

c/o: Mpho Raboeane, Attorney, Ndifuna Ukwazi mpho@nu.org.za

Danielle Louw, Attorney, Ndifuna Ukwazi

danielle@nu.org.za

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To: **Head of Department**
Department of Community Safety
Adv JC Gerber
Cape Town

By email: jan.gerber@westerncape.gov.za

Dear Adv Gerber

RE: NDIFUNA UKWAZI'S COMMENT ON THE WESTERN CAPE PROVINCIAL POLICE OMBUDSMAN REGULATIONS, 2015: DRAFT AMENDMENT, 2020

1. Ndifuna Ukwazi ("NU") is a non-profit activist organisation and law centre that combines research, organising and litigation in campaigns to advance urban land justice in Cape Town. Our primary mission is to expand and protect access to affordable housing towards building a more just and equal city.
2. Over the last six years, Ndifuna Ukwazi has been involved in legal, research and organising work around evictions, relocations, rental housing, the allocation of state-subsidised housing, the management of public land in a manner that prioritises socio-economic needs and the promotion

of social, transitional and inclusionary housing. We have published several resource guides and research reports on these issues. Ndifuna Ukwazi has also been involved in a series of important court cases dealing with land occupations, evictions, the provision of alternative accommodation, and the state's constitutional and legislative obligation to combat spatial apartheid and promote spatial, economic and racial justice and equality through expanding access to land and affordable housing.

3. This submission is made pursuant to the invitation for comments made by the Western Cape Government on 16 July 2020. Ndifuna Ukwazi has read and considered the Western Cape Provincial Police Ombudsman Regulations, 2015: Draft Amendment 2020 and hereby makes this submission.

Yours faithfully,

Ndifuna Ukwazi

Per: Mpho Raboeane, Attorney and Danielle Louw, Attorney

NDIFUNA UKWAZI'S COMMENT ON THE WESTERN CAPE PROVINCIAL POLICE OMBUDSMAN REGULATIONS, 2015: DRAFT AMENDMENT, 2020

Introduction

1. The effect of the Western Cape Provincial Police Ombudsman Regulations, 2015: Draft Amendment 2020 ("the Draft Amendment") will be to, inter alia, provide greater clarity pertaining to certain procedural aspects and the investigative scope and duties of the office of the Ombudsman. The Draft Amendment further introduces the possibility of a complainant having a complaint made on their behalf.¹
2. While we welcome and support the draft amendments, we are concerned that the Regulations currently do not provide sufficient clarity in delineating the police services with regard to which the Ombudsman is empowered to receive and investigate complaints.
3. The relative structural complexity of the City's municipal police services, more especially with regard to Law Enforcement Services and its functionaries such as the Anti Land Invasion Unit ("ALIU"), and the inaccessibility of certain oversight bodies render accountability and *independent* complaint structures an opaque concept in the context of lodging complaints pertaining to any inefficiency within the service and the relationship between the service and the public.
4. This seeming lacuna may be remedied by a mere clarification of the jurisdiction of the Ombudsman as per existing law through the addition of stated definitions as proposed below.

Jurisdiction of the Ombudsman

5. The office of the Ombudsman is established pursuant to section 10 of the Western Cape Community Safety Act² and is empowered to receive and investigate complaints submitted in terms of section 16 of the Act regarding inefficiency of the *police* or a breakdown in relations between the *police* and any community; and perform the other functions assigned to him or her under the Act.³

¹ Regulation 2 of the Western Cape Provincial Police Ombudsman Regulations, 2015: Draft Amendment, 2020.

² Act 3 of 2013.

³ Section 15 Western Cape Community Safety Act 3 of 2013.

6. The Act defines “police” as police officials of the police service, with the “police service” in turn defined as the South African Police Service deployed in the Province or a *municipal police service*.⁴ The Act further defines “municipal police service” as a “municipal police service established in the Province in terms of section 64A of the South African Police Service Act, 1995” (“SAPS Act”).⁵
7. In terms of section 64A(1) of the SAPS Act, a municipality may in the prescribed manner apply to the member of the Executive Council for the establishment of a municipal police service for its area of jurisdiction. Section 64A(2) lists the necessary requirements that any such application must comply with and in sub-item (d), specifically states that it must include proper provision for ensuring civilian supervision of the municipal police service.
8. The City of Cape Town Municipality (“the City”) has, under the auspices of the Directorate of Safety and Security, and specifically the Law Enforcement, Traffic and Coordination Department, constituted a municipal police service as contemplated in Section 64A of the SAPS Act. The Law Enforcement Service is responsible for enforcing the City’s by-laws and traffic laws and its members conferred with powers in terms of Government Notice R209 Gazette 231243 of 19 February 2002 as amended by GN 1201 Gazette 23863 of 26 September 2002.
9. Section 64J(1) of the SAPS Act goes on to expand on the envisioned civilian oversight mechanism and states that a municipal council “shall appoint a committee consisting of members of the council and such other persons as may be determined by the municipal council to ensure civilian oversight of the municipal police service.” The Regulations for Municipal Police Services of 1999 issued under the SAPS Act reiterates this obligation and regulation 1(2)(e) specifically states that any application for the establishment of a municipal police service must include:

[A] detailed description of the composition of the committee contemplated in section 64J(1) and which indicates how that composition will ensure proper civilian oversight over the said municipal police service.
10. To this end, the City has established a Civilian Oversight Committee to investigate the conduct and complaints against the City’s Traffic Services Department, Law Enforcement and the Metro Police. This committee is made up of civilians who are recipients of a nominal stipend from the

⁴ Section 1 Western Cape Community Safety Act 3 of 2013.

⁵ *Id.*

municipality and do the civilian oversight work on a part-time basis. Notwithstanding the complaint and investigative mandates, this committee, however, lacks the degree of transparency and accountability required of the office of the Ombudsman as the former does not publicly report its investigations and outcomes.

11. There is thus an apparent lack of a functional, transparent, public facing (accessible) complaints structure in the context of community complaints of deteriorating relations between the City's Law Enforcement Agencies and affected communities. Such communities cite discrimination and lack of engagement in addition to allegations of violence and unlawful operations carried out by such agencies.

No Independent, Impartial and Effective Complaint Service Available to Affected Communities

12. For instance, Ndifuna Ukwazi has recently assisted communities across the metropole where community members have decried Law Enforcement's abuse of power, failure to engage and failure to respond proportionately and humanely. They have experienced brutality and little regard for their dignity at the hands of the City's Law Enforcement Services.
13. Ndifuna Ukwazi has done this through the office of the City's Ombudsman. This office was established in 2015 to investigate complaints about instances of abuse, unjust or unfair decisions or behaviour, and alleged maladministration. Yet, this office has proved ineffectual and is curtailed in its operation by its empowering legislation. In terms of the Ombudsman By-Law of 2015⁶, the City's Ombudsman does not investigate decisions of statutory bodies such as the Municipal Council and Portfolio Committees.⁷ This provision, therefore, precludes the Ombudsman from reviewing the decisions of the Public Safety Committee.
14. The fractured relationship between these communities and Law Enforcement Services and the need for the Ombudsman's oversight has been brought into sharp focus during the global

⁶ Published in Western Cape Provincial Gazette no. 7419 on 3 July 2015 available at <https://openbylaws.org.za/za-cpt/act/by-law/2015/ombudsman/eng/>.

⁷ Section 7(1) of the City Ombudsman By-law, 2015 available at <https://openbylaws.org.za/za-cpt/act/by-law/2015/ombudsman/eng/>.

pandemic and the National State of Disaster declared in terms of the Disaster Management Act 57 of 2002. The following are examples:

- 14.1. On 9 April 2020 the City's Law Enforcement and ALIU carried out the demolition of 70 homes in the eMpolweni Informal Settlement. These demolitions were violently carried out, with the residents being afforded no prior engagement nor explanation as to the reasons for the razing of their homes and destruction of property.
- 14.2. Further demolitions of more than 100 homes took place on 11 April 2020, with incidents of teargas, pepper spray and rubber bullets being used on the residents. The building materials of some of the demolished homes were confiscated, damaged or destroyed by ALIU, Law Enforcement and the SAPS.
- 14.3. At no stage were the residents engaged as to the grounds for the demolitions and confiscation of their building materials. The ALIU, Law Enforcement and SAPS failed to produce a court order authorising the demolition of the residents' homes. The ALIU officers concealed any means of identification and would not be engaged on the grounds for their actions, save to threaten the arrest of any person found on the property.
- 14.4. Thus, in June 2020, Ndifuna Ukwazi assisted the community of eMpolweni to submit a complaint to the City's Ombudsman against the actions of Law Enforcement and ALIU. Unfortunately, no response was received from the Ombudsman.
- 14.5. Furthermore, on 1 July 2020, the City's Law Enforcement and ALIU illegally demolished the homes of several residents of the eThembeni informal settlement in Khayelitsha, Cape Town rendering them homeless. One eviction in particular, that of Mr Bulelani Qolani, sparked national outrage. Mr Qolani, who was in the process of bathing, requested a few moments to finish washing himself. His requests, however, fell on deaf ears and Law Enforcement and ALIU officials proceeded to drag a naked Mr Qolani out of his home. Mr Qolani resisted, and managed to get back into his home. Still not offering him an opportunity to finish bathing or to get dressed, officials thereafter proceeded to demolish his home with him inside.
- 14.6. The treatment of Mr Qolani at the hands of municipal police led to the National Minister of Police, Mr Bheki Cele and the Western Cape Provincial Police Commissioner visiting

the community a few days later. Minister Cele described the incident as “a new level of police brutality” and expressed his serious concerns regarding the lack of an oversight structure for municipal Law Enforcement.⁸

14.7. Thus, on 6 July 2020, Ndifuna Ukwazi assisted the community of eThembeni to lodge a complaint at the City’s Ombudsman against the actions of Law Enforcement and the ALIU. This time, the community received a response from the Ombudsman requesting confirmation that their complaint was in fact directed at Law Enforcement and ALIU. After receipt of this confirmation from the community, the Office of the Ombudsman indicated that they would contact the community to inform them of the next steps of the investigation. However, to date, the community has not received any communication from the Ombudsman.

14.8. Other communities including Kommetjie in Ocean View, Hangberg in Hout Bay and Makhaza in Khayelitsha, have similarly suffered ill-treatment by Law Enforcement and the ALIU over the course of the National Lockdown.

15. As evinced by community accounts and widely publicised incidents, there is evidently no recognition that the people of these communities are very vulnerable people that the City has a clear constitutional, statutory, and in the time of this pandemic, moral obligation to assist and care for. During this pandemic this cannot be allowed as it places people at increased risk of infection and heightens existing tensions between the community, the City and its Law Enforcement Services. While we have raised these concerns in relation to recent conduct in Cape Town, we remain concerned that similar conduct may have implications for people with insecure tenure across the province (for example, as occupiers of informal settlements, buildings, farm land or other informal arrangements).

14. Given the actions of the Law Enforcement unit and the ALIU of the City in carrying out illegal demolitions and illegal evictions during the period of National Lockdown, there is an increased need to ensure public accountability beyond the functions of the civilian oversight committee. As the Office of the Ombudsman exists to investigate complaints of police inefficiency, this should

⁸ See J Kassen ‘Handling of Bulelani Qholani reveals new level of police brutality’, EWN (4 July 2020) available at <https://ewn.co.za/2020/07/04/handling-of-bulelani-gholani-reveals-new-level-of-police-brutality>.

include the inefficiencies or a breakdown in relations between the Law Enforcement Services and any community.

Recommendation

15. It is our submission that the mandate of the Ombudsman encompasses Law Enforcement Services as a municipal police service constituted as per section 64A of the SAPS Act, as so defined in the Regulations by virtue of being so defined in the Act.
16. We, therefore, submit that the amendment to regulation 1 of the Western Cape Provincial Police Ombudsman Regulations, 2015 be expanded to include an explicit definition of municipal police as a municipal police service constituted as per section 64A of the SAPS Act inclusive of the Traffic Services Department, Law Enforcement and the Metropolitan Police.

ENDS.