

OUTA

ORGANISATION UNDOING TAX ABUSE

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The South African Human Rights Commission's Inquiry into whether or not the state of the Vaal River violates or threatens human rights including environmental rights in terms of section 24



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A. INTRODUCTION

1. The Organisation Undoing Tax Abuse (OUTA) is a proudly South African non-profit civil action organisation. It comprises of and is supported by people who are passionate about improving the prosperity of our nation and sustaining the environment. OUTA was established to challenge the abuse of authority, particularly the abuse of taxpayers' money wherever it arises. It is indeed in this spirit that we have noted the South African Human Rights Commission's (SAHRC) call for submissions to its "inquiry into whether or not the state of the Vaal River violates or threatens human rights including environmental rights in terms of section 24" ("the Vaal Inquiry").
2. As far as OUTA is concerned, the state of pollution in the Vaal River, and the ensuing harm to not only the physical environment, but persons in proximity to it, represents a potential failure in the effective use of taxpayer money.
3. As such, this submission is made pursuant to the Terms of Reference (ToRs) published by the SAHRC for the Vaal Inquiry. It is important to note that the ToRs refer to human rights in general and environmental rights in particular. On the latter, section 24 of the Constitution of the Republic of South Africa¹ provides that
 - “[e]veryone has the right –
 - (a) to an environment that is not harmful to their health or wellbeing; and
 - (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation;
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.
4. In fulfilling the objective of the inquiry, and as alluded to by the SAHRC in a general sense; the Commission will have to consider the right enshrined in section 24 together with other rights such the right to human dignity (section 10). In this regard, we wish to

¹ Act 108 of 1996.

emphasize the late Justice Chaskalson P words in the *State v Makwanyane and another*,² that together with the right to life, the right to human dignity

“is the most important of all human right, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others”.

5. Other than the Constitution, the provisions of legislation such as the National Environmental Management Act (NEMA)³ and the Water Services Act (WSA)⁴ should be among those instruments considered in ascertaining the role of organs of State to the pollution in the Vaal River.
6. To this end, this submission pertains the Sedibeng Regional Sanitation Scheme (SRSS) project. It aims to highlight issues which may have contributed towards the delay in the project’s implementation. On this basis, the lack of effective implementation of the SRSS has likely contributed towards the pollution in the Vaal River, thus potentially violating or threatening the human rights of the person residing in proximity to the River.
7. It is important that we clarify that our submission seeks to only aid the Commission in its inquiry, we draw no conclusions as we deem this to be the task of the Commission. Where appropriate, we do make recommendations that will further assist the Commission in its work as far as this inquiry is concerned.
8. Also important is that we highlight that the submission does not, at least in the manner portrayed, directly address items listed in the ToRs. However, we are of the opinion, especially having participated in the oral submissions between 26-28 September, that it is in the general interest of the Commission that we contribute towards understanding the cause(s) to the pollution in the Vaal River. In this sense, our submission will add to the contextual framework of the inquiry.

² 1995 (6) BCLR 665, par [144].

³ 108 of 1998.

⁴ 108 of 1997.

9. The submission is in two parts. Part B is on the SRSS. Here the submission provides the background for the project and the timeline of events compiled from our sources. Attached to this submission will be a list of the documents used in compiling it.
10. Drawing from the timeline and leaning on a legal opinion that was drafted for the Emfuleni Local Municipality (ELM) on the suspension of the SRSS project, this part of the submission brings to the fore issues identified in the opinion. The submission moves on to highlight the SRSS under Rand Water, indicate what deliverables were expected and the extent to which those deliverables have been met according to Rand Water.
11. Based on the above, the submission concludes by making recommendations for the Commission's investigations as far as the SRSS is concerned. The thinking behind the recommendations is that should it be established that indeed rights enshrined in Constitution and in particular the right to a healthy environment have been violated or are threatened, then those parties responsible for the pollution, in whole or in part, should be held accountable in a manner deemed appropriate by the Commission and/or any other body.

B. THE SEDIBENG REGIONAL SANITATION SCHEME

1. Background

12. On March 2011, the Economic Study (Report 2 of the Economic Valuation) (“Economic Report”) prepared for SIRIS Engineering and SS&G Project Finance Solutions best captured the issues prevalent in the sewage infrastructure in the Sedibeng District and the work required to resolve such issues (**See A2**).

13. The Economic Report stated that the

“Sedibeng Regional Sanitation Scheme (SRSS) affects both the Emfuleni and Midvaal Local Municipalities and extends to a portion of the Johannesburg Metropolitan Municipality, all of which are located along the southern boundary of the Gauteng Province. These municipalities fall within the jurisdiction of the Sedibeng District Municipality (SDM). This is a large district, extending along the southern section of the Gauteng Province, between the adjacent provinces of Mpumalanga and North West. The Vaal River forms the southern boundary of the area of jurisdiction of Sedibeng and this river is also the boundary with the Free State Province. Water and sanitation services within the Emfuleni area of jurisdiction are currently provided by a business unit within Emfuleni, known as Metsi-a-Lekoa. However, it is proposed that the SRSS will extend to the northern and western parts of the area of jurisdiction of Midvaal.

The existing sewerage system infrastructure in the affected region has developed piecemeal as the region has grown over the years. The expansion of the waste water treatment works (WWTW) has failed to keep pace with the increase in flow due to growth in the area, resulting in the inflows exceeding the capacity of the WWTW and the treated effluent not complying with the specified standard. In addition, the infrastructure has been poorly maintained, resulting in a poor level of service with frequent breakdowns of pump installations and the discharge of raw sewage into the Vaal River.

In August 2010 Settlement Planning Services undertook a “Social and Economic Assessment of the Sedibeng Regional Sanitation Scheme (SRSS)”. In the report, the background to the proposed SRSS was outlined. This noted that “The sanitation infrastructure in the Sedibeng District is old and requiring high maintenance. It is working at capacity and will not be able to deal with future planned development. It

is estimated that by 2025, the region will have to be able to process 398 MI/day, of which 150 MI/day would have to be provided by a new waste water works”. (Sedibeng District Municipality Proposed Regional Sanitation Scheme: Technical Report, Arcus Gibb & Iliso Consulting, 2009.)

The Sedibeng Regional Sanitation Scheme (SRSS), as currently envisaged, consists of various components, including a new waste water works, upgrading of the current Sebokeng works, a new pump station, new rising mains and a new gravity main outfall, the total cost of which will exceed R3.5 Billion”.

14. Subsequently, the SRSS was initiated by the Emfuleni Local Municipality (ELM), Midvaal Local Municipality and the Sedibeng District Municipality through Metsi-a-Lekoa, the water services provider. Below is a chronological list of events on the SRSS.

2. Timeline of Events

Date	Description
March 2010	SRSS was registered at National Treasury as a Public Private Partnership (PPP), with project number M0002.
March 2010	<p>A Feasibility Study (The draft MSA Section 78(3) for the Sedibeng Regional Sanitation Scheme - SRSS) was prepared by Gibb, Edward Nathan Sonnebergs and Kagiso Financial Services.</p> <p>This Feasibility Study was incomplete because Gibb <i>et al</i> could not provide a solution to meet the affordability requirement for both Public Sector Comparator PSC and the PPP procurement process.</p>
June 2011	<p>The Provincial Project Management office employed SS&G to enhance the work not completed by Gibb, Edward Nathan Sonnebergs and Kagiso Financial Services consortium.</p> <p>SS&G developed several reports to enhance the bankability of the project and assisted the ELM to put together a project funding application to National Treasury through the PPP Unit.</p>
22 July 2011	The ELM submitted the SRSS Feasibility Study, Project Bankability Enhancement Pack and request Treasury views and recommendation.
14 May 2012	National Treasury through a letter to the ELM confirmed that a total amount of R400 million will be allocated to the SRSS through the Regional Bulk Infrastructure Grant (RBIG).
June 2012	The ELM invited tenders from experienced service providers for performing transaction advisory services in regard to a Sedibeng project. The Bid Description was as follow: “Request for proposal from experiences service providers that offer transactional advisory services for a mega sanitation project for an initial period of three years”.

28 June 2012	<p>SS&G and Gibb entered into a written consortium agreement (“the consortium”). The reason for the consortium agreement was to establish an unincorporated association for preparing and submitting a tender bid proposal to the ELM. It was agreed between the consortium members that SS&G would provide the commercial services and Gibb the engineering services.</p> <p>There was to be no sharing of the revenues as between the consortium members, each would recoup their own revenues related to their respective services in their disciplines.</p>
29 June 2012	The consortium members submitted its bid proposal to the ELM tender.
25 September 2012	The ELM awarded the tender and appointed the consortium for the provision of transaction advisory services for a mega sanitation project with two streams.
26 October 2012	The transactional advisory contract was concluded between the consortium and ELM.
29 October 2012	<p>The ELM advised the consortium that the SRSS was included in the Presidential Infrastructure Implementation Commission (PICC) and the eighteenth Strategic Integrated Project (SIP), the impact of which was that the project would be managed at National level.</p> <p>Subsequently, the management of the Sedibeng Project was taken over on national level and the consortium’s activities under the ELM Agreement was put on hold.</p>
31 May 2013	An inter-governmental implementation protocol was concluded in terms of which the project was identified as a key policy priority of the government of South Africa

	The Sedibeng Regional Scheme Implementation Protocol was entered into to regulate the handover, cession and transfer of the contracts (concluded by ELM) by The Department of Water and Sanitation to Rand Water (Rand Water to act as an agent in respect of the project)
September 2013	Rand Water re - issued a new invitation to tender in respect of substantially the same services the consortium was contractually required to perform under the ELM Agreement
10 October 2013	<p>The consortium launched an urgent application against Rand Water, seeking interdictory relief aimed at preserving its contractual rights against interference by Rand Water by continuing with its tender process.</p> <p>The interdict was granted but the matter was subsequently settled on the basis that the consortium would proceed with delivering services as provided for in its original appointment.</p>
10 February 2014	Rand Water sent a letter of offer to the consortium setting out terms which were to form the basis of the agreement to be concluded.
10 February 2014	SS&G sent an email to Gibb informing them that they did not accept the terms proposed by Rand Water as they scope the commercial stream out of the project.
26 February 2015	<p>Gibb (purporting to act on behalf of the Consortium) signed the Consultancy Service Agreement with Rand Water and proceeded to perform work under this agreement.</p> <p>Gibb made representations that SS&G is involved in the project, which SS&G strongly disputes.</p>
January 2016	<p>The ELM - section 78(1) of the MSA report was compiled, purportedly on behalf of the consortium.</p> <p>SS&G alleges that they did not compile the said report and strongly opposes this report.</p>

16 March 2015	<p>SS&G launched an urgent application, seeking interdictory and declaratory relief, aimed at nullifying the Consultancy Service Agreement with Rand Water and procuring a new Consultancy Service Agreement with Rand Water.</p> <p>The urgent Application was dismissed with costs on 12 November 2015 (This matter was also subject to an appeal made by SS&G regarding the judgment).</p>
September 2017	<p>SS&G succeed in a court application regarding the unlawful use of its name, logo and brand by Gibb. As such, the court has prohibited and interdicted Gibb from representing and purporting to represent the consortium in all matters relating to the Consultancy Service Agreement</p>
31 October 2017	<p>An appeal (with regards to the Judgment granted on 12 November 2015) was heard and the appeal failed.</p>

15. In light of the nature of our submission, and the timeline of events portrayed above, two occurrences, which are discussed below have likely led to the delay in implementation of the SRSS. The first pertains to the suspension of the implementation of the project by the Department of Water Affairs (DWA) and whether such decision was procedurally and legally sound. In this regard, the ELM sought legal opinion from Ashira Legal Advisors (Pty) Ltd (“Ashira”) (**See A12**).
16. The second occurrence pertains to the work done following transfer of the project from ELM to Rand Water.

3. Suspension of SRSS by Minister and DG of DWA

Background

17. According to the background provided in the Ashira (which lists its sources),

“[g]iven the size of the budget required for the implementation of the project, Emfuleni approached various stakeholders to assist in the financing of the project.

A request for funding was made in July 2011 by the Municipal Manager to the National Treasury in respect of funds for the establishment of a PIO [Project Implementation Office]. In response to the request, the Head of the PPP [Public Private Partnership Unit] Unit highlighted the strong possibility that the National Treasury would provide funding and that given the urgency of the project, Emfuleni should commence a tender for the establishment of the PIO but however that the appointment and contracting of service providers should only happen once funding has been confirmed.

A further request for funding was made by the MEC for local government and housing in November 2011 to the Minister of Water and Environmental Affairs. The request highlighted that given the magnitude of the project the Department of Local Government and Housing needed assistance and intervention from various departments for the successful implementation of the project. At that time the project cost for the entire project was estimated to be R 4 billion.

The request highlights the fact that the MEC had sought funding from the National Treasury to the tune of R 1.5 billion and also contributions from the Department of Cooperative Governance and Traditional Affairs.

In response to the MEC's letter, the Minister confirmed the Department's involvement in the project. The response goes on to provide that the Department has projected an allocation of R1.2 billion from its budget for the MTEF period 2012/3 to 2017/18 as a contribution to the SRSSP

The Minister highlights her satisfaction with the progress of the project, that is, the finalisation of designs for both the Sebokeng and Meyeton WWTWs and expresses her support for the establishment of a PIO to facilitate the implementation of the project.

We note that the funding of the project, through the RBIG [Regional Bulk Infrastructure Grant], was reaffirmed by the National Treasury through letters to both the Department and Emfuleni highlighting the funds allocated for the MTEF period ending 2014/15.

With specific reference to the letter from the National Treasury to Emfuleni, the letter states that the funds allocated in the current financial year are earmarked for purposes of the establishment of the PIO. The letter highlights that funds to be allocated in the 2013/14 financial year shall be capital contributions.

It is against this background that Emfuleni embarked on a process of procuring service providers that would form part of the PIO. It noted that the Department appointed three officials to form part of the bid evaluation committee.

We are however made to understand that these officials were not present to the adjudication of tenders issues by Emfuleni. Emfuleni has since gone ahead and procured services of a number of consultants. The process has now been stopped following letters from the Department that are the subject of the opinion".

18. Following suspension of the project from ELM by the Minister, it was transferred to Rand Water as the implementing agent.

19. The opinion moves on to discuss two things. The first is whether the nature and operation of the RGIB permits the actions taken by the Minister (**See A11**). The second sheds light on the “Constitutional and Legislative Framework within which municipalities implement sanitation projects, the relevant authorities empowered to provide sanitation services within the specific jurisdictional boundaries and the powers of the national and provisional government in [respect] of intervention where a municipality fails in the performance of a function”.

RGIB

20. For present purposes, it is sufficient to provide a summation of the opinion’s submission in this regard.

“The Policy [RGIB] highlights that the funds are earmarked for the capital component of the scheme which includes all aspects linked to implementation of the infrastructure, planning design, procurement as well as setting up institutional arrangements. Therefore the RGIB covers PIO related services in as far as those services related to [the provided categories].

The DWA has an option to procure services in the event the [water services authority] is incapable of performing that role. However, such responsibility is limited to the appointment of service providers to conduct a feasibility or implementation study”.

The DWA can appoint a different implementing agent if the RBIG funding accounts for more than 50% of the project cost; and Emfuleni lacks the capacity to implement”.

Constitutional and Legislative powers and functions of local municipalities in respect of water services

21. In this respect, the Ashira opinion departs by referring to section 151 (3) and (4) of the Constitution which respectively provide that “[a] municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution,” and that “[t]he national or a provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions”.

22. The opinion moves on to make reference to the provisions pertaining to developmental duties in municipalities (section 153 of the Constitution) and the powers and functions of municipalities (section 156(1)). The opinion then discusses the relevant provisions of the WSA. It notes that in terms of the Act, sanitation services are the responsibility of a municipality.
23. According to the WSA, a water services authority “means any municipality, including a district or rural council as defined in the Local Government Transition Act 209 of 1993 responsible for ensuring access to water services”. Section 11(1) of the WSA provides that a water services authority has a duty to consumers or potential consumers “in its area of jurisdiction to progressively ensure efficient, affordable, economic and sustainable access to water services. In this regard [a water services authority] must submit integrated development plans and separately, a draft water services development plan for its area of jurisdiction and a summary of that plan”. Such plans, the opinion indicates, have to go through public consideration and commenting. According to the opinion, ELM had implemented the SRSS project in its capacity as a water services authority. ELM also appointed Metsi-a-Lekoa to administer the project.
24. Also, the opinion makes reference to section 22 of the WSA which provides that “no person may operate as a water service provider without the approval of the [water service authority] having jurisdiction in the area in question”.
25. The opinion then moves on to submit that the decision of the Minister to impose “Rand Water on Emfuleni and Midvaal [...] is in contravention of the WSA”. This is because: The WSA gives the Minister powers to monitor a municipality’s performance. Should a municipality fail in performing, only then can the Minister request intervention by the relevant Provincial Government. The letter suspending the SRSS from ELM is silent on the performance of these municipalities (**See A11**).

Analysis

26. Relevant for the Commission is inquiring on how the suspension and transfer of the SRSS project contributed towards pollution in the Vaal. In other words, if the Minister never transferred the project from ELM to Rand Water, and the project was implemented as

was structured; would the Vaal be less polluted? If so, how significantly less polluted would the Vaal be?

27. Also important for the Commission's investigation is assessing whether the transfer of the SRSS from the ELM followed the prescripts of the law. Does there exist a decision, in the form of a municipal council's resolution from the ELM, in line with section 22 of the WSA approving that Rand Water serve as the implementing agent for the SRSS. This is important for accountability purposes.

4. Implementation of SRSS Under Rand Water

28. The SRSS Implementation Protocol ("the Protocol") (**See A13**) was entered into between DWA, Rand Water, ELM, Midvaal Local Municipality, Sedibeng District Municipality and the Gauteng Provincial Government in 2013. The Protocol indicates that the DWA, in terms of the RGIB, appointed Rand Water as an implementing agent for the project, with the Gauteng Provincial Government as the provincial authority that "will support municipalities to fulfil their constitutional mandate". "Together, the Parties are responsible for [the] implementation of the project".
29. In terms of Clauses 6, 70 and Annexure A of the Protocol, the scope of the SRSS Project is:
- Extension of the Sebokeng Waste Water Treatment Works (WWTW) by 100MI/day in Emfuleni. The Sebokeng WWTW consists of:
 - inlet works;
 - emergency storage dams;
 - primary settling tanks;
 - biological filtration units (Disused);
 - biological reactors nutrient removal);
 - secondary settling tanks;
 - chlorine contact channels;
 - anaerobic digestors; and
 - and sludge land for sludge disposal.

- Extension of Meyerton WWTW by 15MI day in Midvaal. Meyerton WWTW consists of:
 - inlet works;
 - emergency storage dams;
 - primary settling tanks;
 - chlorine contact channels;
 - anaerobic digesters; and sludge land for sludge disposal.

 - Construction of new 150MI/day WWTW; and
 - Post construction operation and maintenance.

 - The deliverables for the SSRS are listed as follows:
 - increased capacity of Sebokeng WWTW by 100MI/day in ELM;
 - increased capacity of Meyerton WWTW by 15MI/ day in MLM;
 - new 200 MI/day WWTW in Sedibeng;
 - reduced raw spillage into the Vaal River;
 - improved water quality standards;
 - eradicated water and sanitation service delivery challenges;
 - increased number of employed people;
 - environment Impact Assessment report; and
 - secure off-budget funding to supplement funds provided through the Department’s budget.
30. On 10 August 2018, Rand Water, in a media statement titled “Raw Sewage in the Vaal” (See A16) stated that its “role in the region does not include the operation and maintenance of any existing sewer treatment plants and sewer pump stations. The operation and maintenance of the sewage network systems, pump station and treatment works is the responsibility of the respective municipality. Rand Water cannot assume any responsibility for environmental pollution emanating from non-functioning sewage pump stations”.

31. Rand Water went to further state that “[a]lthough the implementation of this project has its fair share of challenges, including community unrests in the area which led to work stoppages, steady progress has been made;
- Sebokeng wastewater treatment plant 50Ml/d upgrade: Overall completion is 94% (Civil Works), 91% (Mechanical Works, 98% (Electrical Works);
 - Meyerton wastewater works 15 Ml/d upgrade: Overall completion is 94 % (Civil Works), 85% (Mechanical works, 85% Electrical Works).
 - Rothdene sewer pump station: 100% complete”.

Analysis

32. What is clear from the scope of work as per the Protocol is that the successful implementation of the SRSS will address, among other things, the incapacity of the WWTW works in the region to meet growth.
33. What is not clear from the information available to OUTA is the extent to which the SRSS was linked to the ordinary operational and maintenance of sewage networks that would be undertaken by municipalities, and how the project’s removal from municipalities affected their ability (if at all) to operate and maintain sewage networks, particularly those networks that contribute to the pollution in the Vaal.
34. Further, the information provided by Rand Water on the progress of the SRSS has not been audited and verified. It is important in this regard to draw attention to the fact that one of the deliverables for the SRSS is the reduced spillage of raw sewage into the Vaal. In this regard, to what extent has the work undertaken under Rand Water’s auspices met this deliverable?

C. RECOMMENDATIONS

In light of the above, OUTA recommends that the SAHRC, in determining whether the state of the Vaal River violates or threatens human rights including environmental rights:

- assess how the suspension and transfer of the SRSS (which is meant to reduce the spillage of raw sewage in the Vaal River) from ELM to Rand Water contributed

towards pollution in the Vaal. Ancillary to this, the Commission may inquire into the legality of such suspension;

- assess how the removal of the SRSS from ELM (and other relevant municipalities) adversely affected its ability to operate and maintain sewage networks, particularly those networks that contribute to the pollution in the Vaal; and
- request audited and verified reports on the progress of the SRSS from Rand Water, with an indication of the extent to which such progress has reduced pollution in the Vaal.