



**South African Human Rights Commission**

***Final Report of the Gauteng Provincial Inquiry  
into the Sewage Problem of the Vaal River***

**17 February 2021**

## Executive Summary

The South African Human Rights Commission (**'the Commission'**) had been alerted to online and print media reports, published during July and August 2018, reporting that raw sewage had for weeks and months been leaking into and polluting the Vaal and the Rietspruit from the Municipality's Rietspruit Waste Water Care and Management Works situated in Vanderbijlpark, the Leewkuil Waste Water Care and Management Works situated in Vereeniging and other areas within the Emfuleni Local Municipality.

The media reports stated, amongst other things, that: the main sewers in Vanderbijlpark were blocked and that raw sewerage was flowing into people's yards and properties; raw sewage has been left flowing directly into the Vaal due to issues of mismanagement by the Emfuleni authorities; and the situation at the Vaal River – which provides a major source of water for Gauteng – had reached crisis levels as raw sewage continues to spill onto land and into the river, posing a threat to the drinking water of 45% of Gauteng's population.

In order to test the veracity of the media reports, in September 2018, the Commission's Gauteng Provincial Office conducted an inspection-in-loco at certain sites within the Emfuleni Local Municipality (**'the Municipality'**), and observed: raw sewage flowing in a small stream that cut across the Emfuleni Golf Estate; two burst sewerage pipes on the banks of the Rietspruit that runs through the Emfuleni Local Municipal area; defective bio-filters at the Rietspruit Waste Water Treatment Works; a clogged sewerage manhole at the Sharpeville Cemetery and children swimming in, and consuming, polluted waters in the area of a school. Having established a *prima facie* violation of human rights in the Emfuleni municipal areas, regarding the flowing of raw, untreated sewage and other wastewater flowing in the streets, homes, graveyards and also flowing into the Vaal River, the Dam, the Barrage and the Rietspruit (referred to collectively as **'the Vaal'**), and acting within its legislative mandate, the Commission established an Inquiry.

The purpose of the Inquiry was to ascertain: the extent and consequences of the human rights violations; the causes of the violations; the persons and/or state and/or private entities responsible; whether sewage spillage into the Vaal constituted a disaster as defined in the Disaster Management Act of 2002; the various accountability, disciplinary and/ or prosecution mechanisms which can be implemented against persons and/or entities responsible; and to understand what appropriate recourse or remedy, within the Commission powers, could be given effect to, to promote, respect and protect human rights of persons in the Emfuleni area, and provide just and equitable relief for any determined violations.

Oral and written submissions were presented to, and received by, the Commission's Inquiry Panel, from local, national and provincial government, organs of state, non-profit organisations, ratepayers' associations, and academia and private-sector engineers.

Information presented during the Inquiry was assessed against our domestic, as well as regional and international legal framework. In addition to our Constitution, the domestic legal framework referred to includes the Municipal Systems Act of 2000, the Water Services Act of 1997 (**WSA**), the National Water Act of 1998 (**NWA**), the National Environmental Management Act of 1998, (**NEMA**) the Municipal Finance Management Act of 2003 (**MFMA**) and Emfuleni Local Municipality's water and sanitation By-Laws. The regional framework includes the African Charter on Human and Peoples Rights and the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples Rights. The international legal framework makes reference to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, United Nations General Assembly and Human Rights Council Resolutions and General Comments and World Health Organisation Resolutions.

### *Findings*

The Commission accepts the importance and economic value of the Vaal. National Treasury emphasised that approximately 19 million people depend on the Vaal for water and that the pollution of the Vaal reverses the gains made from the Lesotho Highlands Water Project, a vital but costly project for the South African government., sadly, based on submissions, the Commission also has to accept the Vaal is polluted beyond acceptable standards, and it became common cause during the Inquiry that the cause is the kilolitres of untreated sewage entering the Vaal.

It is accepted that the inoperative and dilapidated wastewater treatment plants have been unable to manage the treatment of the sewage and wastewater produced, that the treatment plants service (which includes wastewater produced in areas outside of the Emfuleni municipal area, such as from areas which fall under the City of Johannesburg Metropolitan Municipality as well as the Midvaal Municipality). As a result, raw sewage flowed not only into the Vaal but also onto residential streets, school, homes and other public areas in the jurisdiction of the Municipality.

The extended consequence is that the pollution is impacting natural ecosystems directly dependent on the water and surrounding wetlands which form a vital part of the ecosystem. The population of Yellowfish peculiar to a few South African rivers such as the Vaal are under

threat of extinction on account of the change to the balance of river flora and other competing species in the river caused by pollution of the Vaal. In addition, livestock which consume water from the Vaal and direct human consumption itself, adversely impacts the health of consumers. In respect of the flow of raw sewerage on public streets, paths, and into homes, this poses a major health hazard to people and therefore their rights to dignity as well. In addition, and apart from the long-term effects of pollution of the water source on life; are the direct concerns relating to the negative impact pollution has had on the economy. The evidence provided regarding the decrease in tourist and recreational activities on the river were accepted.

The Commission found that the impact of the discharge, occurring over more than five years at the time of writing, violated a number of constitutional rights which includes the rights to: human dignity, freedom and security of the person, an environment that is not harmful to health or well-being, not be deprived of property, health care, food, water and social security, just administrative action and the rights of children to be protected from maltreatment and degradation.

Generally, in respect of the domestic legal framework relating to the environment, water services, sanitation, all provide for accountability or contain accountability mechanisms. While the information provided to the Panel did not provide evidence of these mechanisms not being applied or given effect to, the resultant pollution and the financial and administrative failures of the Municipality, the general concern is that the mechanisms may not have been invoked or given effect to.

More specifically, in terms of the Commission's assessment and findings, the Water Services Act (**WSA**) creates a clear responsibility on the Municipality to provide water supply services and sanitation services to its customers living in formal and informal settlements. The Municipality did not dispute this responsibility or that it had not fulfilled the responsibility, and instead conceded that these failures were attributable to its failing wastewater infrastructure.

In addition to not providing water supply services the Municipality has, by not maintaining the water sanitation infrastructure, caused sewage pollution of the Vaal and in the streets and homes of persons living in the Emfuleni municipal area. This occurred in contravention of the National Water Act (**NWA**) and the National Environmental Management Act (**NEMA**). Despite having the ability to do so, it did not appear to the Commission that the Department of Water and Sanitation (**DWS**) and the Department of Environment Forestry and Fisheries had been able to hold the Municipality accountable for causing sewage pollution as required in terms of section 19 of the NWA and section 28(2) of NEMA. The pollution in fact continued for a number of years without being successfully contained.

Deviations from management which posed serious risks for the Municipality and service delivery recipients are detailed in the independent forensic reports and identified by the AGSA. Such risks arose in respect of contracts with service providers, choices made in the appointment of appropriate service providers, and the actual delivery by such service providers which has affected the management of wastewater corrective actions.

In certain instances the Commission was advised that contracts concluded by the Municipality with service providers were not honoured despite the provisions of section 116 of the MFMA which requires that a contract entered into with a service provider includes terms for termination in the case of non-performance or under performance. Where full delivery was not achieved to the standard required to address the problems in wastewater management, and infrastructure, such contracts ought not to be accepted or paid. Alternatively, where contracts were entered into, a Municipality has a common law right to cancel the contract and claim damages for breach of contract. The Municipality has a responsibility to enforce controls and oversight to check its spend of public funds, in the interests of delivery. The Municipality did not provide any evidence of termination and claim for breach where service providers did not deliver. This amounted to another avenue of wastage of resources.

To add to the dismal form of the Municipality presented to the Inquiry Panel, the Commission was made aware that the Municipality owes 'billions of rands' to Rand Water for Bulk Water provision. While the Gauteng Provincial Treasury (**GPT**) detailed that in relation to the growing outstanding Rand Water Bulk Account, the Municipality has been on many previous occasions assisted by the GPT working with Gauteng Department: Co-operative Governance and Traditional Affairs (**Gauteng COGTA**) providing inputs on the payment proposals and in an effort towards entering into repayment arrangements to address the arrear accounts. Despite efforts made by GPT and COGTA, the Municipality, did not service and honour the repayment arrangements established causing the arrangement to lapse and become nullified. However, GPT advised the Commission that with the continued section 139 constitutional intervention, introduced in 2018, negotiations to establish a payment plan with Rand Water remain ongoing.

The DWS indicated that it had already taken steps to prevent the pollution on behalf of the Municipality, but that it is now struggling to recover its costs from the Municipality, in terms of the NWA.

Several submissions informed the Commission of a lack of skills within the Municipality to effectively manage the challenges that had been identified in respect of wastewater management more than ten years ago. However, according to private engineers' submissions, the necessary skills are available in South Africa. It is the responsibility of the

Municipality to, in accordance with the MSA and the Municipal Structures Act, appoint skilled workers and/or develop capacity for employees to be able to provide the necessary services.

Theft and vandalism were cited as factors contributing to the ineffectiveness of wastewater management, particularly because of the damage it causes to infrastructure. Theft has caused monetary losses to the Municipality, but no estimated cost impact was provided for any financial year relating to the problem, nor were clear containment and preventative plans submitted to plug this additional leak in scarce resources caused by theft from the SAPS or from the Municipality.

### *Recommendations*

The impact of the raw sewage running into the Vaal and the streets of the Emfuleni Municipality to the rights of the community, and to a vital water resource, is significant. In the absence of timely and effective response from the multiple spheres of government, Gauteng's most vital water resource may very well have been irreparably damaged.

The Commission is aware of the various interventions made by the National DWS, National Treasury and Gauteng Provincial Treasury in its attempt to address the Sewage Problem and general collapse of the Emfuleni Municipality. The DWS's plan to combat pollution in the Vaal and National Treasury's significant cash injection through the Regional Bulk Infrastructure Grant is acknowledged.<sup>1</sup> DWS indicated that as part of its intervention in terms of the Implementation Protocol, it had appointed the East Rand Water Care Company, an entity of the Ekurhuleni Metro, as implementing agent of the plan. The specialist wastewater company, is to ensure that the infrastructure is made operational and wastewater pollution in the Vaal River is stopped.

Unfortunately these efforts have not been enough to address the unmanageable situation that is occurring in the Emfuleni municipal area. The contents of this final report, media reports and publications by experts lends itself to a conclusion of extensive non-compliance at all spheres of Government with legal frameworks which seek to protect water resources, and to regulate water and sanitation services. These levels of poor compliance resulted in the situation observed by the Commission: the pollution of the streets and homes of persons living within the Municipality and the pollution of the Vaal and the Rietspruit. Despite concerted

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<sup>1</sup> The DWS Minister, Gugile Nkwinti announced on 10 April 2019 that an Implementation Protocol was signed on 29 March 2019 by the Departments of Water and Sanitation, Cooperative Governance and Traditional Affairs in Gauteng, Emfuleni Local Municipality, the South African National Defence Force, the Municipal Infrastructure Support Agent and the East Rand Water Care Company.

efforts by DWS and National and Gauteng Provincial Treasury, the information presented in this report demonstrates further, the level to which degeneration must occur within a local municipality before a firm intervention is made at much cost to the public and the state.

It further appeared from Parliamentary reports that the current section 139 intervention by the Gauteng Government /COGTA have not yielded successful results. Reports from Parliament stated that the first two years of the intervention were a failure, and that the Province is trying again.<sup>2</sup> It is understood that in June 2020, the Gauteng Provincial Treasury stepped-up and strengthened the intervention with the deployment of a Lead Administrator and team of (section 139) Administrators focusing on key municipal functions.

Given the situation, there is a need for both urgent and comprehensive intervention, in and above the current section 139 intervention by the Gauteng Province.

The Commission's recommendations include recommending that:

- The National, Provincial and Local Government to take active steps to know and understand all of its constitutional and legislative obligations and to comply and implement them as is the duty of any a public servant or municipal administrator.
- The Municipality uphold the Rule of Law and Constitutional Supremacy in South Africa.
- In the short term that DWS or Gauteng COGTA, together with experienced wastewater management specialists, and respective Treasury Departments draw up a cost-effective interim plan to urgently stop or limit the flow of sewage in the streets and homes of people living in the Emfuleni area and also into the Vaal.
- The National and Provincial governments, for the medium and long term, conduct a detailed needs assessment for the clean-up and rehabilitation of the Vaal. Such an assessment should be supported by experts including financial experts, to cost and make available a project plan and budget for the implementation of such plan on a short, medium and long term basis.
  - This includes DWS and/or Gauteng COGTA engaging with experienced wastewater specialists for job specifications to be drawn up in order to employ or contract the necessary skilled people to repair and replace the defective sewerage systems in the Emfuleni Municipality.

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<sup>2</sup> See <https://www.parliament.gov.za/press-releases/gauteng-provincial-government-failing-people-emfuleni> and <https://pmg.org.za/committee-meeting/30497/>.

- DWS develop and implement policies and standards to deal with water crises in South Africa, and the contamination of the Vaal River in particular.
- Vandalism and theft be regularly reported to the SAPS.
  - the DWS consider placing private security guards at the sewerage infrastructure to prevent further vandalism and theft;
- DWS reintroduce the Blue and Green Drop transparent quality measuring system.
- DWS collaborate with DEFF and use the inspectors provided for in NEMA to investigate offences relating to water and sanitation, as they are likely to relate environmental damage.
- In order to prevent a repeat of the issues, the Vaal River and the associated water infrastructure be declared as critical infrastructure as per the Critical Infrastructure Act 8 of 2019. Declaring the Vaal and the respective sewerage systems as critical infrastructure would ensure that it will be protected, and restored.
- Municipal councils develop mechanisms to interact with communities and identify service needs and priorities.
  - Without capacity to strategize, integrate and interface with non-municipal groups, many local governments are unlikely to be sustainable in the future.
  - The implementation of new strategies and policies requires strong municipal leadership, with the necessary support and belief of the municipal council. Continuous communication between all role players and regular oversight and training should be provided and encouraged.
- Regular inspections of the Vaal and regular meetings to report on all of the above take place between Respondents and the Commission; and
- The Commission would like to reiterate that no evidence was put before it in order for the Commission to make a finding on if, who, when and/or why existing legislation was not given effect to. The Commission would however like to request, a renewed or continued commitment to accountability and to ensure where not already implemented:
  - public servants and municipal administrators and staff who failed to comply with their obligations under the PSA, the MSA and the MFMA, and contributed to the disintegration of the Municipality be disciplined or dismissed in accordance with the PSA, MSA and labour relations legislation -- The PSA and MSA set out a lengthy list of responsibilities for public servants and municipal staff. These obligations are a minimum duty on government through its officials to

render mandated services to the public in an effective, efficient and economically cost effective manner. Effective performance management requires vigilance over the quality of delivery and development to build and strengthen the public service. Performance management also requires that municipal staff who do not give effect to their obligations experience the consequences of repeated poor delivery such as dismissed if warranted. In the absence of stringent consequence management, the public purse is impacted and constitutional duties flouted while people continue to live in deteriorating conditions;

- any irregular or fruitless and wasteful expenditure be investigated and the relevant parties be made to repay monies to the Municipality and that where applicable the actions be reported to SAPS -- In terms of section 32 of the MFMA, any accounting officer, political office-bearer or municipal official who deliberately or negligently made or authorised irregular expenditure or fruitless and wasteful expenditure is liable for that expenditure. A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure;
- any allegations of corruption be referred to the Public Protector or the SAPS Special Investigation Unit -- In terms of section 32(6), an accounting officer of a municipality must report all cases of irregular expenditure that constitute a criminal offence, to SAPS. Where the charge is against the accounting officer, the municipal council must report the alleged offence to SAPS;
- where contracts are not being honoured, that the Municipality or its administrators institute legal action in terms of the MFMA to cancel the contract or to, under common law institute legal action for breach of contract and claim damages, alternatively claim lost money under unjustified enrichment – There is a general need to create precedent that communicates to service providers that they will be held to account.

The Commission is hereby notifying South Africans National, Provincial and Local Government that the Sewage Problem is a crisis and an obvious liability to the State. The consequences of the pollution could result in a string of legitimate civil claims against DWS for damages (as provided for in the NWA). In addition failure to implement the WSA, NWA and NEMA in respect of water and sanitation and pollution of the Vaal area will result in further litigation that could escalate all the way up to the Constitutional Court. Section 151 of the NWA makes the intentional or negligent commission of any act or omission which pollutes or

is likely to pollute a water resource unlawful and a statutory offence which carries penalties. Where harm, loss or damage caused by the offence, for which a person was convicted, is proved in Water Courts, the person or persons who suffered harm, loss or damage be may awarded pecuniary damages.

The Commission would also like to recommend that in terms of section 139(7) of the Constitution and section 63 of the WSA and sections 19 and 63 of the NWA, Cabinet seriously consider taking a decision for National Government to intervene in the running of the Emfuleni Local Municipality.

- The failure to repair and replace the sewerage systems of the Municipality is not only a failure to comply with the WSA, it is a failure of many people over many years to properly run the Municipality.
- It is proposed that all departments of the Municipality, save for ones the Provincial and National Government can show is operating adequately, be taken over by National Government.

Such an intervention can also make use of the services of organs of state such as Rand Water and SALGA, given that the Minister for DWS can issue directives to Rand Water, and further facilitate the implementation of DWS' current and impending interventions.

The Commission requests that all parties to which the above recommendations apply, respond to the Commission jointly or separately, within **60 days** of receiving the final report.

### Acronyms and Abbreviations

|                      |  |
|----------------------|--|
| AG / AGSA            | Auditor General South Africa   |
| By-Laws              | Water and Sanitation By-Laws of 2004                                   |
| CFO                  | Chief Financial Officer  |
| Commission / SAHRC   | South African Human Rights Commission                                  |
| Constitution         | Constitution of the Republic of South Africa Act 108 of 1996           |
| Consulting Engineers | Consulting Engineers of South Africa                                   |
| COGTA                | Cooperative Governance and Traditional Affairs                         |
| DBSA                 | Development Bank of Southern Africa                                    |
| DEFF                 | Department of Environment, Forestry and Fisheries                      |
| DG                   | Director General   |
| DM Act               | Disaster Management Act 57 of 2002                                     |
| DWS                  | Department of Water and Sanitation                                     |
| ELM                  | Emfuleni Local Municipality  |
| FRP                  | Financial Recovery Plan  |
| FSAFF                | Federation of Southern African Fly Fishers                             |
| FSE                  | Federation for Sustainable Environment                                 |
| GPO                  | Gauteng Provincial Office of the South African Human Rights Commission |
| GPT                  | Gauteng Provincial Treasury  |
| ICCPR                | International Covenant on Civil and Political Rights                   |
| ICESCR               | International Covenant on Economic, Social and Cultural Rights         |
| MEC                  | Member of the Executive Council  |
| Ministers            | Members of the Cabinet   |
| MSA                  | Municipal Systems Act 32 of 2000                                       |
| MFMA                 | Municipal Finance Management Act 56 of 2003                            |
| NEMA                 | National Environmental Management Act 107 of 1998                      |
| NWA                  | National Water Act 36 of 1998  |

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|-----------------------------|---|
| NWRS                        | National Water Resource Strategy  |
| OUTA                        | Organisation Undoing Tax Abuse  |
| PFMA                        | Public Finance Management Act 1 of 1999   |
| PSA                         | Public Service Act 30 of 2007   |
| PSA Regulations             | Public Service Act Regulations  |
| RPA                         | Ratepayers Association  |
| SAHRC / Commission          | South African Human Rights Commission   |
| SAHRC Act                   | South African Human Rights Commission Act 40 of 2013                              |
| SALGA                       | South Africa Local Government Association   |
| SANDF                       | South African National Defence Force  |
| SAPS                        | South African Police Service  |
| SAVE                        | Save The Vaal Environment   |
| SCM                         | Supply Chain Management   |
| SRS Pump                    | Sedibeng Regional Sewer Pump  |
| SRS Scheme                  | Sedibeng Regional Sewer Scheme  |
| VEJA                        | Vaal Environmental Justice Alliance   |
| WRC                         | Water Research Commission   |
| Water Standards Regulations | Regulations Relating To Compulsory Water Standards and Measures To Conserve Water |
| WSA                         | Water Services Act 108 of 1997  |

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## 1. Introduction

- 1.1. Between July and August 2018, a flurry of media reports stated that residents living in and around the Vaal River, the Vaal Dam, the Vaal River Barrage Catchment Area and the Rietspruit, within the Emfuleni municipal district, had complained about raw and untreated sewage flowing in their streets and into their homes.<sup>3</sup>
- 1.2. These media reports, quoting environmental-rights non-profit organisations,<sup>4</sup> as well as research reports of research bodies, stated that, in 2018, as a result of ageing, collapsing, and poorly managed wastewater and sewerage infrastructure of the Emfuleni Local Municipality and other municipalities along the Vaal,<sup>5</sup> approximately 150 megalitres of raw sewage flowed into the Vaal and Rietspruit, daily,<sup>6</sup> causing the

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<sup>3</sup> Sedibeng Ster Team, "Sewage overflow reported in many Emfuleni Wards", Sedibeng Ster, 8 July 2018. Available at: <https://sedibengster.com/14835/sewage-overflow-reported-many-emfuleni-wards/> ; Andersen, N, "Vaal River facing crisis as "raw sewage" openly flows into water", The South African, 30 July 2018. Available at: <https://www.thesouthafrican.com/news/vaal-river-sewage-water/> ; Baxter, J, "Vaal Triangle 'Drowning in Sewage', Posing Threat to Gauteng's Drinking Water, SA People News, 31 July 2018. Available at: <https://www.sapeople.com/2018/07/31/vaal-triangle-drowning-in-sewage-posing-threat-to-gautengs-drinking-water/> ; Blom, N, "Vaal district faces catastrophe as Emfuleni sewage spills into river", The Business Day, 31 July 2018. Available at: <https://www.businesslive.co.za/bd/national/science-and-environment/2018-07-31-emfuleni-faces-catastrophe-as-sewage-threatens-crops-and-tourism/> ; Hyman, A, "The Vaal stinks. So does Rand Water", Times Live, 10 August 2018. Available at: <https://www.timeslive.co.za/news/south-africa/2018-08-10-the-vaal-stinks-so-does-rand-water/> ; Cameron, J, "Fishy tales about Vaal River: Ed Herbst examines the slippery facts", BizNews, 13 August 2018. Available at: <https://www.biznews.com/thought-leaders/2018/08/13/fishy-tales-vaal-river-ed-herbst-slippery-facts> ; Naki, E, "SA's municipalities are increasingly drowning in their own human waste", The Citizen, 16 August 2018. Available at: <https://citizen.co.za/news/south-africa/1996338/sas-municipalities-are-increasingly-drowning-in-their-own-human-waste/> ;

<sup>4</sup> Non-Profit Organisations whose work focuses on or includes the pollution of South African bodies of water by national, provincial and local government structures, mines, industry and individuals.

<sup>5</sup> See articles referencing Sewage Problem in Mpumalanga, the Free State, the Northern Cape and the Eastern Cape: <https://www.news24.com/news24/SouthAfrica/Local/Express-News/Sewage-bane-of-residents-lives-20150622>; <https://witbanknews.co.za/76403/sewage-running-down-the-streets-of-hlalanikahle/> ; <https://citizen.co.za/news/south-africa/1996338/sas-municipalities-are-increasingly-drowning-in-their-own-human-waste/>

<sup>6</sup> Bega, S, "Sewage Problem from Emfuleni system sparks health and ecological 'crisis'", IOL, 16 June 2018. Available at: <https://www.iol.co.za/saturday-star/news/sewage-pollution-from-emfuleni-system-sparks-health-and-ecological-crisis-15503098> ; and Mashaba, S, "Council blamed for sewage spillage into Vaal River" the Independent Online, 15 August 2018. Available at: <https://www.iol.co.za/the-star/news/council-blamed-for-sewage-spillage-into-vaal-river-16582073>. See also, South African Human Rights Commission, "Media Advisory: The South African Human Rights Commission to conduct a site inspection at the Vaal Dam on 3 September 2018", 31 August 2018. Available online at: <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1485-media-advisory-the-south-african-human-rights-commission-to-conduct-a-site-inspection-at-the-vaal-dam>.

environmental degradation and harming the health and well-being of the people, fauna and flora existing in and around the Vaal and the Rietspruit.<sup>7</sup>

- 1.3. Community members and non-profit organisations' alleged that despite knowing about the running of sewage waste, into the Vaal, for a number of years, government stakeholders – the Emfuleni Local Municipality, the Department of Water and Sanitation<sup>8</sup>, and the Department of Cooperative Government and Traditional Affairs – failed to adequately address the on-going sewage problem.<sup>9</sup>
- 1.4. Following the media reports, on 3 September 2018, the South African Human Rights Commission, empowered by the Constitution<sup>10</sup> and the South African Human Rights Commission Act,<sup>11</sup> conducted a site inspection of several areas surrounding the Vaal and the Rietspruit, within the Emfuleni Local Municipality.
- 1.5. The site inspection revealed that the failing sewerage infrastructure of the Emfuleni Local Municipality and the presence of sewage and other wastewater running through streets in the area, and into the Vaal River and Rietspruit constituted a *prima facie* violation of the rights of people, living with the Emfuleni municipal area, to human dignity,<sup>12</sup> access to clean water, proper sanitation,<sup>13</sup> and a clean environment.<sup>14</sup>
- 1.6. In light of the evidence of *prima facie* constitutional rights violations, the Commission took a decision to conduct an inquiry<sup>15</sup> into the discharge of sewage and other wastewater into the Rietspruit and the Vaal River, the consequences thereof and the attempts, or absence thereof, to address the problem. The inquiry was conducted between September 2018 and February 2019.
- 1.7. Terms of reference for an inquiry were drawn up and a Commission inquiry panel assembled. As part of the inquiry the Commission invited written submissions regarding

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<sup>7</sup> South African Human Rights Commission Press Release, “Commission calls for submissions on Vaal river pollution”, 17 September 2018. Available online at: <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1575-commission-calls-for-submissions-on-vaal-river-pollution>.

<sup>8</sup> Now the Department of Human Settlements, Water and Sanitation since May 2019. Previously the Department of Water and Sanitation under President Jacob Zuma, and the Department of Water Affairs and Forestry, before that, Under President Thabo Mbeki.

<sup>9</sup> See Bega, S and Mashaba, S (note 4 above).

<sup>10</sup> The Constitution of the Republic of South Africa Act 108 of 1996 (**‘the Constitution’**).

<sup>11</sup> The South African Human Rights Commission Act 40 of 2013 (**‘the SAHRC Act’**)

<sup>12</sup> Section 10 of the Constitution.

<sup>13</sup> Section 27(1) of the Constitution.

<sup>14</sup> Section 24 of the Constitution.

<sup>15</sup> In terms of sections 13, 15 and 16 of the SAHRC Act.

the running of sewage and other wastewater into the Rietspruit and the Vaal River from members of the community living around the Vaal River, Rietspruit and surrounding areas, and also from organisations and other interested parties.<sup>16</sup> Written submissions were followed by oral hearings.

- 1.8. A number of written submissions were received and several organisations, organs of state and individuals made oral representations at the three-day oral hearings, held as part of the inquiry.
- 1.9. The purpose of the inquiry, was to establish: if there was substance to the *prima facie* human rights violations established on the site inspection; the consequences of any established human rights violations; whether the running of sewage and other wastewater into the Vaal constituted a disaster as defined in the Disaster Management Act 57 of 2002; the entities responsible or liable for any established human rights violations; what accountability, retribution and justice mechanisms are available within legal framework and how to implement such mechanisms in the event of adverse findings; and to establish the appropriate remedy or recourse, within the South African Human Rights Commission's powers, that promotes, respects and protects human rights, provides just and equitable relief for any violation of human rights, and holds accountable any entities responsible and liable for the violation of human rights.
- 1.10. In accordance with its powers and terms of reference, the South African Human Rights Commission carried out the inquiry.
- 1.11. On 17 November 2020, an interim report of the inquiry was distributed to the organs of state/respondents, to which the interim report referred to, either in terms of findings, recommendations and/or directives, for response and/or comment.
- 1.12. This document constitutes the South African Human Rights Commission's final report which includes the assessment of the inquiry, the comments received by respondents as well as the Commission's findings and recommendations.

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<sup>16</sup> SAHRC Press Release (note 7 above).

## 2. Background

2.1. For all readers<sup>17</sup> to better understand or make sense of the South African Human Rights Commission's ('**the Commission**') report ('**the Report**') on its inquiry ('**the Inquiry**') into the running of sewage and other wastewater into the Rietspruit and the Vaal River, and into the streets, homes and school grounds within the surrounding community, from failing wastewater sewerage systems of the Emfuleni Local Municipality ('**the Municipality**'), the consequences thereof and the attempts, or absence thereof, to address the problem ('**the Problem**' or '**the Sewage Problem**'), it is useful to set out the following background information.

### *Wastewater and Sewage*

2.2. Although commonly used interchangeably, wastewater and sewage are not the same thing. Sewage is a component of wastewater.

2.3. **Wastewater** is used water that has been affected by domestic, industrial and commercial use.<sup>18</sup> More precisely, it is domestic effluent<sup>19</sup> consisting of black water (excreta, urine and faecal sludge), greywater (kitchen and bathing wastewater); water from commercial establishments and institutions, including hospitals; industrial effluent, storm water and other urban run-off; and agricultural, horticultural and aquaculture effluent, either dissolved or as suspended matter.<sup>20</sup>

2.4. **Sewage** is the wastewater containing only black water and grey water.<sup>21</sup>

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<sup>17</sup> Not just the persons, organisation and interested parties involved in the Commission's inquiry into the running of sewage and other wastewater into the Rietspruit and the Vaal River, the consequences thereof and the attempts, or absence thereof, to address the problem.

<sup>18</sup> Tuser, C "What is Wastewater?" Water and Waste Digest, 9 January 2020. Available at: <https://www.wwdmag.com/wastewater-treatment/what-wastewater>.

<sup>19</sup> Liquid waste (treated or untreated) discharged into a river. See the Compendium of Sanitation Systems and Technologies (2<sup>nd</sup> ed).

<sup>20</sup> Corcoran E, Nellemann C, Baker E, Bos R, Osborn D, Savelli H, Sick Water? The central role of wastewater management in sustainable development. A Rapid Response Assessment. UNEP/UNHABITAT 2010.

<sup>21</sup> Tuser (note 18 above) and Byrne, W, "Sewage versus Wastewater – What's the Difference?" OxyMem. Available at: <https://www.oxyMem.com/blog/sewage-versus-wastewater-whats-the-difference>.

### *Wastewater Treatment*

- 2.5. Wastewater treatment is the removal of impurities from wastewater, or specifically sewage, before it reaches aquifers or natural bodies of water such as rivers, lakes, estuaries, and oceans.<sup>22</sup>
- 2.6. In broad terms, water is said to be polluted when it contains enough impurities to make it unfit for a particular use, such as drinking, swimming, or fishing.<sup>23</sup>
- 2.7. Although water quality is affected by natural conditions, the word pollution implies human activity as the source of contamination. Water pollution, therefore, is caused primarily by the drainage of contaminated, untreated wastewater into surface water or groundwater, and wastewater treatment is a major element of water pollution control.<sup>24</sup>
- 2.8. A wastewater or sewerage treatment plant<sup>25</sup> is a network of pipes, pumping stations,<sup>26</sup> and attachments and appendages that convey sewage from its points of origin to a point of treatment and disposal.<sup>27</sup>
- 2.9. Most sewerage plants have separate collection facilities that carry domestic sewage and storm water sewage, respectively. Domestic wastewater is treated while storm water is carried to a river.<sup>28</sup> Systems that carry a mixture of both sewage and other wastewater are called combined plants. Combined plants are older. They carry large volumes of storm water during wet-weather periods. As a result of large volumes of storm water, sewage must bypass the treatment plants during wet weather and be discharged directly

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<sup>22</sup> Nathanson A, and Ambulkar, A, "Wastewater treatment", Encyclopaedia Britannica, 22 January 2010.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Referred to throughout the report as a "Plant", "wastewater works", a "sewerage system" and a "sewerage plant".

<sup>26</sup> "Pumping stations are built when sewage must be raised from a low point to a point of higher elevation or where the topography prevents downhill gravity flow. Special non-clogging pumps are available to handle raw sewage. They are installed in structures called lift stations. There are two basic types of lift stations: dry well and wet well. A wet-well installation has only one chamber or tank to receive and hold the sewage until it is pumped out. Specially designed submersible pumps and motors can be located at the bottom of the chamber, completely below the water level. Dry-well installations have two separate chambers, one to receive the wastewater and one to enclose and protect the pumps and controls. The protective dry chamber allows easy access for inspection and maintenance. All sewage lift stations, whether of the wet-well or dry-well type, should include at least two pumps. One pump can operate while the other is removed for repair." See Nathanson et.al (note 20 above).

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

(untreated) into the receiving water. Combined plants are therefore troublesome sources of water pollution.<sup>29</sup>

2.10. Determining the amount, size and function of sewerage plants for an area is a gruelling task. The size and capacity of wastewater treatment systems are determined by the estimated volume of wastewater generated from residences, businesses, and industries connected to wastewater systems as well as the anticipated inflows and infiltration. The selection of specific treatment plant configurations depends upon factors such as the number of customers being served, the geography, site constraints, sewer connections, average and peak flows, influent wastewater characteristics, regulatory effluent limits, technological feasibility, energy consumption, and the operations and maintenance costs involved.<sup>30</sup>

### *The Vaal*

2.11. The Vaal is the second-largest river in South Africa, after the Orange River, into which it flows. The 1300 km long river crosses the Gauteng Province, the Free State, Mpumalanga and the Northern Cape.<sup>31</sup>

2.12. The water from the Vaal River supplies water to important industries in South Africa situated in the Gauteng Province,<sup>32</sup> and increasingly over the years to urban domestic consumers. According to Rand Water, at least 70% of its water is supplied to urban domestic consumers.<sup>33</sup>

2.13. The Vaal River has much less water in winter (the dry season) than in the rainy summer season of the Highveld.<sup>34</sup> For this reason reservoirs and large dams have had to be

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Water Kidz, "The Vaal River South Africa's Water Work Horse", The Water Wheel, July / August 2014. Available online at: [https://journals.co.za/docserver/fulltext/waterb/13/4/waterb\\_v13\\_n4\\_a16.pdf?expires=1598134492&id=id&accname=guest&checksum=EC49377280DF1BB80D244294275E8FE6](https://journals.co.za/docserver/fulltext/waterb/13/4/waterb_v13_n4_a16.pdf?expires=1598134492&id=id&accname=guest&checksum=EC49377280DF1BB80D244294275E8FE6).

<sup>32</sup> Ibid.

<sup>33</sup> Rand Water, Consumption Patterns 1905 to 2025. Available at: <https://www.randwater.co.za/WaterAndInfrastructureManagement/Pages/ConsumptionPatterns.aspx>

<sup>34</sup> Water Kidz (see note 31 above) 2020, Encyclopedia Britannica. Accessible at: <https://www.britannica.com/place/Highveld>. The Highveld constitutes almost the whole of the Free State, and Gauteng Provinces, and portions of the surrounding areas: the western rim of Lesotho, and portions of the Eastern Cape, Northern Cape, North West, Limpopo, and Mpumalanga Provinces of South Africa.

## The Vaal Report

constructed on the river to ensure a steady water supply to consumers dependent on water from the Vaal, including during the dry season.<sup>35</sup>

2.14. The Vaal River Barrage Catchment Area (**'the Barrage'**) was completed in 1926 and covers a surface area of about 900km<sup>2</sup>. It was also used to supply water to the Witwatersrand area, but no longer does so due to deteriorating water quality caused by pollution.<sup>36</sup>



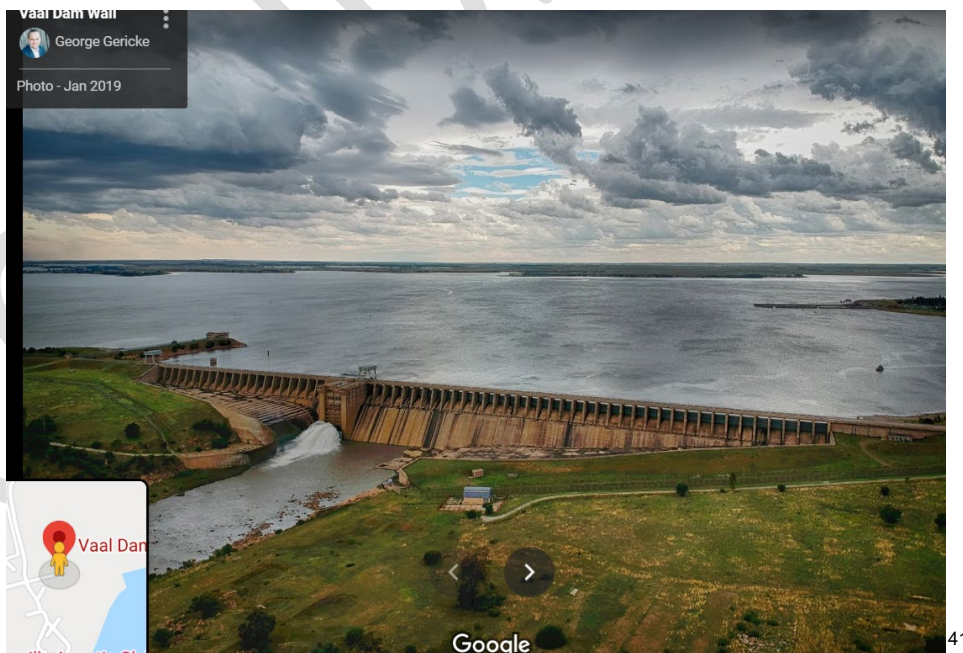
<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> The Barrage. Google Maps.

<sup>38</sup> The Barrage Google Maps. Picture by Mike Brucher (2018)

2.15. The biggest dam on the Vaal is the Vaal Dam (**'the Dam'**) which was completed in 1938, and it remains the main water supply for the Gauteng Province.<sup>39</sup> According to National Treasury, Rand Water, extracts 98% of its raw water from the Vaal, supplying water to about 13 local municipalities, 40 mines, and 926 industries in and around the Gauteng province.



<sup>39</sup> Ibid.

<sup>40</sup> The Dam. Google Maps.

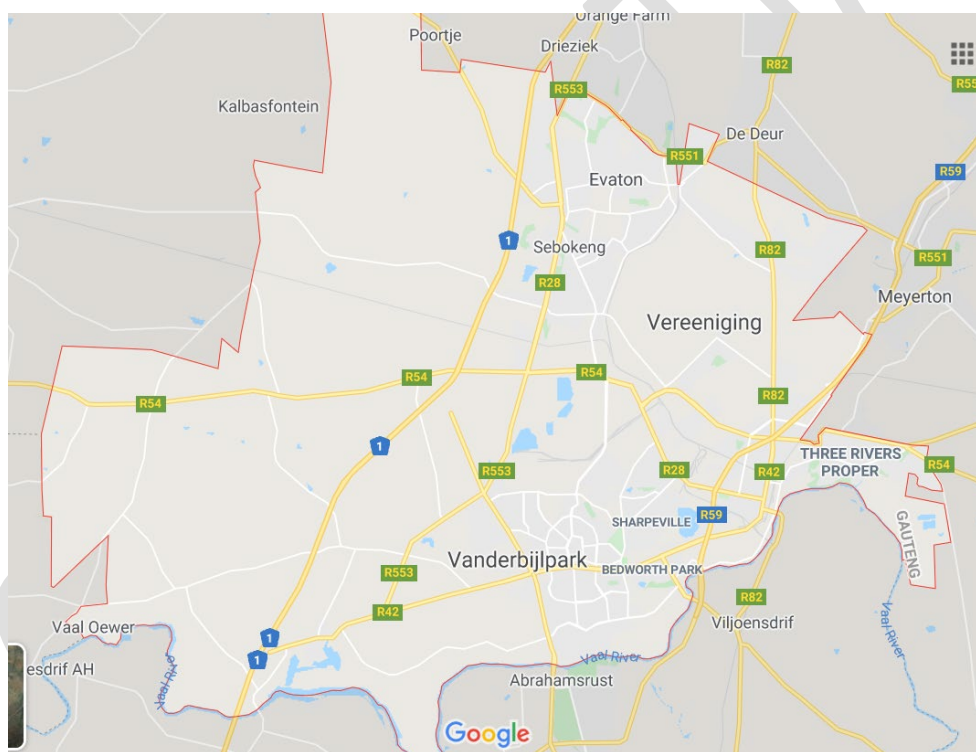
<sup>41</sup> The Dam. Google Maps. Picture by George Gericke (2019).

2.16. The water from the Vaal River, the Dam, and the Barrage (referred to collectively as ‘the Vaal’) is clearly essential to the survival of persons and industry in Gauteng - a province that is allegedly on the cusp of a water shortage.<sup>42</sup>

2.17. Water from the Vaal is essential for agriculture, energy, mining and tourism.<sup>43</sup> It provides our homes with precious water - access to which is a constitutional right.

### *The Media Reports*

2.18. The Commission had been alerted to online and print media reports, published during July and August 2018, reporting that raw sewage had for months been leaking into and polluting the Vaal and the Rietspruit from the Municipality’s Rietspruit Waste Water Care and Management Works situated in Vanderbijlpark, the Leewkuil Waste Water Care and Management Works situated in Vereeniging and other areas within the Municipality.



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<sup>42</sup> “Gauteng facing ‘day zero’ water crisis”, Business Tech, 2 December 2018. Available at: <https://businesstech.co.za/news/government/288678/gauteng-facing-day-zero-water-crisis/>; Kings, S, “Our future is here: Empty taps, dry lands, thirsty power plants”, Mail & Guardian, 25 October 2019. Available at: <https://mg.co.za/article/2019-10-25-00-our-future-is-here-empty-taps-dry-lands-thirsty-power-plants/>; “Gauteng Faces “Real Threat of Running Out of Water” as Heatwave Grips Province”, SA People News, 27 October 2019.

<sup>43</sup> SAVE, The Importance of the Vaal. Available at: <http://www.save.org.za/about-us/#saveimportance>.

<sup>44</sup> The Emfuleni municipal area. Google Maps.

2.19. Media reports stated, amongst other things, that:

2.19.1. ***The main sewers in Vanderbijlpark were blocked and that raw sewerage was flowing into people's yards and properties***<sup>45</sup> - Residents of Vanderbijlpark stated their children were playing in the wastewater and thereby endangering their lives.<sup>46</sup> The report cited people as indicating that in response to their complaints to the Municipality, they received responses, or rather excuses such as, "no petrol for the bakkie", "too many jobcards to attend to", "only 1 bakkie and 2 people to do all the jobs";<sup>47</sup>.

2.19.2. ***Raw sewage has been left flowing directly into the Vaal due to issues of mismanagement by the Emfuleni and Ngwathe authorities***<sup>48</sup> - Maureen Stewart from Save the Vaal told IOL that the "sewage crisis along the banks of the Vaal River in Emfuleni is out of control and causing unbearable living conditions for residents".<sup>49</sup> Maureen stated that a "long history of poor maintenance and lack of infrastructure development to deal with capacity overload has led to the current situation";<sup>50</sup>

2.19.3. ***Peoples News reported that the situation at the Vaal River – which provides a major source of water for Gauteng – had reached crisis levels as raw sewage continues to spill onto land and into the river, posing a threat to the drinking water of 45% of Gauteng's population***<sup>51</sup> - Streets in the Vaal Triangle are filled with refuse and there are streams of raw sewage.<sup>52</sup> Conditions are so horrendous apparently that even rats are dying. During an investigation by Carte Blanche, a man living in one of the townships in the area told Carte Blanche how the long-term effects of the pollution had made him so ill that his doctor told him "the sewage is killing you".<sup>53</sup> Sewage seeps into the floors and

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<sup>45</sup> Sedibeng Ster (note 3 above).

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Andersen (note 3 above).

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Baxter J (note 3 above).

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

walls of homes.<sup>54</sup> Land owners have had to sell their livestock as horses have been left sick and sheep have died;<sup>55</sup>

2.19.4. ***An unprecedented ecological disaster is unfolding in large stretches of the Vaal River, which is the main source of water for some of SA's best farmland***<sup>56</sup> - Raw sewage has been flowing into the river from pump stations in the Emfuleni Local Municipality on the northern bank of the river, killing fish in their thousands.<sup>57</sup> The disaster is unfolding in the midst of the ambitious R1 billion (one-billion rand) Sedibeng Regional Sewer Scheme, announced in 2015 by the then Water and Sanitation minister Nomvula Mokonyane.<sup>58</sup> According to the SRSS's implementation protocol, one of its objectives was to address the "spillage of raw sewage into the Vaal River" and "deliver effective solutions to prevent pollution of strategic national water resources";<sup>59</sup>

2.19.5. ***Workers prevented maintenance of pump stations, which led to major raw sewage spillages into the Vaal River and the streets of Emfuleni*** – The Municipality's sanitation workers downed tools over a dispute about protective clothing. Soon after this dispute was resolved, angry construction workers at the Sebokeng Waste Water Treatment Plant prevented employees entering the plant as a result of the Emfuleni Municipality stopping work on the Module 6 expansion project because of lack of funding for this project, causing a shutdown. This shutdown caused 150 megalitres of raw sewage to flood into the Rietspruit and Vaal rivers for eight days. This included waste water from Joburg Water which is treated at the Sebokeng works.<sup>60</sup>

2.19.6. ***The economically depressed Vaal River district is facing catastrophe as sewage from the Emfuleni water waste works continues to spill into the river, with the area's core agricultural and tourism industries facing imminent ruin***<sup>61</sup> - The non-profit organization, the Organisation Undoing Tax Abuse, highlighted the dire situation at the Municipality, where the organisation

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Hyman (note 3 above).

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Bega (note 6 above).

<sup>61</sup> Blom (note 3 above).

had engaged with businesses and residents.<sup>62</sup> “The collapse of Emfuleni’s administration is evident in the vast extent of raw sewage running through the towns and suburbs that make up the Emfuleni municipality, the larger of these being Vereeniging, Vanderbijlpark, Sharpeville and Bophelong, as it makes its way to the Vaal River,” said Dr Makhosi Khoza, OUTA’s former executive director on local government.<sup>63</sup>

#### *Site Inspection by the Commission*

2.20. In order to test the veracity of the media reports, on 3 September 2018, the Commission conducted an *inspection-in-loco* at certain sites within the Emfuleni Local Municipality. (**‘site inspection’**).

2.21. During its site inspection the Commission observed:

2.21.1. Raw sewage flowing in a small stream that cuts across the Emfuleni Golf Estate.

The source of the raw sewerage is unknown;

2.21.2. Two burst sewerage pipes on the banks of the Rietspruit, resulting in raw sewage flowing into the Rietspruit were observed;

2.21.3. Only four of approximately 11 (eleven) biofilters at the Rietspruit Waste Water Treatment Works were operational, which as we were advised results in the overloading of the operational biofilters, which in turn affects the entire biofiltration process<sup>64</sup> and causes equipment failure;

2.21.4. The sewerage manhole at the Sharpeville Cemetery was clogged and as a result raw sewage containing other pollutants such as plastic was flowing into a stream, which carried the raw sewage towards the Vaal;

2.21.5. Children swimming in, and consuming, polluted waters in the area of a school.

2.22. From these observances the Commission established, at the very least, *prima facie* violations of constitutional rights.<sup>65</sup>

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<sup>62</sup> Naki (note 3 above).

<sup>63</sup> Ibid.

<sup>64</sup> A pollution control technique using a bioreactor containing living material to capture and biologically degrade pollutants. Common uses include processing waste water, capturing harmful chemicals or silt from surface runoff, and microbotic oxidation of contaminants in air.

<sup>65</sup> The constitutional rights violations, as observed during the site inspection included, the right to have their dignity respected and protected (s10); the right not to be treated in a cruel, inhuman or degrading way (s12(1)(e)); to an environment that is not harmful to their health or well-being (s24(a)); and the right to sufficient water (27(1)(b)).

### 3. The Mandate and Powers of the Commission

#### *The Constitution*

3.1. The Commission is an independent institution established in terms of Section 181 of the Constitution to strengthen constitutional democracy. Section 184(1) provides that the Commission must:

- “(a) promote respect for human rights and a culture of human rights;*
- (b) promote the protection, development and attainment of human rights; and*
- (c) monitor and assess the observance of human rights in the Republic.”*

3.2. Section 184(2) of the Constitution empowers the Commission to monitor, investigate, research, educate, lobby, advise and report, on matters where human rights may have been violated.

#### *The SAHRC Act*

3.3. In addition to the broad powers and functions conferred on the Commission by the Constitution, the Commission’s power and obligations, are fleshed out, more specifically, in the South African Human Rights Commission Act 40 of 2013 (**‘SAHRC Act’**). The sections set out below make up the empowering provisions which have enabled the Commission to independently investigate the Sewage Problem, establish the Inquiry as a form investigation, engage organs of state and civil society, and which empower the Commission to make the recommendations as set out at the end of this Report.

3.4. In terms of section 13 of the SAHRC Act, the Commission is empowered to:

- “(i) 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 human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights;*
- (ii) undertake such studies for reporting on or relating to human rights as it considers advisable in the performance of its functions or to further the objects of the Commission; and*
- (iii) request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to human rights”.<sup>66</sup>*

In terms of the SAHRC Act, the Commission:

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<sup>66</sup> Section 13(1)(a).

- “(iii) must liaise and interact with any organisation which actively promotes respect for human rights and other sectors of civil society to further the objects of the Commission;*
- (iv) may consider such recommendations, suggestions and requests concerning the promotion of respect for human rights as it may receive from any source;*
- (v) must review government policies relating to human rights and may make recommendations;*
- (vi) must monitor the implementation of, and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the Commission”.<sup>67</sup>*

The Commission is also competent—

- “(a) to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights, and if, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it must, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum; and*
- (b) to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.”<sup>68</sup>*

In addition the SAHRC Act requires that “[a]ll organs of state must afford the Commission such assistance as may be reasonably required for the effective exercising of its powers and performance of its functions.”<sup>69</sup>

3.5. In order to give effect to the powers and obligations set out in section 13 of the SAHRC Act, the Commission may

- “(a) conduct or cause to be conducted any investigation that is necessary for that purpose;*
- (b) through a commissioner, or any member of staff duly authorised by a commissioner, require from any person such particulars and information as may be reasonably necessary in connection with any investigation;*
- (c) require any person by notice in writing under the hand of a commissioner ... in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under*

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<sup>67</sup> Section 13(1)(b).

<sup>68</sup> Section 13(3).

<sup>69</sup> Section 13(4).

*the control of any such person and which may be necessary in connection with that investigation: Provided that such notice must contain the reasons why such person's presence is needed and why any such article or document should be produced".<sup>70</sup>*

3.6. The Commission may also, in order to give effect to its powers and obligations set out in section 13,

- "(1) ... search any person or enter and search any premises on or in which anything connected with an investigation is or is suspected to be.*
- (2) The entry and search of any person or premises under this section must be conducted with strict regard to decency and order, including the protection of a person's right to—*
  - (a) respect for and protection of his or her dignity;*
  - (b) freedom and security; and*
  - (c) his or her personal privacy."<sup>71</sup>*

3.7. As regards reports by the Commission and any findings therein, in terms of the SAHRC Act:

- "(3) The Commission may ... in the manner it deems fit, in writing, make known to any person, the head of the organisation or institution, or the executive authority of any national or provincial department, any finding, point of view or recommendation in respect of a matter investigated by it.*
- (4) If the Commission makes any finding or recommendation in respect of a matter investigated by it known to the head of the organisation or institution or the executive authority of any national or provincial department concerned, the head of the organisation or institution or the executive authority of any national or provincial department concerned must within 60 days after becoming aware of such finding or recommendation respond in writing to the Commission, indicating whether his or her organisation, institution or department intends taking any steps to give effect to such finding or recommendation, if any such steps are required."<sup>72</sup>*

In addition, the findings of an investigation by the Commission must, when it deems it fit but as soon as possible, be made available to any person implicated thereby.<sup>73</sup>

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<sup>70</sup> Section 15(1)(a)-(c).

<sup>71</sup> Section 16(1)-(2).

<sup>72</sup> Section 18(3)-(4).

<sup>73</sup> Section 18(5).

## 4. Terms of Reference

### 4.1 The Objectives of the Inquiry

- 4.1.1. Following the site inspection at which the Commission observed *prima facie* human rights violations, as a result of the Sewage Problem, the Commission decided to, in accordance with its mandate and powers, establish an inquiry in order to ascertain whether or not there was any substance to the *prima facie* violations witnessed and media reports, and if so, to establish:
- 4.1.1.1. the consequences and extent of ascertained human rights violations;
  - 4.1.1.2. the cause or causes of the human rights violations;
  - 4.1.1.3. the persons and/or state and/or private entities responsible or liable for any ascertained human rights violations – more specifically, whether the Municipality failed in its duty to ensure that people living within proximity of the Vaal were and are not exposed to a harmful environment, and the role of Provincial and National government in preventing the continued pollution;
  - 4.1.1.4. legislative lacunas which allowed for any ascertained human rights violations;
  - 4.1.1.5. whether sewage spillage into the Vaal constituted a disaster as defined in the Disaster Management Act 57 of 2002 (**‘the DM Act’**);
  - 4.1.1.6. the various accountability, disciplinary and/ or prosecution mechanisms within the existing legal framework which can be implemented against persons and/or entities responsible for ascertained human rights violations; and
  - 4.1.1.7. appropriate action, recourse or remedy, within the Commission powers, that promotes, respects and protects human rights, provides just and equitable relief for any violation of human rights, and holds accountable any persons or entities responsible for any ascertained violations of any human rights.

## 4.2 Nature and Proceedings of the Inquiry

- 4.2.1. The proceedings were inquisitorial in nature.
- 4.2.2. The Inquiry panel comprised:
  - 4.2.2.1. Mr Buang Jones, Gauteng Provincial Manager of the Commission, who served as the Inquiry panel Chair;
  - 4.2.2.2. Mr Osmond Mngomezulu, North West Provincial Manager of the Commission;
  - 4.2.2.3. Ms Princess Kelebogile Ka-Siboto, Senior Legal Officer at the Legal Services Unit of the Commission; and
  - 4.2.2.4. Mr Jackson Mzila, Senior Legal Officer at the Gauteng Provincial Office of the Commission. (**'the Inquiry Panel'** or **'the Panel'**).
- 4.2.3. The Commission invited written submissions regarding the concerns, from "[m]embers of the Vaal community and surrounding areas, organisations and interested parties",<sup>74</sup> and held hearings for oral submissions, from 25 to 27 September 2018, at Stonehaven on the Vaal. Parties were required to make both written and oral submissions.<sup>75</sup> Oral submissions made by the parties included responses to the questions posed to them by the Panel.
- 4.2.4. Parties had a right to legal representation. However oral submissions during the course of the Inquiry were provided directly by the parties and not by their legal representatives.
- 4.2.5. Submissions were made by sixteen parties, including local, provincial and national government, community forums, NPOs and individuals.
- 4.2.6. Proceedings of the Inquiry were recorded and transcribed.
- 4.2.7. An interim report on the Inquiry was shared with respondent parties for response, on 17 November 2020. Responses were reviewed and where applicable incorporated into this final report.

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<sup>74</sup> South African Human Rights Commission Press Release (note 7 above).

<sup>75</sup> Ibid.

## 5. A Summary of Submissions Made to the Panel by Participants of the Inquiry

### *Local Government*

#### 5.1 Emfuleni Local Municipality

5.1.1. Mr Jacob Khawe ('**Mr Khawe**'),<sup>76</sup> the Former Executive Mayor of Emfuleni Local Municipality, represented the Municipality at the Inquiry. He stated that he was appearing with the full mandate of the leadership of the Municipality, the then Minister of the Department of Water and Sanitation ('**DWS**'), Mr Gugile Nkwinti<sup>77</sup> and the Gauteng Premier, Mr David Makhura.

5.1.2. At the outset, Mr Khawe accepted that the Inquiry was a necessary intervention and stated that the Municipality would abide by any findings and recommendations made by the Commission, through the Inquiry.

5.1.3. Mr Khawe raised a number of problems within the Municipality that contributed to the Sewage Problem of the Vaal as well as a number of challenges faced by the Municipality in addressing and preventing further pollution of this water source.

5.1.4. The problems which contributed to the Sewage Problem included, according to Mr Khawe:

5.1.4.1. **Infrastructural Inadequacies, Infrastructural Degradation and a Lack of Maintenance** – Mr Khawe informed the Inquiry panel that, at the time of presenting, Emfuleni's Plant infrastructure were aged, ageing and/or in a state of extreme disrepair. Some of the pump stations infrastructure pre-dates 1994, and some date as far back as the 1950s.

Existing pump stations infrastructure was not maintained and pump infrastructure was had not been adapted and upgraded in accordance with the increase in population growth and, formal and informal housing within the Municipality.

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<sup>76</sup> Mr Khawe resigned from his position as the Mayor of the Emfuleni in December 2018. Mr Khawe was succeeded by Reverend Gift Moerane in February 2019.

<sup>77</sup> Mr Nkwinti was the Minister of DWS from 27 February 2018 to 25 May 2019. He was succeeded by Ms Lindiwe Sisulu (when Water and Sanitation was merged with the Department of Human Settlements).

Mr Khawe informed the Panel that of the 44 pump stations situated in the Municipality, only 11 were functional.

5.1.4.2. **Maladministration** - Mr Khawe admitted that the Municipality had allowed the Problem to escalate as the Municipality was “sleeping”.

Mr Khawe submitted that some contracts with service providers, appointed to address the sewage running into the Vaal, although honoured by the Municipality, had been the subject of implementation challenges; and that as a result service providers had not been addressing the Problem.

Mr Khawe testified that some of the contracts which bound the Municipality had not been concluded with the interest of the Municipality in mind, but that the Municipality was in the process of putting policies in place to try and curb this problem.

He stated that the implementation challenges were compounded by the fact that the Municipality was not collecting enough revenue.<sup>78</sup> Through leakages the Municipality lost water revenue that it could not recover; and that they were probably not billing Rand Water accurately / running a proper account with Rand Water and were losing revenue, of approximately R90 million (ninety-million-rand), through this error.

The lack of enforcement of Emfuleni By-Laws was cited as an additional factor which allowed illegal dumping of sewage to take place.

5.1.4.3. **Refusal of offers to Assist** - There was acknowledgement by Mr Khawe, that the Municipality had previously rejected offers of assistance from certain stakeholder to manage the problems with sewage. He informed the Panel that there was a need to build relationships and partnerships with civil society and the private sector and to accept their assistance.

Mr Khawe provided further submissions regarding the challenges relating to the addressing the problems. In this regard he cited the following factors:

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<sup>78</sup> Mr Khawe added that the economic collapse within the Emfuleni municipal area, following the closure of major steel industries towards the middle of 2016, was one reason for a reduction in revenue.

5.1.4.4. ***The lack of budget to pay for the expensive procurement, repair, installation and or maintenance of pumps.*** The cost of one Pump was estimated at R3.5 million (three-and-a-half million rand). In order to address the inadequacy of funds, the Municipality would have needed to reallocate unbudgeted funds and to apply for an adjustment in November 2018. He indicated that the Municipality would have had to engage the Development Bank of South Africa ('**DBSA**') for additional funding.

5.1.4.5. ***Lack of skilled employees, within the Municipality, to address the problems*** – the Municipality had not brought in specialised skilled personnel such as waste management specialists and engineers to fix the Pumps because of the budget constraints. In addition, the Municipality had been unable to retain specialists or to develop skills or to support the transfer of skills.

In this regard Mr Khawe indicated that a request for support to the Gauteng Province had been acknowledged but no further response to the request had been received.

5.1.4.6. ***No co-operation between the Emfuleni Municipality and other municipalities affected by the Sewage Problem*** - Mr Khawe said that the City of Johannesburg, Ekurhuleni and Midvaal municipalities were also contributing to, and affected by, the Sewage Problem affecting the Vaal, but that none of these municipalities wanted to take responsibility for pollution management.

Mr Khawe indicated that, according to his predecessor, non-cooperation and a lack of public participation were attributed to poor coordination between the City of Johannesburg, Ekurhuleni and Midvaal municipalities.

5.1.5. In addition to listing the challenges impacting on addressing the Sewage Problem, Mr Khawe confirmed that the Municipality had not complied with court orders issued against it, by the High Court, Gauteng Division, in respect of the spillage of sewage into the Vaal.<sup>79</sup>

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<sup>79</sup> Bega, S. 'SAVE takes on ministers over Vaal', The Saturday Star, 21 May 2019. Available at: <https://www.iol.co.za/saturday-star/save-takes-on-ministers-over-vaal-23670901>; and Scheepers, L.

## **5.2 Emfuleni Local Municipality's Departments of Human Settlements, Water and Sanitation**

- 5.2.1 Mr Sampie Shivambu (**'Mr Shivambu'**), who was the Acting Chief Director, at the time, represented the Department of Water and Sanitation within the Municipality. (**'Local DWS'**).
- 5.2.2 Mr Shivambu supported Mr Khawe's submissions about the aging sewage infrastructure and the financial and human resource constraints that the Municipality was experiencing, and confirmed that these problems had contributed to the Sewage Problem of the Vaal. He stated that there had been gaps in the Municipality's planning as there was no "contingency plan" for population growth within the Municipality.
- 5.2.3 Mr Shivambu submitted that the Local DWS had made submissions to the Gauteng Department of (Human Settlements,) Water and Sanitation (**'Gauteng DWS'**) for the upgrading and refurbishment of the sewage infrastructure.
- 5.2.4 Adding to the challenges listed by Mr Khawe, Mr Shivambu, indicated that vandalism and theft, in respect of Pumps infrastructure were escalating as there were, according to him, no legislative measures to deal with environmental problems in the Vaal. The Municipality had however, engaged with the South African Police Service and the Directorate of Priority Crimes Investigation to investigate infrastructure theft.

### ***National and Provincial***

The National and Provincial Departments for DWS and COGTA made joint presentations

#### **5.2.5 The Departments of Human Settlements and Water and Sanitation (National and Gauteng)**

- 5.2.5.1 Mr Sibusiso Mthembu (**'Mr Mthembu'**), the Head of Department (**'HoD'**) for the Gauteng Department of (Human Settlements,) Water and Sanitation (**'Gauteng DWS'**), represented the DWS.
- 5.2.5.1 Mr Mthembu indicated that the mandate of the DWS, under the NWA and WSA is to ensure that water resources, in the Gauteng Province, are protected,

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'Victory for SAVE in its fight against Vaal pollution', The Parys Gazette, 22 May 2019. Available at: <https://parysgazette.co.za/28614/victory-save-fight-vaal-pollution/>.

managed, used, conserved, developed and controlled sustainably for the benefit of all and the environment.

5.2.5.2 Mr Mthembu stated that the mandate of the DWS, included monitoring, measuring and reporting on the water quality in the Vaal, in accordance with the NWA, and added that they are also responsible for the regulation of the delivery of clean water and proper sanitation, and had an obligation to provide support to the Local DWS in its delivery of water and sanitation.

5.2.5.3 Mr Mthembu made specific reference to the Sedibeng regional sewage pump ('**SRS Pump**'). In this regard he indicated that the Gauteng DWS had discovered during an inspection-in-loco that the SRS Pump had been built in 1958, making it one of the oldest sewage systems within the Municipality.

5.2.5.4 The inspection of the SRS pump revealed severe sewage spillages. Mr Mthembu revealed that the Gauteng DWS issued directives to the effect that budget to address these challenges needed to be prioritised.

5.2.5.5 The Gauteng DWS also, in accordance with sections 63 and 67 of the NWA, set up the Sedibeng Regional Sewer Scheme ('**SRS Scheme**') funded through the regional bulk infrastructure grants to address the sewage infrastructural challenges in the Vaal.

5.2.5.6 Mr Mthembu submitted that the Sedibeng Regional Sewer Scheme had initially been administered by the Municipality, and that the Gauteng DWS had to thereafter intervene and appoint Rand Water as the Gauteng DWS's implementing agent. However, he added that the contract between the Municipality and Rand Water, for service over a limited period of time, was not without contention.

5.2.5.7 In addition, Mr Mthembu added that community unrest and vandalism added to the challenges faced by the Municipality in addressing the Sewage Problem of the Vaal.

## **5.2.6 The Department of Cooperative Governance and Traditional Affairs (National and Provincial)**

5.2.6.1 The Department of Human Settlements, Urban Planning and Cooperative Governance ('**Gauteng COGTA**'), was represented by the Gauteng HOD, Ms Thandeka Mbassa ('**Ms Mbassa**').

- 5.2.6.2 Ms. Mbassa provided a disclaimer at the beginning of her presentation in which she sought to highlight, to the Panel, the strict regulation of a province's interference or intervention into municipal affairs.<sup>80</sup>
- 5.2.6.3 Ms Mbassa informed the Panel that the Municipality had in fact, been the subject of a section 139(1)(b) and 139(5)<sup>81</sup> provincial intervention since 2018. This occurred as a consequence of the Municipality's serious or consistent material breach of its obligations to provide basic services and/or to exercise financial prudence. By failing to maintain the aging infrastructure, the Municipality failed to maintain fiscal prudence. This, according to Ms Mbassa, contributed to the total collapse of the sewage infrastructure in the Municipality which has led to the pollution of the Vaal.
- 5.2.6.4 Ms Mbassa clarified that Gauteng COGTA's support to address the challenges within the Municipality was limited. This limitation was on account of the separation of function in that the issues which related to water and sanitation fall under the remit of the DWS and the Gauteng DWS. Ms Mbassa added that in its attempts to support the Municipality in focusing on the Vaal pollution challenges, COGTA, established work streams for the Municipality. These streams were:
- Financial management and financial viability of the Municipality;
  - Ensuring basic services and urban management;
  - Improving governance and the institutional framework;
  - Improving communication and stakeholder management; and,
  - Establishing teams led by both the Gauteng Province and the Municipality to drive infrastructure plans that had been planned in the Municipality.
- 5.2.6.5 Ms Mbassa also informed the Panel that COGTA had developed a financial recovery plan, for the Municipality which it submitted to the National Treasury for finalisation.

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<sup>80</sup> Ms Mbassa specified that intervention is regulated in terms of Chapter 7 of the Constitution, the MStA, the MSyA and the MFMA.

<sup>81</sup> The relevant provisions in the Constitution.

### 5.3 Department of Environmental Affairs

- 5.3.1 The National Department of Environmental Affairs ('**DEA**'), represented by the Acting Director General, Mr Ishaam Abader ('**Mr Abader**'), submitted that water pollution in South Africa is widespread. He stated that water pollution problems had also been identified in about nine other water facilities, excluding the Vaal.
- 5.3.2 Mr Abader asserted that the responsibility over water-related matters (in this case the pollution of the Vaal River) formed part a sectoral obligation which is outlined in the National Water Act which is the responsibility of the DWS.
- 5.3.3 Mr Abader submitted that the DEA is a smaller department with more circumscribed responsibilities in respect of water pollution and was therefore unable to attend to all the water pollution issues in the country and would welcome the establishment of partnerships or collaborations with other departments such as DWS to create more capacity to attend to concerns around water pollution problems in South Africa.

### 5.4 Rand Water

- 5.4.1 Rand Water was represented by its Chief Operations Officer, Mr Sipho Mosai. He submitted that Rand Water's role is to provide bulk water to municipalities in its area of supply, which includes the Emfuleni Local Municipality.
- 5.4.2 Mr Mosai outlined the relationship between Rand Water and the DWS. He asserted that the Vaal, particularly the Vaal Dam is owned, operated and maintained by the Gauteng DWS, and that the role of Rand Water was to buy raw water, treat it and supply it to the municipalities. Rand Water also shares the data it generates from extraction, treatment and supply of water with the DWS.
- 5.4.3 A large volume of the water that Rand Water extracts comes from the Vaal Dam, is being polluted with waste water / sewage.
- 5.4.4 Mr Mosai clarified that Rand Water does not own, operate, maintain or refurbish the water infrastructure in municipalities. This, he added, was part of the mandate of the municipalities. Rand Water is an implementing agent or service provider for the DWS, and its mandate does not include the upgrading of Pump infrastructure.

## 5.5 The Water Research Commission

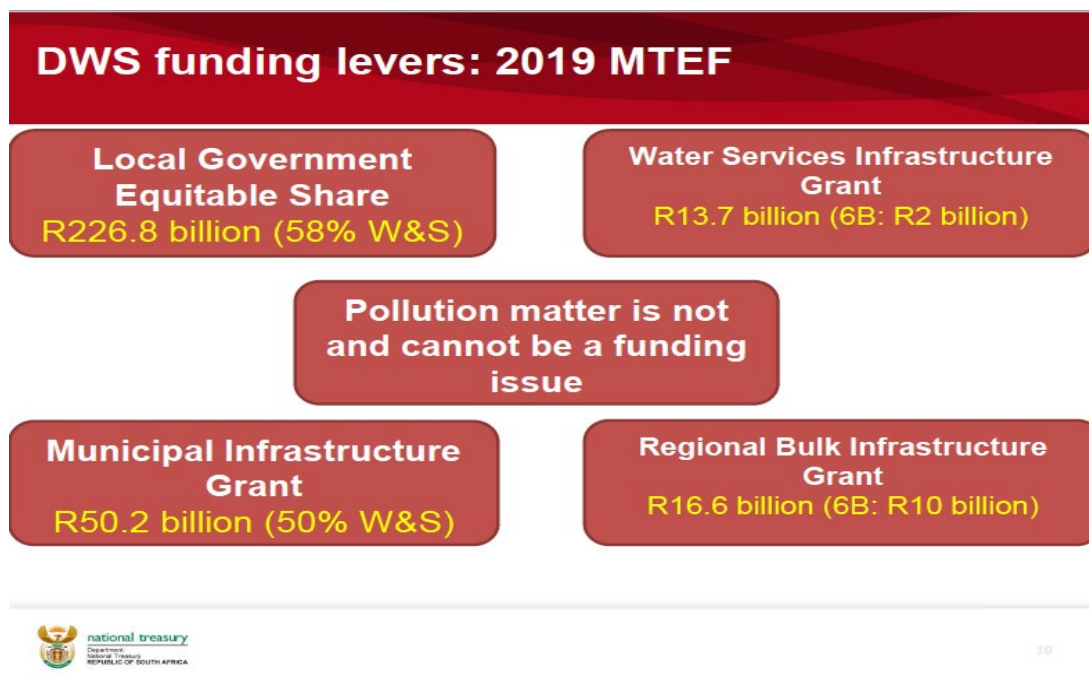
- 5.5.1 The Executive Manager, Mr Jay Bhagwan, and the Group Executive for Innovation and Impact, Dr Mandla Msibi, represented the Water Research Commission (**WRC**).
- 5.5.2 In their presentation, the WRC, indicated that there was both a water quality issue as well as a water quantity issue in South Africa. They further indicated that this was driven by what they called, the fishing dilution capacity, spatial development patterns coming from our history and decreasing general dilution capacity.
- 5.5.3 The WRC added that part of the pollution problem was the increase in populations dependent on the Vaal for water. The dependency increased from 12 million people in 2006 to 18 million people in 2018. The river supports many activities, human, industrial, agricultural and power generation and, is a strategic resource for South Africa. There is therefore a need to monitor and undertake research on solution to address the challenges of demand and maintenance of the resource.
- 5.5.4 The WRC stated, based on their study of the Municipality, that the Sewage Problem requires skills development, an increase in capacity, a monitoring system and infrastructure upgrades. The WRC acknowledged that their proposed solutions require a budget and further institutional arrangements to effectively address the problems over the long-term., and that there was therefore a need for cost effective and innovative solutions.
- 5.5.5 The WRC stated however that the Vaal had been South Africa's most economically valuable aquatic ecosystem, and Africa's hardest working river for over a 100 years, and was able, in parts, to recover from mining and industrial pollution indicating that the Sewage Problem can be managed and corrected.

## 5.6 National Treasury

- 5.6.1 Mr Misaveni Ngobeni (**Mr Ngobeni**), Director: DWS and COGTA, National Treasury, represented the National Treasury.
- 5.6.2 The gist of Mr Ngobeni's presentation was that there were funds available to address the causes of the Sewage Problem and to manage the pollution. The available funds, according to Mr Ngobeni, had either not been utilised by the Municipality accordingly or had not been accessed by the Municipality.
- 5.6.3 He informed the Panel that National Treasury had and continues to allocate grant funding, in accordance with section 227(1)(a) of the Constitution, for municipalities

“to provide basic services and perform the functions allocated to it”, such as municipal water and sanitation services. This grant funding is required to be administered by DWS and COGTA in terms of section 227(1)(b) of the Constitution and other applicable legislation.


**Table 1: DWS funding levers: 2019 MTEF**



**Table 2: DWS funding levers: RBIG 6B performance**

**DWS funding levers: RBIG 6B performance**

| Indirect  | 2014/15          |                  |                  | 2015/16          |                  |               | 2016/17          |                  |                  | 2017/18          |                  |                |
|---|------------------|------------------|------------------|------------------|------------------|---------------|------------------|------------------|------------------|------------------|------------------|----------------|
|   | Available Budget | Expenditure      | Variance         | Available Budget | Expenditure      | Variance      | Available Budget | Expenditure      | Variance         | Available Budget | Expenditure      | Variance       |
| R thousands                                       |                  |                  |                  |                  |                  |               |                  |                  |                  |                  |                  |                |
| Regional Bulk Infrastructure Grant (Schedule 6B)  | 4 007 323        | 3 090 281        | 917 042          | 4 857 654        | 4 856 588        | 1 066         | 3 478 829        | 3 422 262        | 56 567           | 2 973 539        | 2 454 957        | 518 582        |
| Bucket Eradication Programme Grant                | 899 177          | 281 779          | 617 398          | 958 499          | 975 399          | (16 900)      | 422 000          | 831 390          | (409 390)        | -                | -                | -              |
| Water Services Infrastructure Grant (Schedule 6B) | 764 778          | 152 286          | 612 492          | 659 057          | 565 456          | 93 601        | 362 145          | 297 668          | 64 477           | 852 055          | 819 416          | 32 639         |
| <b>Total</b>                                      | <b>5 671 278</b> | <b>3 524 346</b> | <b>2 146 932</b> | <b>6 475 210</b> | <b>6 397 443</b> | <b>77 767</b> | <b>4 262 974</b> | <b>4 551 320</b> | <b>(288 346)</b> | <b>3 825 594</b> | <b>3 274 373</b> | <b>551 221</b> |

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5.6.4 According to Mr Ngobeni, funds had been allocated by National Treasury specifically to deal with the Sewage Problem of the Vaal (and the Orange in River). He stated that:

5.6.4.1 the Public Private Partnership Unit of the National Treasury had engaged with the Municipality during 2012/13, and provided it with R400 million (four-hundred million rand) to address the Sewage Problem; and

5.6.4.2 on 17 May 2016, an emergency intervention allocation of R324 million (three-hundred, and twenty-four million rand) was provided to DWS to ensure a reduction of pollution from the municipal sewerage pump stations and waste water treatment works in 16 municipalities in South Africa, including the Emfuleni Municipality and the Sewage Problem of the Vaal.

5.6.5 In addition to the funding allocated, National Treasury submitted that the DWS intervened in respect of 23 polluting waste water treatment plants in the Vaal (and Orange Rivers). He stated that DWS was unable to carry the full costs of the intervention and had asked National Treasury to recover the costs from municipalities and to secure funds to expand the intervention.

5.6.6 Mr Ngobeni also stated that:

- i) there was a budget of R3 billion (three billion rand) ring-fenced for capacity building within the state; and
- ii) that funding had been available to treat and control the Sewage Problem of the Vaal, but that this funding was not utilised or, was not correctly utilised by the Municipality.

5.6.7 Mr Ngobeni presented the municipal budgets and expenditure related to waste water systems, in South Africa as reflected in the tables below:

Table 3: Reported Vaal River Pollutants 2015/2016

## Problem statement: reported Vaal River pollutants: 2015/16

An assessment of 824 waste water systems was conducted through the 2014 Green Drop certification programme, this showed that there are 471 (57%) of the systems which are poorly managed.

| Municipality         | Operating Budgets | Capital Budget       | Total Budgets         | LGES             | Own revenues      | Repairs & Maintenance |
|----------------------|-------------------|----------------------|-----------------------|------------------|-------------------|-----------------------|
| City of Johannesburg | 43 445 896        | 9 323 557            | 52 769 452            | 2 864 065        | 44 341 088        | 4 235 390             |
| Govan Mbeki          | 1 846 095         | 143 719              | 1 989 813             | 194 986          | 1 620 570         | 94 768                |
| Lekwa                | 596 469           | 23 304               | 596 492               | 83 027           | 257 841           | 50 174                |
| Musukaligwa          | 582 572           | 23 986               | 582 596               | 114 641          | 371 295           | 34 191                |
| Mefube               | 187 049           | 35 901               | 187 085               | 78 587           | 192 856           | 11 743                |
| Metsimehlo           | 897 897           | 151 718              | 898 048               | 115 423          | 868 234           | 33 791                |
| Moghala              | 693 545           | 130 306              | 693 676               | 161 083          | 705 047           | 52 755                |
| Nala                 | 352 136           | 45 863               | 352 182               | 120 422          | 134 178           | 7 338                 |
| Ngawathe             | 530 812           | 43 637               | 530 856               | 159 059          | 530 811           | 14 300                |
| Nkaloana             | 301 781           | 67 767               | 301 848               | 80 525           | 301 515           | 10 898                |
| Phumelela            | 131 049           | 33 720               | 131 083               | 60 462           | 131 049           | 8 321                 |
| Melusi-e-Phofung     | 1 768 320         | 260 791              | 1 768 581             | 451 439          | 1 768 321         | 123 545               |
| Ditlatsong           | 162 076           | 40 974               | 203 050               | 58 153           | 162 075           | 5 899                 |
| Gemagere             | 549 966           | 104 341              | 550 070               | 22 923           | 549 966           | 21 086                |
| Meganeng             | 91 827            | 13 939               | 91 841                | 34 766           | 80 160            | -                     |
| Siyencums            | 116 257           | 25 821               | 116 283               | 39 475           | 116 257           | 6 511                 |
|                      | <b>52 253 745</b> | <b>9 509 210 810</b> | <b>61 762 956 040</b> | <b>4 639 036</b> | <b>52 131 263</b> | <b>4 710 808</b>      |

Source: Department of Water and Sanitation, R'000

Table 4: Vaal River Pollutants 23 WWTWs 2015/2016

## Vaal River Pollutants, 23 WWTWs: 2015/16


| PLANT         | BUDGET              | EXPENDITURE TO DATE | BALANCE             |
|---------------|---------------------|---------------------|---------------------|
| HARRISMITH    | R 11 853 656        | R 5 456 598         | R 6 397 058         |
| VREDE         | R 19 399 111        | R 5 159 237         | R 14 239 874        |
| REITZ         | R 11 391 744        | R 3 379 084         | R 8 012 660         |
| STANDERTON    | R 14 502 299        | R 1 672 388         | R12 829 931         |
| DENEYSVILLE   | R 2 468 342         | R 1 651 588         | R 816 754           |
| VAALMARINA    | R 7 915 441         | R 1 781 140         | R 6 134 301         |
| ORANJEVILLE   | R 8 012 848         | R 4 645 344         | R 3 367 504         |
| MORGENZON     | R 111 150           | R 85 745            | R 25 405            |
| ERMELO        | R 44 275 029        | R 20 072 065        | R 24 202 964        |
| LEEUEWKUIL    | R 36 417 449        | R 9 135 627         | R 27 281 822        |
| BOTHAVILLE    | R 15 055 549        | R 8 899 485         | R 6 156 064         |
| QALABOSHA     | R 14 591 487        | R 7 833 811         | R 6 757 676         |
| DIBENG        | R 8 867 380         | R 571 230           | 8 296 150           |
| VILJOENSKROON | R 13 208 900        | R 5 736 660         | R 7 472 240         |
| FRANKFORT     | R 7 733 721         | R 660 900           | R 7 072 821         |
| NAMAHADI      | R 14 094 880        | R 2 122 300         | R 11 972 580        |
| VILLIERS      | R 7 208 516         | -                   | R 7 208 516         |
| DOUGLAS       | R 12 673 241        | R 2 394 484         | R 10 278 757        |
| BARKLEY WEST  | R12 800 046         | -                   | R 12 800 046        |
| OLIFANTSHOEK  | R 11 338 394        | R 2 827 632         | R 8 510 762         |
| DINGLETON     | R 14 956 349        | -                   | R 14 956 349        |
| PARYS         | R 2 149 393         | -                   | R 2 149 393         |
| WARRENTON     | R 4 825 489         | R 660 900           | R 4 164 589         |
| <b>Total</b>  | <b>R324 000 000</b> | <b>R84 746 178</b>  | <b>R239 253 822</b> |

5.6.8 In relation to the Sewage Problem itself, Mr Ngobeni emphasised that approximately 19 million people depend on the Vaal for water and that the pollution of the Vaal reverses the gains made from the Lesotho Highlands Water Project,<sup>82</sup> which is a costly project for the South African government.<sup>83</sup>

5.6.9 In addition to informing the panel of the number of persons dependent on the Vaal for water, Mr Ngobeni presented disaggregated water usage statistics per sector volume in respect of major rivers in the country.

**Table 5: Way forward: registered volumes per sector**

| <b>Way forward: registered volumes per sector</b> |                    |                                  |                       |                    |                       |
|---|--------------------|----------------------------------|-----------------------|--------------------|-----------------------|
| <b>DESCRIPTION</b>                                |                    | <b>REGISTERED VOLUMES</b>        |                       |                    |                       |
| <b>NO</b>   | <b>9 CMA</b>       | <b>DOMESTIC &amp; INDUSTRIAL</b> | <b>IRRIGATION</b>     | <b>SFRA</b>        | <b>ALL SECTORS</b>    |
|   |                    | <b>m3</b>                        | <b>m3</b>             | <b>m3</b>          | <b>m3</b>             |
| 1   | Limpopo            | 440 300 434                      | 1 452 939 289         | 18 820 784         | 1 912 060 507         |
| 2   | Oifants            | 708 113 895                      | 977 025 554           | 52 530 677         | 1 737 670 125         |
| 3   | Inkomati           | 444 177 582                      | 1 063 463 778         | 418 737 745        | 1 926 379 105         |
| 4   | Pongola-Mzimkulu   | 1 065 000 000                    | 1 076 000 000         | 421 000 000        | 2 562 000 000         |
| 5   | Vaal               | 3 096 560 722                    | 1 335 331 866         | 11 710             | 4 431 904 298         |
| 6   | Orange             | 190 852 253                      | 1 836 611 644         | -                  | 2 027 463 897         |
| 7   | Mzimvubu-Teftakama | 489 768 170                      | 1 291 610 559         | 67 694 744         | 1 849 073 473         |
| 8   | Breede-Gouritz     | 124 182 038                      | 1 283 192 106         | 16 105 542         | 1 423 479 687         |
| 9   | Berg-Oifants       | 392 964 058                      | 875 078 501           | 4 277 880          | 1 272 320 438         |
| <b>GRAND TOTAL</b>                                |                    | <b>6 951 919 153</b>             | <b>11 191 253 297</b> | <b>999 179 081</b> | <b>19 142 351 531</b> |
| <b>GRAND TOTAL %</b>                              |                    | <b>36%</b>                       | <b>58%</b>            | <b>5%</b>          | <b>100%</b>           |

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<sup>82</sup> In 1954, in order to increase water supply for the burgeoning population of the then Witwatersrand, the Natural Resources Development Council proposed the idea that water might be obtained from Lesotho to augment the water of the Vaal River. Negotiations between the governments of South Africa and Lesotho started towards the end of the 1970s. Representatives of Lesotho, the European Union, the United Nations and the World Bank formally signed a treaty for the development of the project on 24 October 1987 at an estimated cost of R5.5 billion. In 1997 this figure was increased to R9.1 billion for the first phase of the project only. The scheme was designed to deliver a massive amount of water, annually to South Africa. The scheme was to be constructed in three phases and would include four major dams, Senqu in Lesotho, Ash River in the Free State, Wilge River and ultimately to the Vaal Dam. In the first phase, the Katse Dam and the Mohale Dam together with a series of tunnels were constructed in the Highlands of Lesotho. (Crooks, J, “100 Years of Excellence 1903 – 2003”, A Rand Water Publication, 2004.)

<sup>83</sup> In addition to the billions of rands spent establishing the Lesotho Highland Water Project, South Africa has to pay R150 million annually to Lesotho, whether the water is used or not, to augment the Vaal Dam water.

5.6.10 He further raised concerns about the role of the South African Defence Force in cleaning and fixing Pumps and pump stations, especially since Rand Water has engineers. National Treasury's understanding was that the military was brought in to provide security against vandalism and not to fix the infrastructure.

### **5.7 South African National Defence Force**

5.7.1 Colonel Andries Mahapa ('**Col. Mahapa**'), commander of the South African National Defence Force ('**SANDF**'), presented on the SANDF's intervention in the waste water management of the Vaal and explained how it came about.

5.7.2 He indicated that the SANDF had been deployed on instruction of the Minister of Finance, Mr Tito Mboweni (with approval of the President and the Minister of Defence) to provide assistance with engineering and other expertise to resolve the pollution crisis on the Vaal.

5.7.3 Col. Mahapa expressed concern about the wastewater treatment system failing and the consequent health crisis for residents in the Municipality. The wastewater treatment failures were, according to Col. Mahapa, attributed to governance failures, old infrastructure and vandalism, amongst others. He lamented that because Pumps are broken, untreated wastewater is discharged into the Vaal, causing pollution of the water, and that this polluted water when consumed is a health hazard. He expressed concern that many consumers are victims of the pollution of the Vaal, and unknowingly drink contaminated water and fall ill as a result.

5.7.4 Col. Mahapa indicated that approximately 60 SANDF members, including military police, formed part of the intervention. However, because their engineers were not sufficiently skilled in the repair and maintenance of wastewater sewage infrastructure, the SANDF contracted external specialists to assist, for a period of seven days.

5.7.5 He stated that the scope of work for the SANDF prioritised--

5.7.5.1 the Sebokeng Waste Water Treatment Plant: 3 modules, 4 pump stations and sewage lines;

5.7.5.2 Rietspruit Waste Water Treatment Plan: 2 modules, 2 pump stations and sewage lines; and

5.7.5.3 the Leeuwkuil Waste Water Treatment Plant: 2 modules, 36 pump stations and sewage lines.

- 5.7.6 As part of his presentation, Col. Mahapa provided a status report on the achievements of the SANDF in respect of its interventions. He informed the Panel that most modules referred to had been fully cleaned, and others had been approximately, 90% cleaned. Col. Mahapa stated that the SANDF employees and contractors had been fixing some pumps with the help of the Municipality and one pump station was being repaired with the help of a resident or residents living in the house adjacent to the pump station. He indicated further that since the arrival of the SANDF, the Emerald and West Side Park pump stations had been regularly cleaned.
- 5.7.7 Col. Mahapa stated that the SANDF would continue working in the Vaal for as long as was needed. However, he understood the SANDF's intervention mandate was short term.
- 5.7.8 Col. Mahapa stated that the challenges related to SANDF's intervention were: the additional costs incurred in having the SANDF in the area; that military intervention in practice, meant that the military leads the operation (as opposed to the Municipality), and that there were difficulties in skills transfer as the Municipality had limited human resources to which skills could be transferred.
- 5.7.9 The Colonel also shared pictures of the outcome of their intervention in the cleaning up of the sewage facilities in the Vaal area. The photographs are provided below.

**Diagram 1: Pump Station 4**

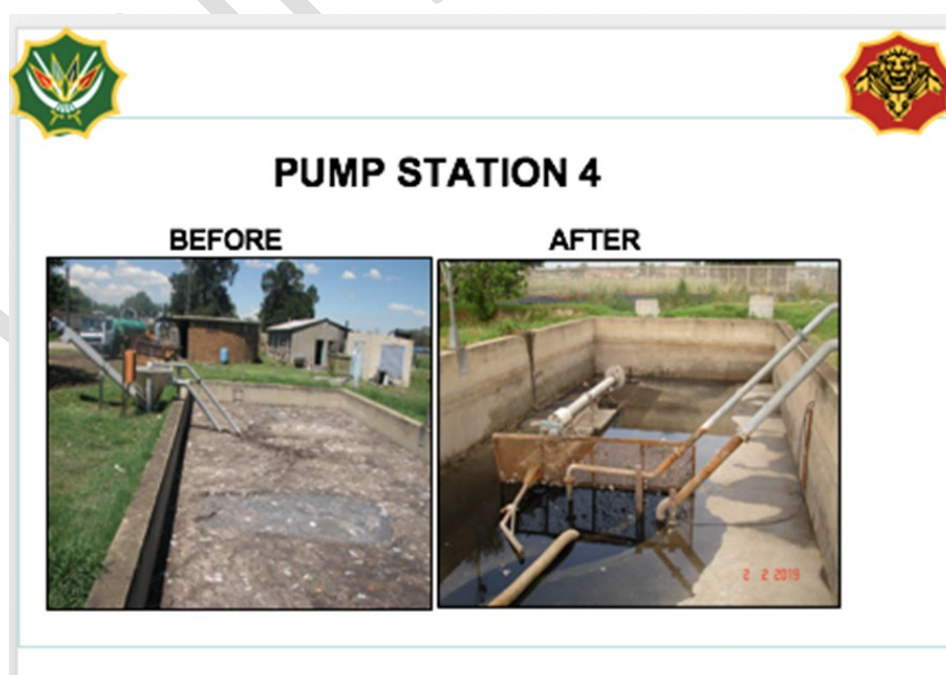


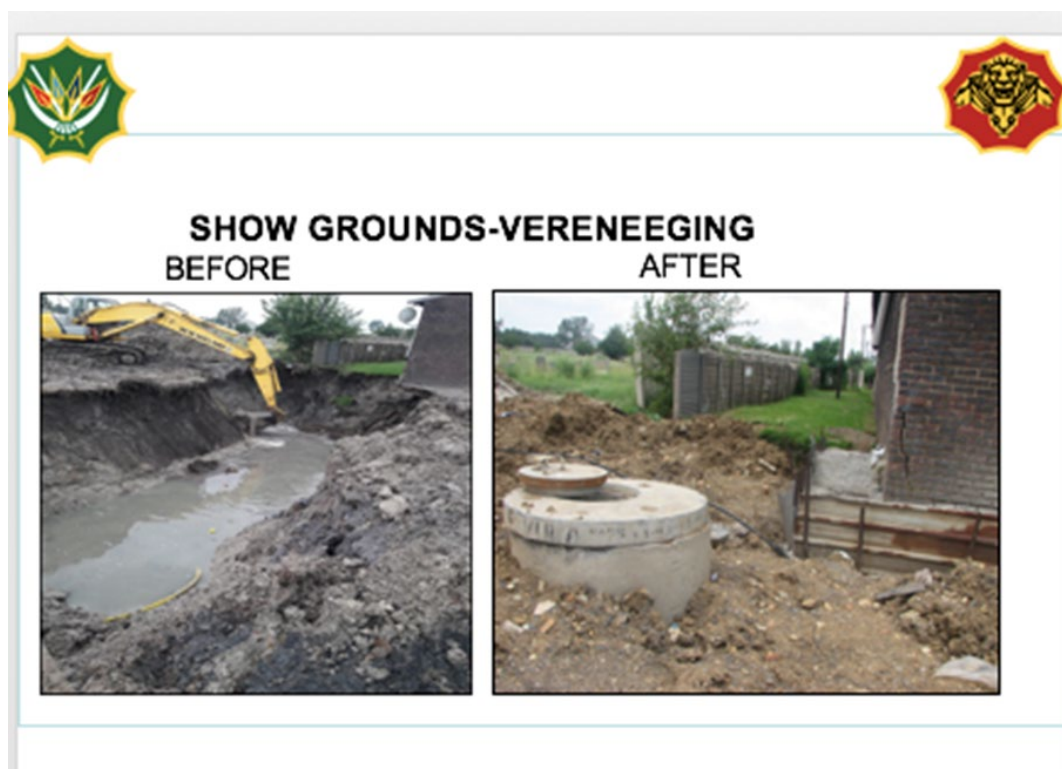
Diagram 2: Sebokeng Waste Water Treatment Plant



Diagram 3: Module 5: Sebokeng Waste Water Treatment Plant



**Diagram 4: Show grounds, Vereneeing (sic)**



## 5.8 Freedom Front Plus

5.8.1 A submission was received from Gerda Senekal (**'Ms Senekal'**), a councillor at the Municipality, who represented the Freedom Front Plus. She informed the Panel that the Emfuleni Local Municipality was the amalgamation of the Lekwa Vaal, Greater Vaal and Greater Evaton municipalities. Ms Senekal asserted that the Municipality had been more turbulent and unstable than any other municipality in the Gauteng Province. In support of this allegation, she referred to the high turnover of mayors for the Municipality - 10 mayors in the past 17 years. Ms Senekal added that the Municipality had received adverse disclaimers and adverse audit findings, from the Auditor General of South Africa (**'AG'** or **'AGSA'**), since 2001.

5.8.2 Ms Senekal alleged that the Municipality had not been able to access the grants available to upgrade its water infrastructure, as mentioned by Mr Ngobeni, since 2015, because it did not have a long-term economic plan in place.

5.8.3 Ms Senekal informed the Panel that the Municipality had 44 pump stations, of which six are dual pump stations. The pump stations are, according to Ms Senekal, designed to, or have the capacity to run 92 pumps. However, 30% of the pump stations are dysfunctional and only ten pumps were actually installed.

- 5.8.4 According to Ms Senekal, because pumps at the Leeukuil Water Works were not working, untreated sewage had passed through the Water Works, into the storm water drains and through the drains into the Vaal River. Sewage has been running through the Sharpeville pump station into Sharpeville cemetery for three years, passing right through the pump station, into the storm drains and into the Vaal River.
- 5.8.5 Ms Senekal stated that the population growth in the Municipality and the lack of funding to upgrade pump stations to increase capacity, caused pump stations to run over capacity and to pump for 24 hours each day. Wastewater and sewage spillages into the Vaal occurred more regularly as a result of a lack of preventative maintenance, vandalism, and because refurbishments on pump stations were last done in the 2008/9 financial year.
- 5.8.6 Ms Senekal added that poor management in the Municipality had enabled corruption, mismanagement of funds, maladministration, nepotism, inadequate human resources, and poor monitoring. In addition the Municipality had failed to comply with the orders of the High Court.<sup>84</sup>
- 5.8.7 She stated that the Municipality had submitted a funding application to the DWS, during the 2017/18 financial year, for refurbishment of all pump stations. According to Ms Senekal, R20 million (twenty million rand) had been approved for the project for the 2018/19 financial year, by DWS. However, Ms Senekal said the amount was inadequate, no formal letter regarding the funding was received, but a transfer of R5 million (five million rand) was received by the Municipality.

## **5.9 Organisation Undoing Tax Abuse**

- 5.9.1 The Organisation Undoing Tax Abuse ('OUTA') submitted that the Municipality and the Gauteng DWS were failing to meet their legislative and constitutional mandates. One of the root causes of the problem at the Municipality, was corruption and maladministration, which had been made worse by a lack of consultation and meaningful engagement with the community.
- 5.9.2 Additional factors cited by Outa, as contributing to the problems at the Municipality included the apathetic attitude of the Gauteng DWS, evidenced in its failure to hold the Municipality to account for its failures. Outa added that the Municipality needed

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<sup>84</sup> See note 79 above.

to ensure their contractors acted in Emfuleni Local Municipality's best interest in respect of water contracts.

5.9.3 OUTA stated that the absence of financial plans impacted on the ability of the Municipality to meet its legislative mandate.

## **5.10 Federation of Southern African Fly Fishers**

5.10.1 Chris Williams, the Chairperson of the Federation of Southern African Fly Fishers ('**FSAFF**'), Northern region, incorporating the Vaal River and Dam ('**Mr Williams**'), provided information to the panel on the impact of the Sewage Problem on the people and the ecosystems of the Vaal.

5.10.2 As the chairperson of the Yellowfish Working Group of South Africa, Mr Williams advised that Yellowfish (South Africa's national indigenous fresh water fish) is in danger of being annihilated by the pollution of the Vaal. Sustenance fishing for consumption are at risk of skin and intestinal disorders including dysentery and para-methoxymethamphetamine poisoning, a neurotoxic scion bacterium. The bacterium is very small and cannot be removed through filtering in local water treatment plants which makes it a serious threat for the future. The bacteria will therefore negatively impact people who ingest the polluted water.

5.10.3 Mr Williams indicated further that communities have said that the pollution affects family activities and livelihoods as tourism has been declining due to the state of the Vaal. Mr Williams advised the Panel that fishing is one of the largest pastimes in the world and a R3 to R4 billion industry (four billion rand) in South Africa. Bait and fly-fishing took place in the Vaal until pollution caused by the sewage put an end to this. . The profitable tourism economy was seriously impacted by the deterioration of the Vaal, resulting in the decline in tourism, business closures and job losses.

5.10.4 It appeared to the FSAFF that the Municipality laboured under the impression that communities are there to serve it, and not the other way around.

5.10.5 The presentation was concluded with an emphasis on the need for urgency in responding to the worsening threat posed by pollution on the Vaal's ecosystem, and the negative impact on the lives of those who depend on fishing for sustenance.

## **5.11 Emfuleni Ratepayers Association**

5.11.1 Kobus Van Rensburg and Liezel Viljoen (Liaison officer) represented the Emfuleni Ratepayers Association ('**RPA**'). Their presentation highlighted that ratepayers are faced with four challenges: the sewage, refuse and sanitation problems and incompetence at the Municipality. In support of this conclusion the examples and context provided below were submitted.

5.11.1.1 The Municipality did nothing when ratepayers reported sewage leaks onto their properties. Other responsible authorities such as the police indicated that they had no authority over environmental affairs, and the National Prosecuting Authority referred affected ratepayers to the Green Scorpions.

5.11.1.2 In some instances, workers had to walk through raw sewage to enter some of the farms. The matter was reported to all spheres of government and the media, and only then did the DWS respond. The DWS indicated that the matter had been resolved when in fact it had not been. In addition, the DWS would send different reference numbers for the same complaints, making them difficult to trace.

5.11.2 The sewage spills extend into schools exposing learners to the contaminated waste water on a daily basis. The RPA expressed concerns for the violations to the human rights of the children and suggested that Child Welfare be required to make representations to the panel on the Sewage Problem and its effect on the human rights of children.

5.11.3 The Panel was provided with the images below depicting sewage flows into the Vaal River and past communities living along the River.

**Diagram 5: Trench dug to channel the raw sewage straight into the Vaal River**



**Diagram 6: Raw sewage on the rugby field of Hoërskool Vanderbijlpark**



**Diagram 7: Pump 16 as at 16:00 on the Friday before 26 September 2018**



#### **5.12 South African Black Technical and Allied Careers Organisation / Consulting Engineers of South Africa**

5.12.1 The South African Black Technical and Allied Careers Organisation / Consulting Engineers of South Africa (**'Consulting Engineers'**) provided submissions relating to the solving of the problems and refuted claims made by the Municipality, regarding alleged skills shortages.

5.12.2 They suggested that a technical skills audit be carried out by municipalities in South Africa and that only skilled persons or entities with the necessary skilled people be hired or contracted by the Municipalities for the refurbishment of the pump stations.

5.12.3 However, the Consulting Engineers stated that because the Municipality (and the municipalities before it) had failed to maintain the pump station infrastructure, and increase the capacity of water waste systems as the population increased, much of the infrastructure would have to be rebuilt and not just refurbished.

5.12.4 The Consulting Engineers alleged, based on the Municipality and DWS's presentations to the Panel and the absence of infrastructure maintenance plans, that the representatives of the Municipality and DWS lacked the knowledge and expertise to address the problems causing the Sewage Problem of the Vaal. Consulting Engineers raised concerns that this lack of knowledge and expertise by administrators affects tender adjudications and awards resulting in the contracting

of entities or persons who do not have the necessary skills to fix the ailing sewage infrastructure in the Municipality to the standard and scope required.

5.12.5 The Consulting Engineers recommended further that the monitoring of the Municipality's required specifications of goods and/or services and the suppliers' specifications is needed using appropriate systems that will enable proper assessment and monitoring. The necessary technical knowledge and expertise will avert a myriad of errors by the Municipality and the DWS. Consultation with technical experts are a short-term solution when such expertise is not yet available within municipalities.

### **5.13 Vaal Environmental Justice Alliance**

5.13.1 Mr Samson Mokoena (**'Mr Mokoena'**) of the Vaal Environmental Justice Alliance (**'VEJA'**) stated that the DWS was not transparent and cooperative. He submitted that a 2009 contract between Rand Water and the Municipality was entered into for the purposes of training and capacitation for technical work at the waste water works and to run their stations. He indicated that the contracts entered into are not made public. Despite requests for this information, access to the VEJA was provided only by virtue of a court order instructing the release of the information.

5.13.2 Mr Mokoena concluded that in the view of the VEJA, the pollution problem had not improved since the Green Drop Initiative had collapsed.

### **5.14 The Federation for Sustainable Environment**

5.14.1 Ms Mariette Liefferink (**'Ms Liefferink'**) indicated on behalf of the Federation for Sustainable Environment (**'FSE'**) that government has limited technical skills, fragmented policies and poor monitoring, contributing to other water security challenges in South Africa. She advised the Panel that there is a water deficit of approximately 200 million (two-hundred million) litres a day in areas within the North East and South West of South Africa.

5.14.2 She added that South Africa's water scarcity could rapidly worsen as supply contracts and demand escalates on account of growth, urbanization, unsustainable water use, wetland degradation, water losses and rainfall decrease from climate change.

5.14.3 Ms Liefferink emphasised the need for water treatment works to be attended to in order to solve water quality problems. In particular, she indicated that because of the water quality and pollution, 57% of river ecosystems are threatened. The water

and sanitation master plan requires intervention in 12 of South Africa's 19 water management areas. These statistics indicate a visibly growing crisis of demand exceeding supply due to the absence of source-based, medium and long term solutions.

5.14.4 In conclusion, Ms Liefferink added that based on experience, the existing and highly complex environmental crime regulatory framework is a disincentive for prosecutions and deterrence.

### **5.15 Save the Vaal Environment**

5.15.1 The Save the Vaal Environment organisation (**'SAVE'**), provided information to the Inquiry regarding the vast range of land which the river impacts, its support to life and the surrounding ecosystem. The organisation commenced its submission by providing an overview in the context summarised below.

5.15.2 The Vaal River is a source of life amid water scarcity. It provides employment to many people in agriculture, tourism, and the mining industries and provides drinking water for many people. The river stretches about 1170 km, the 2nd longest in South Africa and is a major water resource. It irrigates crops along most of its length. It teems with bird life and fish, which provides a food source for thousands of households. The Vaal River flows into the Vaal Dam upstream of the Vereeniging area, and provides water to areas as close as Parys, then into the Bloemhof dam and as far as the Orange River. It is an important part of the agricultural sector.

5.15.3 Rand Water regularly measures the extent of pollutants in the Vaal River and publishes information regarding the pollutants which are of general interest to the community and visitors on their website, [www.reservoir.co.za](http://www.reservoir.co.za).

5.15.4 The DWS has not proceeded with the planned Sebokeng Regional Sewer Scheme (**'SRSS'**). In recent years, emails and letters addressed to the Minister of Water and Sanitation, the Gauteng Premier and the Municipal Manager of Emfuleni Local Municipality by SAVE have gone mostly unanswered. From 2008 to 2018, SAVE has obtained 6 court orders against Emfuleni Local Municipality for not preventing pollution into the Vaal River from various pump stations and waste works in the Vaal triangle. In February 2018, following an application brought by SAVE, the court issued a structural interdict where Emfuleni Local Municipality was restrained from allowing raw and impartially treated sewage into the Vaal via its tributaries, the Klip and Rietspruit streams, from its waste water management works.

5.15.5 In 2007, the DWS launched the SRSS and provided a document detailing plans for an R82 million (eighty-two million rand) scheme which would save running costs and increase capacity of Municipality. Nothing came of this plan. The Minister of DWS re-launched the SRSS in August 2015. The R4 billion (four billion rand) infrastructure development project was allegedly intended to construct a new mega treatment plant below the Vaal Barrage.

5.15.6 SAVE did however note that since September 2015, communication and cooperation between SAVE and officials of the Gauteng DWS and the Municipality had become more regular. These meetings allowed for useful exchange of information but made little impact on the problem.

**5.16 Dr Victor Munnik - PhD, Geography and Environmental Studies, Research Associate at the Society Work and Development Institute, University of the Witwatersrand**

5.16.1 Dr Munnik highlighted most of issues that had been highlighted by the presenters before him. He further stated that the root cause of problems at the Municipality could be traced to its failure to properly support the waste water works. This failure was attributable to staffing problems and that the DWS was understaffed which translated to issues of a budgetary nature and to procurement. Dr Munnik emphasised that there is a political problem in the Municipality which has manifested itself in the other problems therein.

5.16.2 One thing that had not been ventilated by the speakers before Dr Munnik was the Green Drop Programme ('the Programme') in the Vaal. The key focus of the Program was that it identified core issues; both technical and management, of the municipality's performance and it included a step-by-step programme on problem solving and ensuring smooth running of the quality assessments. He stated that the Program included a public participation component where the results of a municipality's performance and water quality was publicised. The Programme was stopped by former Minister of DWS, Nomvula Mokonyane in 2017. Thus municipalities could then stop the reports from going public, which defeated the purpose of the Programme.

5.16.3 He further reminded the Commission of the bad state of local government in 2009 and its negative impact on the situation on the Vaal. In particular he cited reluctance by high ranking official to have frank discussions on the status of the Vaal, and to embrace public participation.

5.16.4 He was of the view that there is a need to capacitate staff and that restore transparency and accountability. He added that there was a need to use the media in a constructive manner to educate on the issues, and furthermore to rebuild the DWS in a manner that serves the people in order to limit current violations of human rights. Thus, he concluded that the challenges of 'state capture' in the water sector needed to be dealt with as the issues were beyond just a river, the ecosystems, and the health and well-being of the population affected.

**5.17 Professor Johan Tempelhoff - Researcher and Historian at the School of Basic Sciences on the Vanderbijlpark Campus of the North-West University (NWU Vaal)**

5.17.1 Professor Tempelhoff ('Prof Tempelhoff') provided the history of the Vaal Dam and segmentation of places it catered for when it was built in 1938. His research into the Vaal River began in 1998 after complaints about water quality emerged. An industrial revolution at the time triggered movement into the Vaal River catchment area which impacted on its function. There were reasonable and systematic developments in the area, until demand boomed outside the capacity of the Vaal area.

5.17.2 He stated that little has been done to ensure infrastructure can accommodate population growth, and that high unemployment, with socio-economic impacts, further aggravated the situation.

5.17.3 Prof Tempelhoff believes, in a similar vein to the other parties who presented to the Panel, that Infrastructure planning was neglected. Failure to manage and regulate partnership between the private and public sector threatens South Africa's water resources, as the Vaal is constantly at risk because of industries, farming and poor waste water treatment works.

5.17.4 He suggested that the rest of South Africa needs to re-use recycled sewage water like Cape Town has begun doing. By 2050 South Africa will run out of water, which poses a bigger crisis. The solution lies in understanding the extent of the damage caused by pollution to a major water source at present. A public participation system that exudes respect and tolerance of all is crucial to ensure a shared investment in our water resource. He urged the Panel to accept that the Vaal water is limited and there is need to monitor treatment works.

## **6. Key Points of the Participants' Submissions and Analysis**

### ***The Problem / The Sewage Problem***

- 6.1. Although the Vaal is being polluted largely by wastewater, the key focus emerging from submissions to the Panel, and the "crisis" or "unprecedented ecological disaster" referred to in the Media Reports, related specifically to:
  - 6.1.1. the pollution of the Vaal by the raw, untreated **sewage** entering the Rietspruit and the Vaal from failing wastewater treatment plants of the Municipality; and;
  - 6.1.2. the presence of raw, untreated sewage on the streets, in homes and other public properties, such as schools in the Municipality, from failing wastewater treatment plants of the Municipality.
- 6.2. The focus of the factual and legal analysis, findings and directives of the Commission will therefore focus on the pollution of the Vaal by raw, untreated sewage into the Rietspruit and the Vaal, and its presence in the streets, homes and other public properties, such as schools of the community members of the Municipality, from failing wastewater treatment plants of the Municipality.

### ***The Importance of the Vaal***

- 6.3. A number of participants highlighted the importance and economic value of the Vaal. WRC stated that the Vaal is or was South Africa's most economically valuable aquatic ecosystem and Africa's hardest working river for over a 100 years. National Treasury emphasised that approximately 19 million people depend on the Vaal for water and that the pollution of the Vaal reverses the gains made from the Lesotho Highlands Water Project, a vital but costly project for the South African government. SAVE and the WRC pointed out that the Vaal provides employment to many people and drinking water for many people.
- 6.4. Mr Williams of the FSAFF advised the Panel that recreational and sport fishing is approximately a R3 to R4 billion (four billion rand) industry in South Africa, and that this included bait and fly-fishing which took place in the Vaal until pollution caused by the sewage prevented the continuation of the sport.

### ***The Pollution of the Vaal***

- 6.5. The Vaal is undisputedly a vital water resource in South Africa. In the natural and ideal scheme of natural rehabilitation, water sources through complex

natural processes manage a state of balance through time. However, when vast amounts of pollutants are discharged into such systems on a daily basis over a protracted period of time, irreversible damage is done to the system.

- 6.6. Such conscious pollution, coupled with high usage, the building of dams and other infrastructure to support consumption, further impact on the natural ability of rivers to rehabilitate themselves and maintain their ecosystems.
- 6.7. Having considered the various media reports, court orders, submissions to the Panel regarding the pollution of the Vaal, the Commission accepts, as a basic premise, that the Vaal is polluted beyond acceptable standards.

#### *The Cause of the Pollution*

- 6.8. It is common cause that the untreated sewage entering the Vaal has been caused by aging, defective and an inadequate number of wastewater systems situated within Municipality. Of the 44 sewerage pumps situated in the Municipality, only 11 were, at the time of hearings, operational.
- 6.9. The reasons for the failing essential infrastructure, based on written and oral submissions of the participants to the Inquiry, may be summarised as follows:

#### *Defective and Inadequate Infrastructure*

- 6.9.1. The wastewater infrastructure is relatively old and pre-dates 1994. The infrastructure has since that time not been adequately maintained or upgraded; and
- 6.9.2. Not enough wastewater systems were added or adapted to meet the needs of the growing population of, and the increasing demands on the Vaal in, the Emfuleni municipal area.

#### Maladministration

- 6.9.3. Severe maladministration:
  - 6.9.3.1. Administrators and staff within the Municipality were not all performing effectively, and ineffective or no consequence management was said to have been applied.
  - 6.9.3.2. Contracts concluded by the Municipality for the maintenance and repair of the wastewater systems that were not honoured by service providers, or were not entered into with the interest of the Municipality in mind was cited. This implies that the Municipality

has been giving away money without receiving any services in return. It was also specified that the Municipality was not billing Rand Water accurately / running a proper account with Rand Water, and as a result was losing revenue, of approximately R90 million (ninety-million-rand).

- 6.9.3.3. The maladministration within the Municipality is not a recent phenomenon. In the course of its Inquiry the Commission reviewed a range of data sources which support this conclusion. Reports submitted by the AGSA to the Select Committee on Appropriation on the Oversight Institutions to Gauteng Municipalities from 21-24 August 2012 clearly indicate the number of challenges experienced by the Municipality in performing effectively and in compliance with the law.<sup>85</sup> For the financial years from 2008 to 2011, the Municipality tellingly received qualified audit opinions from the AG on each occasion. In the main the qualified audit opinions were on account of deviations from the implementation of accepted accounting practises; material losses and impairments, 51% of which was attributable to water; Supply Chain Management deviations; and unemployment at 45%. The serious state of affairs of direct relevance to the Commission's considerations were a reported water and sanitation backlog of R10 billion (ten billion rand) and water losses of up to 180 million (one-hundred and eighty million rand) per annum.

<sup>85</sup> The Gauteng Provincial Treasury (GPT) reported on capital performance, that the three targeted local municipalities (Emfuleni , Randfontein and Mogale City) had budgeted on estimates of capital expenditure for the 2011/12 financial year as follows:

| Municipality | Budget    | Expenditure as at the end of the 2011/12 financial year |
|--------------|-----------|---|
| Emfuleni     | R364 mill | R193 mill   |

The GPT reported that the performance of the three municipalities had been largely impacted by low revenue collection, inadequate staff capacity and management of capital projects. Revenue and cash management had been an area of concern, according to the GPT. (Own emphasis).

- 6.9.3.4. The scenario has not much improved since that time. More than 10 years later, a private entity conducted a forensic audit at the Municipality. The forensic report, more commonly referred to as the Comperio Report revealed that the Municipality incurred irregular expenditure in the staggering amount of R670, 595, 793 (six-hundred and seventy, five-hundred and ninety-five thousand rand, seven-hundred and ninety-three rand). This expenditure was largely attributable to deviations from prescribed processes, including for procurement and management of contracts.
- 6.9.3.5. The AG's report above, gave no reasons for any other conclusion that the Municipality was not managing its finances properly and ethically, for more than a decade. Not only was the Municipality not effectively managing finances allocated to it year on year, but it was not collecting much needed revenue to address the challenges it faced in respect of its aging infrastructure, and skills shortages. Most concerning, special grants allocated for this purpose were equally affected by poor management. The provincial government for its part was unable to release further funds to the Municipality on account of the absence of auditable financial plans to support such provision and release.
- 6.9.3.6. The dire state of the Municipality, characterised by poor service delivery, poor management, poor governance, inadequate controls, ultimately resulted in interventions by the provincial government. As a result the Gauteng Department of Human Settlements, Urban Planning and Cooperative Governance has had to implement a section 139 provincial intervention of the Municipality.<sup>86</sup>

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<sup>86</sup> The provinces also have the power and obligation, in terms of section 139 of the Constitution, acting through the Premier and MEC and other members of the provincial executive, to:

- “(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including -*
- (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;*
  - (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to -*

### Costs and Funding

- 6.9.4. The considerations detailed above provide the context for considerations in respect of costs and funding relating to wastewater systems by the Municipality. The abysmal situation portrayed above has a direct bearing on the Municipalities increasing inability to take corrective actions toward the repair and maintenance of wastewater systems, but further the near impossibility of upgrading such systems to meet increasing demands. The situation, needless to state has reached a point where a multitude of violations to basic human rights continue unabated on account of corruption, mismanagement, poor governance and related factors.
- 6.9.5. According to the National Treasury funds were allocated to the Municipality for the repair of the broken wastewater systems causing the sewage pollution. It is unclear at the time of this report whether these funds were used for its allocated purpose or not. National Treasury indicated that the Municipality would need to request additional funds but that in the absence of acceptable accounting procedures and governance controls such as an acceptable financial plan and evidence that the funds would be properly be managed to actually give effect to the objectives, further public funding could not be allocated to the Municipality.
- 6.9.6. In the absence of such assurance, or alternative proposal by responsible authorities, the human rights of affected people, the economy, and the basic rights to a safe environment will continue to be violated.

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- (i) *maintain essential national standards or meet established minimum standards for the rendering of a service;*
- (ii) *prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or*
- (iii) *maintain economic unity;*
- ...
- (5) *If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must-*
- (a) *impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments".*

#### Lack of Skilled Human Resources

- 6.9.7. A number of submissions made reference to the lack of adequately trained human resources within the Municipality. In particular, there was, according to the Municipality, a lack of employees who have the necessary wastewater management skills to address the Problem and to monitor wastewater treatment. According to the private entity which provided a submission, Consulting Engineers, the skills are available to be employed by the Municipality, but its administrators responsible for supply chain management and the appointment of service providers to repair the wastewater systems, did not or do not have the necessary skills to be able to properly assess tenders in order to appoint appropriately qualified and experienced service providers who are able to honour the contract entered into with the Municipality.
- 6.9.8. As indicated in the considerations regarding maladministration, and having considered the long period of time over which the problems in respect of which wastewater management has prevailed, the Commission had little grounds not to accept this submission.

#### Lack of Cooperation between Municipalities

- 6.9.9. Submissions were provided which demonstrated that the City of Johannesburg, Ekurhuleni and Midvaal municipalities share the sewerage system within the jurisdiction of the Emfuleni Municipality. In this regard, it was pointed out that despite sharing the sewerage system, the affected municipalities did not cooperate with or provide support to the Emfuleni Local Municipality, despite its requests for support.

#### *The Effects of Pollution caused by the Discharge of Raw Sewage*

- 6.10. Based on submissions by the participants it is common-cause that sewage running into the Vaal is occasioned by a lack of adequate treatment and management of such discharge. Evidence was provided and observed by the Commission of deteriorating and deteriorated Plants which process and pump sewerage into the Vaal.
- 6.11. In the first instance, such pollution is impacting natural ecosystems directly dependent on the water and surrounding wetlands which form a vital part of the ecosystem. No evidence was provided to dispute the submission from Mr

Williams of the FSAFF that the population of Yellowfish peculiar to a few South African rivers such as the Vaal are under threat of extinction on account of the change to the balance of river flora and other competing species in the river caused by pollution of the Vaal. In addition, livestock which consume water from the Vaal and direct human consumption itself, adversely impacts the health of consumers. In particular, the submission by Col. Mahapa that people were “unknowingly” consuming polluted water was accepted given the proximity of the SANDF to the communities along the river over a period of time while supporting efforts to manage pollution of the Vaal and vandalism of state equipment.

- 6.12. Given that South Africa is a water scarce country, prolonged and continued pollution of the Vaal River, will invariably result in extreme water scarcity in the very near future.
- 6.13. Submissions regarding the flow of untreated sewerage into the Sharpeville Cemetery for at least three years, and onto school premises were also accepted. The impact of this discharge is without doubt of serious concern of persons who visit the cemetery and of children and others in the school environment. It should be noted that the Sharpeville Cemetery is where notable and celebrated struggle heroes are interred and attracts many visitors to the country. Apart from concerns regarding the imminent threats to health, in respect of the cemetery, the flow of raw sewerage onto the premises must cause untold pain to those who have interred loved ones at the cemetery. The disrespect such a situation gives rise to, having regard to the diverse cultural practises and beliefs of families who have interred people in graves at the cemetery should be borne in mind.
- 6.14. Similar concerns regarding the health hazards posed to people and therefore their rights to dignity as well arise in respect of the flow of raw sewerage on public streets, paths, and into homes.
- 6.15. In addition, and apart from the long-term effects of pollution of the water source on life; are the direct concerns relating to the negative impact pollution has had on the economy. The evidence provided regarding the decrease in tourist and recreational activities on the river were accepted. It is estimated that the angling industry generates about R 1 200 000 000.00 (one billion, two hundred million rand) in revenue to the country per annum<sup>87</sup>. No evidence demonstrating a

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<sup>87</sup> Saayman, M., Saayman, A., Zeelie, E., Potts, W., Mann, B., Weyl, O., Van der Merwe, P., Wood, A., Raemeakers, S., Cowley, P., Pledger, J., Bova, C. & Scholtz, M. “Economic significance of recreational angling in South Africa 2017”, Potchefstroom: Tourism Research in Economic Environs

regulating, measuring or monitoring of such activities by the responsible authorities was tendered to the panel.

- 6.16. The Commission, in the absence of evidence to the contrary accepted the submissions in respect of the impacts for the purpose they were submitted as evidence of the adverse impacts of the pollution caused by unregulated, untreated discharge of raw sewage both into the Vaal River and elsewhere.

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## 7. The Responsibilities of Public Servants and Office Bearers

### The Constitution

- 7.1. South Africa is a democratic state founded on, amongst others, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and supremacy of the Constitution and the rule of law.<sup>88</sup>
- 7.2. Obligations imposed by the Constitution “must be fulfilled” and any conduct inconsistent with the Constitution is invalid.<sup>89</sup>
- 7.3. The obligations for national, provincial and local government, more generally, include the obligations (within its jurisdiction) to:
- “(b) *secure the well-being of the people of the Republic;*
  - “(c) *provide effective, transparent, accountable and coherent government for the Republic as a whole;*
  - “(d) *be loyal to the Constitution, the Republic and its people*”.<sup>90</sup>
- 7.4. In addition to setting out these obligations, the Constitution requires Members of Cabinet (**‘Ministers’**) (National government) and Members of the Executive Council (**‘MECs’**) (provincial government), through the taking of an oath or making of an affirmation, to confirm their loyalty to the Constitution and the people of South Africa and to confirm their undertaking to “perform the functions of [their respective] offices conscientiously and the best of their abilit[ies].”<sup>91</sup>
- 7.5. The Constitutional provisions apply with equal force to local government. In respect of local government, the Constitution requires that a municipality “strive, within its financial and administrative capacity to achieve its objectives set out in the Constitution.”<sup>92</sup> These are objectives are:
- “(a) *to provide democratic and accountable government for local communities;*
  - “(b) *to ensure the provision of services to communities in a sustainable manner;*
  - “(c) *to promote social and economic development;*

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<sup>88</sup> Section 1(a) and (c).

<sup>89</sup> Section 2.

<sup>90</sup> Section 41(1).

<sup>91</sup> Schedule 2, section 3 and 5, respectively.

<sup>92</sup> Section 152(2).

- (d) *to promote a safe and healthy environment; and*
- (e) *to encourage the involvement of communities and community organisations in the matters of local government.*<sup>93</sup>

7.6. In addition to the above, section 195 prescribes basic values and principles applicable to all tiers of public bodies and states:

- “(1) *Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
- (a) *A high standard of professional ethics must be promoted and maintained.*
  - (b) *Efficient, economic and effective use of resources must be promoted.*
  - (c) *Public administration must be development-oriented.*
  - (d) *Services must be provided impartially, fairly, equitably and without bias.*
  - (e) *People’s needs must be responded to, and the public must be encouraged to participate in policy-making.*
  - (f) *Public administration must be accountable.*
  - (g) *Transparency must be fostered by providing the public with timely, accessible and accurate information.*
  - (h) *Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
  - (i) *Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*”<sup>94</sup>

7.7. The Public Service Act (**‘PSA’**)<sup>95</sup> and the Public Service Regulations (**‘PSA Regs’**)<sup>96</sup> provide the statutory regulatory frameworks for the administration, organisation and conditions of service for the public service of South Africa<sup>97</sup>.

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<sup>93</sup> Section 151(1).

<sup>94</sup> Section 195(1).

<sup>95</sup> Act 103 of 1994.

<sup>96</sup> Published under Government Notice R877 in *Government Gazette* 40167 of 29 July 2016

<sup>97</sup> In terms of these statutes: In terms of the PSA and the PSA Regs and Public Service Charter<sup>97</sup>, an employee in the public service is obligated to:

- “(a) *be faithful to the Republic and honour and abide by the Constitution and all other law in the execution of his or her official duties;*

7.8. Where a head of department or other employee fails to comply with the requirements of the PSA and PSA Regulations provision is made for the executive authority (Premier) in the case of a province, or head of department, respectively, to take disciplinary action against the head or employee.<sup>1</sup> The laws are also quite

- 
- (b) *put the public interest first in the execution of his or her official duties;*
  - (c) *loyally execute the lawful policies of the Government of the day in the performance of his or her official duties;*
  - (d) *abide by and strive to be familiar with all legislation and other lawful instructions applicable to his or her conduct and official duties; and*
  - (e) *cooperate with public institutions established under the Constitution and legislation in promoting the interest of the public*
  - ...
  - (a) *promote the unity and wellbeing of the South African nation in performing his or her official duties;*
  - (b) *serve the public in an unbiased and impartial manner in order to create confidence in the public service;*
  - (c) *be polite, helpful and reasonably accessible in his or her dealings with the public;*
  - (d) *have regard for the circumstances and concerns of the public in performing his or her official duties and in the making of decisions affecting them;*
  - (e) *be committed through timely service to the development and upliftment of all South Africans;*
  - (f) *(f)? not abuse his or her position in the public service to promote or prejudice the interest of any political party or interest group;*
  - (g) *(g)? respect and protect the dignity of every person and his or her rights as contained in the Constitution; and*
  - (h) *(h)? recognise the public's right of access to information, excluding information that is specifically protected by law*
  - ...
  - (b) *not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties;*
  - ...
  - (e) *immediately report to the relevant authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes a contravention of any law (including, but not limited to, a criminal offence) or which is prejudicial to the interest of the public, which comes to his or her attention during the course of his or her employment in the public service”.*

<sup>97</sup> In the performance of their official duties, employees in the public service must:

- “(a) *strive to achieve the objectives of his or her institution cost effectively and in the interest of the public;*
- (b) *be creative in thought and in the execution of his or her official duties, seek innovative ways to solve problems and enhance effectiveness and efficiency within the context of the law;*
- (c) *be punctual in the execution of his or her official duties;*
- (d) *execute his or her official duties in a professional and competent manner;*
- (e) *cooperate fully with other employees to advance the interest of the public;*
- (f) *be honest and accountable in dealing with public funds and use the State's property and other resources effectively, efficiently, and only for authorised official purposes;*
- ...
- (h) *be committed to the optimal development, motivation and utilisation of employees reporting to him or her and the promotion of sound labour and interpersonal relations;*
- (i) *avail himself or herself for training and development;*
- (j) *promote sound, efficient, effective, transparent and accountable administration; ...*
- (q) *shall immediately report any noncompliance of the Act to the head of department.”*

clear that employees in public service may have their employment terminated on account of “incapacity due to poor work performance” or “misconduct”.<sup>1</sup>

### **The Municipal Systems Act<sup>98</sup>**

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

- “(a) exercise the municipality’s executive and legislative authority and use the resources of the municipality in the best interests of the local community;*
- (b) provide, without favour or prejudice, democratic and accountable government;*
- (c) encourage the involvement of the local community;*
- (d) strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;*
- (e) consult the local community about—*
  - (i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and*
  - (ii) the available options for service delivery;*
- (f) give members of the local community equitable access to the municipal services to which they are entitled;*
- (g) promote and undertake development in the municipality;*
- (h) promote gender equity in the exercise of the municipality’s executive and legislative authority;*
- (i) promote a safe and healthy environment in the municipality; and*
- (j) contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.”*

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

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

- “(a) give priority to the basic needs of the local community;*
- (b) promote the development of the local community; and*

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<sup>98</sup> Act 32 of 2000.

*(c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.”<sup>99</sup>*

7.12. Municipal services must be equitable and accessible; be provided in a manner that is conducive to the prudent, economic, efficient and effective use of available resources; and the improvement of standards of quality over time. Municipal services must be financially sustainable; be environmentally sustainable; and be regularly reviewed with a view to upgrading, extension and improvement.<sup>100</sup>

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

- “(a) be responsive to the needs of the local community;*
- (b) facilitate a culture of public service and accountability amongst staff;*
- (c) take measures to prevent corruption;*
- (d) establish clear relationships, and facilitate cooperation and communication, between it and the local community;*
- (e) give members of the local community full and accurate information about the level and standard of municipal services they are entitled to receive; and*
- (f) inform the local community how the municipality is managed, of the costs involved and the persons in charge.”<sup>101</sup>*

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

- “(a) be responsive to the needs of the local community;*
- (b) facilitate a culture of public service and accountability amongst its staff;*
- (c) be performance orientated and focused on the objects of local government set out in section 152 of the Constitution and its developmental duties as required by section 153 of the Constitution;*
- (d) ensure that its political structures, political office bearers and managers and other staff members align their roles and responsibilities with the priorities and objectives set out in the municipality’s integrated development plan;*
- (e) establish clear relationships, and facilitate cooperation, coordination and communication, between—*

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<sup>99</sup> Section 73(1).

<sup>100</sup> Section 73(2).

<sup>101</sup> Section 6(2).

- (i) its political structures and political office bearers and its administration;*
- (ii) its political structures, political office bearers and administration and the local community;*
- (f) organise its political structures, political office bearers and administration in a flexible way in order to respond to changing priorities and circumstances;*
- (g) perform its functions—*
  - (i) through operationally effective and appropriate administrative units and mechanisms, including departments and other functional or business units; and*
  - (ii) when necessary, on a decentralised basis;*
- (h) assign clear responsibilities for the management and coordination of these administrative units and mechanisms;*
- (i) hold the municipal manager accountable for the overall performance of the administration;*
- (j) maximise efficiency of communication and decision making within the administration;*
- (k) delegate responsibility to the most effective level within the administration;*
- (l) involve staff in management decisions as far as is practicable; and*
- (m) provide an equitable, fair, open and non-discriminatory working environment.”<sup>102</sup>*

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

- “(a) the formation and development of an economical, effective, efficient and accountable administration*
- ...*
- (c) the implementation of the municipality’s integrated development plan, and the monitoring of progress with implementation of the plan;*
- (d) the management of the provision of services to the local community in a sustainable and equitable manner;*
- ...*
- (f) the management, effective utilisation and training of staff;*
- (g) the maintenance of discipline of staff;*
- (h) the promotion of sound labour relations and compliance by the municipality with applicable labour legislation;*
- (i) advising the political structures and political office bearers of the municipality;*

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<sup>102</sup> Section 51.

*(j) managing communications between the municipality's administration and its political structures and political office bearers;*

...

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

*(p) the implementation of national and provincial legislation applicable to the municipality; and*

*(q) the performance of any other function that may be assigned by the municipal council.*

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

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

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

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

7.16. According to the MSA, municipal councillors and all municipal staff members must abide by the Code of Conduct included in the Schedules of the MSA. Failure to comply with the applicable provisions of the Constitution, the MSA and the Code of Conduct is grounds for dismissal or other disciplinary steps.

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

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

## 8. The Responsible Parties /Respondents: The Domestic Legal Framework

### The Water Services Act 108 of 1997

- 8.1. The preamble to the Water Services Act (“**WSA**”) confers a clear responsibility on all spheres of government to ensure that water supply services and sanitation services are provided in a manner which is efficient, equitable and sustainable. The preamble of the WSA confers on national government custodial powers over the water resources of the country.
- 8.2. Section 11(1) of the WSA states that a municipality, as a “water services authority”,<sup>103</sup> has a duty to all consumers<sup>104</sup> or potential consumers in its area of jurisdiction to “progressively ensure efficient, affordable, economical and sustainable access to water services”.
- 8.3. “[W]ater services, as defined in section 1, is made up of “water supply services”, which are the abstraction, conveyance, treatment and distribution of potable water, water intended to be converted to potable water or water for commercial use but not water for industrial use,<sup>105</sup> and “sanitation services”, which are the collection, removal, disposal or purification of human excreta, domestic wastewater, sewage and effluent resulting from the use of water for commercial purposes.<sup>106</sup>
- 8.4. Section 11 (4) states that a municipality may not unreasonably refuse or fail to give access to water services to a consumer or potential consumer in its area of jurisdiction. However, sections 5 and 11(5) of the WSA require that, in an emergency, or where the municipality or “water services institution”<sup>107</sup> cannot meet

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<sup>103</sup> In terms of section 1 of the NWA, “water services authority” means “any municipality, including a district or rural council as defined in the Local Government Transition Act, 1993 (Act No. 209 of 1993), responsible for ensuring access to water services”.

<sup>104</sup> In terms of section 1 of the NWA, a “consumer” is defined as “any end user who receives water services from a water services institution, including an end user in an informal settlement”.

<sup>105</sup> In terms of section 1 of the NWA, “water supply services” means “the abstraction, conveyance, treatment and distribution of potable water, water intended to be converted to potable water or water for commercial use but not water for industrial use.”

<sup>106</sup> In terms of section 1 of the NWA, “sanitation services” means the collection, removal, disposal or purification of human excreta, domestic wastewater, sewage and effluent resulting from the use of water for commercial purposes”.

<sup>107</sup> As per the definition in the NWA, a “water services institution” includes, a “water services authority” (municipalities including the Emfuleni Local Municipality), a “water services provider” (also usually a municipality and entities such as Rand Water who provide water to municipalities) and a “water board” (this also includes Rand Water).

all of its water service and sanitation obligations, a municipality or a water services institution prioritise the provision of basic water supply and basic sanitation.

- 8.5. “[B]asic water supply” and “basic sanitation” refers to the prescribed minimum standard of water supply services and sanitation services, that “[e]veryone has a right of access to”,<sup>108</sup> and that “[e]very “water services institution”<sup>109</sup> must take reasonable measures to realise these rights”.<sup>110</sup>
- 8.6. Accordingly, in accordance with the WSA, the Emfuleni Local Municipality is the local authority through which water is provided as the “water services provider[s]”,<sup>111</sup> again, in this case, the Municipality, Rand Water who provides bulk water supply to the Municipality, and any other entity, such as entities who provide prepaid water facilities, and “water board[s]”,<sup>112</sup> which in this case is also Rand Water.
- 8.7. In addition to the obligations set out in the WSA, regulation 4 of the Regulations Relating to Compulsory Water Standards and Measures to Conserve Water,<sup>113</sup> a water services institution must take steps to ensure that where the water services usually provided by or on behalf of that water services institution are interrupted for a period of more than 24 hours for reasons other than those contemplated in section 4 of the Act, a consumer has access to alternative water services, including sanitation services sufficient to protect health. These measures recognise the need for continued access to both water and sanitation on account of their vital importance to life and health.
- 8.8. It is therefore clear from the WSA and the Water Standards Regulations that the obligation to provide water supply services and sanitation services is that of the Emfuleni Municipality, with support and oversight from the Gauteng Province, particularly Gauteng COGTA and National DWS and COGTA.

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<sup>108</sup> Section 3(1).

<sup>109</sup> In terms of section 1 of the NWA, “water services institution” means “a water services authority, a water services provider, a water board and a water services committee”. See footnote 88 above.

<sup>110</sup> Section 3(2).

<sup>111</sup> In terms of section 1 of the NWA, “water services provider”: means “any person who provides water services to consumers or to another water services institution, but does not include a water services intermediary”

<sup>112</sup> In terms of section 1 of the NWA, “[w]ater board” means “an organ of state established or regarded as having been established in terms of this Act to perform, as its primary activity, a public function”.

<sup>113</sup> Published under GN R509 of 8 June 2001.

8.9. In terms of planning and giving effect to this obligation, the WSA requires that every water services authority (i.e. all municipalities who provide water) have a “water services development plan” that sets out the measures a municipality will take or implement to realise these rights. The development plan must form part of a municipalities integrated development plan.

8.10. A draft water services plan must include information:

- “(a) of the physical attributes of the area to which it applies;*
- (b) of the size and distribution of the population within that area;*
- (c) of a time frame for the plan, including the implementation programme for the following five years;*
- (d) of existing water services;*
- (e) of existing industrial water use within the area of jurisdiction of the relevant water services authority;*
- ...*
- (g) of the number and location of persons within the area who are not being provided with a basic water supply and basic sanitation;*
- (h) regarding the future provision of water services ... including—*
  - (i) the water services providers which will provide those water services;*
  - (ii) the contracts and proposed contracts with those water services providers;*
  - (iii) the proposed infrastructure necessary;*
  - (iv) the water sources to be used and the quantity of water to be obtained from and discharged into each source;*
  - (v) the estimated capital and operating costs of those water services and the financial arrangements for funding those water services, including the tariff structures;*
  - (vi) any water services institution that will assist the water services authority; and*
  - (vii) the operation, maintenance, repair and replacement of existing and future infrastructure;*
- (i) of the number and location of persons to whom water services cannot be provided within the next five years, setting out—*
  - (i) the reasons therefor; and*
  - (ii) the time frame within which it may reasonably be expected that a basic water supply and basic sanitation will be provided to those persons; and*

(j) *of existing and proposed water conservation, recycling and environmental protection measures.*<sup>114</sup>

- 8.11. Draft water services development plans must: be made publicly available; undergo a public comment process; and be sent to the Minister of DWS, the relevant Province and all neighbouring municipalities.<sup>115</sup> Once adopted by the municipality, a copy of the development plan must be sent to the Minister of DWS, the Minister of COGTA, the Province, and all neighbouring municipalities.<sup>116</sup>
- 8.12. A new development plan must be drafted and adopted at intervals determined by the Ministers of DWS and COGTA.<sup>117</sup> Any deviation from an adopted development plan is invalid unless the deviation is included in a new adopted development plan.<sup>118</sup>
- 8.13. A municipality is required to submit a report on the implementation of its water services development plan, within four months after the end of its financial year, to the Ministers for DWS and COGTA, the province and the organisation representing the municipality (in this case the South Africa Local Government Association ('SALGA')).<sup>119</sup>
- 8.14. The water services development plan is specifically regulated and detailed in law. It is obviously an important tool or mechanism for the municipality to support fulfilling the obligation to provide water supply and sanitation services. If complied with properly, and updated regularly or as required, the development plan allows a municipality the opportunity (in the form of a legal obligation) to gather information necessary to be able to, within its available resources, provide water supply and sanitation services in compliance its mandatory constitutional duty to provide for the right to access water and sanitation. The development plan and the obligation to report on its implementation also allows for the Ministers of the DWS and COGTA, the Province and other municipalities to monitor the performance of a municipality and to intervene where necessary given the significance to basic rights involved where this is not done.

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<sup>114</sup> Section 14.

<sup>115</sup> Section 14.

<sup>116</sup> Section 15.

<sup>117</sup> Section 16.

<sup>118</sup> Section 17.

<sup>119</sup> Section 18.

8.15. In addition to the reporting requirements in sections 17 and 18, section 62 expressly requires that the Minister of DWS and, the Gauteng Province, monitor the performance of every water services institution, and not just water services authority in order to ensure compliance with and attainment of all applicable national standards prescribed by the WSA;<sup>120</sup> and compliance with every applicable development plan, policy statement or business plan adopted in terms of the WSA are observed.<sup>121</sup>

8.16. Section 63 gives specific effect to section 139 of the Constitution, which empowers a province or the National DWS to intervene where a water services authority has not effectively performed any function imposed on it by or under the WSA.

8.17. The power of the Minister of DWS to intervene is further supported by the Minister's general powers under section 73, which includes the power to:

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

8.18. It was indicated by Parties that presented to the Panel that the Municipality had not published financial or water services development plans in the last three or four years. Given the extent of the degradation of the sewerage pumps, the megalitres of raw untreated sewage still flowing into the Vaal and onto streets, and homes,<sup>122</sup>

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<sup>120</sup> Section 62(1)(a).

<sup>121</sup> Section 62(1)(c).

<sup>122</sup> Bega, S, “Day and night we smell it’: Sewage spills make life hell for Deneysville residents”, IOL, 12 September 2020. Available at: <https://www.iol.co.za/saturday-star/news/day-and-night-we-smell-it-sewage-spills-make-life-hell-for-deneysville-residents-8e066221-2e91-4801-a2f0-a59d490c9c28> ;

it is not unreasonable to expect that at some tier of government, a water services development plan would have been requested. In this instance such a plan was not published by the Municipality, for a great deal longer than just three or four years. In this time neither the Province, nor the DWS and COGTA, exercised their oversight roles effectively. In the event that such plans had been published, the continued challenges which had been made public implied poor implementation. In this regard, it would similarly be safe to conclude that the DWS as custodian of water resources, and COGTA failed to intervene effectively or to the extent necessary to manage the ongoing sewage crises.

8.19. In terms of section 21 of the WSA, the Municipality published their Water and Sanitation By-Laws in 2004 (**'the By-Laws'**) to regulate the standard of services and the installation, alteration, operation, protection and inspection of water services works.<sup>123</sup>

8.20. The By-Laws focus on contractual relationships between the Municipality and the obligations of owners of property within the Municipality, and while article 17 requires that an owner provide and maintain approved measures to prevent the entry of a substance, which may be a danger to health or adversely affect the potability of water or affect its fitness for use, into the water supply system, the definition of "owner" does not include the Municipality.

8.21. "[P]erson" is defined in the By-Laws as "any person, whether natural or juristic and is not limited to any local government body, a company or close corporation incorporated under any law, a body of persons whether incorporated or not, a statutory body, public utility body, voluntary association or trust". On an ordinary interpretation of the definition, the Municipality, or rather responsible persons within the Municipality, such as the municipal manager, not acting in good faith,<sup>124</sup> may be able to be held accountable in terms of the prosecuted in terms of the National Water Act.

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Richards, N, "WATCH: Rivers of raw sewage flowing into the rivers which provide your drinking water", The Citizen, 22 July 2020. Available at: <https://citizen.co.za/multimedia/2326526/watch-rivers-of-raw-sewage-flowing-into-the-rivers-which-provide-your-drinking-water/>; and Staff Reporter, "Raw sewerage flood Arcon Park houses", Vaal Weekblad, 30 June 2020.

<sup>123</sup> Published under Local Authority Notice 840 in *Provincial Gazette Extraordinary* No. 183 dated 21 May 2004.

<sup>124</sup> In terms of article 110, neither employees of the Municipality nor any person, body, organisation or corporation acting on behalf of the Municipality is liable for any damage arising from any omission or act done in good faith in the course of their duties.

- 8.22. Rand Water is a bulk water supply utility, founded in 1903, as a result of a partnership alliance between the mining industry and government to provide water to the Witwatersrand when South Africa's gold mining industry was evolving at a rapid rate.<sup>125</sup> The water supply of Johannesburg had diminished and pollution posed a health threat during that period. Consequently, Rand Water had the responsibility of locating a consistent supply of water for what was becoming South Africa's major industrial and financial centre.
- 8.23. In the 1950s, as a result of an increasing threat of pollution in the Barrage and a greater demand for water, Rand Water built the Zuikerbosch purification plant just above the Blesbokspruit in the Barrage area. This massive plant, with substantial capacity for expansion, enabled Rand Water to provide for the ever-increasing demand for water to the Witwatersrand, but also to Vanderbijlpark and Sasolburg, two urban settlements that had been founded on the banks of the Vaal River in the Barrage area.<sup>126</sup>
- 8.24. The initial threat of pollution was monitored by Rand Water which had, up to the passing of the new National Water Act 36 of 1998, been responsible for managing the Vaal River Barrage as a riparian owner. Rand Water as the previous water owner had power to intervene via the repealed Rand Water Statute, by cutting off water supply to industries on suspicion of pollution, and taking polluters to court. Under the NWA, ownership of water transferred from Rand Water, to the South African people, held in custodianship by the DWA, and as a result, Rand Water took on a different role.
- 8.25. Rand Water became a national government business enterprise,<sup>127</sup> in terms of the Public Finance Management Act 1 of 1999 ('the PFMA'). Rand Water also falls within the definition of a water board in terms of the WSA.
- 8.26. In terms of section 30(2) other activities of a water board may include, but are not limited to—

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<sup>125</sup> Tempelhoff, J & Munnik, V, "The Vaal River Barrage, South Africa's hardest working water way: an historical contemplation", The Journal for Transdisciplinary Research in South Africa, April 2007 at 109.

<sup>126</sup> Ibid. at 113.

<sup>127</sup> A national government business enterprise is "(a) is a juristic person under the ownership control of the national executive; (b) has been assigned financial and operational authority to carry on a business activity; (c) as its principal business, provides goods or services in accordance with ordinary business principles; and (d) is financed fully or substantially from sources other than— (i) the National Revenue Fund; or (ii) by way of a tax, levy or other statutory money".

- “(a) *providing management services, training and other support services to water services institutions, in order to promote cooperation in the provision of water services;*
- (b) *supplying untreated or nonpotable water to end users who do not use the water for household purposes;*
- (c) *providing catchment management services to or on behalf of the responsible authorities;*
- (d) *with the approval of the water services authority having jurisdiction in the area—*  
...  
*(ii) acting as a water services provider to consumers;*
- (e) *providing water services in a joint venture with water services authorities; and*
- (f) *performing water conservation functions.”*

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

- “ ...
- (b) *the installation, alteration, operation, protection and inspection of water services works and consumer installations;*
  - (c) *the determination and structure of tariffs;*
  - (d) *the payment and collection of money due to the water board;*
  - (e) *the circumstances under which water services may be limited or discontinued and the procedure for such limitation or discontinuation; and*
  - (f) *water conservation and the prevention of wasteful or unlawful use of water provided by the water board..”*

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

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

8.30. In performing its activities, exercising its powers and carrying out its duties, a water board must achieve a balance between, amongst others, striving to provide efficient, reliable and sustainable water services; through optimal use of available resources;

promoting the efficiency of water services authorities; taking cognisance of the needs of water services institutions, consumers and users; acting in an equitable, transparent and fair manner; and taking reasonable measures to promote water conservation and water demand management, including promoting public awareness of these matters.<sup>128</sup>

8.31. A water board's financial report must be audited and submitted to the Minister for DWS, the relevant Provinces and Parliament.<sup>129</sup>

8.32. While Rand Water does not own, operate, maintain or refurbish the water infrastructure in municipalities, it has considerable powers to provide much needed management services, training and other support services to water services institutions, to provide catchment management services to or on behalf of the responsible authorities, to set conditions for the operation and protection of the sewage treatment plants, and may therefore review and report on compliance with the conditions (set by it or DWS).

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

### **The National Water Act 36 of 1998**

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

- “(a) meeting the basic human needs of present and future generations;*
- (b) promoting equitable access to water;*
- ...*
- (d) promoting the efficient, sustainable and beneficial use of water in the public interest;*
- ...*
- (g) protecting aquatic and associated ecosystems and their biological diversity;*
- (h) reducing and preventing pollution and degradation of water resources;*

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<sup>128</sup> Section 34.

<sup>129</sup> Section 44.

- (i) *meeting international obligations;*
- (j) *promoting dam safety*".<sup>130</sup>

8.35. According to section 3, the National Government, acting through the Minister of DWS, has the "power to regulate the use, flow and control of all water in the Republic",<sup>131</sup> and that the National Government, acting through the Minister of DWS has the responsibility to ensure that: water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate; and s allocated equitably and used beneficially in the public interest, while promoting environmental values.<sup>132</sup>

8.36. Chapter 2 of the NWA regulates the development, content and implementation of the National Water Resource Strategy ('**the NWRS**') – the framework, published by the DWS, after consultation with relevant parties, for the protection, use, development, conservation, management and control of water resources for the country at national, provincial and local level. The NWRS has to make reference to international rights and obligations; estimates of present and future water requirements; and objectives in respect of water quality to be achieved through a classifications system.<sup>133</sup>

8.37. According to section 7, the National DWS, organs of state and water management institutions must give effect to the NWRS when exercising or performing any duties in terms of the NWA.

8.38. In terms of section 19, a person (including an organ of state and the Minister for DWS) who is the owner of land or in control of land on which any activity or process is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause pollution<sup>134</sup> of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

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<sup>130</sup> Section 2.

<sup>131</sup> Section 3(3).

<sup>132</sup> Sections 3(1) and (2).

<sup>133</sup> Section 6.

<sup>134</sup> Pollution is defined as "the direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it—(a) less fit for any beneficial purpose for which it may reasonably be expected to be used; or (b) harmful or potentially harmful— (aa) to the welfare, health or safety of human beings; (bb) to any aquatic or nonaquatic organisms; (cc) to the resource quality; or (dd) to property".

- 8.39. Section 19 makes it the responsibility of a water catchment management agency to direct the person in control of the land to take action to prevent the pollution, or where the landowner does not take steps to stop and/or prevent the pollution, the catchment management agency is allowed take steps itself to prevent the pollution and claim the costs it incurs.
- 8.40. A catchment management agency such as the Vaal Catchment Management Agency, may therefore be able to direct the Municipality, Gauteng Province or DWS to take remedial and preventative actions in respect of the pollution or it may itself take such steps and claim the costs incurred as a result. However the Vaal Catchment Management Agency does not have the resources to exercise the latter option which includes refurbishment and replacement of pump stations, to prevent the flow of sewerage into the Vaal. Despite the existence of the management agency, it is the Minister and Rand Water acting as a catchment management agency which are more likely to have the resources to intervene to prevent continued pollution and reclaim costs.
- 8.41. It is understood from DWS and National Treasury that the DWS has made use of section 19, in respect of the Municipality and the Sewage Problem, but the intervention appears to have limited success and DWS is still in the process of trying to reclaim costs from the Municipality.
- 8.42. Section 151 of the NWA makes any act or omission, whether by intent or negligence, which has the effect of polluting or likelihood of polluting a water resources unlawful. Such act or omission constitutes a statutory offence which is punishable through penalties such as a fine or imprisonment.<sup>135</sup>
- 8.43. Where harm, loss or damage caused by the offence, for which a person was convicted, is established, the person/s who suffered harm, loss or damage may be awarded pecuniary damages.<sup>136</sup>
- 8.44. The liability of the state in terms of the NWA is triggered when the exercise of power or performance of duty, or failure to exercise power or perform duties was unlawful, negligent or in bad faith.

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<sup>135</sup> Sections 151(1)(i) and (j) and 151(2).

<sup>136</sup> Section 152 and 153.

## The National Environmental Management Act 107 of 1998

8.45. According to the National Environmental Management Act 107 of 1998 ('NEMA'), development must be socially, environmentally and economically sustainable, and sustainable development requires the consideration of all relevant factors including, that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied; that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied; and that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.<sup>137</sup>

8.46. NEMA, like the NWA requires that international responsibilities relating to the environment must be discharged in the national interest.<sup>138</sup>

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

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

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<sup>137</sup> Section 2(3) and (4)(a).

<sup>138</sup> Section 2(4)(n).

8.48. The Director-General for DEFF has the statutory duty to monitor compliance with environmental implementation plans and environmental management plans and may—

- “(a) take any steps or make any inquiries he or she deems fit in order to determine if environmental implementation plans and environmental management plans are being complied with by organs of state; and*
- (b) if, as a result of any steps taken or inquiry made under paragraph (a), he or she is of the opinion that an environmental implementation plan and an environmental management plan is not substantially being complied with, serve a written notice on the organ of state concerned, calling on it to take such specified steps as the Director General considers necessary to remedy the failure of compliance.”<sup>139</sup>*

8.49. The Minister for DEFF, has the power to at any time appoint one or more persons to assist either him or her or, after consultation with a Municipal Council or MEC or other national Minister, to assist such a Municipal Council or MEC or another national Minister in the evaluation of a matter relating to the protection of the environment by obtaining such information, whether documentary or oral, as is relevant to such evaluation.<sup>140</sup> The Minister may even establish a Commission of Inquiry to evaluate a matter,<sup>141</sup> or appoint external investigators or inspectors to inquire about possible failures to comply with NEMA.

8.50. NEMA therefore has a number of control mechanisms which allow for interventions at the national level to secure protection of the environment.

8.51. Like the NWA, NEMA makes deliberate or negligent pollution an offence for the land owner or person in control of land and has implications for liability for organs of state where conduct or omission to act results in unlawfulness.<sup>142</sup>

8.52. Where NWA establishes Water Courts, NEMA allows for both prosecution of offences by the state (the National Prosecuting Authority) and organisations to pursue private prosecutions.<sup>143</sup>

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<sup>139</sup> Section 16(2).

<sup>140</sup> Section 20.

<sup>141</sup> Section 20(a).

<sup>142</sup> Section 28(2).

<sup>143</sup> Section 33 and 34.

### **The Disaster Management Act 57 of 2002**

8.53. In terms of section 1 of the DMA, a “disaster” is defined as “progressive or sudden, widespread or localised, natural or human caused occurrence which—

- “(a) *causes or threatens to cause—*
  - (i) death, injury or disease;*
  - (ii) damage to property, infrastructure or the environment; or*
  - (iii) significant disruption of the life of a community; and*
- (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources”.*

8.54. The DMA does not apply to occurrences falling within the definition of a “disaster” to the extent that the occurrence can be dealt with effectively in terms of other national legislation—

- “(i) aimed at reducing the risk, and addressing the consequences, of occurrences of that nature; and*
- (ii) identified by the Minister [of COGTA] by notice in the Gazette.”*

8.55. The DMA requires National Government, Provincial Government and metropolitan and district municipalities to have disaster management plans and disaster management centres in order to deal with a disaster, once declared.

8.56. Once a disaster is declared, the respective Minister, Premier or Mayor or executive committee may issue legislation which allows for far reaching control and direction of things, such as the regulation of traffic in a disaster stricken area, the regulation of movement and goods to and from a disaster stricken area; the provision of emergency accommodation and emergency procurement measures.

### **The Public Finance Management Act**

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

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

8.58. In terms of section 16 and 25 of the PFMA, the Minister of Finance may authorise the use of funds from the National Revenue Fund, and an MEC for finance may

authorise the use of funds from that province's Provincial Revenue Fund to defray expenditure of an exceptional nature which is currently not provided for and which cannot, without serious prejudice to the public interest, be postponed to a future parliamentary appropriation of funds, respectively.

### **The Municipal Finance Management Act 56 of 2003**

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

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

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

8.61. In respect of unauthorised,<sup>144</sup> irregular<sup>145</sup> or fruitless and wasteful expenditure,<sup>146</sup> section 32(1) of the MFMA states:

- “(a) a political officebearer of a municipality is liable for unauthorised expenditure if that officebearer knowingly or after having been advised by the accounting officer of the municipality that the expenditure is likely to result in unauthorised expenditure, instructed an official of the municipality to incur the expenditure;*
- (b) the accounting officer is liable for unauthorised expenditure deliberately or negligently incurred by the accounting officer, subject to subsection (3);*
- (c) any political officebearer or official of a municipality who deliberately or negligently committed, made or authorised an irregular expenditure, is liable for that expenditure; or*
- (d) any political officebearer or official of a municipality who deliberately or negligently made or authorised a fruitless and wasteful expenditure is liable for that expenditure.”*

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

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<sup>144</sup> “**unauthorised expenditure**”, in relation to a municipality, means any expenditure incurred by a municipality otherwise than in accordance with section 15 or 11 (3), and includes—

- (a) overspending of the total amount appropriated in the municipality’s approved budget;*
- (b) overspending of the total amount appropriated for a vote in the approved budget;*
- (c) expenditure from a vote unrelated to the department or functional area covered by the vote;*
- (d) expenditure of money appropriated for a specific purpose, otherwise than for that specific purpose;*
- (e) spending of an allocation referred to in paragraph (b), (c) or (d) of the definition of “allocation” otherwise than in accordance with any conditions of the allocation; or*
- (f) a grant by the municipality otherwise than in accordance with this Act”.*

<sup>145</sup> “**irregular expenditure**”, in relation to a municipality or municipal entity, means—

- (a) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of this Act, and which has not been condoned in terms of section 170;*
- (b) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the Municipal Systems Act, and which has not been condoned in terms of that Act;*
- (c) expenditure incurred by a municipality in contravention of, or that is not in accordance with, a requirement of the Public Office Bearers Act, 1998 (Act No. 20 of 1998); or*
- (d) expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with, a requirement of the supply chain management policy of the municipality or entity or any of the municipality’s bylaws giving effect to such policy, and which has not been condoned in terms of such policy or bylaw, but excludes expenditure by a municipality which falls within the definition of “unauthorised expenditure”.*

<sup>146</sup> Section 32(2).

- “(a) in the case of unauthorised expenditure, is—*
- (i) authorised in an adjustments budget; or*
  - (ii) certified by the municipal council, after investigation by a council committee, as irrecoverable and written off by the council; and*
- (b) in the case of irregular or fruitless and wasteful expenditure, is, after investigation by a council committee, certified by the council as irrecoverable and written off by the council.”*

However, in terms of section 32(5), the writing off, in terms of section 32(2)(b), of any unauthorised, irregular or fruitless and wasteful expenditure as irrecoverable, is no excuse in criminal or disciplinary proceedings against a person charged with the commission of an offence or a breach of this Act relating to such unauthorised, irregular or fruitless and wasteful expenditure.

In terms of section 32(3), if an accounting officer becomes aware that the council, the mayor or the executive committee of the municipality, as the case may be, has taken a decision which, if implemented, is likely to result in unauthorised, irregular or fruitless and wasteful expenditure, the accounting officer is not liable for any ensuing unauthorised, irregular or fruitless and wasteful expenditure provided that the accounting officer has informed the council, the mayor or the executive committee, in writing, that the expenditure is likely to be unauthorised, irregular or fruitless and wasteful expenditure.

The accounting officer, for a municipality, or municipal entity, must, in accordance with section 32(4), promptly inform the mayor, the MEC for local government in the province and the AGSA, in writing, of—

- “(a) any unauthorised, irregular or fruitless and wasteful expenditure incurred by the municipality;*
- (b) whether any person is responsible or under investigation for such unauthorised, irregular or fruitless and wasteful expenditure; and*
- (c) the steps that have been taken—*
- (i) to recover or rectify such expenditure; and*
  - (ii) to prevent a recurrence of such expenditure.”*

In addition, in terms section 32(6), the accounting officer must report alleged irregular expenditure that constitutes a criminal offence, theft and fraud that occurred in the municipality, to the South African Police Service (**SAPS**).

If the alleged charges are against the accounting officer, it is the responsibility of the municipal council to ensure that the alleged charges are reported to the SAPS.

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

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

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

- “(a) the amount to be paid by the municipality or municipal entity for such bulk resources for that month, and for the financial year up to the end of that month;*
- (b) the arrears owing and the age profile of such arrears; and*
- (c) any actions taken by that organ of state to recover arrears.”<sup>147</sup>*

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

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

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

8.66. Given the financial state of the Municipality it appears that the accounting officer or officers have not been fulfilling their obligations in terms of the MFMA.

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<sup>147</sup> Section 41(2).

8.67. In terms of section 116, a contract or agreement procured through the supply chain management system of a municipality or municipal entity must:

- “(a) be in writing;*
- (b) stipulate the terms and conditions of the contract or agreement, which must include provisions providing for—*
  - (i) the termination of the contract or agreement in the case of non or underperformance;*
  - (ii) dispute resolution mechanisms to settle disputes between the parties;*
  - (iii) a periodic review of the contract or agreement once every three years in the case of a contract or agreement for longer than three years” (Own emphasis).*

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

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## 9. The International Legal Framework

- 9.1. Despite having two international covenants at the level of the United Nations: The International Covenant on Civil and Political Rights ('**ICCPR**') and the International Covenant on Economic, Social and Cultural Rights ('**ICESCR**') which govern specific rights; human rights must be seen as a system where all rights are interdependent, indivisible and interrelated. The vision of a comprehensive human rights system<sup>148</sup> was built on the understanding that, in order to guarantee the dignity of the human person, all human rights should be reached. In this way, the integral human rights system is established where the violation of either their civil or political right; or economic, social and cultural right, damages the achievement of the others.
- 9.2. Everyone has the right to safe drinking water. The right to water is essential for a dignified life and is vital for the realisation of many other rights, such as the rights to health, life and an adequate standard of living. Although not mentioned explicitly in the International Covenant on Economic, Social and Cultural Rights, it is an essential part of realizing the right to an adequate standard of living, and has been recognized in a wide range of international human rights instruments.
- 9.3. In its November 2002 General Comment 15<sup>149</sup>, the United Nations Committee on Economic, Social and Cultural Rights provided detailed guidance to State Parties regarding their obligations to respect, protect and fulfil the right to water. The Committee on Economic, Social and Cultural Rights also notes that the right includes the following interrelated and essential features:

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

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

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<sup>148</sup> In 1948 the Universal Declaration of Human Rights (UDHR) was drawn up. The content of this document was further reflected two treaties, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights. To maintain the interrelationship between the rights contained in each of the Covenants, the idea that all rights are interdependent and indivisible was stressed.

<sup>149</sup> United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) General Comment 15

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

- 9.4. On 28 July 2010, through Resolution 64/292<sup>150</sup>, the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of human rights. To demonstrate the indivisibility of these rights the Resolution further emphasised that universal access to sanitation is, “*not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality*” of water resources.
- 9.5. Affirming the substance of this General Assembly Resolution, the United Nations Human Rights Council resolved in September 2010 that the human right to water and sanitation was legally binding on state governments under established human rights, tempering the expansive international obligations declared by the General Assembly while reiterating the “*primary responsibility*” of national governments for safe drinking water and sanitation.
- 9.6. Furthermore, in April 2011, the Human Rights Council adopted, through Resolution 16/2, access to safe drinking water and sanitation as a human right: a right to life and to human dignity.
- 9.7. On May 2011, the World Health Organisation (WHO), through Resolution 64/24, made a call to Member States “to ensure that national health strategies contribute to the realisation of water and sanitation – related Millennium Development Goals while coming in support to the progressive realization of the human right to water and sanitation”.
- 9.8. On 28 September 2011, the Human Rights Council passed a new Resolution 18/1 which takes the human right to safe drinking water and sanitation a step further. The Human Rights Council welcomed the submission of the compilation of good practices on the right to safe drinking water and sanitation, in which the Special

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<sup>150</sup> The Resolution calls upon States and international organisations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all.

Rapporteur put particular emphasis on practical solutions with regard to the implementation of the human right to safe drinking water and sanitation. **The Resolution calls on States to ensure enough financing for sustainable delivery of water and sanitation services**. (Own emphasis)

- 9.9. Most human rights treaties were drafted and adopted before environmental protection became a matter of international concern. Legal recognition has however been expanding for decades at national and regional levels. Since the United Nations Conference on the Human Environment in 1972, more than 100 countries have incorporated the right to a healthy environment into their national constitutions, in varying formations.
- 9.10. The human right to a healthy environment brings together the environmental dimensions of civil, cultural, economic, political and social rights, and protects the core elements of the natural environment that enable a life of dignity.
- 9.11. Diverse ecosystems and clean water, air, and soils are now accepted as being indispensable for human health and security. The right also protects the civic space for individuals to engage in dialogue on environmental policy.
- 9.12. General Comment 15<sup>151</sup> also notes that environmental hygiene, as an aspect of the right to health under Article 12 paragraph 2 (b) of the International Covenant on Economic, Social and Cultural Rights, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions. The Committee on Economic, Social and Cultural Rights further notes that State parties should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes. In addition, State parties should monitor and combat situations where aquatic systems serve as a habitat for vectors of diseases wherever they pose a risk to human living environments.
- 9.13. South Africa by virtue of the Constitution and ratification of the ICESCR, bears responsibilities for the fulfilment of the obligations to protect the environment and to provide access to safe water and sanitation.

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<sup>151</sup> General Comment 15 Paragraph 08.

## 10. Regional Legal and Policy Framework

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

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

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## 11. Findings

11.1. It is accepted that raw, untreated **sewage** is being discharged into the Vaal. Based on the submissions, it is accepted that the inoperative and dilapidated wastewater treatment plants have been unable to manage the treatment of the sewage and wastewater produced in the area that the treatment plants service (which includes areas outside of the Emfuleni municipal locale. As a result, raw sewage flowed not only into the Vaal but also onto residential streets, school, homes and other public areas in the jurisdiction of the Municipality.

11.2. The Commission noted that the flow of raw, untreated sewage is not a once off, or short term occurrence, but has been taking place for a long period of time. Certainly, the discharge of raw, untreated sewage into the Rietspruit and Vaal Rivers has been taking place in excess of five years.

11.3. The impact of such discharge over such a period of time is found to have violated a number of human rights, which includes the rights to:

11.3.1. **Human dignity** – Human dignity is centrally located in our Constitution both as a founding value and a right within the bill of rights. This premium afforded to dignity as a value recognises the indignity of the past, when people were deemed to be far less than equal or deserving of equal access for instance, to services. Dignity as a protected right of itself asserts that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.<sup>152</sup> It cannot be that for a long period of time, raw, untreated sewage in homes, streets, in school and in public areas accords with ones sense of dignity. Nor can it be respectful of the right to dignity when ones source of food is threatened and when one is forced to consume water that has raw, untreated sewage over a period of time. Such treatment for lack of corrective action is degrading an inhuman.

11.3.2. **Freedom and security of the person** – The right to freedom and security of the person includes the right not to be “treated ... in a cruel, inhuman or degrading way”.<sup>153</sup> To have to constantly see or smell sewage in your private living spaces and to have raw sewage flow into water source from which Rand Water gets over 40% of the water it turns into drinking water, is to be treated by the Municipality, who has the responsibility, in terms of the Constitution, the

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<sup>152</sup> Section 10.

<sup>153</sup> Section 12(1)(e).

WSA, and the Municipal Structures Act 117 of 1998, to provide water supply services and sanitation services, in a degrading way which must threaten the security of persons. The impact on the sense of security of more vulnerable persons affected by such conditions such as the elderly, children, persons who are ill and persons with disabilities are likely to be even more acute.

11.3.3. **Environment** – In terms of this right, everyone has the right “to an environment that is not harmful to their health or well-being”,<sup>154</sup> and everyone has the right to “have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that: (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.<sup>155</sup> Based on population growth, the increase of industry and increasing inability of the Municipality to manage the treatment of sewage, and its disposal, has meant that large volumes of raw, untreated sewage is discharged on a daily basis, and over a period of time into the river system. In addition, such waste has entered both public and private spaces. Both the volume of flow and duration of the flows has an adverse effect on the river and riverine ecosystems. These effects may become irreversible and have dire consequences in a water scarce country like South Africa very shortly. In addition, the inadequate management of such waste into both public and private areas apart from the rivers, has meant that the immediate and personal environment of persons and animals are negatively affected. Such spaces can no longer be considered to environmentally safe when raw sewage can frequently be anticipated in them. The exposure to raw sewage, the air that surrounds it, and the drinking water from the polluted Vaal causes a number of diseases, such as cholera, typhoid and salmonella.<sup>156</sup>

11.3.4. **Property** – No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.<sup>157</sup>

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<sup>154</sup> Section 24(a).

<sup>155</sup> Section 24(b).

<sup>156</sup> The Australian Government Department of Health, “3 Disease from Sewage”, November 2010. Available at: <https://www1.health.gov.au/internet/publications/publishing.nsf/Content/ohp-enhealth-manual-atsi-cnt-l~ohp-enhealth-manual-atsi-cnt-l-ch2~ohp-enhealth-manual-atsi-cnt-l-ch2.3>.

<sup>157</sup> Section 25(1).

Section 25(4)(b) makes clear that property is not limited to land. The flow of sewage into the yards of community members limits the full use and enjoyment of their properties or homes. Apart from limiting usage, it must make such spaces almost uninhabitable. In addition, the consumption of polluted water from the Vaal by livestock impacts the health of such livestock. One submission was made to the panel indicating that livestock had died after the consumption of polluted water over a period of time.

11.3.5. **Health care, food, water and social security** – Everyone has the right to have access to sufficient food and water. Section 27(1)(b) of the Constitution requires that the state take reasonable and other measures within its available resources to ensure that everyone ultimately has access to healthcare, sufficient food safe water and adequate sanitation. These rights have been grouped together by design, in recognition that they are inextricably linked. Exposure to and consumption of polluted water and air, over a period time, caused by the inability to manage the treatment of sewage affects the health of consumers of such water and air. Additionally, the consumption of fish which are affected, and livestock depending on the waters of the polluted river, has serious negative health implications for consumers. The running of raw sewage impinges on the quality and safety of water the Municipality and Rand Water can supply to a large group of consumers.

11.3.6. **Children** - A child's best interests are of paramount importance in every matter concerning the child, and every child has the right to be protected from "maltreatment ... or degradation".<sup>158</sup> As stated in this report, the Commission observed children playing in untreated wastewater during its site-inspection. Moreover, it was noted that raw sewage is present at times at school and even in the homes of people. This scenario heightens the vulnerability of children to disease, and illness. It has long-term impacts and limits their potential in many fundamental areas of life, including education and future work. The situation is antithetical to the best interests of any child in the Emfuleni area.

11.3.7. **Just administrative action** – In terms of this right everyone has the right to administrative action that is lawful, reasonable and procedurally fair.<sup>159</sup> The Municipality is obligated, variously in terms of section 152(2) of the Constitution,

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<sup>158</sup> Sections 28(2) and (1)(d).

<sup>159</sup> Section 33.

section 4 and 73 of the MSA, the WSA, and the WSA Water Standards Regulations to provide effective and efficient municipal services which include access to water supply services and sanitation services. This report goes to some length to demonstrate the obligations of the Municipality under law. Most importantly, both the NWA and NEMA requires not only that the Municipality does not pollute the air or water, but that it takes steps to prevent the pollution and degradation of air and water. In recognising, that pollution and degradation are not confined by legal boundaries, but that they require a range of actors to manage the environment, legislation provides for both oversight roles for the Gauteng Province, the DWS and National Treasury and for enforcement where unlawful pollution is imminent or has occurred. The resultant Sewage Problem is evidence of a failure to provide administrative action that is lawful and reasonable.

11.4. The remaining findings (**'the Findings'**) follow the structure adopted in the terms of reference for the Inquiry and appear accordingly below.

*The consequences and extent of ascertained human rights violations:*

11.5. The Vaal, Gauteng's major source of water for domestic and commercial use, continues to be polluted at the time of this report. The sewage flow related pollution, according to Professors Tempelhoff and Munnik, first started in the early 1980s<sup>160</sup> and has continued. Given the long period of time over which sewage has been discharged into the Vaal, it is reasonable to infer that some 40 years later, coupled with increased volumes of discharge, the Vaal is severely polluted on account of sewage;

11.6. Recent media accounts, report high levels of wastewater with raw untreated sewage running into people's yards and even homes;<sup>161</sup>

11.7. It is accepted that pollution of rivers has adverse impacts to the ecosystems within the river and in riverine areas as well. Both fauna and flora are dying, and being harmed to the extent that damage and imbalance in the ecosystems may be irreversible. Impacts have already been documented in respect of the reduced safety of the Yellowfish population, endemic to such rivers in South Africa;

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<sup>160</sup> Tempelhoff et.al (note 125 above) at 116.

<sup>161</sup> See footnote 122 above.

11.8. The attraction of the Vaal as a tourist destination, and which is therefore income generating, is also at a decline as the Vaal becomes increasingly polluted and unattractive to tourists.; and

11.9. Although not scientifically demonstrated at the Inquiry or clearly documented elsewhere, the Commission accepts the causal connection between regular consumption and exposure to polluted water by humans as resulting in ill-health to them. Additional, risks to health potentially arise where livestock and vegetables grown in such polluted waters are consumed. There are therefore clear health risks from exposure to the raw sewage from the street, school, homes, and from eating fish caught or other river creatures from the Vaal; or from drinking water, swimming, bathing or conducting any recreational activity directly in the Vaal.

*The cause or causes of the human rights violations:*

11.10. Pollution of the Vaal River arising from the flow of untreated sewage into the river and elsewhere has given rise to the human rights violations enumerated in paragraph 11.3 above. The pollution has been caused by sewage not being adequately managed and treated by responsible authorities before it is disposed.

*The persons and/or state and/or private entities responsible or liable for any ascertained human rights violations:*

11.11. The responsible authority at local level is the Municipality which bears legal responsibility to manage waste such as sewage and water resources in its jurisdiction.

11.12. The Municipality did not dispute this responsibility or that it had not fulfilled the responsibility, and instead conceded that these failures were attributable to its failing wastewater infrastructure.

11.13. The WSA creates a clear responsibility on the Municipality to provide water supply services and sanitation services, as defined in the WSA to its customers living in formal and informal settlements. In order to give proper effect to this obligation the WSA requires that the Municipality draw up "water services development plans". This obligation which took effect with the passage of the WSA in December 1997 is an important one which includes three key elements:

- i) the development of a plan for the provision of such services must include information regarding the size and distribution of the population within its area, and the existing water services.
- ii) The plan must be reviewed by the Minister for DWS, Gauteng COGTA and other municipalities, both for oversight, co-ordination, planning and integration purposes; and;
- iii) Relevant provincial and national government departments such as the DWS and CoGTA must monitor the implementation of the plan once adopted.

11.14. The existing infrastructure is both old and inadequate to cater for growing demands. It has been unable to cater for such demands for a long period of time and not on account of a sudden unanticipated explosive increase in the population.

11.15. Where a water service institution and in this case the Municipality has not adequately planned, or has not been able to implement its plan adequately, monitoring controls are triggered at other levels of government. The monitoring required of the national and provincial departments would have allowed early intervention to address the challenges in full realisation of the plan. Similarly, the Minister of the DWS has authority to intervene where an organ of state such as the Municipality has not been compliant with the NWRS.

11.16. In addition to not providing water supply services the Municipality has, by not maintaining the water sanitation infrastructure, caused sewage pollution of the Vaal and in the streets and homes of persons living in the Emfuleni municipal area. This occurred in contravention of the NWA and NEMA.

11.17. Despite having the ability to do so, it did not appear to the Commission that the DWS and DEFF had been able to hold the Municipality accountable for causing sewage pollution as required in terms of section 19 of the NWA and section 28(2) of NEMA. The pollution in fact continued for a number of years without being successfully contained.

11.17.1. In response to 11.6, in the interim report, DEFF advised the Commission that although sections 19 of the NWA and 28 NEMA provide for the same basic processes in the issuance of administrative enforcement mechanisms, they have different triggers. Section 28 NEMA is triggered "by a person that causes, has caused or may cause significant pollution or degradation **of the**

**environment**” (own emphasis), section 19 is triggered “by any person who fails to take reasonable measures to prevent pollution of **a water resource**” (own emphasis).

11.17.2. According to DEFF’s interpretation, applying the rule, *generalia specialibus non derogant*, which means that for the purposes of interpretation of two statutes in apparent conflict, the provisions of a general statute must yield to that of a special one, section 19 of the NWA, which applies to “water resources” as opposed to “the environment” is the appropriate enforcement mechanism to apply to a contravention involving the pollution of a watercourse of the Vaal.

11.17.3. Two alternatives to DEFF’s interpretation:

One:

11.17.3.1. In the case of *Khumalo v Director-General of Co-Operation and Development and Others*,<sup>162</sup> the SCA held that the rule *generalia specialibus non derogant* is not always applicable, and that the cardinal question, in determining its applicability, is whether the legislature intended that its later general Act should alter its own earlier special enactment.<sup>163</sup> In addition, courts are required, where an apparent conflict between legislation exists, to prefer any reasonable interpretation of the legislation that avoids a conflict, over any alternative interpretation that results in a conflict.<sup>164</sup>

11.17.3.2. Section 28 can therefore be seen as not in conflict with section 19, but rather complimentary. Where DWS has not enforced section 19, there exists room for DEFF to step-in, in communication with DWS and within the bounds and respect of section 41 of the Constitution and DWS’ jurisdiction, and enforce section 28.

Two:

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<sup>162</sup> 1991 (1) SA 158 (AD).

<sup>163</sup> Ibid at para 4.

<sup>164</sup> Section 150 of the Constitution.

11.17.3.3. As stated in paragraph 2.1 above, the Inquiry was “into the running of sewage and other wastewater into the Rietspruit and the Vaal River, and into the streets, homes and school grounds within the surrounding community”, and not just about the Vaal. There exists in the flowing of the raw sewage into streets and homes pollution and degradation of the environment and consequently an opportunity to enforce section 28 NEMA.

11.18. Several submissions informed the Commission of a lack of skills within the Municipality to effectively manage the challenges that had been identified in respect of wastewater management more than ten years ago. No persuasive evidence indicated that these deficiencies had been adequately responded to at all. In addition, it did not appear that effective consequence management was applied in respect of repeated failures in delivery of wastewater services. More recently, the Commission has however been made aware that the Municipality had finally been placed under administration in the face of repeated non-compliance with accounting and service delivery obligations.

11.19. Deviations from management which posed serious risks for the Municipality and service delivery recipients are detailed in the independent forensic reports and identified by the AGSA.<sup>165</sup> Such risks arose in respect of contracts with service providers, choices made in the appointment of appropriate service providers, and the actual delivery by such service providers which has affected the management of wastewater corrective actions.

11.20. In certain instances the Commission was advised that contracts concluded by the Municipality with service providers were not honoured despite the provisions of section 116 of the MFMA which requires that a contract entered into with a service provider (appointed through a supply chain management system (**SCM**)) includes terms for termination in the case of non-performance or under performance. Where full delivery was not achieved to the standard required to address the problems in wastewater management, and infrastructure, such contracts ought not to be accepted or paid. Alternatively, where contracts were entered into with or without

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<sup>165</sup> See the AGSA’s Consolidated General Report on National and Provincial Audit Outcomes 2017-2018 at 97-99. Accessible at <https://www.agsa.co.za/Portals/0/Reports/PFMA/201718/GR/PFMA2017-18%20Consolidated%20General%20Report.pdf>.

SCM processes, a Municipality has a common law right to cancel the contract and claim damages for breach of contract. The Municipality has a responsibility to enforce controls and oversight to check its spend of public funds, in the interests of delivery.

11.21. According to its website, Rand Water established the Rand Water Bulk Sanitation unit (**‘the Bulk unit’**).<sup>166</sup> The fundamental reason for establishing the Bulk unit, according to Rand Water, comes from the fact that through Rand Water’s extensive catchment-monitoring programme, the main polluters identified were primarily the sewage treatment plants, specifically the sewage plants belonging to local municipalities.<sup>167</sup>

11.22. Any sewage pollution that drains towards the sources from which Rand Water draws its raw water will have an impact on the quality and treatment cost of potable water,<sup>168</sup> and according to National Treasuries submissions to the Panel, Rand Water draws 98% of its water from the Vaal.

11.23. The primary focus of the Bulk unit was or is to conduct assessments of the sewage treatment plants, to report on the findings and to provide site-specific recommendations to the respective municipalities that guarantee effluent compliance with the general standards set by DWA.<sup>169</sup>

11.24. Between 2004 and 2008, the Bulk unit provided services to Randfontein Local Municipality related to the management, operation and maintenance of the Randfontein wastewater treatment works.<sup>170</sup> The work or assistance provided by Rand Water appears extensive as it included: management functions personnel allocation and empowerment, analytical services, operational functions, electrical, mechanical and instrumentation maintenance, process upgrading, and environmental monitoring and control.<sup>171</sup>

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<sup>166</sup> See <https://www.randwater.co.za/WaterAndInfrastructureManagement/Pages/Sanitation.aspx>.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

11.25. As a result, Midvaal Local Municipality's personnel were skilled through an intensive training programme, waste water treatment plant staff members received competency ratings, a monitoring programme was implemented to ensure that all the industries/ polluters are identified, categorized, controlled and appropriately billed, pollution was minimized, sewer systems and wastewater treatment processes were protected and revenue associated with the conveyance and treatment of industrial effluent is covered.<sup>172</sup>

11.26. Rand Water has or had, through the Bulk unit been able to give effect to its powers in terms of section 30 and 33 of the WSA. It is unknown as to whether the assistance or services of the Bulk unit were used or offered to the Emfuleni Local Municipality. This may possibly be the help turned down that Mr Khawe was referring to in his submissions.

11.27. Shared liability arises in respect of Rand Water, the Municipality, Provincial Government and Provincial Treasury. In this instance, submissions indicating that the Municipality was losing 'billions of rands' by not managing its account with Rand Water is telling. In terms of the WSA, a water board set its tariffs and must, amongst other obligations, act in an equitable, transparent and fair manner. If the amount is significant enough to run into billions of rands, it is deeply concerning that such amounts were allowed to accumulate without effective intervention by Rand Water. It must have known how much it was owed by the Municipality and could not accept gross non / or underpayment from the Municipality. It had a responsibility based on its ethical finance and business principles to fix this with the Municipality.

11.28. It is however, not known, based on information before the Panel whether and what steps Rand Water took to intervene in respect of its account with the Municipality.

11.29. In addition to Rand Water's financial report being audited and submitted to DWS, Gauteng Province and Parliament, in terms of the MFMA Rand Water must each month furnish National Treasury with the statement with the amounts to be paid by a municipality and if there are any arrears owing.<sup>173</sup>

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<sup>172</sup> Ibid.

<sup>173</sup> Section 41(2).

11.30. General financial mismanagement appears to have ultimately reached such a poor state that in June 2018, the EFL was put under a section 139 the Constitution intervention by the Gauteng Province.

11.30.1. In response to these findings in the interim report, the Gauteng Provincial Treasury (**GPT**) asserted that it did “all that was necessary, within its scope and mandate, to assist the [Emfuleni] municipality with its current woes.” According to GPT, this included:

11.30.2. The State of Municipal Finance and Municipal Compliance reports which covers outstanding debt due to creditors like Rand Water is also presented by GPT, annually and quarterly at various administrative and political intergovernmental structures. This is done to raise awareness on the state of Bulk Accounts (like that of Rand Water) and the importance of the settlement of the accounts as per the MFMA to both officials and politicians who attend and participate in these structures.

11.30.3. In relation to the growing outstanding Rand Water Bulk Account, the Municipality has been on many previous occasions assisted by the GPT working with COGTA providing inputs on the payment proposals and in an effort towards entering into repayment arrangements to address the arrear accounts. Despite efforts made by GPT and COGTA, the Municipality, did not service and honour the repayment arrangements established with Rand Water causing the arrangement to lapse and become nullified.

11.30.4. In April 2018 GPT deployed a Municipal Finance Advisor (**‘the Advisor’**) to the position of a Chief Financial Officer of the Municipality, on a five-day-a-week basis, to assist with the running of the finance department. The cost of this deployment was borne by the GPT. The Advisor placement made by the GPT was eventually appointed by the municipality on a fulltime basis as the Municipality’s Chief Financial Officer (**CFO**).

11.30.5. Under the Municipal Manager and CFO’s stewardship, guidance and lead, several payment plan proposals were made to Rand Water, however a payment proposal, amenable to all parties, had not yet, at the time of responding, been successfully concluded. GPT advises that negotiations remain ongoing.

- 11.30.6. When the crisis became severe, GPT working with National Treasury and COGTA, assisted the EFL in the development of its Financial Recovery Plan (**FRP**) which included a financial resource plan for the Municipality that was approved by the Gauteng MEC for Finance and funding was negotiated and allocated for water and sanitation projects.
- 11.30.7. GPT has consistently advised the Municipality to increase and utilise its budgets for maintenance (noting that loss prevention should more than cover any cost outlay) and also to utilise grant funding towards, metering, refurbishment, upgrading, replacing and repairs of its water infrastructure, to reduce its bulk water account, but to no avail, hence the section 139 provincial intervention had to be instituted in the Municipality.
- 11.30.8. The intervention was further stepped up and strengthened in June 2020 with the deployment of a Lead Administrator and team of (section 139) Administrators focusing on key municipal functions to further strengthened the intervention. The team of Administrators was further augmented by appointment of FRP Manager and Revenue Experts to oversee and assist with the implementation of the FRP respectively.
- 11.31. In addition, in its response to the interim report GPT advised that it does not have a legislative mandate to bail out municipalities and neither a mandate to allocate resources from the provincial fiscus to municipalities to supplement their capital and operating activities except for those departments that have mandates that are implemented by municipalities.
- 11.32. However, GPT further advised that the allocation by the National Treasury for the Regional Bulk Infrastructure Grant to EFL in this financial year (2020-2021) was R1 113 000 000.00 (one billion, one-hundred and thirteen million rand). Of the total allocation, R60 500 000 (sixty million, five-hundred thousand rand) was scheduled as an indirect transfer in May 2020, R30 250 000.00 (thirty million, two hundred and fifty thousand rand) in June 2020 and thereafter R113 583 000 (one-hundred and thirteen million and five-hundred and eighty-three thousand rand) per month from July 2020 to March 2021.

Lack of skilled human resources:

11.33. Professors Tempelhoff and Munnik, both highlighted the “white-flight” of experienced wastewater engineers or staff in the late 1980s and the lack of transfer of skills.<sup>174</sup>

11.34. According to the Consultants, the necessary skills are available in South Africa. It is the responsibility of the Municipality to, in accordance with the MSA and the Municipal Structures Act, appoint skilled workers and/or develop capacity for employees to be able to provide the necessary services.

Cooperation between municipalities:

11.35. It is unclear from legislation but it would seem that it would be the responsibility of the Gauteng Province and the City of Johannesburg, the Midvaal, and the Emfuleni municipalities to establish paths of communication and methods of engagement in order to take the strain off the Emfuleni Local Municipality. The Commission finds that improved intragovernmental cooperation is necessary to strengthen and coordinate efforts toward the protection of water resources, and for effective management of wastewater infrastructure.

Theft and Vandalism:

11.1.1. Theft and vandalism were cited as factors contributing to the ineffectiveness of wastewater management, particularly because of the damage it causes to infrastructure. Theft has caused monetary losses to the Municipality, but no estimated cost impact was provided for any financial year relating to the problem, nor were clear containment and preventative plans submitted to plug this additional leak in scarce resources caused by theft from the SAPS or from the Municipality.

Legislative framework

11.2. There appears to be a need to develop a cohesive legislative framework which may be relied on by local government to apply policy, plan, seek intervention, develop, monitor and evaluate the environment and the provision of key services such as water and sanitation.

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<sup>174</sup> Tempelhoff et.al (note 125 above) at 116.

11.3. In particular, the number of by-laws, and national legislation which appear to have concurrency in certain instances, should be consolidated and training on the framework and policy sustained. Without such efforts, the exercise of oversight in such technical areas of delivery will be seriously challenged and the experience of the Emfuleni Local Municipality is likely to be repeated in many others which are custodians of equally vital water resources in the country.

#### Accountability Mechanisms

11.4. Relevant legislation, set out above, relating to the environment, water services, sanitation, and PSA and MSA all provide for accountability or contain accountability mechanisms. While the information provided to the Panel did not provide evidence of these mechanisms not being applied or given effect to, the resultant pollution and the financial and administrative failures of the Municipality, which has resulted in a section 139 administration, an administrative intervention, which over the past two years has not bore fruit,<sup>175</sup> the general concern is that the mechanisms may not have been invoked or given effect to.

11.5. The DWS indicated that it had already taken steps to prevent the pollution on behalf of the Municipality, but that it is now struggling to recover its costs from the Municipality.

#### Appropriate action, recourse or remedy within the Commission's powers

11.6. The Commission may in accordance with the SAHRC Act, 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 human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights.

11.7. The Commission's recommendations are set out below.

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<sup>175</sup> See <https://www.parliament.gov.za/press-releases/gauteng-provincial-government-failing-people-emfuleni> and <https://pmg.org.za/committee-meeting/30497/>.

## 12. Recommendations

12.1. The Commission is grateful to all the participants to the Inquiry into the running of sewage and other wastewater into the Rietspruit and the Vaal River, and into the streets, homes and school grounds within the surrounding community, from failing wastewater sewerage systems of the Emfuleni Local Municipality and for the responses to the Interim Report.

12.2. The Municipality's website proclaims that it is a place with, "Greenery, space and natural beauty in abundance. These are the visitor's first impressions of Emfuleni but look further and you will discover an active, highly industrialised and diversified area and one of the most knowledge-intensive areas of Africa", the unfortunate reality for many who live in this municipality is that its streets and waters flow with raw untreated sewage.

12.3. Access to water is and has been historically unequal, as recognised by the Court in the case of *Mazibuko and Others v City of Johannesburg and Others*,<sup>176</sup> in which Justice Kate O'Regan in her introduction states:

*"Although rain falls everywhere, access to water has long been grossly unequal. This inequality is evident in South Africa. While piped water is plentifully available to mines, industries, some large farms and wealthy families, millions of people, especially women, spend hours laboriously collecting their daily supply of water from streams, pools and distant taps. In 1994, it was estimated that 12 million people (approximately a quarter of the population), did not have adequate access to water. By the end of 2006, this number had shrunk to 8 million, with 3, 3 million of that number having no access to a basic water supply at all. Yet, despite the significant improvement in the first fifteen years of democratic government, deep inequality remains and for many the task of obtaining sufficient water for their families remains a tiring daily burden. The achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is abundantly available to the wealthy, but not to the poor."*<sup>177</sup>

And access to basic sanitation has been, for many South Africans, a long and indignifying process.

12.4. The Commission appreciates the history and context within which the Municipality finds itself, but at the same time the jarring impact to the rights of the community,

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<sup>176</sup> 2010 (4) SA 1 (CC) (*Mazibuko*).

<sup>177</sup> *Mazibuko* at 2.

and to a vital water resource is significant. In the absence of timely and effective response from the multiple spheres of government, Gauteng's most vital water resource may very well have been irreparably damaged.

12.5. And the Commission acknowledges the difficulty of the transition from apartheid, which brought with it an exodus of particular technical skills in the late 1980s / early 90s, but as stated in the preamble to the MSA, "the Constitution of our non-racial democracy enjoins local government not just to seek to provide services to all our people but to be fundamentally developmental in orientation".

12.6. The Commission is aware that developmental, middle income countries like South Africa face enormous challenges in accelerating the progressive realisation of rights to all its people. The Covid-19 pandemic has exacerbated these challenges, and shattered a struggling economy.

12.7. The Commission is aware of the various interventions made by the National DWS, National Treasury and Gauteng Provincial Treasury in its attempt to address the Sewage Problem and general collapse of the Emfuleni Municipality. The DWS's plan to combat pollution in the Vaal and National Treasury's significant cash injection through the Regional Bulk Infrastructure Grant is acknowledged.<sup>178</sup> DWS indicated that as part of its intervention in terms of the Implementation Protocol, it had appointed the East Rand Water Care Company, an entity of the Ekurhuleni Metro, as implementing agent of the plan. The specialist wastewater company, is to ensure that the infrastructure is made operational and wastewater pollution in the Vaal River is stopped.

12.8. Unfortunately these efforts have not been enough to address the unmanageable situation that is occurring in the Emfuleni municipal area. The contents of this final report, media reports and publications by experts lends itself to a conclusion of extensive non-compliance at all spheres of Government with legal frameworks which seek to protect water resources, and to regulate water and sanitation services. These levels of poor compliance resulted in the situation observed by the Commission: the pollution of the streets and homes of persons living within the Municipality and the pollution of the Vaal and the Rietspruit. Despite concerted

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<sup>178</sup> The DWS Minister, Gugile Nkwinti announced on 10 April 2019 that an Implementation Protocol was signed on 29 March 2019 by the Departments of Water and Sanitation, Cooperative Governance and Traditional Affairs in Gauteng, Emfuleni Local Municipality, the South African National Defence Force, the Municipal Infrastructure Support Agent and the East Rand Water Care Company.

efforts by DWS and National and Gauteng Provincial Treasury, the information presented in this report demonstrates further, the level to which degeneration must occur within a local municipality before a firm intervention is made at much cost to the public and the state.

12.9. To add insult to injury, in addition to owing 'billions of rands' to Rand Water for bulk water, the contents of the judgment in *Cape Gate (Pty) Limited and Others v Emfuleni Local Municipality and Others*<sup>179</sup> showed that the Municipality owed or owes hundreds of millions of rands to Eskom for the supply of Bulk Electricity.

12.10. It further appeared from Parliamentary reports that the current section 139 intervention by the Gauteng Government /COGTA have not yielded successful results. Reports from Parliament stated that the first two years of the intervention were a failure, and that the Province is trying again.<sup>180</sup> It is understood that in June 2020, the Gauteng Provincial Treasury stepped-up and strengthened the intervention with the deployment of a Lead Administrator and team of (section 139) Administrators focusing on key municipal functions.

12.11. Given the situation, there is a need for both urgent and comprehensive intervention, in and above the current intervention by the Gauteng Province.

### **The Commission's Recommendations to the Respondents**

#### ***Respect the Rule of Law - Compliance with Court Orders***

12.12. At the outset, and out of desperation of the Sewage Problem and ignored court orders issued in the interest of SAVE and the community of the Vaal, directing the Municipality to do its job, the Commission recommends and implores National, Provincial and Local Government to take active steps to know and understand all of its constitutional and legislative obligations and to comply and implement them as is the duty of any a public servant or municipal administrator. The Commission implores the Municipality to uphold the Rule of Law and Constitutional Supremacy in South Africa.

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<sup>179</sup> [2019] ZAGPJHC 39 (6 February 2019) at para 5.

<sup>180</sup> See <https://www.parliament.gov.za/press-releases/gauteng-provincial-government-failing-people-emfuleni> and <https://pmg.org.za/committee-meeting/30497/>.

*National Government Intervention – Section 139(7) Intervention*

- 12.13. Section 63 of the WSA replicates section 139 of the Constitution which allows for the Province to intervene in the running of a municipality when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation. Section 139(7) of the Constitution empowers the National executive to intervene where the Province cannot or does not or does not adequately exercise the powers or perform the functions referred to in section 139.
- 12.14. Section 63 of the NWA empowers Gauteng COGTA or DWS to intervene where a municipality has not effectively performed any function imposed on it by or under the WSA. In accordance with this power section 73 of the NWA allows a Minister all the powers to construct and run water services works.
- 12.15. In terms of section 19 of the NWA, if a person, including a municipality, who is the owner of land or in control of land on which any activity or process is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause pollution, fails to stop the pollution from recurring, a catchment management agency (which includes the DWS or on DWS' authority, Rand Water) may take the necessary steps to prevent the pollution or prevent the pollution from recurring and claim back the costs from the landowner or person controlling the land.
- 12.16. The Commission is recommending that, in terms of section 139(7) of the Constitution and section 63 of the WSA and sections 19 and 63 of the NWA, Cabinet take a decision for National Government to intervene in the running of the Emfuleni Local Municipality. The failure to repair and replace the sewerage systems of the Municipality is not only a failure to comply with the WSA, it is a failure of many people over many years to properly run the Municipality. It is proposed that all departments of the Municipality, save for ones the Provincial and National Government can show is operating adequately, be taken over by National Government. Such an intervention can also make use of the services of organs of state such as Rand Water and SALGA, given that the Minister for DWS can issue directives to Rand Water, and further facilitate the implementation of DWS' current and impending interventions.
- 12.17. Wastewater systems will be needed for many years to come. It is therefore recommended that the intervention not be a reactionary one, but an intervention

with the purpose of establishing long term, implementable frameworks for the maintenance, repair and replacement of wastewater systems.

*Limiting and Preventing Pollution of the Vaal by Untreated Sewage*

12.18. In this respect the Commission recommends:

12.18.1. that in the short term that DWS or Gauteng COGTA, together with experienced wastewater management specialists, and respective Treasury Departments draw up a cost-effective interim plan to urgently stop or limit the flow of sewage in the streets and homes of people living in the Emfuleni area and also into the Vaal. The use of South African National Defence Force is not ideal, and should be exceptional and short term;

12.18.2. that the National and Provincial governments, for the medium and long term, conduct a detailed needs assessment for the clean-up and rehabilitation of the Vaal. Such an assessment should be supported by experts including financial experts, to cost and make available a project plan and budget for the implementation of such plan on a short, medium and long term basis. This includes DWS and/or Gauteng COGTA engaging with experienced wastewater specialists for job specifications to be drawn up in order to employ or contract the necessary skilled people to repair and replace the defective sewerage systems in the Emfuleni Municipality.

12.18.3. that DWS develop and implement policies and standards to deal with water crises in South Africa, and the contamination of the Vaal River in particular;

12.18.4. that vandalism and theft be regularly reported to the SAPS;

12.18.5. that the DWS consider placing private security guards at the sewerage infrastructure to prevent further vandalism and theft;

12.18.6. that DWS reintroduce the Blue and Green Drop transparent quality measuring system;

12.18.7. that the DWS collaborate with DEFF and use the inspectors provided for in NEMA to investigate offences relating to water and sanitation, as they are likely to relate environmental damage.

- 12.18.8. that in order to prevent a repeat of the issues, the Vaal River and the associated water infrastructure be declared as critical infrastructure as per the Critical Infrastructure Act 8 of 2019. Declaring the Vaal and the respective sewerage systems as critical infrastructure would ensure that it will be protected, and restored. Once the area has been declared and accorded the status, it will be incumbent on National and Provincial Government to ensure that it is safe, maintained and that an adequate budget is provided to prevent a recurrence of the current environmental and human crisis in our constitutional democracy;
- 12.18.9. that municipal councils develop mechanisms to interact with communities and identify service needs and priorities. Without capacity to strategize, integrate and interface with non-municipal groups, many local governments are unlikely to be sustainable in the future. The implementation of new strategies and policies requires strong municipal leadership, with the necessary support and belief of the municipal council. Continuous communication between all role players and regular oversight and training should be provided and encouraged;
- 12.18.10. that regular inspections of the Vaal and regular meetings to report on all of the above take place between Respondents and the Commission; and
- 12.18.11. that National Treasury allocate the funds required to give effect to the recommendations.

#### *Overall Accountability and Enforcement of Existing Legal Frameworks*

- 12.19. The Commission would like to reiterate that no evidence was put before it in order for the Commission to make a finding on if, who, when and/or why existing legislation was not given effect to. The Commission would however like to request, a renewed or continued commitment to accountability and to ensure where not already implemented:
- 12.19.1. that all municipal and public servants be trained on their constitutional and legislative obligations, either by the National School of Government or where there are limitations there, then by experienced administrative law academics or practitioners;

- 12.19.2. that public servants and municipal administrators and staff who failed to comply with their obligations under the PSA, the MSA and the MFMA, and contributed to the disintegration of the Municipality be disciplined or dismissed in accordance with the PSA, MSA and labour relations legislation -- The PSA and MSA set out a lengthy list of responsibilities for public servants and municipal staff. These obligations are a minimum duty on government through its officials to render mandated services to the public in an effective, efficient and economically cost effective manner. Effective performance management requires vigilance over the quality of delivery and development to build and strengthen the public service. Performance management also requires that municipal staff who do not give effect to their obligations experience the consequences of repeated poor delivery such as dismissed if warranted. In the absence of stringent consequence management, the public purse is impacted and constitutional duties flouted while people continue to live in deteriorating conditions;
- 12.19.3. that any irregular or fruitless and wasteful expenditure be investigated and the relevant parties be made to repay monies to the Municipality and that where applicable the actions be reported to SAPS -- In terms of section 32 of the MFMA, any accounting officer, political office-bearer or municipal official who deliberately or negligently made or authorised irregular expenditure or fruitless and wasteful expenditure is liable for that expenditure. A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure from the person liable for that expenditure;
- 12.19.4. that any allegations of corruption be referred to the Public Protector or the SAPS Special Investigation Unit -- In terms of section 32(6), an accounting officer of a municipality must report all cases of irregular expenditure that constitute a criminal offence, to SAPS. Where the charge is against the accounting officer, the municipal council must report the alleged offence to SAPS;
- 12.19.5. that where contracts are not being honoured, that the Municipality or its administrators institute legal action in terms of the MFMA to cancel the contract or to, under common law institute legal action for breach of contract and claim damages, alternatively claim lost money under unjustified enrichment

- There is a general need to create precedent that communicates to service providers that they will be held to account.

12.20. The Commission is hereby notifying South Africans National, Provincial and Local Government that the Sewage Problem is a crisis and an obvious liability to the State. The consequences of the pollution could result in a string of legitimate civil claims against DWS for damages (as provided for in the NWA). In addition failure to implement the WSA, NWA and NEMA in respect of water and sanitation and pollution of the Vaal area will result in further litigation that could escalate all the way up to the Constitutional Court. Section 151 of the NWA makes the intentional or negligent commission of any act or omission which pollutes or is likely to pollute a water resource unlawful and a statutory offence which carries penalties. Where harm, loss or damage caused by the offence, for which a person was convicted, is proved in Water Courts, the person or persons who suffered harm, loss or damage be may awarded pecuniary damages.

12.21. The Commission requests that all parties to which the above recommendations apply, respond to the Commission jointly or separately, within 60 days of receiving the final report.

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

SIGNED ON THIS THE \_\_\_\_\_ DAY OF FEBRUARY 2021.

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Mr. Jonas Ben Sibanyoni

**Commissioner**

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Adv. Mohamed Shafie Ameerma

**Commissioner**