater context of African states, and accordingly made the following qualification:

"The African Commission would however like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into article 16 [of the African Charter] the obligation on part of states party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind."[28]

Free Legal Assistance Group and Others v Zaire (2000) AHRLR 74 (ACHPR 1995) – The rights to health care and water

In this matter, the petitioners alleged that the State of Zaire had violated numerous rights contained in the African Charter. The Commission held accordingly that:

"Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that states parties should take the necessary measures to protect the health of their people. The failure of the government to provide basic services such as safe drinking water and

[27] Para 80.
[28] Para 84.

electricity and the shortage of medicine as alleged in communication 100/93 constitute a violation of article 16."[29]

7.5. Domestic case law

7.5.1. The right to human dignity

***S v Makwanyane and Another* 1995 (3) SA 391 (CC)**

In this seminal case the Constitutional Court, when dealing with the constitutionality of the death penalty, observed as follows:

"Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."

***NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC)**

In this matter, dealing with an alleged violation of the claimants' dignity, the Constitutional Court held that "[a] constant refrain in our Constitution is that our society aims at the restoration of human dignity because of the many years of oppression and disadvantage. While it is not suggested that there is a hierarchy of rights it cannot be gainsaid that dignity occupies a central position. After all, that was the whole aim of the struggle against apartheid – the restoration of human dignity, equality and freedom."

The Court held further that if human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and

[29] Para 47.

protected. In this regard, reference was made to the following dictum from the matter of Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) para 35:

"The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it clear that dignity is not only a value that is fundamental to our constitution, it is a justiciable and enforceable right that must be respected and protected."

7.5.2. Socio-economic rights and the provision of services generally

Government of the Republic of Republic of South Africa and Others v Grootboom and Others **2001 (1) SA 46 (CC)**

This matter was the first in which the Constitutional Court thoroughly addressed, interpreted and applied the constitutional right to housing, and is of wider relevance with regard to the provision of all socio-economic rights.

The Court held that the determination of a minimum core which constitutes the State's obligation in respect of a particular right cannot be done without assessing the needs and opportunities for the enjoyment of that right, which will vary in different areas due to the prevalence or absence of relevant factors. As the Court does not have access to sufficient information upon which to make the

determination as to what constitutes a minimum core, it is held that it will be unable to do so. Rather, the appropriate question in the South African context is "whether the measures taken by the State to realise the [socio-economic right concerned] are reasonable."[30]

In assessing reasonableness, the particular context of the policy under considered must be taken into account in order to determine the capacity of the implementing entities. Furthermore, the context of the Bill of Rights as a whole is relevant, in particular the interconnectedness of the socio-economic right concerned and other rights therein in light of the foundational principles (including human dignity).

Moreover, the Court held that legislative measures adopted by the government must be supported by policies, while the programmes adopted must be reasonable "both in their conception and implementation". The court also held that reasonable measures are those that take into account the degree and extent of the denial of the right they endeavour to realise and, significantly for the complaint under consideration, do not ignore people whose needs are the most urgent and whose ability to enjoy all the rights is most in peril.[31]

Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC) – 'Public law right' to basic municipal services

In this matter the Constitutional Court read sections 152 and 152 of the Constitution alongside the provisions of the Municipal Systems Act and the Housing Act to find that a "public law right to basic municipal services" existed, which imposed a duty on local government to provide such services.

[30] Para 33.
[31] Para 44.

7.5.3. The right of access to water

***Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W)**

This case was one of the first matters in which the court explicitly recognised the constitutional right to water, imposing a duty on the local council concerned to progressively provide for that right.[32]

***Mazibuko and Others v The City of Johannesburg and Others* 2010 (4) SA 1 CC** In this case the Constitutional Court assessed, interpreted and applied the right of access to sufficient water contained in s 27(1)(*b*) of the Constitution.

The Court first outlined the content of the right of access to sufficient water (s 27(1)(*b*)), holding that the constitutional provision in which it is enshrined must be read alongside the qualification of the state's obligation in that regard (s 27(2)). Consequently, "it is clear that the right does not require the State upon demand to provide every person with sufficient water without more; rather it requires the State to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources."

However, the Court itself is not well-placed to determine the actual quantity of water required to meet the State's obligations in this regard; in any event, any such quantification would be too static to constitute sufficient protection of the right. The appellant's argument for a quantification of the right to water therefore failed. Rather, the test for whether the State has met its obligations is focused on the reasonableness of its conduct.

[32] Para 12.

7.5.4. The right of access to health care services

***Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 (1) SA 765 (CC)**

In one of the first cases addressing the justiciability of socio-economic rights and focusing on the right of access to health care, the Constitutional Court noted that

"[T]he obligations imposed on the State by ss 26 and 27 [of the Constitution] in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and . . . the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which s 27(3) must be construed."[33]

***Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC)**

In this matter concerning the State's policies aimed at curbing mother-to-child transmission of HIV through the provision of anti-retroviral medication, the Constitutional Court again reiterated the approach to socio-economic rights outlined above (specifically in the *Grootboom* and *Soobramoney* cases). In applying its preferred test of 'reasonableness' to the policy concerned, the Court held that:

"[T]he policy of government insofar as it confines the use of [the medication] to hospitals and clinics which are research and training sites constitutes a breach of the State's obligations under s 27(2) read with s 27(1)(a) of the Constitution."[34]

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[33] Para 11.
[34] Para 80.

In making this finding, the Court noted that "throughout the country health services are overextended" and it was therefore "conscious of the daunting problems confronting government as a result of the [HIV/AIDS] pandemic". Moreover,

"[B]esides the pandemic, the State faces huge demands in relation to access to education, land, housing, health care, food, water and social security. These are the socio-economic rights entrenched in the Constitution, and the State is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them. In the light of our history, this is an extraordinarily difficult task. Nonetheless it is an obligation imposed on the State by the Constitution."[35]

8. Analysis of data collected during investigation

8.1 Human Dignity

a) The Commission submits that the Respondent violated the right to human dignity by not providing the residents of Matwabeng with sufficient water and providing unclean water.

b) The investigations conducted by the Commission and the inspection *in loco* reveal that indeed there has not been any running water since June 2012, water was only provided in tanks since August 2012, people have to keep long queues in order to access water which is still not sufficient for their families, the water is also allegedly unclean.

c) The former Constitutional Court judge, Albie Sachs, in arguing that the right to dignity is of central significance states:

[35] Paras 93-94.

"Respect for human dignity is the unifying constitutional principle that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not to simply ensure that the 'haves' continue to have, but to help create conditions in which the basic dignity of the 'have nots' can be secured."

d) Notwithstanding the fact that there has been running water since February 2013, the water is still dirty and on the day of the inspection there was no water and the municipality has taken the water tanks that were provided as in interim measure. Further, the length of time over which the residents of Matwabeng have been forced to resort to waking up early to access water and the length of time over which they have been forced to drink unclean water is unacceptable. A situation where people are forced to make do with insufficient, unclean water is irreconcilable with the Bill of Rights and any relevant applicable governing framework in our country in that the Respondent did take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the above mentioned rights.

e) One cannot simply be forced to use four buckets of water per daily for the whole family in a residential area without one's right to dignity being gravely infringed. It is therefore the finding of the Commission that the right to the dignity of the residents who are being forced to use unclean, insufficient water has been infringed.

8.2 Access to Information and Public Participation

a) With regard to the duty of the Respondent in service provision, the Commission observes that the principles of active participation, social cohesion and community empowerment are key principles to the work

of the Respondent. It is therefore incumbent upon the Respondent to demonstrate that effective and interactive community participation took place. Active communication and proactive information sharing lie at the heart of such engagement and participation. A municipality must demonstrate that effective and interactive community participation has taken place in the planning, implementation and evaluation of a project.

b) There was nothing gleaned during the course of investigations that suggested that the Respondent had included active community participation in the project, the project was, for all intents and purposes, not a transparent one.

c) Adequate consultation at the point of conceptualization would have provided the Respondent with clear insight of the community's needs and its own capacity to respond accordingly.

d) In terms of the MFMA, a municipality must consult communities and present the budget available to undertake specific projects. The budget must be presented through the Medium Term Expenditure Framework (MTEF) process, where there is an agreement as to how the municipality intends to deal with water shortages. The fact that the community of Matwabeng was not informed of the water cuts or about when the water would be back for a lengthy period is an indication that the Respondent did not consult, neither did the Respondent use the multiyear planning framework on service delivery.

e) Access to information is a fundamental right entitling people to information that public bodies hold, and facilitating informed participation in decisions which affect their daily lives. The Commission has considered the Respondent's compliance or lack thereof with the

Promotion of Access to Information Act (PAIA), a law of national application which facilitates information sharing in the country and is meant to promote public participation.

f) PAIA obliges the Respondent to avail information about its decisions relating to all aspects of the process, including tenders and the means through which the community can access the information the Respondent holds. In this sense, people are not only able to participate meaningfully in the project of the Respondent, but they are also able to hold it accountable.

g) In this instance, the residents of Matwabeng advised the Commission's investigators that they do not know anything about the water cuts.

h) Based on the Respondent's failure to share information and consult with the community, the Commission finds no justification for the Respondent's actions.

8.3 Health & Sufficient Water

8.3.1 The health risks posed by the above situation, particularly to vulnerable groups with weak immune systems are extremely serious. This situation is exacerbated by the fact that most people experiencing these conditions have very little means of combating diseases such as diarrhoea resulting from the consumption of unclean water.

8.3.2 Water is a source of life, a commodity that people cannot do without. The fact that the residents of Matwabeng do not have sufficient water is of grave concern in and of itself, the fact that the little water that they can access might be contaminated is of even greater concern.

8.3.3 Not only are people subjected to a lack of access to sufficient water, they are also subjected to unhealthy water that might carry with it water borne diseases, which might be fatal for their health.

8.4 Obligations and Responsibilities of National and Provincial Government

8.4.1 National and provincial government departments have a clear responsibility to ensure that municipalities meet their obligations.

8.4.2 It is incumbent upon both provincial and national departments to monitor and intervene if necessary in the work of local government structures. This is also true of the planning and budgeting undertaken by municipalities. National and provincial departments should have exercised closer monitoring of the Respondent. Such monitoring and scrutiny of the work of the Respondent would have permitted timely intervention by the MEC and relevant national ministers.

9 Findings

Based on the investigation conducted by the Commission and the analysis of the Constitutional rights, court judgments and applicable legislation, the Commission finds that:

9.1 The Respondent has violated the right to dignity, the right to sufficient water and the right to heath care services in that the Respondent has failed to provide sufficient and clean water to the residents of Matwabeng.

9.2 The Respondent failed to adequately include affected citizens in (or inform citizens of) the conceptualisation, planning or implementation of its water projects, thereby violating the right of citizens to access to information.

9.3 The provincial and national government departments have not adequately monitored the work of the respondent or intervened in respect of their legislative and Constitutional obligations.

10 Recommendations

In terms of the human Rights Commission Act, the Commission is entitled to *"make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution."*

The Commission recommends accordingly that:

10.1 The Respondent is required to provide the Commission with measures that they have taken to ensure that the community of Matwabeng has sufficient, clean and safe water, thus enabling people to have their rights to dignity restored.

10.2 To this end the Respondent is required to:

10.2.1 Furnish the Commission with a progress report at least every six (6) months from the date of this finding; and further to,

10.2.2 Furnish the Commission with a progress report at least every three (3) months in respect of the progressive realisation of the right to water in Matwabeng.

10.3 The report to the Commission must demonstrate the following:

10.3.1 The Respondent's implementation and budgetary plans;

10.3.2 Interim measures for the provision of adequate, uninterrupted water services to the residents;

10.3.3 The manner in which it has identified and responded to the rights of vulnerable groups like women, children and people with disabilities.

10.4 The Respondent is required to provide the Commission with the framework through which meaningful and ongoing consultation with the community will be undertaken. To this end, the Respondent is directed to furnish the Commission with the minutes of every community meeting held at least every three (3) months in respect of development in the municipality relating to access to water.

10.5 The Provincial Free State Department of Water Affairs is directed to provide the Commission with a report and a detailed plan on strategies intended to deal with challenges and a report setting out strategies setting out clear timeframes for operational and capacity shortcomings of the Municipality. The report should be furnished to the Commission within three (3) months from date of this finding.

11. APPEAL

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

The Chairperson, Adv M.L. Mushwana

South African Human Rights Commission

Private Bag X2700

Houghton

2041

SIGNED AT JOHANNESBURG ON THIS THE 18TH DAY December OF 2013.

Deputy Chairperson

Pregs Govender

South African Human Rights Commission