THE Toilet war

The City of Cape Town built unenclosed toilets in Makhaza, an informal settlement in Ward 95 of Khayelitsha. It did so on the understanding that the community would erect their own enclosures. This led to a public outcry, protests by the ANC Youth League (ANCYL), an investigation by the Human Rights Commission and even a court challenge. The media has dubbed the dispute 'the toilet war'.

Photo: Esa Alexander/*Sunday Times*

This article sets out some of the key facts of the dispute and reports on the Human Rights Commission's findings. In so doing, it seeks to draw out some key lessons that may benefit other municipalities that are faced with the daunting challenge of managing the politics of service delivery in informal settlements under severe capacity and funding constraints.

The main facts

In 2007 the City of Cape Town agreed with community leaders to build houses in response to the housing backlogs in the areas of Silverton, Town 2 and Makhaza. As part of the housing project, the City started building streets and toilets. Five

households were to share one toilet as a temporary measure. The background to this was that the City had planned to build a house for each family with built-in flushing toilets. Therefore it was thought that building many outside toilets as an interim measure would be too costly and would also destabilise the housing project, as the outside toilets would, in any event, have to be demolished after the completion of the housing project.

In 2008, difficulties with the one-toilet-for-five-households arrangement led to the agreement between the City and community leaders to erect a number of unenclosed toilets with the understanding that the housing project would be completed in three months' time. Pending the completion of the project (which would ensure that each family had a house with a built-in flushing toilet), the temporary enclosure of the unenclosed toilets was to be the responsibility of the residents of the individual sites on which the toilets were to be installed. Based on this agreement, 280 unenclosed toilet facilities were installed, and all but 55 of them were enclosed by the residents themselves, as per the agreement.

The housing project was, however, still not completed by the end of 2009. In January 2010, the ANCYL's Dullah Omar region lodged a complaint with the South African Human Rights Commission on behalf of the community members of the area called Ward 95, Makhaza, in Khayelitsha. In the complaint, the League argued that the installation of unenclosed toilets amounted to a gross human rights violation and that it undermined the people's right to have their dignity protected as stipulated in section 10 of the Constitution. The Commission visited the area to inspect the conditions alleged in the complaint.

Mediating the dispute

The Commission initially attempted to mediate between the City and the ANCYL, with no success. This was followed by an attempt by the City to install galvanised iron structures over the open-air toilets. These were immediately dismantled by angry community members. The Mayor of the City of Cape Town then went to the area for a door-to-door survey of the entire site, to ask the residents whether they wanted their toilets to be enclosed. The residents were asked to register their wishes in a pre-designed agreement, which required their signatures. The majority of the residents (97 %) indicated that they wanted their toilets to be enclosed.

The ward councillor convened a meeting with the residents in an attempt to clarify what the agreement entailed. It transpired that the residents thought they were agreeing to the installation of concrete structures, not the corrugated enclosures. The residents consequently rejected the enclosures if they were going to be made of corrugated metal sheets. The Mayor then showed them the agreement they had signed. Some verbal exchanges took place, attitudes on both sides hardened and the community embarked on violent protest action.

The City then removed the toilets altogether, arguing that they risked being vandalised. The result was that the situation reverted to the one-toilet-for-five-households arrangement, with some community members forced to relieve themselves in open fields.

key points

- The City of Cape Town built 280 open-air toilets in Makhaza with the understanding that the residents would enclose them.
- All but 55 of the open-air toilets were duly enclosed by the residents, as per the agreement.
- The ANCYL, Dullah Omar region, lodged a complaint with the SAHRC arguing that the installation of unenclosed toilets amounts to a gross human rights violation.
- The SAHRC, while commending the City's effort to provide each household with a toilet, found the provision of unenclosed toilets unreasonable.
- The SAHRC furthermore held that in any development project, the needs of the most vulnerable in a community must be prioritised.

Findings of the Human Rights Commission

In June 2010 the Human Rights Commission released its findings in favour of the ANCYL and the residents. In arriving at its decision, the Commission took account of various constitutional considerations, particularly the right to human dignity. Human dignity, according to the Commission, was 'both the first value listed in the founding provisions of the Constitution and the pre-eminent right in the Bill of Rights'. Furthermore, the Commission held, the right to human dignity was very closely linked to socio-economic rights and, more specifically, the right of access to adequate housing in terms of

section 26 and the right of access to basic services as contained in section 27 of the Constitution.

With regard to the obligations of the state in the realisation of these rights, the Commission referred to the *Grootboom* decision of the Constitutional Court in which the Court held that 'the Constitution requires the state to put in place a comprehensive and workable plan in order to meet its socio-economic rights obligations' and that the programme must be 'balanced and flexible and must make appropriate provision for attention to short, medium and long term needs'.

The Commission adopted the criteria formulated by the Constitutional Court to test the reasonableness of measures taken by the state in the realisation of the rights discussed above. Accordingly, the reasonableness of the measures needed to be assessed in relation to the design, adoption and implementation of the measures undertaken to fulfil these duties, which were 'comprehensive' and did 'not exclude those most in need of the protection of those rights'.

The Commission commended the City's effort in providing a toilet for each family over and above the national one-toilet-for-five-families standard. However, the Commission found the manner in which the project had been implemented unreasonable because the City had provided the community with unenclosed toilets. It noted the legacy of apartheid in which adequate sanitation was denied to the majority of the country's citizens. The Commission noted that, even if the measure was supposed to be a temporary one, it had persisted for almost three years. The special interests of women and girls, in terms of both their biological needs and their vulnerability to gender-based crimes, and the interests of vulnerable members of the community, including those with disabilities, had not been taken into account in the planning of the project. No consideration had been taken of those who could not afford to build their own toilet enclosures. The Commission stated that the City 'was constitutionally obliged to come to the aid of those who, due to poverty and their particular disadvantaged socio-economic status, could not afford to enclose their toilets'. The failure to meet this obligation, the Commission found, 'violated the right to dignity of the community members'.

With regard to the City's claim that members of the community had been informed that they would have to cover the costs of the enclosures and had agreed to that, the Commission maintained that the consultation with the community had been 'inadequate'. The Commission stated that a 'comprehensive programme designed to achieve the ultimate delivery of full basic services to the community, vulnerable groups in the community and individuals would have placed a premium on prior consultation with the target groups'. It found insufficient evidence that the community had been adequately consulted about the full impact, financial and otherwise, of the project.

The Commission criticised the destruction of the corrugated metal sheet enclosures by the community. However, it maintained that, given the high crime rate in the area, corrugated iron sheeting could not be regarded as an adequate or safe enclosure. 'The City ought, therefore, to have considered the circumstances of the community members', particular vulnerability and concerns about safety in determining the reasonableness of using metal sheeting, as opposed to more durable structures, to enclose the toilets and to ensure proper lighting'.

The Commission thus found that the City had violated the right to dignity as envisaged by section 10 of the Constitution by not enclosing the toilets.

Comment

The above narrative may very well have missed certain nuances or roles played by either side to the dispute, as it is such a long-standing and vexed disagreement. However, the sequence of events, put together on the basis of an honest examination of the information available, paints the picture of a housing delivery project gone wrong. This article does not seek to apportion blame to either party. That is now the task of the Western Cape High Court. However, as pointed out in the editorial, there are a number of key lessons that other municipalities facing similar challenges may learn from.

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