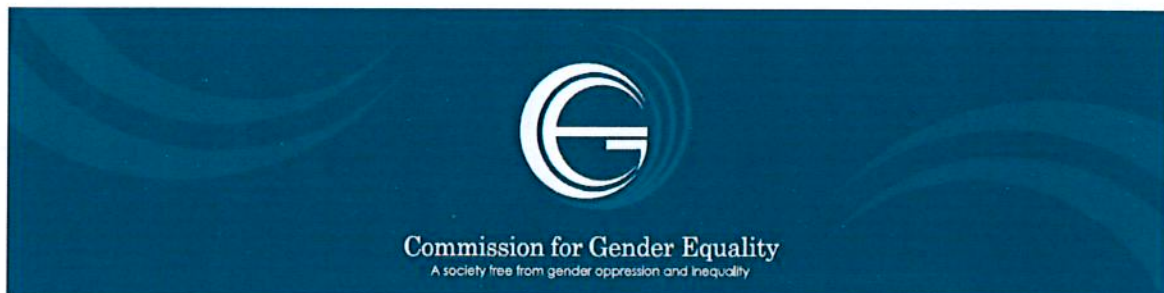


Supplementary Investigative Report



THE MAIDEN BURSARY INVESTIGATIVE REPORT

**Complainant
Respondent**

**Commission for Gender Equality
Uthukela District Municipality**

**INVESTIGATIVE REPORT ON THE MAIDEN BURSARY AT UTHUKELA
DISTRICT MUNICIPALITY**

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1 Introduction

1.1 The Commission for Gender Equality (hereinafter referred to as “the Commission”) is an institution established in terms of Section 181 of the *Constitution of the Republic of South Africa*, 108 of 1996 (hereinafter referred to as “the Constitution”).

1.2 In terms of section 187(1) of the Constitution, the Commission is specifically mandated to:

1.2.1 promote respect for gender equality and the protection, development and attainment of gender equality;

1.2.2 monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality;

1.2.3 assess the observance of gender equality.

1.3 The Commission for Gender Equality Act 39 of 1996, as amended, (hereinafter referred to as “the CGE Act”), further supplements the powers of the Commission to fulfil its constitutional mandate.

2. The parties

The complainant is the Commission for Gender Equality, an independent constitutional body with functions as stipulated in section 187 of the Constitution. The investigation is conducted *sua sponte* as prescribed by Section 11(1) (e) of the Commission for Gender Equality Act 39 of 1996, as amended.

The Respondent is Uthukela District Municipality, an organ of state with its principal place of business at 33 Forbes Street, Ladysmith, KwaZulu-Natal.



1. Principles guiding the investigation

It is common cause that this complaint has received extensive media attention, both locally and internationally. Despite this, an objective investigation has been conducted, and adherence to the rules of natural justice and, more particularly, that of *audi alteram partem*, has been observed. In adherence to the *audi alteram partem* rule, the Commission afforded the respondent adequate opportunity to make submissions during the investigation. Furthermore, upon conclusion of the investigation, the Commission found it prudent to share the draft investigation report with the respondent for review and input, and subsequently convene a meeting with the latter to discuss the draft report. Consequently, the Commission requested the respondent to submit comments and inputs to the draft investigation report no later than 4 May 2016, and further sought a meeting on 6 May 2016 with the respondent. The respondent unfortunately did not submit inputs on 4 May 2016; instead the respondent requested a further extension to enable the Council of the Municipality to meet and discuss the draft report. The Commission extended the submission date to 18 May 2016. Despite this extension, the respondent neglected to submit inputs and comments as requested, and advised of its intention to review the draft investigation report through the Courts. The Commission responded to allegations raised in the said letter in relation to time periods stipulated, the *audi alteram partem* rule and legality of the report.

The Commission is thus satisfied that the *audi alteram partem* rule had been complied with during the investigation processes.

2. Nature and background of complaint

During January 2016 the media reported that the respondent had allegedly awarded 16 female students a bursary for tertiary education studies,

contingent on their virginity ('Maiden Bursaries'). This virginity was to be ascertained by them successfully undergoing *ukuhlolwa* (virginity inspection) procedures, and had to be maintained throughout the duration of their studies, for the students to retain their bursaries.

The Uthukela District Mayor, Cllr Dudu Mazibuko, conducted various radio interviews during January 2016, during which the mayor argued that the objectives of the scholarships were to encourage "girls to keep themselves pure and inactive from sexual activity and focus on their studies".

It is important to note that the question regarding *ukuhlolwa* becomes peripheral, as this investigation does not deal with the cultural practice, but with the awarding of bursaries based on virginity.

3. **Preliminary assessment**

It is evident that the granting of bursaries based on virginity as well as virginity inspection of women forms the crux of this complaint, and this accords the Commission with the necessary jurisdiction for investigation. The critical issue to be determined in this investigation is whether the conditions on the basis of which Maiden Bursaries were awarded to the 16 female beneficiaries by the respondent amount to gender discrimination, or are in breach of any other rights protected by the Bill of Rights. As a result, a preliminary assessment of this complaint necessitates a consideration of the legal framework governing gender discrimination in South Africa.

The report is intended to present the Commission's findings based on its preliminary assessment. It reserves its right to supplement this report in due course should it become necessary.

4. **Steps taken by the Commission**

Upon deciding to initiate its own investigation into this matter, on 27 January 2016 the Commission wrote to the respondent and sought the following documents:

- The Maiden Bursary policies;
- Uthukela District Municipality resolutions on the awarding of scholarships to learners;
- Any other documents that may assist in the investigation.

On 5 February 2016, the respondent furnished the Commission with the following documents:

- A report on the Maiden Bursary;
- Bursary policy;
- Payment of tuition fees letters to the universities;
- Minutes of the meetings of April and June 2015;
- Advertisements for applications for bursaries/study assistance for the 2016 academic year;
- Council resolution NO A28/11/15.

An analysis of the above documents is found *infra*.

After perusing the submitted documents, the Commission deemed it necessary to consult with the 16 students who were awarded the Maiden Bursary. In order to achieve this, the respondent was requested to furnish the Commission with the names and contact details of all the Maiden Bursary beneficiaries. The respondent forwarded the names to the Commission on 9 February 2016.

The objective of contacting the students was to set up an appointment to engage with the students on questions prepared by the Commission during the consultation process. The Commission contacted the students during 10 and 11 February 2016, but the majority of the students did not co-operate, perhaps concerned at jeopardising their bursaries. The students either informed the Commission that they were busy, or they just hung up the phone. Two students were, however, willing to meet with the

Commission on 24 February 2016, and one was willing to complete a written questionnaire.

On 24 February 2016 the Commission consulted with two students. However, they opted to remain anonymous for the purposes of the investigation. The outcomes of the consultations will follow in this report.

On 29 February 2016 the Commission wrote to the respondent to seek clarity on certain points contained in the documents submitted, and information obtained during the consultation with the students.

5. Legal framework

Section 39 of the Constitution mandates a court, tribunal or forum when interpreting the Bill of Rights to consider relevant international law. The Commission considered, *inter alia*, the following international instruments, as a guiding yardstick in conducting its investigation:

7.1 International law

7.1.1 **Convention on the Elimination of All Forms of Discrimination Against Woman (CEDAW)**

Article 1 of CEDAW states that:

"For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

The Convention in **Article 1** therefore provides a definition of discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that

inflict physical, mental or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

In addition, Article 10 states that the state shall take all appropriate measures to eliminate discrimination against women in order to ensure them equal rights with men in the field of education and in particular to ensure this on a basis of equality of men and women. The article further states:

- 10(d): the same opportunities to benefit from scholarships and other study grants;
- 10(e): the same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women.

7.1.2 Universal Declaration of Human Rights (UDHRC) (1948)

Article 2 of the UDHRC states that: *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

7.1.3 Vienna Declaration 1993 and South African National Action Plan for the Promotion and Protection of Human Rights.

Article 8 highlights the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation of, and trafficking in, -women, the elimination of gender bias in the administration of justice, and the eradication of any conflicts which may arise between the rights of

women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.

7.1.4 The Beijing Platform for Action (BPA)

The BPA requires governments, international communities and civil society, including non-governmental organisations and the private sector, to take strategic action to address 12 critical areas of concern. These areas include, but are not limited to, violence against women, the burden of poverty on women, and the inequality between men and women in the sharing of power and decision making at all levels and education and training.

7.1.5 Sustainable Development Goals: 2030 Agenda

Goal 5 aims at achieving gender equality and the empowerment of all women and girls. Its targets include ending all forms of discrimination and violence against women and girls, as well as eliminating harmful practices, and the recognition and value of unpaid care and domestic work.

Other targets stress the importance of ensuring women's full and effective participation and equal opportunities for leadership, as well as universal access to sexual and reproductive health and reproductive rights.

Goal 4 is aimed at ensuring inclusive and equitable quality education and promote lifelong learning opportunities for all. 4(b) states that by 2020, substantially expand globally the number of scholarships available to developing countries, in particular least developed countries, small island developing States and African countries, for enrolment in higher education, including vocational training and information and communications technology, technical, engineering and scientific programmes, in developed countries and other developing countries.

7.2 Regional conventions

7.2.1 SADC Declaration on Gender and Development (2008)

The Declaration notes that gender equality is a fundamental human right and commits states to protecting the rights of women and the girl child, amending constitutions, enacting empowering gender-sensitive laws and changing social practices which subject women to discrimination.

Article 14 specifically focuses on gender equality in education and emphasises that state parties shall by 2015 adopt and implement gender sensitive education policies and programmes addressing gender stereotypes in education and gender-based violence amongst others.

7.2.2 AU Solemn Declaration on Gender Equality in Africa

The Declaration defines “harmful practices” means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity

The Declaration reaffirms our commitment to the principle of gender equality as enshrined in Article 4 (I) of the Constitutive Act of the African Union, as well as other existing commitments, principles, goals and actions set out in the various regional, continental and international instruments on human and women's rights, including the African Platform for Action (1994), the Beijing Platform for Action (1995), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW - 1979), the African Plan of Action to Accelerate the Implementation of the Dakar and Beijing Platforms for Action for the Advancement of Women (1999); the Outcome Document of the Twenty-

third Special Session of the United Nations General Assembly Special Session on the Implementation of the Beijing Platform for Action (2000); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

The Declaration reaffirms states' commitments to gender equality and expresses deep concern about harmful traditional practices.

7.2.3 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

The Protocol notes that despite these commitments, women continue to be victims of discrimination and harmful practices negatively affecting the fundamental rights of women and girls, such as the rights to life, health, dignity, education and physical integrity. The Protocol commits states to enact regulative or legislative measures to prohibit and curb such practices and discrimination. States are obliged to modify social and cultural conduct to eliminate harmful cultural and traditional practices.

7.2.4 Addendum to 1997 Declaration on Gender and Development by SADC Heads of State or Government

The Addendum expresses concern at physical and sexual violence occurring in the family, including traditional practices harmful to women. It commits states to eradicate traditional norms and practices which legitimise and exacerbate the persistence and tolerance of violence against women and children.



South Africa has ratified the above international and regional instruments. They therefore find application in the current interpretation of the applicable rights in the Bill of Rights.

7.3 Domestic Legislation

7.3.1 The South African Constitution

The Supremacy of the Constitution (Section 2)

The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Bill of Rights (Section 7)

Section 7 states that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. Sub-section 2 specifically states that the State must respect, promote and fulfil the rights in the Bill of Rights.

Application of the Bill of Rights (Section 8)

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

The right to equality (Section 9)

Section 9(1) states that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) further states that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The right to dignity (Section 10).

Section 10 of the Constitution guarantees everyone a right to dignity. The importance of the right to dignity is one of the fundamental rights in the Constitution. The Constitutional Court has repeatedly emphasised the importance of the fundamental right to human dignity. In *S v Makwanyane*¹ it was stated that recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings, independent of his or her station in life. It was further stated that without dignity, human life is substantially diminished. It is only when a person is treated with dignity that they feel worthy and important in society. This right is violated when persons are subjected to conduct that is degrading and humiliating.²

Freedom and security of the person (section 12).

Section 12(1)(e) of the Constitution prescribes that everyone has the right to freedom and security of the person including the right not to be treated or punished in a cruel, inhuman or degrading way.

¹ *S v Makwanyane* 1995 (3) SA 391.

² GE Devenish, *A Commentary on the South African Bill of Rights* (Butterworths, 1999) at page 79.



Section 12(2) sets out that everyone has the right to bodily and psychological integrity which includes the rights to make decisions concerning reproduction and to security in and control over their body.

Right to Privacy (section 14)

Section 14(a) guarantees that everyone has the right to privacy, including the right not to have their person searched.

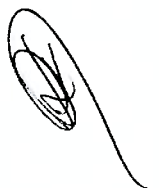
Cultural practices (section 31).

Section 31(1) of the Constitution protects both individual and group interests to enjoy their culture. Section 31(2) further states, however, that the rights in section 31(1) may not be exercised in a manner inconsistent with the Bill of Rights.

Status of Municipalities (Section 151)

Section 151(3) specifically states that 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.

Basic Values and principles governing public administration (Section 195)

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Section 195 states that 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.

These principles apply to administration in every sphere of government, organs of state and public enterprises.

7.3.2 Promotion of Equality and Prevention of Unfair Discrimination Act 4 2000 (PEPUDA).

Section 1 of PEPUDA defines discrimination as any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantages or withholds

benefits, opportunities or disadvantages from any person on one or more of the prohibited grounds (race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth) as outlined in Section 9 of the Constitution.

7.3.3 The Commission for Gender Equality Act 39 Of 1996, as amended

Section 11(1)(e) of the Commission for Gender Equality Act (as amended) provides that the Commission shall investigate any gender-related issues of its own accord or on receipt of the complaint. The CGE is also empowered to resolve complaints through mediation, conciliation or negotiation processes.

7.3.4 Children's Act 38 of 2005

Section 12 of the Children's Act states that virginity inspection in children under the age of 16 is prohibited. It further states that virginity inspection may only take place in children older than 16 years, the child should give consent in the prescribed manner, the child should be counselled, and such inspection should be conducted in the prescribed manner.

The Commission notes that there is a direct conflict between the implementation of the agreed/prescribed virginity testing and the procedure prescribed in terms of the Children's Act. This is a relevant consideration in the event that any of the bursary recipients are minors.

7.3.5 Promotion of Administrative Justice Act 3 of 2000 (PAJA)

Administrative action is defined in the PAJA as meaning, *inter alia*: ... any decision taken, or any failure to take a decision, by (a) an organ of



state, when (i) exercising a power in terms of the Constitution or a provincial constitution, or (ii) exercising a public power or performing a public function in terms of any legislation, or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.

Decision is defined in section 1 as including:

"... any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to (a) making, suspending, revoking or refusing to make an order, award or determination; (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; (d) imposing a condition or restriction; (e) making a declaration, demand or requirement; (f) retaining, or refusing to deliver up, an article; or (g) doing or refusing to do any other act or thing of an administrative nature."

Section 6(2)(i) of PAJA provides for the review of administrative action where that action is unconstitutional. For all the reasons set out above, the Commission considers the action taken by the Municipality in connection with the Maiden Bursary scheme to be unconstitutional.

8. Analysis of evidence



The Commission has to apply its mind in relation to the evidence and/or information that is before it. The findings must rationally be connected to the information gathered during the investigation process.

8.1 The Bursary Policy and Application Advertisement for the 2016 academic year

The respondent has four categories in which bursaries may be allocated:

- (a) New students
- (b) Debts payments
- (c) Returning (continuation)
- (d) Maidens.

A gender representation in each bursary category follows:

New students

- 32 male students were represented.
- 20 female students were represented.

Debts payments

- 9 male students were represented.
- 12 female students were represented.

Returning students

- 11 male students were represented.
- 12 female students were represented.

Maidens

- 16 female students were represented.

The bursary covers registration, full tuition, books and stationery, accommodation and student debtors' fees.



In terms of the policy the bursary will be terminated on the following grounds:

- (a) The bursary holder fails one or more subjects.
- (b) The bursary holder drops out from the academic institution.

For the purposes of this investigation the Commission notes that the termination clause of the bursary policy makes no specific reference to terminating the bursary when the bursary holders lose their virginity. The respondent submitted that it is common cause that the Maiden Bursary is meant for Maidens (i.e. women who are virgins) and that when one ceases to be a virgin she is no longer entitled to the bursary. The respondent submitted further that a meeting was not convened with the 16 female students to discuss the terms and conditions of the Maiden Bursary. A view may be expressed that the failure to expressly state in the bursary policy that when one ceases to be a virgin the bursary will be terminated, raises concerns regarding transparency, and legal implications for termination of bursaries upon non-disclosed grounds. Ideally, a bursary policy should detail in full the grounds that will result in the bursary being terminated.

The Commission notes further that the application advertisement does not make specific reference to the required initial and continuous virginity inspection before the bursaries are awarded, and during the course of their studies (as reported in the media).

The respondent denied that it subjects anyone to a continuous virginity inspection. The respondent submitted that the advertisement does not make mention of continuous virginity inspection because the Maiden Bursary is granted on condition that maidens produce a maiden certificate as proof of their virginity when they apply for a bursary for the academic year of study. The respondent further submitted that the maiden certificate is produced once during the bursary application for a particular academic year of study. The respondent submitted further that

the maidens have to submit an academic record and a new maiden certificate if they were still interested in financial assistance for following academic years of study.

Inference is drawn that before a new maiden certificate is issued, the applicant has to be certified as a virgin through the virginity inspection process. Although the respondent argues that it does not subject anyone to continuous virginity inspection, it indirectly subjects the maiden students to a continuous virginity inspection, as a prerequisite for ongoing bursary support for the duration of their studies. It is evident that without a new maiden certificate, the student concerned will not be considered for the Maiden Bursary for the coming academic year. Virginity inspection should not be used to access government services and funds, although culture is specifically recognised in our Constitution. Due to economic hardships, the recipients of bursaries might be subjected to undue influence.


The Commission notes that, according to the respondent's submission, if a maiden no longer qualifies for the Maiden Bursary, she may still have an opportunity to apply for other bursaries offered by the respondent. They would nevertheless be deprived of the benefits of the Maiden Bursary scheme, which deprivation would be discriminatory.

8.2 Council Resolution No A28/11/15 for a meeting held on 12 November 2015

The Commission notes that it was resolved that only an accredited person may authorise the maiden certificates.

The Commission observes that the respondent solely relies on the accreditation of persons that are recognised by the Traditional Zulu royal House and Her Royal Highness (Indlovukazi).

8.3 Information sought from the two maiden students



The information submitted by students during consultation is as follows:

- (a) The students confirmed they were awarded the maiden bursaries by the respondent.
- (b) Virginity inspection is part of their cultural practices and beliefs and they were involved voluntarily in the practice prior to the respondent awarding the maiden bursaries.
- (c) The students submitted that virginity inspection does not infringe on their dignity as women; on the contrary, it curbs teenage pregnancy and the spread of HIV/AIDS.
- (d) One of the students highlighted that her own father disapproved of her attending the virginity inspection but she opted to continue because the virginity inspection instils values and principles in her as a young woman.
- (e) The students submitted that virginity inspection is not violating their rights to privacy as entrenched in the Constitution.
- (f) The students further highlighted that they were informed by their maiden leaders and not by the respondent that the Maiden Bursary is subject to the bursary holder remaining a virgin throughout her studies.
- (g) The Maiden Bursary is not discriminatory as it encourages the youth to focus on their studies.
- (h) The students had a limited understanding of the Bill of Rights in the Constitution.

Concerns raised during the consultation with students

One of the students highlighted that she lives outside the university campus. She advised that on her way to and from campus she passes a 'bushy area' where she fears that she and other women may easily be raped. The students acknowledged that it would not be fair for anyone to lose their bursary if they were to be raped during the course of their studies.

9. Findings

- A. The Commission welcomes initiatives that encourage girls to pursue tertiary education, and measures to prevent their vulnerability to HIV infection or teenage pregnancy, but finds that the issuance of a bursary contingent on a female student's virginity is fundamentally discriminatory. It goes against the ethos of the Constitutional provisions in relation to dignity, equality and discrimination. It furthermore violates regional and international commitments to promote gender equality and eradicate harmful traditional practices.
- B. All spheres of government should not use policy to exclude people who do not take part in cultural practices from development support and opportunities. In as much as the right to cultural practices is protected in the Constitution, a universal approach should be followed. People of other cultures are excluded from the Maidens Bursary due to cultural practices.
- C. The Commission finds that the Maiden Bursary category fails to take into consideration that extrinsic factors may lead to any of the maidens losing their virginity such as by way of rape. It is evident that it is traumatic in and of itself to deal with a rape ordeal, and to further lose a bursary as a result of being a rape victim, amounts to secondary victimisation.
- D. The Maiden Bursary creates two categories of beneficiaries: (i) a group of women on whom additional burdens or obligations are imposed; and (ii) another group on whom no such additional burdens or obligations are imposed.
- E. The Commission finds that the Maiden Bursary category amounts to gender discrimination because firstly, equivalent bursaries for male recipients are not subject to the condition that such recipients should remain virgins. Within the context of a deeply patriarchal society marked by power imbalances on the basis of gender, to place all responsibility to reduce teenage pregnancy and the spread of HIV and Aids on the shoulders of a vulnerable group is discriminatory. Furthermore, sexuality

and decisions concerning sexuality are deeply intertwined with a person's dignity and privacy. The differentiation is not allowed and supported by Section 9 of the Constitution. It is further common cause that virginity is not intrinsic to the task of studying.

- F. The Commission finds that any funding by an organ of state based on a woman's sexuality perpetuates patriarchy and inequality in South Africa. In this premise, the respondent's objectives to reduce the spread of HIV/AIDS and teenage pregnancy by awarding the Maiden Bursary would not justify the differentiation of only female students being subjected to virginity inspection. Most of the factors listed in section 14(3) of PEPUDA weigh in favour of a finding that the discrimination by the respondent is unfair and hence unlawful.
- G. The Commission finds that the respondent, as an organ of state, is mandated in terms of the Promotion of Just Administrative Justice Act (PAJA) to take an administrative action that is lawful, reasonable and procedurally fair. In terms of PAJA, the respondent's decision to award the Maiden Bursary to 16 maiden students imposes a restriction or condition that is accordingly discriminatory and unlawful, and falls foul of PAJA's requirements. The administrative action in this regard is not permitted by any empowering provision in this regard.
- H. Constitutional Law expert Pierre De Vos correctly pointed out that it would not assist the respondent to argue that the purpose of the discrimination is to prevent students from falling pregnant.³ This is so because the awarding of the bursary is not made conditional on the women not falling pregnant – it is made conditional on the women remaining virgins. If pregnancy was the issue, the condition is overbroad and too invasive. In any case, PEPUDA prohibits discrimination on the basis of pregnancy. A rule that prohibits women from benefiting from a bursary after falling pregnant would in effect punish one of the parents (the woman) while turning a blind eye to the actions of the other parent

³ <http://constitutionallyspeaking.co.za/virginity-test-bursaries-discriminatory-and-unlawful/>

(the man) and would perpetuate the sexist double standard which forms the basis of so many of the rules used to entrench patriarchal privilege.⁴

- I. The Uthukela Municipality is an organ of State and is therefore, in terms of section 7(2) of the Constitution, obliged to respect, protect, promote and fulfil the rights set out in the Bill of Rights. Although the State is, in terms of section 36 of the Constitution, authorised in certain circumstances to limit rights in the Bill of Rights, they must do so in terms of a law of general application.

Harksen v Lane N.O and Others⁵ the court has ruled that the law may differentiate between classes of persons only if the differentiation is rationally linked to the achievement of a legitimate government purpose. The question to ask is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious.

10. Recommendations

The Commission accordingly recommends and advises the respondent as follows:

- (a) The Maiden Bursary be removed as a category for bursary allocation and the respondent's bursary policy in this regard be amended.
- (b) The students who were awarded the Maiden Bursary retain their bursary on any grounds stipulated in the bursary policy, other than their virginity.
- (c) Council Resolution No A28/11/15 which deals with the Maidens Bursary should be rescinded or amended as per the municipality's internal processes to comply with the recommendations of the Commission.
- (d) A high-level meeting be held between the Commission's Chairperson, the Mayor of Uthukela Municipality, South African Local Government

⁴ ibid

⁵ 1997 (11) BCLR 1489; 1998 (1) SA 300

Association (SALGA) as well as the KwaZulu-Natal Provincial Legislature and the MEC for Cooperative Governance and Traditional Affairs in KZN, to ensure that the respondent spends funding on appropriate and lawful programmes that are in line with the principles and values enshrined in the South African Constitution.

- (e) All councillors of the respondent should receive training on gender equality, including relevant legislation and international and regional instruments to which South Africa is signatories to. All new councillors should receive said training during induction post the forthcoming 2016 municipal elections. The Commission offers its services in this regard, but the municipality is at liberty to source the services of any service provider.
- (f) Annual feedback for a period of two years should be given to the Commission, the KwaZulu-Natal Provincial Legislature as well as the KwaZulu-Natal MEC for Cooperative Governance and Traditional Affairs, on the bursary schemes afforded by the respondent, amendments to policies relating to the bursary schemes, as well as gender training of councillors.
- (g) The respondent should consider a gender awareness outreach programme among communities in the district, that deals with issues of patriarchy, HIV/AIDS, gender discrimination and gender-based violence, should budgetary allocation and finances allow for this.
- (h) The respondent is requested to report back in writing to the Commission on its implementation of these recommendations, within 60 days hereof, and by not later than 18 August 2016.

Signed at Constitution Hill on the 24th day of JUNE 2016.

A handwritten signature in blue ink, appearing to read 'Keketso Maema', is written over a horizontal line.

Keketso Maema

Chief Executive Officer

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