south african
human
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commission

# Investigative Reports

*Volume 1*

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# Investigative Reports

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# COMPLAINT NO: Western Cape/2008/0448

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: WC/2008/0448*

In the matter between:

**Karl Günsche** COMPLAINANT

and

**German International School** RESPONDENT

# REPORT

## 1. Introduction

1.1. The South African Human Rights Commission (hereinafter referred to as the "SAHRC") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996.

1.2. The SAHRC and the other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".

1.3. The SAHRC is specifically required to:

1.3.1. Promote respect for human rights;

1.3.2. Promote the protection, development and attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. *Section 184(2) of the Constitution*[1] empowers the SAHRC to investigate and report on the observance of human rights in the country.

1.5. Further, Section 184(2) and (d) affords the Commission authority to carry out research and educate on human rights related matters.

1.6. The *Human Rights Commission Act, 54 of 1994,* (hereinafter referred to as "the Act") further supplements the powers of the SAHRC.[2]

## 2. Complaint of a violation of the right to privacy

2.1. Respondent is a private school offering bilingual German and English education for Grades 1 through 12. Complainant, the parent of a student attending Respondent's school, alleges that Respondent infringed Complainant's son's constitutional right to privacy.[3] More specifically, Complainant alleges that Respondent violated his son's right not to have his property searched[4] and his right not to have the privacy of his communications infringed[5].

1 The Constitution of the Republic of South Africa Act 108 of 1996

2 Findings and recommendation of the Commission in the matter of Van Onselen, Gareth on behalf of the Democratic Alliance number FS/2010/0231.

3 Section 14.

4 Section 14(b).

5 ection 14(d).

2.2. These alleged infringements occurred when Respondent undertook a search and examination of students' cellular phones in August 2007 without prior notice to students or parents. At the time, Respondent's Code of Conduct had no provision dealing with the search of cellular phones. Instead, Respondent justified the search using the principle of *in loco parentis.* On 21 November 2007, however, Respondent amended its Code of Conduct, to incorporate paragraph 1.3 (see Attachment 2), which states:

> *The school retains the right to view and copy information that has been stored on electronic devices / cell phones in order to ensure that no undesirable communication, in particular pornography or other material, is distributed or exchanged among students.*

2.3. Complainant claims that paragraph 1.3 continues to violate his son's right to privacy as it allows Respondent to search electronic devices and copy content without a reasonable suspicion of prohibited materials. Moreover, Complainant argues that the phrase 'undesirable communication' is ambiguous as it is not defined in the Code of Conduct, thereby giving Respondent sole discretion over whether material is 'undesirable' or not.

## 3. Constitutional considerations

### 3.1. First the Right to Privacy is at issue.

Section 14 of the Constitution states:

*Everyone has the right to privacy, which includes the right not to have:*

*a. their person or home searched;*

*b. their property searched;*

*c. their possessions seized; or*

*d. the privacy of their communications infringed.*

### 3.2. Limitation of rights

Section 36(1) of the Constitution states:

*The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:*

*a. the nature of the right;*

*b. the importance of the purpose of the limitation;*

*c. the nature and extent of the limitation;*

*d. the relation between the limitation and its purpose; and*

*e. less restrictive means to achieve the purpose.*

## 4. Investigation

4.1. An investigation into a violation of the constitutional right to privacy follows a two stage analysis. Firstly, it must be assessed whether Respondent's conduct has infringed the right. Secondly, if Complainant's right has been infringed, whether this infringement can be justified under Section 36 of the Constitution.

4.2. Generally speaking, Section 14 of the Constitution explicitly protects the individual from illegal searches of his or her property and communications, although this right to privacy is subject to limitations as established by constitutional provisions as well as by case law.[6] In Bernstein v Bester NO ('Bernstein'), Ackermann J maintained that,

'The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the *inner sanctum* of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community... Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly'.[7]

4.3. Thus, the issue is whether information on a cellular phone pertains to the 'inner sanctum of a person'. Ackerman J described possible infringements of the 'inner sanctum'.

'Examples of wrongful intrusion and disclosure which have been acknowledged at common law are entry into a private residence, the reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion, and the disclosure of private facts contrary to the existence of a confidential relationship.'[8]

4.4. According to this description, searching through the contents of a cell phone could been seen as very similar to 'the reading of private documents' or even 'listening in to private conversations', and thus may be considered an infringement on Complainant's son's 'inner sanctum'. Ackermann J further qualified his description, however, stating that privacy is only protected if it is reasonable for the individual to expect protection of this 'inner sanctum':

> *'[I]t seems to be a sensible approach to say that the scope of a person's privacy extends a fortiori only to those aspects in regard to which a legitimate expectation of privacy can be harboured'.*[9]

4.5. Referring to US jurisprudence, Ackermann J explained that a 'legitimate expectation of privacy' involves a 'subjective expectation of privacy...that the society has recognised... as objectively reasonable.'[10] Here, the question is whether it is reasonable for students at Respondent school to expect that their cell phones and the information contained therein are private property... If the contents of a student's cell phone are protected by privacy rights, and if the students at Respondent school have a legitimate expectation of privacy with respect to their cellular phones, then Respondent is generally not justified in searching through its students' private property and communications.

4.6. The data stored on a cellular phone consists of a person's private communications, and it is generally reasonable for an individual to expect that this information be kept

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6 In *Bernstein v Bester NO* 1996 (2) SA 751 (CC0 [71], Ackermann J warned that caution should be exercised 'when attempting to project common law principles onto the interpretation of fundamental rights and their limitation'. Nonetheless, he was referring to the stages of enquiry rather than the scope of privacy rights.

7 1996 (2) SA 751 (CC) (67) (emphasis added). The case was in fact based on the analogous privacy provision in the interim Constitution (Section 13).

8 1996 (2) SA 751 (CC) [69]

9 1996 (2) SA 751 (CC) [75].

10 1996 (2) SA 751 (CC) [76].

private. Indeed, Section 14 of the Constitution makes explicit reference to property being searched and the privacy of communications. Although one could argue that the scope of this privacy right is limited due to the 'communal relations' that exist between students and educators in the school environment, Complainant's son's cell phone and the information and communications on it were part of his 'truly personal realm'. The decision to search students' cellular phones in August 2007, thus, constituted an infringement of Complainant's son's Section 14 privacy rights unless an exception applies.

4.7. The next step in the legal analysis is whether this infringement can be justified under the Section 36 limitations clause. Section 36(1) states that, '[t]he rights in the Bill of Rights may be limited only in terms of law of general application…' Therefore, in order to justifiably limit Complainant's son's right to privacy, the power to act *in loco parentis* must count as a law of general application.

4.8. To be of 'general application' such a power must be stated in 'a clear and accessible manner'.[11] The reason for this is that:

> *'[I]f broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision'.*[12]

4.9. In other words, a rule of 'general application' cannot be so vague as to be susceptible to arbitrary enforcement. Here, the question is whether the legal principle of *in loco parentis* is sufficiently limited in scope to qualify as a rule of 'general application', thereby triggering the exception to the Section 14 privacy right as defined by the Constitution.

4.10. *In loco parentis* is a well-established legal principle in which a temporary guardian or caretaker of a child takes on some or all of the responsibilities of the parent.[13] When a parent leaves her child in the care of a school, that school then assumes a role *in loco parentis*, and is therefore bound to exercise the same foresight and care as a 'reasonably careful parent' in relation to her own children.[14] This principle is clearly established, but broad in scope, particularly with respect to what steps a 'reasonably careful parent' would take to protect the child. *In loco parentis* is most readily applied in situations where the physical safety of a child is at stake, such as when a child is injured on a school trip.[15] No 'reasonably careful parent' wants a child to get lost on a field trip or fall off a bunk bed and get hurt, for example. In many other situations, however, there is more room for disagreement as to what a 'reasonably careful parent' would want for her child, and in some cases, a school is expressly prohibited from acting as a parent would act.[16]

4.11. With respect to the appropriateness of certain content, there is much room for disagreement among 'reasonably careful parents'. In these cases, there must be 'express

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11 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) [47].

12 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) [47].

13 Black's Law Dictionary (9th ed. 2009), available at Westlaw BLACKS.

14 Hawekwa Youth Camp v Byrne (615/2008) [2009] ZASCA 156 (27 November 2009) [20].

15 Hawekwa Youth Camp v Byrne (615/2008) [2009] ZASCA 156 (27 November 2009) [20].

16 Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11 (18 August 2000) [51], in which the court holds that a school may not use corporal punishment on minor students, even with parents' express consent.

constraints' and clearly defined boundaries so that all parties – the school, parents and students – know exactly what powers the school can exercise, and when it has overstepped its authority. Respondent school's Code of Conduct is supposed to further define its role *in loco parentis,* but in August 2007, when the search was conducted, there was no policy on searching students' cellular phones. By searching students' cell phones without such a policy in place, Respondent school acted without adequately defining the scope of its power. Therefore, Respondent's comprehensive search and examination of students' cellular phones in August 2007, *in loco parentis,* is not justified by the 'rule of general application' exception stated in Section 36(1) of the Constitution.

4.12. After the August 2007 search, Respondent did modify its Code of Conduct to include searches and seizures of cellular phones and other electronic devices, although this modification still raises some constitutional questions. Respondent incorporated paragraph 1.3 into the Code of Conduct which states that,

The school retains the right to view and copy information that has been stored on electronic devices / cell phones in order to ensure that no undesirable communication, in particular pornography or other material, is distributed or exchanged among students.

4.13. Respondent alleges that this provision violates his son's constitutional right to privacy as paragraph 1.3 does not require 'reasonable suspicion', nor does it define 'undesirable communication' or 'other material'.

4.14. As concluded in paragraph 4.11 above, searching students' cell phones constitutes an infringement of the Section 14 right to privacy, unless the search was conducted by an institution acting *in loco parentis* but only when this power is clearly defined and limited in scope. The next issue is whether paragraph 1.3 of the revised Code of Conduct can justifiably limit this right of *in loco parentis,* thereby triggering the 'law of general application' exception to the right of privacy as described in Section 36(1) of the Constitution.

4.15. Respondent states that its powers to incorporate paragraph 1.3 come from Section 3.8 of the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners ('the Guidelines'). (See Attachment 1.) This Guideline derives from Section 8.3 of the South African Schools Act 1996. Section 3.8 of the Guidelines states that,

> *The principal or an educator, upon reasonable suspicion (sufficient information), has the legal authority to conduct a search of any learner or property in possession of the learner for a dangerous weapon, firearm, drugs, or harmful dangerous substance, stolen property, or pornographic material brought on to the school property... During a search human dignity shall be observed and learners shall be searched in private by persons of their own gender, preferably in the presence of at least one other person. A record must be kept of the search proceedings and the outcome.*

4.16. Given that the South African Schools Act 1996 makes express provision for them, the Guidelines are law as required by Section 36 of the Constitution. Therefore, paragraph 1.3 which incorporates Section 3.8 of the Guidelines into Respondent's Code of Conduct must also be law. The fact that the Guidelines are delegated legislation does not alter the fact that they count as law.[17]

[17] *Larbi-Odam v MEC for Education* 1998 (1) SA 745 (CC) [27].

4.17. As for the requirement of 'general application', both Section 3.8 of the Guidelines and paragraph 1.3 of the Code of Conduct appear to be sufficiently clear and accessible. Indeed, this Section 3.8 requirement was not intended to be particularly demanding. Therefore, although there are some terms in paragraph 1.3 which could helpfully be expanded upon, both paragraph 1.3 and Section 3.8 are such that they enable students to alter their conduct so as to conform to the law. Consequently, they constitute laws of general application.

4.18. Although paragraph 1.3 of Respondent's modified Code of Conduct does trigger the 'law of general application' exception, the analysis does not end there. In order to determine the constitutionality of this 'law of general application', the court must balance several competing factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose; and whether there is a less restrictive means to achieving the purpose. The most extensive discussion on this part of Section 36 of the Constitution, then Section 33 of the Interim Constitution, was conducted in S v Makwanyane. In that case, Chaskalson P stated that,

> *'The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality... The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests'...*[18]

4.19. The different factors in Section 36 must, therefore, be analysed in order to determine where the balance of the different interests lies. Firstly, Section 36 mentions 'the nature of the right'. In National Coalition for Gay and Lesbian Equality v Minister of Justice, whilst maintaining that '[w]e should not deny the importance of a right to privacy in our new constitutional order'. Ackermann J stated that,

> *Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.*[19]

4.20. Moreover, the Commission of the European Union, quoted by Ackermann J in Bernstein, has stated that,

> *[T]he concept of privacy in Article 8 also includes, to a certain extent, the right to establish and maintain relations with other human beings for the fulfilment of one's personality.*[20]

4.21. From this, the importance of the right to privacy enshrined in Section 14 is highlighted. Privacy protects more than just places; it protects people.[21] It is essential in the flourishing of social relations which in turn has a huge impact on the personality of the individual.

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18 *S v Makwanyane* [1995] ZACC 3 [104].

19 [1998] ZACC 15 [32].

20 Application 8962/80 *X an Y v Belgium D & R* 28 (1982) 112, 124.

21 *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15 [116] (Sachs J).

4.22. Highlighting the importance of the right to privacy in a democracy. Judge Langa stated in his concurring opinion Case v Minister of Safety and Security,

> *[T]he individual's right to privacy has to be seen against the backdrop of our history and the fact that constitutional protection of this right is new in this country. It is a right which, in common with others, was violated often with impunity by the legislature and the executive. Such emphasis is therefore necessary particularly in this period when South African society is still grappling with the process of purging itself of those laws and practices from our past which do not fit in with the values which underpin the Constitution – if only to remind both authority and citizen that the rules of the game have changed.*[22]

4.23. Secondly, Section 36 requires us to consider the importance of the purpose of the limitation. There are, undeniably, important purposes served by paragraph 1.3, mainly the protection of young people from inappropriate or harmful content. Indeed, Complainant himself does not question the school's objectives in incorporating paragraph 1.3. Whilst intercepting an adult's cell phone communications may be justifiable only very rarely, viewing a school child's cell phone may be justifiable in a greater range of circumstances. In other words, the argument that the school should take a paternalistic approach in protecting students from inappropriate content is much more acceptable with respect to children at school than with adults. Therefore, there might be a legitimate purpose in viewing a school student's phone if one is doing so to protect the interests of that child and other children.

4.24. Paragraph 2.6 of Respondent's Code of Conduct prohibits students from accessing and possessing pornographic material. In Case v Minister of Safety and Security, the applicants challenged Section 2(1) of the Indecent or Obscene Photographic Matter Act 37 of 1967 which stated that,

> *Any person who has in his possession any indecent or obscene photographic matter shall be guilty of an offence...*[23]

4.25. Focussing on the privacy aspect of possessing pornographic material, Didcott J stated that,

> *What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the state. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which Section 13 of the interim Constitution (Act 200 of 1993) guarantees that I shall enjoy.*[24]

4.26. Nonetheless, Madala J maintained that, with regards to children, different interests may present themselves:

> *While I agree that one's right to privacy should be respected, this, in my view, does not mean that all pornographic or similar material warrants protection under that right or even under the wing of free expression... In my view, children should not be exposed to or participate in the production of pornography, and that, therefore,*

22 *Case v Minister of Safety and Security* [1996] ZACC 7 [100] (Langa J).

23 [1996] ZACC 7.

24 [1996] ZACC 7 [91].

*possession by them and exposure to pornographic material should be prohibited. However, possession by adults, in the privacy of their homes for personal viewing of sexually explicit erotica, portraying nudity, sexual interaction between consenting adults, without aggression, force, violence or abuse, may not be prohibited, for the benefit of those who derive pleasure in viewing such material.*[25]

4.27. Treating children different in this way may stem from the need to protect them from material which would be harmful to them in some way. For example, it has been suggested that exposure to pornography at an early age can increase the risk that children themselves become victims or perpetrators of sexual violence as children or later on in life. Moreover, exposure to pornographic material can negatively influence attitudes and views of the opposite sex and sex in general. Whilst viewing pornographic material can affect people of all ages, children are especially vulnerable as their brains and sexual identity have not yet fully developed.

4.28. In a letter to SAHRC dated 27 October 2008 (see Attachment 3), Respondent justifies the addition of paragraph 1.3 to its Code of Conduct, arguing that the provision allows it to search for undesirable communications such as pornography. Respondent argues that the Constitution and the South African Schools Act 84 of 1996 (Schools Act) (see Attachment 4) charges Respondent with balancing the best interests of the children with their rights to privacy. Respondent also refers to regulation 372 of 1997 promulgated under the Schools Act (see Attachment 5), whose definition of 'undesirable behaviour' includes, among other things, the possession of drugs and pornographic materials. Moreover, given the potential effects of early exposure to pornography as mentioned in the previous paragraph, deference should be shown to the school's view that 'it is in the best interests of children…not to be exposed to undesirable information such as pornography'. The limitation on students' privacy rights as stated in paragraph 2.6 of Respondent's Code of Conduct, consequently, serves a legitimate purpose. Furthermore, an attempt to regulate a banning of pornography in the school environment, as accomplished by paragraph 1.3 of the Code, serves a legitimate purpose.

4.29. Respondent argues that paragraph 1.3 aims to prevent the dissemination of 'undesirable communication', including *'pornography or other material'.* This language is unquestionably broad, but there are certainly types of communication, other than pornography, which Respondent could legitimately attempt to regulate. For example, cyber-bullying, or the use of information and communications technologies to harm others, is a common problem in schools. With regards to cell phones, this could occur when a bully sends a victim threatening, tormenting, harassing or otherwise targeted text messages.

4.30. The transmission of inappropriate and harmful content on students' cellular phones is of particular concern in South Africa today, after a rash of incidents in which gang rapes were videotaped and distributed among young people via cellular phone. In one recent incident, which received international media attention, a group of Soweto youths filmed themselves raping a mentally disabled teenage girl.[26] The attack was discovered after

[25] [1996] ZACC 7 [105] (emphasis added).

[26] Nkepile Mabuse, Shocking rape video goes viral in South Africa, April 19, 2012, see http://edition.cnn.com/2012/04/18/world/africa/south-africa-rape-video/index.html, accessed on June 25, 2012.

the video went viral, distributed rapidly among school children via cellular phone.[27] By being able to 'view and copy information stored on…cell phones', schools could serve the legitimate purpose of bringing these attacks to light and discourage the transmission of similar attacks.

4.31. Thirdly, Section 36 requires one to consider the nature and extent of the limitation. This reinforces the point that '[S]ection 36…does not permit a sledgehammer to be used to crack a nut.'[28] Although paragraph 1.3 of Respondent's Code of Conduct serves a legitimate purpose, some of the language is overly broad and does not adequately limit the scope of Respondent school's power. For example, 'undesirable communication', including *'pornography or other material'* is broad enough to include cyber bullying and violent attacks, but it is not sufficiently precise to exclude other kinds of communication. For example, what if students distributed communications that were critical of the school or of their teachers. The school may consider this kind of communication 'undesirable' – could they seize students' phones and electronic devices for the purpose of searching for evidence of this kind of communications? According to the language in the revised Code of Conduct, yes. Similarly, paragraph 1.3 does not adequately describe when Respondent may exercise its power to search students' phones. The language of paragraph 1.3 is more broad than required to meet Respondent school's objectives, and so the language in the Code of Conduct must be more precise.

4.32. Fourthly, Section 36 requires one to consider the relation between the limitation and its purpose. In other words, there must be a causal connection between paragraph 1.3 and the purpose of preventing the possession of pornography or other undesirable communication on electronic devices or cell phones. It appears self-evident that the power to inspect phones will have some deterrent effect in this regard.

4.33. Finally, the last relevant factor in Section 36 is whether the limitation is the least restrictive means to achieve the purpose. Complainant essentially argues that paragraph 1.3 is overbroad because there does not need to be any 'reasonable suspicion' with regards to a certain individual before a search is conducted. Indeed, the provision appears to sanction arbitrary searches of large groups of students.

4.34.

4.35. Complainant argues that students' cell phones should only be able to be searched if teachers have a reasonable suspicion that they are breaking the law or school rules. As a result, the benefits of paragraph 1.3 come at too great a cost to the rights of students at Respondent school. If the purposes of paragraph 1.3 are to prevent the possession of pornography on cell phones in school and to stamp out other undesirable communications such as cyber-bullying and violence, then there are other effective means of doing so. In other words, these purposes could be fulfilled with a provision that was worded more narrowly than paragraph 1.3. Therefore, it is suggested that paragraph 1.3 is disproportionate because it is not the least restrictive method of achieving the desired purpose. The unreasonableness of this provision is highlighted by the fact that Section 3.8 of the Guidelines, upon which paragraph 1.3 is based, does require a 'reasonable suspicion' before a search is undertaken.

[27] *Ibid.*

[28] *S v Manamela* [2000] ZACC 5 [34].

4.36. As a corollary to this, Complainant argues that paragraph 1.3 is unconstitutional on the basis that the terms 'undesirable communication' and 'other material' are ambiguous and fail to be defined by the Code of Conduct.

4.37. If it is not possible to recognise what kind of communication, apart from pornography, Respondent considers 'undesirable' and wants to ban then it is not possible to appreciate the purpose of this limitation. One possible example of 'undesirable communication', as stated above, is cyber-bullying. The purpose of limiting students' rights in order to stamp out cyber-bulling is obvious. However, this legitimate purpose of limiting students' rights is very different from other legitimate purposes, such as preventing students from using their cell phones to cheat on exams. Without paragraph 1.3 making any mention of what 'undesirable communication' consist of, apart from pornography, suggests that it is not possible to analyse the importance of the purpose of the limitation. Moreover, it is not possible to consider the relation between the limitation and its purpose. Nor is it possible to deduce whether the limitation is the least restrictive means to achieve the purpose. The phrase 'undesirable communication' could be used by Respondent to justify all manner of spying into the private lives of its students. The fact that Respondent has not yet used paragraph 1.3 in this way does not mean that it will not do so in the future in the event of emergency. Consequently, with regards to ambiguous terms such as 'undesirable communication' and 'other material' paragraph 1.3 is overbroad.

## 5. Finding

5.1. In conclusion, the August 2007 search of students' cell phones was unconstitutional, even though Respondent school acted *in loco parentis,* because the Respondent's right to seize and search electronic devices was not adequately defined in a Code of Conduct. Similarly, paragraph 1.3 of Respondent School's Revised Code of Conduct, drafted after the August 2007 search, is open to constitutional challenge due to the vagueness of its language. Paragraph 1.3 of the Code of Conduct includes undefined terms such as 'undesirable communication' and 'other material'. Apart from explicitly including pornography as falling within these categories, such ambiguity fails to demonstrate the real reason for such searches.

## 6. Recommendation

The Commission recognizes that Respondent school has the duty to protect its students and supports its assumption of rights *in loco parentis* as long as these rights are clearly defined and limited in scope. As Complainant's son is no longer a student at Respondent school and the Commission has been unable to locate the Complainant, the therefore Commission does not recommend any remedy for the unconstitutional search conducted in August 2007. However, the Commission recommends that Respondent adjust paragraph 1.3 of the Code of Conduct so that it can pass constitutional muster while allowing Respondent to continue to act *in loco parentis* and protect students from harmful communications. In particular, the Commission recommends that Respondent more clearly define 'undesirable communication' as all communications that are offensive or harmful. The Commission also recommends that paragraph 1.3 be revised to define the situations in which Respondent school will be justified in exercising its right to seize and search electronic devices and cell phones. The Commission is willing to work with Respondent and to help it bring paragraph 1.3 in compliance with the Constitution.

## 7. Appeal

Should you not be satisfied with this decision, you may lodge an appeal, in writing (a copy of the appeal form is available at any office of the SAHRC), within 45 days of receipt of this letter, providing full reasons why your complaint should be dealt with by the SAHRC. The appeal should be lodged with the Head Office of the SAHRC – contact details are as follows:

**Private Bag X2700**
**Houghton**
**2041**

**Signed in Braamfontein ON THE 27 DAY OF September 2012**

**South African Human Rights Commission**

## Attachments

Attachment 1: Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners
Attachment 2: Code of Conduct Applicable to all Students of the Deutsche Internationale Schule Kapstadt ("DSK")
Attachment 3: Letter from Deutsche International Schule Kapstadt to The South African Human Rights Commission, dated
27 October 2008
Attachment 4: South African Schools Act 84 of 1996 (Schools Act)
Attachment 5: Regulation 372 of 1997 promulgated under the Schools Act


COMPLAINT NO: Western Cape/2009/0562

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: WC/2009/0562*

In the matter between:

**Pieter Hall** **Complainant**

and

**Superspar Belhar** **Respondent**

# REPORT

## 1. Introduction

1.1. The South African Human Rights Commission (hereinafter referred to as the "SAHRC") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996.

1.2. The SAHRC and the other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".

1.3. The SAHRC is specifically required to:

1.3.1. Promote respect for human rights;

1.3.2. Promote the protection, development and attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. *Section 184(2) of the Constitution*[1] empowers the SAHRC to investigate and report on the observance of human rights in the country.

1.5. Further, *Section 184(2)(c) and (d)* afford the Commission authority to carry out research and to educate on human rights related matters.

1.6. The *Human Rights Commission Act, 54 of 1994* (hereinafter referred to as "the Act") further supplements the powers of the SAHRC.[2]

## 2. The Complaint

Pieter Hall submitted a complaint to the SAHRC on 17 December 2009. In his complaint, Mr. Hall detailed going to the Superspar grocery store in Belhar, Bellville on 16 December 2009:

2.1. On 16 December, Mr. Hall was told that he could not enter the store because he was carrying a bag. Mr. Hall described the bag as a postman's bag, sometimes referred to as a messenger bag.

2.2. The security guard told Mr. Hall that only women were allowed to carry bags in the store. Mr. Hall asked if his sister would be allowed to carry the bag in the store, and the security guard said, "Yes because she is a woman".

2.3. Mr. Hall then gave the bag to his sister, Ms. De Koker, and they entered the store.[3]

[1] The Constitution of the Republic of South Africa Act 108 of 1996

[2] Findings and recommendation of the Commission in the matter of Van Onselen, Gareth on behalf of the Democratic Alliance number FS/2010/0231.

[3] See Complaint, Pieter Hall (18-Dec-2009)

2.4. Ms. De Koker confirmed her brother's account and further asserted that after shopping she went to talk to the security supervisor who told her it was a Spar company policy that no man is allowed inside the Superspar with a bag because men were more likely to steal.[4]

## 3. The investigation

3.1. SAHRC contacted Wayne Fleischer, the branch manager for Spar-Bellville, via the telephone on 26 January 2010. Mr. Fleischer maintained that the store has an unwritten policy with respect to male customers who are carrying bags: they are not permitted to enter the store unless they hand in their bags at the designated parcel counter.[5]

3.2. Mr. Le Roux, the owner of Spar-Bellville, then contacted SAHRC. Mr. Le Roux maintained that Mr. Fleischer was an employee, not authorized to comment publicly, and that Mr. Le Roux would send a formal response on behalf of the company.[6]

3.3. On 30 March 2011 the SAHRC received a fax from the Belhar Superspar management that stated the official store policy was as follows:

3.3.1. The customer is requested to hand his/her bag in at the parcel counter;

3.3.2. The customer is provided with a facility to store his/her bag till he has completed his shopping;

3.3.3. This does not include laptop bags on provision that the bag be inspected before the customer may enter with said bag; and

3.3.4. This includes all medium and large bags but excludes ladies' hand bags, as they constitute a law risk[7] because of their size.

3.4. In their letter, Superspar noted that the policy had been developed after a number of security incidents, thefts, and assaults in the local area.

3.5. The store also noted that they service 130,000 customers on average per month and have not had a similar complaint in six years, indicating that Mr. Hall's encounter may have been an isolated incident.

3.6. Superspar did not provide an official copy of the store's written policy or any other official documents.

## 4. Constitutional Rights

4.1. Section 9(4) of the Constitution Act 108 of 1996 provides that:

1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative other measure designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

3) 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

4 See Witness Statement, Marianna De Koker (5-April-2010)

5 See Letter to Wayne Fleischer (26-January-2010)

6 See Case Notes (28-Jan-2010)

7 See Superspar Letter (30-March-2010)

social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

## 5. Legal Analysis

5.1. In the *Harksen* judgment,[8] a two-part test was created to determine if there is unfair discrimination. The first question is whether the differentiation amounts to discrimination. If the differentiation is on a specified ground then there is a *prima facie* showing of discrimination.

5.2. When the discrimination is based on a specified ground, there is a presumption of unfairness until the contrary is proved.[9] In considering whether to rebut the presumption, the law requires us to examine:[10]

5.2.1. The nature of the provision;

5.2.2. The position of the complainant in society; and

5.2.3. The effect of the discrimination.

5.3. In this case, gender is the ground upon which the Superspar discriminated.[11] Superspar's policy is to request that all people turn over their medium and large bags, but the policy has an exemption for ladies' handbags.

5.4. In the policy, there is no specific exemption for men's bags of similar size as ladies' handbags. There is only a specific exemption for handbags that are conventionally worn by women – for ladies' handbags.

5.5. The official policy does not reflect the practice of the store. Both the security guards and store manager refer to an unwritten policy of refusing to allow men into the store with any size bag (except laptop bags) and make no reference to requiring women to check bags of any size. The policy is *prima facie* discrimination.

5.6. The official policy explicitly talks about ladies' handbags.[12] Thus, there is discrimination on one of the listed grounds in Section 6(3) of the Constitution, namely gender. 'When a listed ground is involved, all that the [claimant] is required to do is establish that the differentiation is based on one or other of the listed grounds and there is no need to prove that the discrimination impairs his or her fundamental dignity as a human being'.[13]

5.7. Because of the presumption of unfair discrimination, the onus of proof is on the Respondent to show that the discrimination was fair. Therefore, we have to consider the relevant factors as laid down by the Constitutional Court.[14]

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8 *Harksen v Lane NO and others* 1997 (11) BCLR 1489.

9 *Harksen v Lane NO and others* 1997 (11) BCLR 1489 para 54 & Section 9(4) of the Constitution.

10 *Ibid.* at para 62-67.

11 See para 3.3.

12 See para 3.3.

13 I. Carrie & J. De Waal, 2005, *The Bill of Rights Handbook*, Juta, Cape Town 5ed, page 245.

14 See para 5.2.

*The nature of the provision*

5.8. The primary purpose of the bag check requirement is reducing crime in the stores, which is a worthy and important societal goal.

5.9. The store implemented the policy after assessing the propensity of demographic groups to commit crime in their stores. Based upon the store's assessment of the demographics, they allege that male customers are more likely to commit crimes than their female counterparts. Although bags of similar size have identical capacity to be used as an implement for theft, they argue it is more efficient to target men for bag checking, as men are more likely to commit crimes. *(This view is not unsubstantiated by any research/data).*

5.10. Furthermore, the Respondent argues that female customers carry bags of all sizes more frequently than their male counterparts. In addition, female customers carry small ladies' bags at a greater frequency than men carry bags of similar size. Given that the majority of women carry bags but men rarely carry bags of similar size, it would be impractical for the store to require all women to check their ladies' handbags and to remove their shopping lists and purses every time they shopped at Spar. It is, they argue, practical to require men to check all of their bags.

This reasoning does not follow as by their own admission a few men carry 'handbags' and these men would also be inconvenienced by having to remove their shopping lists and purses.

5.11. It is questionable whether the official policy or the unofficial policy are reasonably effective ways of implementing a crime prevention policy. Firstly, neither policy is applied consistently, and furthermore, men carrying laptop bags are allowed to take their bags into the store.

5.12. The question is whether Spar's policy which targets a specific demographic group 'most likely to commit a crime in their stores – men (in their view)', amounts to discrimination.[15]

*The position of the complainant in society*

5.13. The Complainant is a member of a class – all men of all ages – who have not historically been disadvantaged and are not currently disadvantaged in South African society.

5.14. Even if it were true that men are more likely to commit crimes in stores, it is still not unfair discrimination. Under the principles of *The President of South Africa and Another v. Hugo,* a Court looks at, "the nature of the power in terms of which the discrimination was effected, and also at the nature of the interests which have been affected by the discrimination."[16] The store is exercising its power to prescribe who can enter their property and under what circumstances. The store's policy is designed to combat crime in their stores, which serves a laudable public purpose.

5.15. In *Hugo*, the Court notes that the President would not have been able to pardon all of the men and all of the women who fit the criteria specified because there would have been a political uproar; in other words, it would have been impractical.[17]

5.16. Spar is therefore within its powers to implement a policy to address issue of crime prevention, even if the policy is discriminatory however, this policy must be based on sound grounds.

[15] *Id*. Para 3.3.4.

[16] *President of the Republic of South Africa and Another v. Hugo* 1997 (6) BCLR 708 at para 44.

[17] *Id.* Para 46.

*The effect of the discrimination*

5.17. Men are not allowed to take their handbags inside a Spar store because the management are of the view that men are more prone to steal than women.[18]

5.18. The purpose of the policy is not to stigmatize or degrade innocent male customers. Whilst the policy is not based upon a perceived immutable personality trait – the criminality of the male mind – that was used as a historical or current basis for unfair discrimination, the policy nevertheless discriminates against men who carry handbags.

## 6. Finding

6.1. The courts have found that there are grounds for 'justifiable' discrimination. Whilst it would be 'justifiable' for Spar to implement a policy which discriminated against men, it would need to be based on sound reasons.

6.2. The current application of the policy is in itself inconsistent with the current objectives of the policy. Firstly it is inconsistently applied, as men with laptops are allowed in the store. Secondly, the reasons cited for exclusion of allowing men with handbags in the store is that it would be impractical and defeat the purpose of the policy. However, by Spar's own admission a few men carry handbags in the store and they are already granting exemption to those men carrying laptops.

6.3. There are non-discriminatory alternatives which could meet the twin goal of crime prevention and practicality. The store policy could require that no small bags be checked in at the parcel desk or the store policy could require that only bags of a certain size be let in. The former would be inconvenient as it prejudices a large proportion of shoppers whilst the latter will be of minimal risk by Spar's own admission as few men carry handbags.

## 7. Recommendation

7.1. Issue a written apology to Mr. Hall for this isolated incident;

7.2. Create signage and clearly display its bag check policy at all points of customer entry;

7.3. Train its staff to inform customers of the bag policy prior to requesting that the customer checks his or her bag; and

7.4. Amend its policy so that it is not gender specific but merely relates to handbag size.

**Private Bag X2700**
**Houghton**
**2041**

**Signed in Johannesburg ON THE 31st DAY OF October 2012.**

**South African Human Rights Commission**

[18] See para 2.4.


COMPLAINT NO: Western Cape/2009/0562

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: WC/2009/0562*

In the matter between:

**Clint Allen** COMPLAINANT

and

**Golden Valley Lodge & Casino** RESPONDENT

# REPORT

## 1. Introduction

1.1. The South African Human Rights Commission (hereinafter referred to as the "SAHRC") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996.

1.2. The SAHRC and the other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".

1.3. The SAHRC is specifically required to:

1.3.1. Promote respect for human rights;

1.3.2. Promote the protection, development and attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. Section 184(2) of the Constitution[1] empowers the SAHRC to investigate and report on the observance of human rights in the country.

1.5. Further, *section 184(2)(c) and (d)* afford the SAHRC authority to carry out research and to educate on human rights related matters.

1.6. The *Human Rights Commission Act, 54 of 1994,* (hereinafter referred to as "the Act") further supplements the powers of the SAHRC.[2]

## 2. The Complaint

Mr. Allen submitted a complaint to the SAHRC on the 14th June 2010. After the initial assessment by the Western Cape Office the matter was rejected as it was felt that there was no human rights violation. The Complainant objected and the appeal was upheld by the Chairperson of the Commission who referred the matter back to the Western Cape Office for further investigation:

**Background:**

2.1. On the 12th January 2010 the complainant checked into the Golden Valley Hotel and Casino in Worcester, Western Cape.

2.2. The Complainant alleges that when he made the booking he requested a smoking room.

[1] The Constitution of the Republic of South Africa Act 108 of 1996.

[2] Findings and recommendation of the Commission in the matter of Van Onselen, Gareth on behalf of the Democratic Alliance number FS/2010/0231.

2.3. He further advises that the lady who accepted and administered his booking advised that there were smoking rooms available and that booking would not be a problem other than the fact that the complainant may have to move rooms on the Wednesday but that the hotel would confirm the same if required.

2.4. Upon booking his three night stay, the complainant was not advised that he would have to move rooms and thus proceeded to pay for his three night stay.

2.5. On the Wednesday 13th January 2010 the complainant and his wife met with clients for breakfast and later enjoyed the facilities at the casino for the remainder of the day. The complainant and his family only returned to the hotel room at or about 21h20 in the evening.

2.6. On arrival at his room the complainant discovered a privacy sign on the door and that his keys would not open the door.

2.7. Upon enquiring at reception the complainant was advised that he and his family along with their possessions were moved to another room.

2.8. The complainant was shocked and enquired as to who gave the respondent the right to move the complainant to another room without contacting the complainant. The receptionist had no answer and eventually the hotel manager arrived.

2.9. The complainant was then accompanied by security into his old room in order to remove certain personal belongings in the room safe and claims that he felt like a criminal as the security watched his every move.

2.10. The hotel eventually acknowledged that it had erred in not contacting the complainant prior to removing his belongings to the new room and was at fault for not attempting to notify the complainant of its intention to do so.

2.11. The complainant advises that certain sentimental instruments (i.e. a brush and a lighter) were misplaced/lost by the respondent at the time of the move and this added to the complainant's feeling that his rights were violated.

2.12. The complainant seeks financial compensation in the amount of R3 000 000.00 for the damages and suffering he and his family had to endure in this whole debacle.

## 3. The Investigation

3.1. Subsequent to the Appeal herein being upheld by the Chairperson, the Western Cape Office of the SAHRC immediately drafted the allegations letter and forwarded it onto the respondent on or about the 20 May 2011.

3.2. The respondent replied to the allegations letter on or about the 6 June 2011 and the response was received by the SAHRC – WC offices on 13 June 2011.

3.3. The respondent addressed the following issues in their reply:

3.3.1. That the allegation by the complainant that the respondent entered his room unannounced was factually incorrect. The respondent avers that the complainant himself admitted that he was notified that there was a possibility that he would be moved to another room during his stay.

3.3.2. The hotel advises that the complainant was fully aware that he would have to change rooms when he checked into the hotel and was provided a snapshot of

the reservation system which reflected two different reservation numbers and two different room numbers. (This is in contrast to the complainant's allegation that he received only one room number and one reservation number).

3.3.3. The respondent further avers that their system cannot be changed retrospectively and this can be independently verified.

3.3.4. The respondent admits that the complainant should have been called at the time his possessions were moved to the new room and conceded that the respondent's staff's failure to do so was an oversight on the respondent's part.

3.3.5. The respondent advises that they have taken the necessary steps against the staff and have also repeatedly apologised for the oversight.

3.3.6. The respondent further advises that it was not its intention to violate neither the complainant's dignity nor his privacy.

3.3.7. The respondent alleges that its conduct was in the normal scope of its business in the hospitality industry (whilst acknowledging their oversight).

3.3.8. The respondent also indicates that housekeeping staff would normally move guests' possessions. It advises that this is an accepted practice in the hospitality industry and cannot be seen as an infringement of guest privacy.

3.3.9. The respondent denies subjecting the complainant to public humiliation as alleged by the complainant and claims that the complainant was afforded the dignity shown to all guests. The respondent disagrees with the complainant's assertion that his dignity was impaired, save for the unintentional oversight.

3.3.10. The respondent has made numerous conciliatory gestures to the complainant in order to express its sincere apologies for the incident but all have been rejected by the complainant.

3.3.11. The respondent states that if the complainant was so aggrieved at the respondent to the extent that he felt his dignity and privacy was impaired, the complainant would not have returned to the respondent's hotel for another stay during July 2011.

3.3.12. The respondent denies having violated the complainant's rights to dignity and privacy but has on numerous occasions apologised for the unfortunate occurrence.

## 4. Constitutional Rights

4.1. The *Constitution* provides that: *"Everyone has inherent dignity and the right to have the dignity respected and protected."*

*4.2. "everyone has the right to privacy, which includes the right not to have;*

*4.2.1. Their person or home searched;*

*4.2.2. Their property searched;*

*4.2.3. Their possessions seized; or*

*4.2.4. The privacy of their communications infringed."*[3]

[3] Section 9(4) of the Constitution of the Republic of South Africa.

# 5. Finding

## 5.1. Legal principles

**Right to privacy:**

a) Section 14 of the Constitution includes a right to privacy, including the right not to have one's person or home searched; one's property searched; possessions seized; or the privacy of one's communications infringed.

Thus there are two parts to the constitutional right to privacy: the general right to privacy, and protections against specific infringements of privacy.

b) Under the constitutional right to privacy one engages in a two stage enquiry. The first involves looking at the scope of the right to determine whether the conduct complained of infringed the right. The second stage is a determination of whether the infringement is justifiable under the limitations clause.

Having one's possessions moved does not directly fall under any of these specific categories, since the property was being neither searched nor seized, but may fall under the general right to privacy.

**Common law and the right to privacy**

c) The common law recognises the right to privacy as an independent personality right that the courts consider to be part of the concept of *'dignitas' (Bernstein v Bester).*[4]

However, in *Bernstein,* the Constitutional Court cautioned against a straight forward use of common law principles to interpret fundamental rights and their limitation.[5]

The unlawfulness of a factual infringement of privacy is gauged in the light of the contemporary good practice and general sense of justice of the community, as perceived by the court in *Financial Mail.* The presence of a ground of justification (e.g. statutory authority) makes an invasion of privacy not wrongful.[6]

**The scope of the right to privacy**

d) In *Bernstein,* Ackermann J limited the scope of the right to privacy: 'the scope of a person's privacy extends a *fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured.[7] A *'legitimate expectation of privacy'* has two components *'a subjective expectation of privacy…that the society has recognised…as objectively reasonable".*[8]

One can, therefore, have no expectation of privacy if one has consented explicitly or implicitly to having one's privacy invaded.

Ackermann J expanded on the application of the 'legitimate expectation' test by explaining the 'continuum of privacy interests': *'each right is always already limited by every other right accruing to another citizen…it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community… Privacy is*

4 1996 (275) A 751 (CC) at p 75 para 68.

5 Bernstein vs. Bester supra note 4 at p 105 para 95.

6 Financial Mail (Pty) Ltd vs Sage Holdings Ltd supra note 5 at p 29.

7 Bernstein vs. Bester supra note 4 at p 75 para 67.

8 Bernstein vs. Bester supra note 4 at p 75 para 67.

*acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly'.*

In the 'truly personal realm', an expectation of privacy is more likely to be considered reasonable than a privacy expectation in the context of 'communal relations and activities'.[9]

e) The value served by protection of the 'inner sanctum' and 'truly personal realm' is that of 'one's own autonomous identity' (Bernstein). Privacy is not in itself an intrinsic, non-instrumental value: instead, it is protected for intrinsic reasons, because it contributes to the realisation of a further value(s).[10] In *The Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others (2001),* it was found that one such value served by privacy is human dignity (thus substituting the concept of 'autonomous identity').[11]

Section 10 of the Constitution reinforces this: Everyone has inherent dignity and the right to have their dignity respected and protected.

In *Jordan (2002)* the concept of human dignity in the context of privacy was considered to be that which was dignity-affirming.[12] *Jordan* makes clear that the special metaphors encountered in *Bernstein* and other cases (i.e. 'inner sanctum' and 'personal sphere') are misleading to the extent that they suggest that privacy is a space or a place.[13] The fact that conduct takes place outside the inner sanctum (at work and/ or on the street), should not deprive it of protection *(Hyundai),* although this was referring specifically to interference by the State).[14]

However, human dignity has not been given a comprehensive definition by the Constitutional Court.

In Bernstein the court noted that: *"A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place."*[15]

This was reinforced in *Hyundai* in which the court noted: *"As we have seen, privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core."*[16]

**Presumption of intention to harm/ or intention to invade the right to privacy.**

f) In *NM, SM and LH v Charlene Smith and Ors, High Court of SA, 2004,* the court considered the common law and the Constitutional protection of a person's right to

9 Bernstein vs. Bester supra note 4 at p 75 para 67.

10 Bernstein vs. Bester supra note 4 at p 75 para 67.

11 2001 (1) SA 545 (CC).

12 2002 (6) SA C42 (CC), at p 48 para 76.

13 Bernstein vs. Bester supra note 4 at p 75 para 67.

14 2001 (1) SA 545 (CC) at p 15 para 16.

15 Bernstein vs. Bester supra note 4 at p 89 para 77.

16 Hyundai case at p 16 para 18.

privacy, dignity, and integrity and mental and intellectual well being. It noted that an invasion of this bundle of rights is *prima facie* unlawful.[17] This case involved the publication of the identity of three HIV positive women. It was considered whether there was intention to harm, but the court found that there was a 'presumption of intention' which failed to be rebutted.[18]

In Mkhize v S the Court found that the police officer did not subjectively intend to violate the Appellant's constitutional right to privacy and had acted in good faith.[19]

However, not all cases make a reference to an intention to harm, or the requirement of a subjective knowledge or intention to invade the right to privacy in order for a violation to be found. It is therefore not clear whether this is a requirement for a violation of the right to privacy. Logic would suggest not: a constitutional rights, at least, may be violated whether or not this was the intention. Furthermore, precedents such as Bernstein make no mention of a requirement of intention to violate.

This was noted in *Laws v Rutherford, 1924* which noted that a waiver of rights is never lightly inferred. Dignity is an 'inseparable element of personal privacy'.[20]

Most case law surrounds the disclosure of confidential or private information to the media, or search and seizure of property, or installing devices to retrieve information from private conversations. These are obvious privacy issues. In contract, there is no precedent for the current situation.

**5.2. Analysis of the Facts**

5.2.1. Hotel contract

In the Terms & Conditions, there is no clause permitting hotel staff to move possessions without permission.

5.2.2. General hospitality practice

The Golden Eye claims that it is accepted hotel practice to move guests' belongings without their permission; although it admits that it should have informed the complainant before moving his possessions.

According to FEDHASA[21], there are no generic industry guidelines, nor a handbook for the industry, or rules which cover guest luggage re-location. Normally each establishment applies their own in-house policy in this regard.

**5.3. Opinion**

The following questions need to be addressed in order to determine whether the act of moving the complainant's belongings constituted an invasion of privacy:

Was the moving of the complainant's possessions without his permission an invasion of his general right to privacy?

– Is it the movement of possessions that constituted the breach of the right, or merely seeing the possessions (especially more personal belongings)?

17 2007 (5) SA 250 (CC) at p 13 para 31.

18 2007 (5) SA 250 (CC) at p 35 para 92-3

19 [2000] 1 All SA 572 (W).

20 (Protea Technology LTD v. Waiver 1997 (a) BCCR 1225 (w) 1241.I.)

21 Federated Hospitality Association of South Africa.

- Was the right to privacy, a legitimate expectation, in light of the public's sense of what is reasonable, and the continuum of privacy?
- Did this act infringe the complainant's human dignity? And if so was such an invasion justifiable? Notably, was there consent?

5.3.1. The complainant alleges that by transferring his and his family's possessions from their hotel room to another hotel room, without their permission, the hotel breached their right to privacy and dignity.

As noted above, there are two parts to the constitutional right to privacy: i) the general right to privacy, and ii) protections against specific infringements of privacy. Having one's possessions moved does not directly fall under any of these specific categories, but may fall under the general right to privacy. In order to determine whether it falls under the general right to privacy, it is necessary to examine in what sense the complainant's general right to privacy may have been invaded. The movement of possessions in itself cannot constitute a breach of the right to privacy, since the notion of privacy relates primarily to access to information. Rather, one must consider whether the right to privacy may have been breached when the hotel staff entered the hotel room and saw the guests' possessions.

In *Bernstein*[22]*,* Ackermann J limited the scope of a person's privacy, stating that it extends a *fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured. A 'legitimate expectation of privacy' has two components "a subjective expectation of privacy…that the society has recognised…as objectively reasonable". Therefore, the question is whether society would regard the complainant's expectation of his possessions not being seen by hotel staff as reasonable.

Ackermann J in *Bernstein* indicated that in the 'truly personal realm', which relates to the 'inner sanctum', and expectation of privacy is more likely to be considered reasonable than a privacy expectation in the context of 'communal relations and activities'.[23] Therefore it must be considered to what extent possessions in a hotel room relates to the 'inner sanctum' and the 'truly personal realm'. As stated in *Hyundai,* the fact that conduct takes place outside the inner sanctum (e.g. at work, or, in this case, in a hotel room), should not deprive it of protection.

However, privacy is not an intrinsic, non-instrumental value in itself. Instead, it is protected for intrinsic reasons, because it contributes to the realisation of a further value, notably the protection of one's 'autonomous identity' *(Bernstein),*[24] or the right to dignity *(Hyundai),* and see Section 10 of the Constitution. Only under a very broad interpretation of the meaning of the right to dignity could the sight / transferral of the complainant's possessions be regarded as infringing his dignity. It is doubtful whether a court would enforce such a wide interpretation of dignity, especially given the obiter comment of O'Regan J in *Bernstein:* 'Our Constitution represents an emphatic rejection of a past in which human dignity was denied

[22] Bernstein v Bester supra note 4 at p 105 para 95.

[23] Bernstein vs. Bester supra note 4 at p 75 para 67.

[24] Bernstein vs. Bester supra note 4 at p 75 para 71-2

repeatedly by an authoritarian and racist government', which indicates a far more fundamental significance of dignity.

5.3.2. However, if it is necessary for there to be intention to invade the right to privacy, or intention to harm, (see case law discussion above), then no such intention was present. The hotel merely wished to vacate the complainant's room so as to enable the arriving guests to enter.

Even if the moving of the possessions did constitute a violation of the 'right to privacy' as indicated in *Bernstein,* one can have no expectation of privacy if one has consented explicitly or implicitly to having one's privacy invaded. Consent is a justification for violation of the right to privacy.

The Terms and Conditions of the hotel do not provide for explicit consent to having one's possessions moved, nor a general waiver of the right to privacy. Therefore, the question is whether, by staying in a hotel, one implicitly consents to a reduced level of privacy, in particular, to hotel staff seeing one's possessions. Indeed, cleaners have access to one's room, and therefore will see/move one's possessions, as is necessary for them to perform their job. However, on the other hand, a cleaner will only see those possessions which are left on visible surfaces (but not those kept in the wardrobe, notably, in relation to the present facts, underwear). Thus a guest can maintain their privacy by choosing which possessions to leave visible. In contrast, in transferring the complainant's possessions, the hotel staff saw possessions which would not usually be visible to hotel cleaners.

There is no case law on the matter of implied consent in relation to privacy. An argument for either case could be made, though a distinction between the implied consent for a cleaner to see one's possessions, but no implied consent for other hotel staff to see (all) one's possessions does seem rather tenuous.

## 6. Conclusion

It appears that the complainant is seeking to use human rights to bring a claim which should in fact be brought in the civil court, under the tort of negligence, for the loss of two sentimental objects: a hairbrush and a lighter. However, he is prevented from doing so due to the disclaimer he signed in the hotel's terms and conditions: clause 9.1 of the Terms and Conditions:

'9. The owner and its subsidiaries, Hotel operators and their respective directors, employees and agents are not liable for any loss or damage: 9.1 to the property or possessions of any guest whether such damage is caused by fire, theft or otherwise, or by the negligent act or omission or breach of contract of the owner, its subsidiaries, Hotel operators and their respective directors, employees and agents…under no circumstances whatsoever shall the…Hotel operators… Be liable to any guest, for any loss…howsoever sustained arising from or connected with the guest…using any accommodation…it being understood that such…accommodation are…used by the guest at his own risk'

The amount of which the complainant is claiming (R3 000 000) is a further indication of this.

On consideration of all the facts and analysis of legal issues it would be tenuous to suggest that the complainant's right to privacy and dignity have been infringed. This would be stretching the

concept of both rights, especially given the present case law and Ackermann J's limitation of the principle of the right to privacy in *Bernstein v Bester.*

Even if such a case could be made, the damages received would probably be nominal, rather than the R3, 000, 000 which the complainant seeks to recover, since any violation was very slight, and unintentional.

## 7. Recommendation

- The alleged infringement does not constitute a violation of the Complainant's rights to privacy or dignity.
- The Complaint be rejected.

**Appeal Clause**

Should you not be satisfied with this decision, you may lodge an appeal, in writing within 45 days of receipt of this letter. A copy of the appeal form is available at any office of the SAHRC. The appeal should be lodged with the Head Office of the SAHRC – contact details are as follows:

**Private Bag X2700**
**Houghton**
**2041**

**Signed in Johannesburg ON THE 31st DAY OF October 2012.**

**South African Human Rights Commission**


COMPLAINT NO: Western Cape/2009/0526

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: WC/2009/0526*

In the matter between:

**AGRI WES-KAAP** **Complainant**

and

**FARM WORKER RIGHTS COALITION** **Respondent**

# REPORT

## 1. Introduction

1.1. The South African Human Rights Commission (hereinafter referred to as the "Commission") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996.

1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".

1.3. The Commission is specifically required to:

1.3.1. Promote respect for human rights;

1.3.2. Promote the protection, development and attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. *Section 184(2) of the Constitution* empowers the Commission to investigate and report on the observance of human rights in the country.1

1.5. Further, *Section 184(2) and (d)* affords the Commission authority to carry out research and to educate on human rights related matters.

1.6. The *Human Rights Commission Act, 54 of 1994,* (hereinafter referred to as "the Act") further supplements the powers of the Commission.[2]

## 2. The Parties

2.1. Agri-Wes (hereinafter referred to as the "Complainant") a legal entity operating with the agricultural industry in the Western Cape.

2.2. Farm Worker Rights Coalition (hereinafter referred to as the "Respondent"), a coalition of civil society organisations operating within the agricultural industry.

## 3. Background

3.1. On 3 August 2009, the Respondent, consisting of representatives of various organisations, including Women on Farms, entered the premises of the Complainant, during which time

[1] The Constitution of the Republic of South Africa Act 108 of 1996

[2] Findings and Recommendation of the Commission in the matter of Van Onselen, Gareth on behalf of the Democratic Alliance number FS/2010/0231.

there were allegedly several violations of human rights. A "PDC" meeting was scheduled for Monday, 3 August 2009 at 10h00 between the four social partners: the Government (Department of Agriculture), business (Agri Wes-Kaap and NAFU), labour, and civil society to discuss the complaints procedures which should be followed to resolve problems that had arisen or which might arise between these four social partners within the PDC. The meeting was cancelled because Government could not be present, and a quorum was not met.

3.2. The Complainant alleges the following:

3.2.1. On the 3 August 2009, Ms Mercia Andrews ("Andrews") arrived at the Complainant's offices and informed the receptionist, Ms Celia de Villiers ("De Villiers") that she had an appointment with the Complainant's Chief Executive Officer, Mr Carl Opperman ("Opperman"). De Villiers informed Andrews that Opperman was not at the office at the time, but at another meeting. Andrews allegedly demanded to speak to someone in authority and De Villiers left her desk in order to contact Mr Johan Bothma ("Bothma"), a senior employee of Agri Wes-Kaap ("AWK").

3.2.2. While De Villiers was absent from her desk, approximately twenty people allegedly entered the building unannounced and without an appointment. This group proceeded to Bothma's office, singing. Bothma met them at the door, and enquired as to their purpose at the Complainant's premises. One of the group members, Ms Fatiema Sabordien ("Sabordien") allegedly demanded that a meeting be convened between Opperman, Bothma and the representatives of the various organisations to discuss the issues regarding the farm workers. Bothma informed her that they did not have a meeting scheduled and tried to close his office door.

3.2.3. At this point, it is alleged that the confrontation became one characterised by hate speech, physical violence, unlawful detention, assault and injury to the Complainant's employees. Sabordien and another member of the group, Mr Gafieldien Benjamin ("Benjamin") allegedly violently shoved Bothma in his chest, pushing him aside to gain entry into his office. Bothma's right forearm was allegedly injured in the process.

3.2.4. The group allegedly took Bothma to his desk, preventing him from escaping. The office door was allegedly shut by a member of the group, and the door barred, preventing entry to Bothma's office. Ms Lellani Le Roux ("Le Roux") , the personal assistant to Opperman, knocked on the door and tried to gain entry to the office. When she realised that members of the group were preventing her entry, Le Roux tried to force the office door open. It is alleged that at this point Sabordien and Andrews engaged in hate speech, including:

*"gee pad, jou wit gesiggie klap ek"; "take that white lady out of here, she doesn't belong here"; and "you are a racist, get out, I am not afraid of you".*

3.2.5. Ms Helene van Eeden ("van Eeden") attempted to assist Le Roux to enter the office. Sabordien allegedly grabbed both women by their fore-arms and violently forced them away from the office entrance, after which she slammed the office door.

3.2.6. The group refused to leave the premises when asked and began moving furniture and putting up posters. Bothma was afraid that the group would break the furniture in the process, and tried to stop them. In response, Sabordien allegedly said to Bothma:

*"excuse me, sorry sorry ek gee vir jou 'n moerse klap my broer!"*

3.2.7. The group continued to sing, but stopped when Opperman (who had been recalled from the meeting which he was attending in order to deal with the incursion) arrived at Agri Wes-Kaap's (AWK) premises. He demanded that the office door be opened. In the interim, the South African Police Service ("SAPS") had been notified, and arrived at AWK's premises at approximately the same time as Opperman, and escorted the crowd outside.

3.3. The Respondent replied to the allegations in a statement provided by a representative of Women on Farms in which the following was said:

3.3.1. They omitted any reference to the alleged hate speech and expressly denied that there were any threats issued by them or that force was used against Bothma nor did anyone touch him at any stage, and that a respectful distance was kept from him.

3.3.2. The Respondent allege that they were directed to Bothma's office, and that Bothma, after the Respondent explained the reason for their presence, responded aggressively to them, by shouting at them to get out. He allegedly referred to a worker as 'gemorste', saying "mens kan sien julel maenss het julle nie maniere gelerre nie". Allegedly, this agitated people, but the group remained peaceful, continuing to sing freedom songs.

3.3.3. In relation to the alleged hate speech to Le Roux, the Respondent allege that since they did not know who she was, they explained that they were at the premises to stay until a meeting was going to take place.

3.3.4. Opperman called the SAPS once he arrived, and after an agreement was made for a re-scheduled meeting in 21 days, the group allegedly departed peacefully.

## 4. The Complaint

The Complainant claims that the above events constituted an infringement of several constitutional rights namely:

**4.1. The Right to Human Dignity (Section 10 of the Constitution)**

4.1.1. The right to human dignity as gauranteed under the South African Constitution does not extend to the protection of a juristic person, and thus it cannot extend to AWK. However, this right extends to the individual employees of the Complainant. It is alleged that Bothma's right to human dignity has been infringed when the Respondent allegedly assaulted Bothma and caused him physical injury; held him captive at his desk for an hour; and when Sabordien allegedly said to Bothma *"excuse me, sorry sorry ek gee vir jou 'n moerse klap my broer!".*

4.1.2. Le Roux's right to human dignity was allegedly infringed when she was told *"gee pad, jou with gesiggie klap ek" and "take that white lady out of here, she doesn't belong here, you are a racist, get out, I am not afraid of you".*

**4.2. The right to freedom and security of the person (Section 12 of the Constitution)**

4.2.1. The right to freedom and security of the person can only be invoked once a person has been deprived of his physical integrity. Bothma's rights were allegedly infringed when he was allegedly confined to his office for an hour by the Respondent.

4.2.2. The Complainant alleges that substantively, this constitutes a deprivation of Bothma's rights, since the reason for the deprivation of his rights was unacceptable, and the detention was without just procedure, hence unfair. Procedurally, there was allegedly no acceptable reason for this deprivation, and therefore it was not procedurally fair.

4.2.3. It is alleged that the following of Bothma's Section 12(1) and 12(2b) rights were violated:

*1) Everyone has the right to freedom and security of the person, which includes the right-*

*a) not to be deprived of freedom arbitrarily or without just cause;*

*b) not to be detained without trial;*

*c) to be free from all forms of violence from eithe public or private sources;*

*d) not to be tortured in any way; and*

*e) not to be treated in a cruel, inhuman and degrading manner.*

*2) Everyone has the right to bodily and psychological intergrity, which includes the right-*

*b) to security in and control over their body;*

4.2.4. It is alleged that Le Roux's rights were violated when Sabordien and Andrews allegedly verbally assaulted her. It is further alleged that Le Roux and van Eeden's rights were infringed when they were grabbed by Sabordien and shoved out of the office.

4.2.5. Le Roux and van Eeden allege that the following rights were violated:

Section 12(1) (c) and 12 (1) (d):

*1) Everyone has the right to freedom and security of the person, which includes the right-*

*c) to be free from all forms of violence from eithe public or private sources;*

*d) not to be tortured in any way;*

*Section 12 (2b):*

*2) Everyone has the right to bodily and psychological intergrity, which includes the right-*

*b) to security in and to be in control of their bodies.*

**4.3. The right to Freedom of Expression (Section 16 of the Constitution)**

4.3.1. The Complainant alleges that the following words by Sabordien and Andrews to Le Roux constituted hate speech based upon race:

*"gee pad, jou wit gesiggie klap ek",* and
*"take that white lady out of here, she doesn't belong here".*

4.3.2. The Complainant further alleges that the circumstances of a charged atmosphere which allegedly progressed to physical violence constituted incitement to cause harm.

4.3.3. It is alleged that this alleged hate speech also constituted a breach of Section 10 of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA") because the members allegedly advocated and communicated words which could reasonably be construed to demonstrate a clear intention to be hurtful, harmful, to incite harm and promote hatred.

4.3.4. It is also alleged that Sabordien's alleged words to Bothma *"..ek gee vir jou 'n moerse klap my broer!"* constituted incitement of imminent violence.

## 5. Further steps taken by the Commission

5.1. Following the Commissioners Legal Committee meeting held on 27 August 2012 and at which a Draft Report in respect of the matter was presented, it was resolved and acknowledging that there is a dispute of fact between the parties, that it would be more appropriate to exercise the Commission's further powers and attempt to mediate the dispute between the parties. It was further resolved that the allegations of criminal behaviour be addressed through the criminal process.

5.2. Communication in this regard was accordingly forwarded to the Complainant (via its legal representative Werksmans Attorneys) and Respondent in order to ascertain whether the parties would be amenable to participating in a mediate process.

5.3. A response was received from the Complainant's legal representative confirming that the Complainant are amenable to mediating the dispute.

5.4. As no response was received from the Respondent, further correspondence was sent to Ms Collette Solomons ("Solomons" – representative of the Respondent) on 8 November 2012 in terms of which a copy of the draft Report was enclosed and again enquiring whether the Respondent is amendable to mediating the dispute.

5.5. On 28 November 2012 the Commission attempted to telephonically contact Solomons, she failed to return the calls of the Provincial Manager.

5.6. Further correspondence was then addressed to Solomons on 29 November 2012 in terms of which a response was requested by 3 December 2012 regarding the proposed mediation in light of the Complainant's willingness to engage in mediation as a mechanism to resolve the complaint.

5.7. The Commission sent final correspondence to Solomons on 7 December 2012 due to the Respondent's failure and/or neglect to furnish the Commission with a response, advising the Respondent of the Commission's intention to proceed with the finalisation of its Report in respect of the complaint.

## 6. The Legal Framework

### 6.1. The right to human dignity.

Section 10 of the Constitution provides that:

> *"Everyone has inherent dignity and the right to have their dignity respected and protected."*

**6.2. The right to freedom and security of the person.**

Section 12 of the Constitution provides that:

1) *Everyone has the right to freedom and security of the person, which includes the right*
    a) *not to be deprived of freedom arbitrarily or without just cause;*
    b) *not to be detained without trial;*
    c) *to be free from all forms of violence from either public or private sources;*
    d) *not to be tortured in any way; and*
    e) *not to be treatedd or punished in a cruel, inhuman or degrading way.*
2) *Everyone has the right to bodily and psychological integrity, whch includes the right:*
    a) *to make decisions concerning reproduction;*
    b) *to security and control over their body; and*
    c) *not to be subjected to medical or scientific experiments without their informed consent*

**6.3. The right to freedom of expression.**

Section 16 of the Constitution provides that:

1) *Everyone has the right to freedom of expression, which includes:*
    a) *freedom of the press and other media;*
    b) *freedom to receive or impart information or ideas;*
    c) *freedom of artistic creativity; and*
    d) *academic freedom and freedom of scientific research*
2) *The right in subsection (1) does not extend to:*
    a) *propaganda for war;*
    b) *incitement of imminent violence; or*
    c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

**6.4. The Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000**

Section 10 (1) provides:

*"Subject to the proviso in section 12, no person may publish, propogate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonable be construed to demonstrate a clear intention to –*

a) *be hurtful;*
b) *be harmful or incite to harm;*
c) *promote or propagate hatred.*

# 7. Legal Analysis

## 7.1. The Right to Human Dignity (Section 10 of the Constitution)

7.1.1. Dignity is one of the most important rights and the foundation of many of the other rights entrenched in the Bill of Rights.[3] The Supreme Court of Appeal has held that dignity is "the ability to live without positive humiliation and degradation".[4] Although it has not been given a comprehensive definition by the Constitutional Court, the Constitutional Court has held that the right constitutes recognition of "the intrinsic worth of human beings", while acknowledging that "human beings are entitled to be treated as worthy of respect and concern".[5]

7.1.2. The question is therefore whether the alleged shoving and holding captive of Bothma, and the words allegededly spoken to Bothma and Le Roux violated their ability to live without humiliation and degradation.

7.1.3. Firstly, it must be noted that the Respondent deny that Bothma was even touched, and make no mention of the words spoken.

7.1.4. The question whether the right to dignity was infringed in relation to the words spoken to Bothma and Le Roux will be considered below when determining whether these words constitute hate speech, since "The right to dignity is at least as worthy of protection as the right to freedom of expression. ... freedom of expression does not enjoy superior status in our law."[6]

## 7.2. The Right to Freedom and Security of the Person (Section 12 of the Constitution)

7.2.1. Section 12 combines a right to freedom and security of the person with a right to bodily and psychological integrity.[7] Protection of physical liberty is the primary purpose of Section 12(1), although the list of five aspects of the right, which protect the bodily integrity of the individual against unwarranted intrustion by the state, is not exhaustive. Section 12(2) expands the ambit of the right by protecting aspects of bodily self-determination.

7.2.2. Where a person has been deprived of his physical integrity, both substantive and procedural protection are provided by Section 12(1). In *S v Coetzee,* O'Regan J, described the two components of the right as: "two different aspects of freedom: the first is concerned particularly with the reasons for which the State may deprive someone of freedom [substantive component]; and the second is concerned with the manner whereby a person is deprived of freedom [procedural component]."[8] It should be noted that O'Regan J, refers to this right in terms of deprivation by "the State".[9] Thus, it appears that Section 12(1)(a) is primarily regarded as applying to members of the State detaining individuals.

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3 S v Makwanyane 1995 (3) SA 391 para 328.

4 Minister of Home Affairs v Watchenuka 2004 (4) SA 426 para 32.

5 Supra note 3 at para 328.

6 S v Mamabolo 2001 (3) SA 409 para 40 and 41.

7 The Bill of Rights Handbook, 5th edition.

8 S v Coetzee and Others 1997 (3) SA 527 para 159.

9 Ibid.

7.2.3. In Section 12(1)(a), there is a a tripartite test: 1) has there been a deprivation of physical freedom; 2) is the reason for the deprivation of freedom acceptable?; and 3) is the manner of the deprivation procedurally fair? Determining whether a person has been deprived of their liberty requires assessment of the duration, degree and the intensity of the constraint that has been imposed.[10]

7.2.4. The Complainant argues that Bothma's Section 12 rights were infringed in that:

a) He was deprived of his freedom arbitrarily and without just cause;

b) He was detained without trial;

c) He was subjected to violence;

d) He was treated in a cruel, inhuman and degrading manner; and

e) He was prevented from exercising security and control over his body.

7.2.5. The first two alleged infringements refer to the right under Sections 12(1)(a) and (b), and are intended to refer to violations by members of the State, and are therefore not applicable in these circumstances. Even if it did apply, the short period for which he was constrained does not constitute a deprivation of liberty. Since the threshold enquiry of whether there was a deprivation of physical freedom has not been satisfied, it is not necessary to consider the substantive and procedural protection.

7.2.6. Section 12(1)(c) invokes the right to be free from all kinds of violence, having its origin either in public or private sources. However, since the alleged facts proffered by the Complainant and Respondent differ so substantially, and there is no causational evidence provided by the Complainant that injury was caused by the Respondent allegedly shoving Bothma in the chest, the Commission is unable to make a finding in this regard.

7.2.7. Even if the Complainant's version of events is adopted, the alleged violence falls under the definition of assault, and therefore is within the ambit of the Criminal Courts, and should therefore be subject to investigation by the SAPS. This incident therefore falls outside the ambit of the Commission's mandate.

7.2.8. For the same reason the Commission cannot make a finding on the alleged prevention of exercising security and control over his body. For the same reasons, Le Roux and van Eeden's rights under section 12(1)(c) and Section 12(2) were also not infringed: Sabordien allegedly shoving them out the door would at most be an assault under criminal law.

7.2.9. Neither the alleged shoving of Bothma, Le Roux or van Eeden nor the alleged detainment of Bothma constitutes cruel, inhuman and degrading treatment. This subsection was designed to counter torture and similar extreme physically or psychologically damaging treatment, and has been applied *inter alia* to capital punishment: the current circumstances therefore do not fall within the ambit of this subsection.

[10] Guzzardi v Italy 3 EHRR 333 (1980).

### 7.3. Hate Speech

7.3.1. Although Section 16 of the Constitution provides for freedom of expression, the Constitutional Court has held that certain forms of expression are not deserving of constitutional protection as they have the potentional to impinge adversely on the dignity of others and cause harm.[11]

7.3.2. Section 16(2)(c) of the Constitution expressly prohibits any expression which constitutes *"advocacy of hatred that is based on race, ethnicity...and that constitutes incitement to cause harm".* In *Afri-Forum & another v Malema,*[12] it was found that the song including the words 'shoot the boer' constituted advocacy of hatred.

7.3.3. In the case of *R v Andrews*[13]*,* Corry JA defined 'hatred' as instilling 'detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition".

7.3.4. Hatred is therefore an extreme emotion: "Hatred is predicated on destruction... of both the target group and the values of society...Hatred in this sense is a most extreme emotion...that, if exercised against any member of an identifiable group, implies that those groups are to be despised, scorned, denied respect and madesubject to ill-treatment on the basis of group affiliation".[14]

7.3.5. The words spoken to Le Roux: *"gee pad, jou wit gesiggie klap ek";* and "take that white lady out of here, she doesn't belong here" do not convey the extreme emotion necessary to constitute advocacy of hatred. Although the word "white" clearly indicates race, it does not imply that white people are supposed to be despised, scorned and made subject to ill-treatment.

7.3.6. Even if the words spoken did constitute advocacy of hatred, however offensive advocacy of hatred may be, it does not rise to the level of hate speech unless the second element, 'incitement to cause harm,'[15] is present. The speech must be intended to incite or produce imminent action. 'Incited' should be taken to mean 'directed at' or 'intended'.[16] 'Harm' is not limited to physical harm, but also extends to psychological harm,[17] as well as harm to dignity.[18]

7.3.7. The test is an objective one:[19] "whether a reasonable person assessing the advocacy of hatred on the stipulated grounds within this context and having regard to its impact and consequences would objectively conclude that there is a real likelihood that the expression causes harm"[20].

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11 Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 para 30.

12 Afri-Forum and another v Julius Malema and Others, Case no 20968/2010.

13 R v Andrews (1988) 65 OR 161.

14 R v Keegstra (1990) 3 SCR 697.

15 Van Loggerenburg v 94.7 Highveld Stereo 2004(5) BCLR 561.

16 S v Mamabolo; Van Loggerenburg v 94.7 Highveld Stereo 2004(5) BCLR 561.

17 Human Rights Commission of South Africa v SABC 2003 (1) BCLR 92.

18 Freedom Front v SAHRC 2003 (11) BCLR 1283.

19 S v Mamabolo (see note 6 above).

20 Freedom Front (see note 18 above).

7.3.8. The focus is on whether the expression causes or is likely to cause harm, rather than the subjective intention of the speaker. The harm caused or likely to be caused must be serious and significant.

7.3.9. A reasonable person is a person who would not easily take offence, and who would consider the context from an objective stance. Given the present context, where Le Roux was the only white person entering the office, and was unknown to the Respondent, a reasonable person would be likely to conclude that the words spoken to Le Roux were not intended to harm, but instead were intended as an instruction not to permit her to enter the office, *albeit* in an emotionally charged atmosphere.

7.3.10. Regarding the question of the right to dignity, "Implicit in its provisions (Section 16(2)) is an acknowledgment that certain expressions do not deserve constitutional protection because, among other things, they have the potential to impinge adversely on the dignity of others and cause harm.

7.3.11. Since the words spoken here do not constitute hate speech under Section 16(2), Le Roux's right to dignity was not adversely affected.

7.3.12. In addition to being an infringement of the constitutional rights, it was claimed that the Complainant's rights under the PEPUDA were also breached.

7.3.13. Section 10 of the Equality Act defines hate speecas follows:

*1) Subject to the proviso in section 12 no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds against any person that could reasonably be construed to demonstrate a clear intention to*

*a) Be hurtful;*

*b) Be harmful or to incite harm;*

*c) Promote or propagate hatred.*

Thus the scope of Section 10 of the Equality Act is broader than that of s16 of the Constitution.

7.3.14. In *Afri-Forum & another v Malema* it was stated that a court in assessing whether words complained of fall within the definition of hate speech the following questions would have to be asked:

a) Are the words communicated based on one or more prohibited grounds?

b) May any reasonable person consider the words to be intended to hurt, harm or incite hatred?

c) Is the use of the said words falling within the prescribed exclusion as set out in section 12?[21]

[21] Afri-Forum and another v Malema (see note 12 above at para. 109).

7.3.15. The prohibited grounds referred to in Section 10 of the Equality Act are defined in section 1 as being:

*"prohibited grounds" are:*

*a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or*

*b) any other ground where discrimination based on that other ground-*

*i. causes or perpetuates systemic disadvantage;*

*ii. undermines human dignity; or*

*iii. adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);"*

7.3.16. The words communicated clearly fall within the prohibited ground of 'colour'. Therefore the second question must be considered: would any reasonable person consider the words to be intended to hurt, harm, incite or propagate hatred?

7.3.17. The reasonable person will be of the same sensibilities as the reasonable person who considered the breach of s16(2) of the Constitution: not easily hurt or offended and considering the context. The intention of the speaker is examined by considering the likelihood of being hurtful or harmful. There is also a difference between words being hurtful or offensive: the former is more severe than the latter.

7.3.18. Given the context of the situation, as discussed above, it is unlikely that the words communicated were intended to cause harm or be hurtful: under the circumstances, they could merely have been descriptive, yet conveyed in an undiplomatic manner. A 'clear intention' needs to be demonstrated for the Section 10 right to be breached. Any alleged intention is not sufficiently clear to satisfy this requirement.

### 7.4. Incitement of imminent violence

7.4.1. It was alleged that Sabordien's alleged words to Bothma "..ek gee vir jou 'n moerse klap my broer!" constituted incitement of imminent violence. This language is clearly intimidating threatening, but in order to constitute incitement of imminent violence, the language must be intended to encourage violence.

## 8. Finding

8.1. The facts put forward by the Complainant and the Respondent vary substantially that based on the different versions the Commission is unable to make conclusive finding.

8.2. Even in the event that the facts as stated by the Complainant are assumed, the Commission finds that:

8.2.1. There was no violation of Bothma nor Le Roux's right to dignity;

8.2.2. Bothma's right to freedom and security of the person was not violated by the alleged detention;

8.2.3. The criminal courts would be a more appropriate forum for the alleged violence and injury to Bothma, Le Roux and van Eeden;

8.2.4. None of the words allegedly spoken constitute hate speech, but merely constitute offensive language.

## 9. Recommendation

9.1. The Criminal Courts would be the appropriate forum for this case given the allegations of assault and intimidation levelled against the Respondent.

9.2. The parties submit themselves to a mediation process facilitated by the Commission in the interests of restoring a cordial working relationship with a view to soliciting an apology from each other – In respect of the Repondent who feel aggrieved by the dismissive nature of the Complainant and failure to entertain a scheduled meeting; and the Complainant who feel aggrieved by the aggressive behaviour of the Respondent.

**Private Bag X2700**
**Houghton**
**2041**

**Signed in Johannesburg on the 26th day of April 2013**

**South African Human Rights Commission**


COMPLAINT NO: North West/2009/0036

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: NW/2009/0036*

In the matter between:

**George Mkhwanazi** **Complainant**

(On behalf of the residents of Klipgat C)
and

**Madibeng Local Municipality** **Respondent**

## REPORT

*(In terms of Article 21 of the Complaints Handling Procedures of SAHRC)*

## 1. Introduction

1.1. The South African Human Rights Commission (hereinafter referred to as the **"Commission"**) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the "**Constitution"**).

1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".

1.3. The Commission is specifically required to:

1.3.1. Promote respect for human rights;

1.3.2 Promote the protection, development and attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.

1.5. Further, section 184(2) (c) and (d) affords the Commission authority to carry out research and to educate on human rights related matters.

1.6. The Human Rights Commission Act,54 of 1994, further supplements the powers of the Commission.

1.7. Section 9(6) of the Human Rights Commission Act, 1994 determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

## 2. Parties

2.1. The Complainant is George Mkhwanazi (hereinafter referred to as the "Complainant"), an adult male resident of Klipgat C, an area falling under the jurisdiction of Madibeng Local Municipality, North West Province.

2.2. The Complainant acts in his representative capacity on behalf of the residents of Klipgat C.

2.3. The Respondent is Madibeng Local Municipality, a Municipality established in terms of the provisions of the Local Government Municipal Structures Act 117 of 1998 with its Head Office situated at corner 53 Van Velden Street, Brits (hereinafter referred to as the "Respondent").

## 3. Nature of the Complaint

3.1. On 16 March 2013, the Commission received a complaint at the Commission's North West Provincial Office (hereinafter referred to as "the Provincial Office") from the Complainant.

3.2. The Complainant is acting in his representative capacity on behalf of the residents of Klipgat C.

3.3. In his complaint, the Complainant alleged that the community of Klipgat C had been without water supply for a period of 5 (five) weeks and the Respondent fails to address the problem, notwithstanding having been made aware of the plight.

3.4. The Complainant further complained that:

3.4.1. In failing to address the water crisis the Respondent was in violation of the constitutional rights of the residents of K1ipgat C to have access to adequate supply of water;

3.4.2. That the supply of water provided by the Respondent to the residents of Klipgat C was inadequate;

3.4.3. That on several instances the Complainant discussed the issue with the Respondent in an attempt to resolving Same, but to date the issue still stands as the Respondent keeps making empty promises;

3.4.4. That the Respondent has to date failed and/or neglected and/or refused to provide the Complainant residents of Klipgat C with information regarding the steps that the Respondent has taken to address the water supply challenges.

3.5. In the result, the Complainant alleges that the Respondents failure and/or neglect and/or refusal to provide the residents of Klipgat C with adequate clean and safe water supply amounted to a violation of the residents' constitutional rights to enjoy access to adequate and clean water.

3.6. Further, that the Respondent's failure and/or neglect and/or refusal to provide the residents with information as to the steps, if any, that were being taken by the Respondent to address their right to water amounted to a violation of the residents' constitutional rights to access information.

## 4. Preliminary Assessment

4.1. The Provincial Office made a preliminary assessment of the complaint that:

4.1.1. The alleged complaint constituted prima facie violation of the following provisions of the Constitution:

a) *Section 27 (1) (b)* - Water

b) *Section 32 (1) (a)* and *(b)* - Access to information

4.1.2. The assessed violations fell within the mandate and jurisdiction of the Commission;

4.1.3. There was no other organisation that could more effectively and expeditiously deal with the complaint.

## 5. Steps Taken by the Commission

In investigating the alleged violation, the methodology used by the Provincial namely:

a) Interview with the Residents;

b) Correspondence with the Respondent;

c) Inspection *in loco* in the concerned area;

### 5.1. Interview with Residents

5.1.1. The investigation team conducted several interviews[1] with local residents to verify the complaint.

5.1.2. During the interviews with the residents, some interviewees informed that:

a) Some residents of Klipgat C had been staying in the area for over 50 years and they previously relied on windmills for water;

b) The windmills had provided sufficient water supply until the influx of people into the area when the windmills dried up;

c) Klipgat C has about 3500 households;

d) The water shortage problem in the area is long standing since 1994 and notwithstanding the Respondent being fully aware of the same[2], the Respondent fails and/or neglects to attend to the problem;

e) From April 2013, the residents have been supplied with water tanks from allegedly, the Respondent, although no communication or confirmation in this regard has been provided by the Respondent;

f) The residents receive about 4 water tanks for the entire Klipgat C which is made up of Jakkalasdans 1, Jakkalasdans 2 and Mashimong;

g) Capacity of each water tank is about 3000 litres and the tanks are refilled twice a week - Mondays and Thursdays;

h) The trucks that refill the water tanks are construction trucks and the residents allege that the water appears dirty and not healthy for human consumption;

i) This water supply is inadequate as the tanks are soon empty immediately after they have been refilled during the day and the people that are normally at work come back to empty water tanks in the evening;

j) Due to the inadequate water supply and the fact that the water tanks are only refilled twice a week the residents often have to go for days without water;

k) The school children lose out on valuable study time as they have to travel distances to draw water from the water tanks;

l) The elderly and the sick spend money in hiring people to fetch water for them;

[1] 06 June 2013

[2] The Residents allege to have made the Respondent aware of their water problem on several occasions and prior to approaching the Commission for assistance. The Residents also allege to have held several unsuccessful meetings with the Respondent.

m) The Respondent has made empty undertakings about a long term solution;

n) The residents are left in the dark as to whether the Respondent is addressing this problem due to the fact that they do not receive updates from the Respondent;

o) The last time the residents heard from the Respondent was in 2010[3] when the Respondent once more made empty promises just to get the residents to cancel an intended illegal protest march. [4]

**5.2. Correspondence with the Respondent**

5.2.1. The Commission through its Gauteng Provincial Office sent an allegation letter to the Respondent on 12 March 2009 and requested the Respondent to furnish its written response by not later than 26 March 2009.

5.2.2. In its written response dated 23 October 2009 the Respondent attached a copy of the Respondent's letter that was previously sent to the Complainant.

5.2.3. Briefly, on the issue of water supply, the Respondent informed in the above mentioned letter that:

a) The Council of Madibeng has in its sitting of 30 June 2009, approved the handing over of water services by Sandspruit Works Association to the local Municipality of Madibeng;

b) This approval meant that Madibeng Municipality would as from 01 July 2009 be able to be directly responsible for the provision of water services due to the problems experienced as a result of getting these services through the service provider; and

c) The implementation of the handing over of the water services would assist the Respondent in overcoming some bottlenecks they experienced under the previous system and eventually address the challenges experienced.

5.2.4. The Provincial Office, in its letter dated 09 November 2012 requested the Respondent to provide an update regarding the Respondent's progress in addressing the water crisis at Klipgat C as promised in the Respondent's above stated written response.

5.2.5. To date the Respondent has failed and/or refused to furnish the required written response.

**5.3. Inspection** *in Loco*

5.3.1. On Thursday, 06 June 2013, the North West Provincial investigators (the investigators) visited Klipgat C, to inspect the reported water challenges and the following observations were noted:

**General Observations**

Klipgat C is a semi formal settlement.

b) The community is vastly unemployed and living in desperate conditions.

[3] Meeting held between the Respondent and the Residents 25 March 2010 to discuss service delivery issues.

[4] Illegal protest march scheduled for Friday, 26 March 2010.

c) There are clear streets and no street lights.

d) The houses are mostly shacks[5] made of corrugated iron.

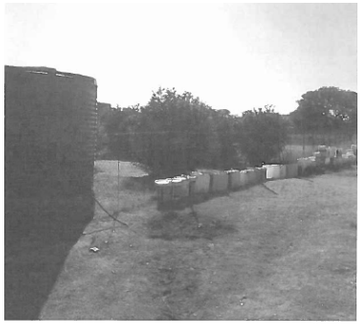
e) Most residents are not formally educated, but displayed varying levels of functional literacy.

f) The residents of the community predominantly speak Setswana.

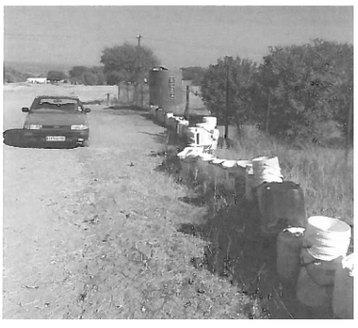
**Substantive Observations**

During the inspection at Klipgat C, the investigators established that indeed water supply was an existing problem as the following water tanks and several containers put in lines next to the water tank were seen:

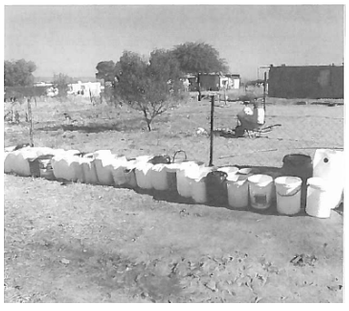
**"Photo A"**



**"Photo B"**



**"Photo C"**



[5] 'Shack' refers to a dwelling constructed of a combination of corrugated iron, wood and plastic.

# 6. Applicable Legal Framework

## 6.1. Key International instruments

### 6.1.1. International Covenant on Economic Social & Cultural Rights (ICESCR)

Article 11 of the ICESCR recognises the right of everyone to an adequate standard of living which includes accessibility and availability of adequate housing, food and clothing. The right to water falls under this article as it guarantees an adequate standard of living; water is one of the fundamental conditions for survival.

Although South Africa has not ratified the ICESCR, as a signatory State, the Government of South Africa cannot act in a manner that is contrary to the spirit of this Convention.

### 6.1.2. United Nations General Assembly Resolution Recognizing Access to Clean Water and Sanitations[6]

The General Assembly adopted a resolution calling on all states to provide Safe, clean, accessible and affordable drinking water and sanitation for all.

## 5.2. Constitutional Rights

### 6.2.1. The right to water – Section 27 of the Constitution:

a) The right to have access to water is provided for herein.

b) It is also provided hereunder that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

### 6.2.2. The Right to Access Information

Section 32 provides that everyone has the right of access to –

a) any information held by the state; and

b) any information that is held by another person and that is required for the exercise or protection of any rights.

## 6.3. Domestic. Legislation

### 6.3.1. The Water Services Act[7]

Section 3 of the Water Services Act states that:

(1) Everyone has a right of access to basic water supply and basic sanitation.

(2) Every water services institution must take reasonable measures to realise these rights.

(3) Every water services authority must, in its water services development plan; provide for measures to realise these rights.

Section 5 of the Water Services Act states that:

*"If the water services provided by a water services institution are unable*

[6] Resolution 64/292

[7] 108 of 1997.

> *to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them".*

Basic sanitation is defined in the Water Services Act as:

> *"The prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households "*

**6.3.2. The Municipal Systems Act[8]**

The definition of basic municipal services according to the Act[9] is:

> *"A municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment".*

Section 73(1) of the Act states that a municipality must give effect to the provisions of the Constitution and:

(a) Give priority to the basic needs of the local community;

(b) Promote the development of the local community; and

(c) Ensure that all members of the local community have access to at least the minimum level of basic municipal services.

6.3.3. **Section 73(1) (c) of the Local Government: Municipal Systems Act**[10] echoes the constitutional precepts and obliges a municipality to provide all members of communities with *"the minimum level of basic municipal services."*

**6.3.4 Municipal Finance Management Act[11]**

In considering the obligations of the Respondent with regard to its budgeting and finance processes, the Commission paid close consideration to Chapter Four of the Municipal Finance Management Act (hereinafter referred to as the "MFMA"). Section 28(1) of the MFMA is of particular relevance in its directive that municipalities may revise and approve their annual budget through an adjustments budget.

**6.3.5. Promotion of Access to Information Act[12]**

This Act protects and upholds the rights of people to access to information. It protects the right to access to information and seeks to enhance the transparency, accountability and effectiveness of government.

Public bodies are obliged to give information needed to exercise rights enshrined in the Constitution.

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8 32 of 2000.

9 Chapter 8 of the Municipal Systems Act

10 Act 32 of 2000.

11 Act 56 of 2003.

12 Act 2 of 2000.

### 6.4 Case Law

The following case law was considered in determining the nature and scope of a human right in relation to the complaint at hand:

6.4.1. In **Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)** it was held that legislative measures adopted by the government must be supported by policies and programmes adopted must be reasonable *"both in their conception and implementation".*[13]

The Court held further that reasonable measures are those that take into account the degree and extent of the denial of the right they endeavour to realise and do not ignore people whose needs are the most urgent and whose ability to enjoy all the rights therefore is most in peril.[14]

6.4.2. In **City of Johannesburg and Others v Mazibuko and Others**[15] the Court in answering "***what would constitute sufficient water in terms of section 2.7(1)****?"* stated that:

> *"[16] In interpreting the right to sufficient water a purposive approach should be followed. In' determining the purpose of the right one should have regard to the history and background to the adoption of the Constitution: and the other provisions of the Constitution, in particular the other rights with which it is associated in the Bill of Rights.*
>
> *There is a high level or unemployment, inadequate social security, and many do not have access to dean water or to adequate health services. The conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into One in. which there will be human dignity, freedom and equality, ties at the heart of our new constitution order. For as long as these conditions continue to exist that aspiration will have a hollow ring.*
>
> *[17] A commitment to address a lack of access to dean water and to transform our Society into one in which there win be human dignity and equality, lying at the heart of our Constitution, it follows that a right of access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human existence.*
>
> *Support for this conclusion is to be found in the 2002 General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights on the International Covenant on Economic, Social and Cultural Ri!jJlf1Jts, in which it is stated: The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental*

[13] Grootboom at para [42]

[14] Grootboom at para [44].

[15] [20091 3 All SA 202 (SCA)].

*conditions for survival . . . The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity. For this reason the elements of the right to water must be adequate for human dignity, life and health.*

*[18] The quantity of water that is required for dignified human existence would depend on the circumstances of the individual concerned".*

6.4.3. **The Federation for Sustainable Environment vs The Minister of Water Affairs. C/N 35672/2012 North Gauteng High Court** at [14] the court states the responsibilities of local government inter alia as per section 152 as:

*"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;*

*d) to promote a safe and healthy environment;*

*e) to encourage the involvement of communities and community organisation in the matter of local government "within its available resources". This entails, inter alia, that within its resources, a municipality should strive towards improving the quality of life of Its community. Municipalities are also bound to be responsive to the needs of their communities."*

## 7. Analytical Framework

In analysing this complaint, the Commission considered the following constitutional tests and guidelines for the interpretation of the reasonableness of the limitations posed by the Respondent on the rights of the Complainant

**(a) Test for Reasonableness of Limitation of Rights**

**Section 36 of the Constitution** provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) The nature of the right;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitations;

(d) The relation between the limitation and its purpose; and

(e) Less restrictive means to achieve the purpose.

**(b) Interpretation of the Bill of Rights**

**Section 39 of the Constitution** provides that, when interpreting the Bill of Rights, a court, tribunal or forum –

*(a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*

*(b) Must consider international law; and*

*(c) May consider foreign law.*

Section 39(2) of the Constitution makes it clear that the Act must be interpreted in light of the *"spirit, purport and objects of the Bill of Rights."*

## 8. Legal Analysis

8.1. Water is one of the most important substances on earth. All the living beings must have water to survive. If there was no water there would be no life on earth.

8.2. The State is obliged in terms of **Section 27(2) of the Constitution** and the Water Services Act to take reasonable legislative and other measures within its available resources to achieve the progressive realization of everyone's right to access to sufficient water.[16]

8.3. In terms of **Section 84 of the Municipal Structures Act**, the responsibility for providing water services rests with district and metropolitan municipalities. However, the Act allows the Minister of Provincial and Local Government Affairs to authorise a local municipality to perform these functions or exercise these powers.

8.4. **Section 4** of the **Water Services Act** states:

(3) Procedures for the limitation or discontinuation of water services must:

*a) be fair and equitable;*

*b) provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless:*

*i) other consumers would be prejudiced;*

*ii) there is an emergency situation; or*

*iii) the consumer has interfered with a limited or discontinued service; and*

*c) not result in a person being denied access to baste water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.*

8.5. Further, the **Water Supply and Sanitation Policy White Paper (Nov 1994**) states:

*Basic water supply is defined as:*

*Quantity:*

*25 litres per person per day. This is considered to be the minimum for direct consumption, for the preparation of food and for personal hygiene. It is not considered to be adequate for a full, healthy and productive life which is why it is considered as a minimum.*

*Cartage:*

*The maximum distance which a person should have to cart water to their dwelling is 200m.*

8.6. The **Water and Sanitation Service Standard**[17] states:

The minimum standard for basic water supply service is the provision of appropriate

[16] See footnote 15 supra

[17] Preliminary Draft 02, March 2008

education in respect of effective water use, and, a minimum capacity of potable water of 25 litres per person per day or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute, within 100 metres of a household, with a maximum of 25 families sharing, and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

8.7. In the present case, from the interviews and physical inspection conducted, it was confirmed that indeed the residents did not have access to water alternatively sufficient water for domestic purposes.

8.8. It is common cause that as per the provisions of the Water Services Act, the National Water Act and the Constitution as respectively stipulated above, the duty and responsibility of the provision of sufficient and clean water to the residents of Klipgat C and surrounding areas rests with the Respondent.

8.9. It is further common cause as it was confirmed through the interviews with Residents of Klipgat C that the Respondent was aware of the residents' water plight and notwithstanding, the Respondent failed to and/or refused to resolve this water crisis once and for all.

## 9. Finding

9.1. Based on the legislative, constitutional and international human rights obligations,[18] the Commission finds that the Respondent violated the Complainant's right to access to adequate, clean drinking water.

9.2. The Respondent further violated the Complainant's right to access to information.

## 10. Recommendation

10.1. The Commission recommends:

10.1.1. The Respondent to increase the supply of water services to 3 (three) tanks per section in Klipgat C (Mashimong, Jakkalasdans 1 & 2 Sections) every second day of the week.

10.1.2. The Respondent to provide the Commission within a period of three (3) months of the date of this finding, with a Report indicating interim measures the Respondent has put in place to address access to water challenges;

10.1.3. The Respondent to provide the Commission, within a period of three (3) months of the date of this finding, with a Report that sets out immediate measures that the Respondent is taking to remove impurities from the water supplied to the Residents of Klipgat C;

10.1.4. The Respondent to provide the Commission with a detailed report within a period of six (6) months of the date of this finding in respect of measures put in place to ensure that the challenge of adequate supply of water is permanently resolved.

[18] The South African Constitution of 1996 allows for reference to international law in its Interpretation. Section 39(I)(b) obliges "a court, tribunal or forum" to "consider international W "[w]hen interpreting the Bill of Rights". In S v Makwanyane and Another, \3 the South African Constitutional Court (CC) held that in terms of the above section 'public international law' means both international law that is binding on South Africa and international law that is not binding on South Africa. The CC stressed that our courts are obliged to consider both 'hard' and 'soft international law in their Interpretation of the Bill of Rights.

10.1.5. The Respondent to furnish the Commission with the Minutes of every community meeting held at least every three (3) months with the Residents in addressing access to water challenges.

## 11. Appeal

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days of the date of receipt of this finding**, by writing to:

**Private Bag X2700**
**Houghton**
**2041**

**South African Human Rights Commission**


COMPLAINT NO: Gauteng Province/2009/0424

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: GP/2009/0424*

In the matter between:

**JAN WILLEM LOTZ** **Complainant**

and

**M-NET** **Respondent**

# REPORT

## 1. INTRODUCTION

1.1. The South African Human Rights Commission (the Commission) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

1.2. The Commission and the other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".

1.3. In terms of Section 184 (1) of the Constitution, the Commission is specifically mandated to:

1.3.1. Promote respect for human rights and a culture of human rights;

1.3.2. Promote the protection, development and attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. Section 184(2) (a) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.

1.5. The Human Rights Commission Act 54 of 1994 ("the HRC Act"), further supplements the powers of the Commission. In addition to other powers, duties and functions, the HRC Act confers powers on the Commission to conduct or cause to be conducted any investigation necessary for the exercise of its broad powers under the Constitution.

## 2. THE COMPLAINANT

2.1. The Complainant is Professor Jan William Lotz, an adult male, a Professor presently residing at 12 De Mist Avenue, Welgemoed, Western Cape, South Africa and who is the father of Miss Inge Lotz (hereinafter referred to as the "deceased").

## 3. THE RESPONDENT

3.1. The Respondent is M-NET, a commercial satellite subscription broadcasting channel in Southern Africa and a signatory to the Broadcasting Complainants Commission of South Africa (the BCCSA), whose head office is situated at 137 Bram Fischer Drive, 2194 Randburg, Johannesburg.

3.2. The Respondent broadcasts Carte Blanche the program complained about herein, a flagship magazine and actuality programme launched in 1989 and aired every Sunday evening.

## 4. THE COMPLAINT

4.1. On 16 March 2005, the deceased was murdered in her apartment on the outskirts of Stellenbosch in the Western Cape. The deceased was 22 years old at the time of her death and was the only child of the Complainant and his wife.

4.2. A forensic team from the South African Police Services (SAPS) gathered and collected evidence from the deceased's apartment. As part of their investigation, videos and photographs were taken of the deceased and of the crime scene. The visual material gathered was explicit and graphic.

4.3. On 14 September 2008, Carte Blanche aired the programme *"Forensics Investigated"* The insert began with a narration outlining the details about the murder of the deceased on Wednesday, 16 March 2005.

4.4. Approximately 20 seconds into the segment, the camera cuts from an external view of the deceased's apartment building to an internal shot of her living room. The visual was created by using an editing device specifically designed to take the viewer into the heart of the crime scene.

4.5. The deceased's body, clearly visible in the three second shot, is viewed from behind, on the couch. The displayed image was an official police photograph taken of the crime scene. It appeared that the Carte Blanche programme editor had blurred the picture and had used a staggered zoom effect to make the shot appear as though it was a moving video footage.

4.6. The complaint arises due to the airing of these images, the Complainant relies on the following argument:

4.6.1. The Respondent failed to notify the Complainant or his wife a; about broadcasting the programme.

4.6.2. Carte Blanche did not request permission from the deceased's next of kin to broadcast the images;

4.6.3. Based on the above, the Complainant sought a public apology and requested that the programme not be rebroadcast. The Respondent refused to tender an apology as requested and also rebroadcast the programme on a further two occasions.

## 5. RELIEF SOUGHT

5.1. The nature of the relief that the Complainant seeks is an unconditional public apology to both his wife and himself in memory of his late daughter.

5.2. The Complainant required that the apology be screened at the regular screening time allocated to Carte Blanche on MNET on a Sunday evening.

5.3. The Complainant required formal identification of the party who handed the police video of the deceased's death scene to the Respondent and Carte Blanche.

## 6. HUMAN RIGHTS ALLEGEDLY VIOLATED

6.1. Section 10 of the Constitution – Dignity

6.1.1. The Complainant contends that in terms of Section 10 of the Constitution, the right to dignity of the deceased was violated by M-Net and further contends that an individual's right to have their dignity respected, upheld and protected does not cease upon their death.

6.1.2. In addition, it is alleged that the producers were aware that the parents of the deceased would be distressed by the public broadcast of the images and that as a result, the deceased's parents' right to dignity had also been violated by such action.

6.2. Section 12(e) of the Constitution – Freedom and Security of person

The Complainant alleged that by showing pictures of his deceased daughter's body, the deceased's right to freedom and security of her person had been violated.

6.3. Section 14 of the Constitution – Privacy

The Complainant argues that his deceased daughter's right to privacy was violated when pictures of her body were broadcast without the permission of her next of kin.

## 7. STEPS TAKEN BY THE COMPLAINANT

7.1. The Complainant advised the Commission that subsequent to the programme being broadcast on the aforementioned date, he had informed William Booth, the attorney representing the person accused of the murder of the deceased, Fred Van Der Vyver, of his dissatisfaction with the insensitive manner in which the matter was handled by both Van Der Vyver's attorneys and Carte Blanche.

7.2. The Complainant advised that he had also unsuccessfully attempted to address the matter through the Broadcasting Complaints Commission of South Africa (BCCSA). The BCCSA is an independent quasi-judicial tribunal[1] that is required to adjudicate complaints from the public against broadcasters which are members of the National Association of Broadcasters (NAB) without fear or favour. In terms of its Constitution, the objects of the BCCSA are to *"ensure the adherence to high standards in broadcasting and to achieve a speedy and cost effective settlement of complaints against full members of NAB who have submitted themselves to the jurisdiction of the BCCSA and its Code and, where a settlement cannot be attained, to adjudicate upon a complaint and take appropriate steps in accordance with [its] Constitution".*[2]

7.3. In light of the above, the Complainant alleged that he had exhausted all internal remedies available to him and on that basis, proceeded to lodge a complaint with the Commission on 8 April 2008.

[1] http://www.bccsa.co.za/index.php?option=com_content&view=article&id=18&Itemid=32

[2] http://www.bccsa.co.za/index.php?option=com_content&view=article&id=12&Itemid=26

## 8. STEPS TAKEN BY THE COMMISSION

8.1. In assessing the complaint, the Commission considered the Complainant's engagements with the BCCSA unsuccessful.

8.2. Although this complaint does not fall within the jurisdiction of the Commission as it is more appropriate for the BCCSA, the Commission saw fit to consider the complaint in terms of **its broad human rights mandate with a view to deepening the understanding of the right to dignity and privacy and its relationship to enhanced broadcasting ethics.**

8.3. The matter was therefore accepted by the Commission on the basis stated above and transferred to the Gauteng Provincial Office (GP) of the Commission. The Complainant was requested to furnish the following further information to the Commission:

8.3.1. Details of the Carte Blanche programme in question;

8.3.2. Date, time and subject matter of the programme

8.4. When no response was received to the first request for information dated 20 July 2009, further correspondence was forwarded to the Complainant dated 18 September 2009.

8.5. On the 22 September 2009, the Complainant responded to the Commission's letter dated 20 July 2009 and requested a time extension to provide the additional information to the Commission, which request was agreed to.

8.6. On 26 October 2009, the Commission received from the Complainant a document titled, "Official Report to The Human Rights Commission of South Africa".

8.7. On 23 June 2010, the Commission wrote to the Respondent requesting a copy of the footage at issue, a copy of which was received on 17 November 2010. Upon viewing the footage it became evident that the body of the deceased and other photographs depicting the deceased during her lifetime had been shown during the introduction of the show.

8.8. A summary of a progress meeting held thereafter between the Commission and the Complainant on 16 April 2012 is provided below:

8.8.1. During the meeting, the Complainant confirmed and acknowledged that he **understood and respected the limitation** of the Commission's mandate. He however appealed for assistance from the Commission based on a human rights interpretation of the complaint;

8.8.2. In support of the request, the Complainant pointed out that the Respondent had failed to take into consideration the effect the broadcasting would have on the family of the deceased and that the Respondent had not contacted him to establish whether he had any objections to the broadcasting of the video or to enquire whether he had any comments or input concerning the deceased's case. The Complainant further emphasized that as a result of their actions, the Respondent had not shown any compassion towards him or his wife.

8.8.3. The Commission fully explained to the Complainant that should the Commission's attempt to engage with the producer of Carte Blanche fail to achieve the relief he sought, it would have no option but to close its file as the matter was being addressed by the Commission based on a human rights interpretation of the complaint.

8.8.4. The Complainant confirmed that he had not previously engaged the Respondent or Carte Blanche regarding his dissatisfaction with the airing of the programme and had instead reported the matter to Van Der Vyver's attorney, William Booth.

8.8.5. In addition, the Complainant confirmed that he had also lodged a complaint with the BCCSA but that he had not been assisted.

8.8.6. In order to assist the Complainant, who had clearly been traumatized by the incident, the Commission undertook as a final measure, to intervene and engage further with the Respondent regarding the reason(s) for its alleged failure to inform the Complainant and his wife that the programme would be broadcast The Complainant asks for an apology as well as to establish the name of the person(s) who had furnished the footage to the Respondent.

8.9. On 25 April 2012, correspondence setting out the allegations was forwarded to Carte Blanche, providing until 9 May 2012 to respond.

8.10. On 16 May 2012, the Commission received an email from Mari Truter, the personal assistant of the Executive Producer of Carte Blanche, requesting a meeting with the Commission regarding the complaint.

8.11. On 4 June 2012, during a telephonic discussion with the Commission, the Complainant advised that due to the emotional and psychological pain suffered by him and his wife as a result of the incident, the meeting could proceed in their absence. The Complainant did however emphasize that he required an **unconditional apology to his wife, to him, and to the memory of the deceased and that such apology should be aired during Carte Blanche.** In addition, the Complainant again confirmed that the required formal identification of the party who had handed the police video of the deceased's death scene to the Respondent.

8.12. During a meeting between the Commission and the Respondent on 7 June 2012, the following was discussed:

8.12.1. The executive producer of the Respondent, Mr. George Mazarakis, informed the Commission that there had been **no malicious intent** on the part of the Respondent when it broadcast the video. Mr Mazarakis further stated that both he and the Respondent fully understood the emotional pain suffered by the Complainant and his wife.

8.12.2. Mr. Mazarakis however emphasized that the Respondent had **no legal/ethical obligation to inform the Complainant** prior or subsequent to the broadcast of the footage as the programme was not centred around the deceased or her death *per se* but rather around the fabrication of evidence by the SAPS during its forensic investigations.

8.12.3. Mr. Mazarakis alluded to the fact that the matter was treated with a sufficient degree of sensitivity and was reported on **with the relevant bounds of broadcasting standards.**

8.12.4. Carte Blanche insisted that they had not acted in a manner which was questionable and indicated that the visuals used could have been more graphic. For that reason, **Carte Blanche could not apologise** as it had nog done anything ethically and / or legally wrong.

8.12.5. In addition, Mr. Mazarakis stated that the Respondent could not apologise notwithstanding its view that it had not contravened any legal or ethical boundaries as such apology would **compromise the journalistic credibility of the show and its reporters.** In this respect, Mr. Mazarakis also raised a concern that should the Respondent tender a written apology; the Complainant would present same to the media for publication, thereby calling the Respondents integrity into question.

8.12.6. Mr. Mazarakis did however advise that the Respondent was willing to meet with the Complainant as **a sign of compassion and respect** for the Complainant and his family.

8.12.7. The Respondent also requested that the Commission, on its behalf, **extend an apology to the Complainant** for what he and his wife had been through following the murder of their daughter;

8.12.8. The Respondent emphasized that had it acted incorrectly, it would have tendered an apology but that **in the present case, an apology was unwarranted.**

8.13. The Commission notes the time it has taken in the issuing of its recommendations herein. A number of factors are attributable for the finalisation of this complaint. Amongst these included attempts made to engage with the Respondent, as more fully set out above, and other on-going legal proceedings relating to the death of Ms Lotz.

8.14. It is recorded that pursuant to finalizing its recommendations in this matter, the Commission issued its draft findings and recommendations to the parties in February 2014 in terms of Article 30(1) of its Complaint Handling Procedures (CPH). The relevant excerpts of the parties' responses are summarised below:

8.14.1. On 5 March 2014, the Complainant responded to the Commission's preliminary findings and recommendations. In summary, the Complainant confirmed that in his view, and given his own vulnerability to continue a challenge of the Respondents conduct, the Commission had courageously assessed measures for reform to strengthen the right of individuals.

8.14.2. On 12 March 2014, the BCCSA provided its response to the Commission. The BCCSA challenged the mandate of the Commission's finding and stressed that the matter be governed by the Code of Subscription Broadcasters (the Code), which was exclusively within its jurisdiction.

8.14.3. In response to its recommendation that the BCCSA consult with its membership, it should also consider codifying best practice guidelines regarding the content of clause 28.4 (dignity) of the Code, particularly in regard to deceased persons and their relatives (and that the BCCSA should provide the Commission with confirmation thereof) The BCCSA recommended that the Commission could make such submissions to the Independent Communications Authority of South Africa (ICASA) or to itself when it next held inquiries regarding the amendment of the Codes for broadcasters.

8.14.4. On 14 March 2014, the Commission received responses from the Respondent which addressed the substantive contextual considerations undertaken by the Commission in arriving at its recommendations, challenged the mandate of the

Commission and indicated concerns around the potential for forum shopping by parties whose complaints are not accepted by the BCCSA.

8.14.5. The Respondent also raised concerns regarding the delay between the broadcast and the issuing of the preliminary findings and recommendations by the Commission. In this regard the Respondent did not appear to have noted the steps taken by the Commission in attempting to engage with the Respondent regarding this complaint, as set out in paragraphs 8.6. to 8.11 above;

8.15. Having considered the response of the parties, the Commission is of the view that its recommendations remain relevant for the protection of human rights. The Commission has however noted the submission from the BCCSA regarding the role of ICASA and on that basis, accepts that ICASA be included for the purposes of communicating its recommendations toward reform on the broader concerns raised rose through this matter.

# 9. LEGAL FRAMEWORK

## 9.1. Jurisdiction

On the basis of the submissions from the Respondents, the Commission has specifically addressed the question of mandate hereunder.

9.1.1. The Commission has a broad mandate to promote and protect the rights in the Bill of Rights. In this respect, the only complaints expressly excluded from the mandate of the Commission are those that occurred before April 1994 (See article 4(1) of the Commission's CHP). Other complaints *maybe* rejected by the Commission on various other grounds contained in Article 4(2) of the Commission's CHP. One such ground upon which the Commission may or may not elect to reject a complaint is that the matter *"(c) is the subject of a dispute before a court of law, tribunal, any statutory body, any body with internal dispute resolution mechanisms…or in which there is a judgment on the issues in the complaint or finding or such court of law, tribunal, statutory body or other body…".*

9.1.2. With specific respect to the Code, ICASA is mandated to review existing regulations and prescribe regulations relating to the conduct of broadcasting service licensees. Although the BCCSA is the body responsible for enforcing such code of conduct, it does not necessarily have the exclusive mandate to do so, especially considering the broader constitutional mandate of an institution such as the Commission. In addition, the Code (as with other enabling legislation, regulations, by-laws etc.) gives content to the rights contained in the Bill of Rights, which the Commission has a clear mandate to promote and protect in terms of its own Constitutional mandate.

9.1.3. Regarding the Respondent's allegation relating to the exclusivity of the BCCSA's mandate, the Commission submits as follows:

9.1.3.1. Section 192 refers to the enactment of *national legislation* in terms of which an independent authority to regulate broadcasting must be established. In contrast, the Commission is directly established in terms of Chapter 9 of the Constitution, elevating its jurisdictional basis. In any event, the Code and the jurisdiction of the BCCSA only applies to full

members of the National Association of Broadcasters (NAB) whereas the Commission's mandate extends to all in South Africa (including non-juristic entities);

9.1.3.2. The overlapping mandates of Chapter 9 institutions and statutory bodies themselves does not limit the mandate of the Commission, which has the broadest mandate of all Chapter 9 institutions to ensure the protection and promotion of all constitutional rights; and

9.1.3.3. The Commission's previous referral of matters to the BCCSA, based on that institution's mandate does not preclude it from making decisions on any future matters where it deems its intervention appropriate.

9.1.3.4. Having considered the nature of the complaint, the form of relief being sought by the Complainant, and the impact of necessary reform in its broadest sense in such matters, the Commission found it appropriate to deliberate on the matter and issue recommendations with the intent of promoting broader reform through the appropriate authorities and assisting the Complainant at the same time.

9.1.4. Based on the above, the Commission finds that it has a mandate to attend to the present matter and to make findings and recommendations in respect thereof in terms of its CHP.

**International legal framework**

**9.2. Universal Declaration of Human Rights (1948)**

The Universal Declaration of Human Rights (UDHR) was adopted by the General Assembly of the United Nations on 10 December 1948 and provides human rights standards binding on all States as a matter of customary international law.

**Dignity**

Article 1 of the UDHR states that *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*

**Privacy**

Article 12 of the UDHR states that *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

**Freedom of Expression**

Article 19 of the UDHR represents the normative basis that led to the formulation of the standards for freedom expression. Article 19 states that *"Everyone has the right to the freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".*[3]

[3] http://www.un.org/en/documents/udhr/

**9.3. International Covenant on Civil and Political Rights (1966)**

The International Covenant on Civil and Political Rights (ICCPR) entered into force in 1976. It elaborates the principles laid out in UDHR and is legally binding on all states who have signed and ratified its provisions.

**Privacy**

Article 17 of the ICCPR states that *"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation."*

**Freedom of Expression**

Article 19 of the ICCPR stipulates that:

*"(1) Everyone shall have the right to hold opinions without interference.*

*(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*

*(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals."*

9.4. The guarantee of freedom of expression is also found in the following three important **regional human rights systems:**

9.4.1. Article 9 of the African Charter on Human and Peoples' Rights (a Declaration of Principles of Freedom of Expression was adopted by the ACHPR in October 2002);

9.4.2. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

9.4.3. Article 13 of the American Convention on Human Rights.[4]

**Domestic legal framework**

**9.5. The Constitution of South Africa, 1996**

9.5.1. Section 10 – Dignity

*"Everyone has inherent dignity and the right to have their dignity respected and protected."*

9.5.2. Section 14 – Privacy

*"Everyone has the right to privacy, which includes the right not to have –*

*(a) Their person or home searched;*
*(b) Their property searched;*
*(c) Their possession seized; or*
*(d) The privacy of their communications infringed."*

[4] http://www.unesco.org/webworld/publications/mendel/inter_standards.html

9.5.3. Section 16 – Freedom of Expression

*"(1) Everyone has the right to freedom of expression, which includes –*

*(a) Freedom of the press and other media;*

*(b) Freedom to receive or impart information or ideas;*

*(c) Freedom of artistic creativity; and*

*(d) Academic freedom and freedom of scientific research.*

9.5.4. Section 36 – Limitation of rights

*"(1) The rights in the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*

*(a) The nature of the right;*

*(b) The importance and the purpose of the limitation;*

*(c) The nature and extent of the limitation;*

*(d) The relation between the limitation and its purpose; and*

*(e) Less restrictive means to achieve the purpose.*

*(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

**Applicable codes and standards (and findings of tribunals)**

Countries around the world, including South Africa, have developed codes to regulate their broadcasting services and to ensure adherence to certain ethical standards. This is emulated regionally in countries such as Nigeria,[5] Tanzania,[6] Malawi[7] and Ghana[8] which

[5] Applicable provisions of the Nigerian Code of Ethics for Nigerian Journalists include the following:
*"3. Privacy*
*As a general rule, a journalist should respect the privacy of individuals and their families unless it affects the public interest..."*
*And*
*"5. Decency*
*In cases involving personal grief or shock, enquiries should be carried out and approached made with sympathy and discretion."*

[6] Applicable provisions of the Tanzanian Code of Ethical Practice for Broadcasters include the following:
*¨2.7. Privacy*
*Respect of the privacy of individuals and recognise that intrusions have to justified by serving a higher public good...*
*In depicting disasters and tragic events there is need to emphasise the importance of compassion. Coverage should not add to the distress of the people who already know their loss...*
*Use of library material depicting suffering, pain, violence or grief becomes less defensible as the original event passes into history. Avoid needless or repeated use of traumatic library material especially if it features identifiable people..."*
*"2.9. Violence...*
*The dead should be treated with respect, and not shown unless there are compelling reasons for doing so. Close-ups should be avoided and if justified, then they must be not lingered over. Nor should there be undue concentration on the bloody consequences of an accident or terrorist attack..."*

[7] Applicable provisions of the Malawian Media Council of Malawi Code of Ethics and Professional conduct include the following:
*"2.2. Distinction in presentation: a journalist shall avoid traumatizing shocking or obscene pictures as much as possible. Pictures must be used appropriately, not for the sake of sales promotion. A journalist shall not publish pictures that infringe on individuals' right to privacy."*

[8] Applicable provisions of the Ghana Journalists Association (GJA) Code of Ethics include the following:
*"5. Respect for privacy and human dignity*
*Journalists should respect the right of the individual, the privacy and human dignity. Enquiries and intrusions into a person's private life can only be justified when done in public interest."*
*"16. Personal grief and sensationalism*
*In case of personal grief or distress, journalists should exercise tact and diplomacy in seeking information and publishing."*

have all produced codes reiterating the need for maintaining a certain degree of care in the broadcasting industry.

**Domestic**

9.6. Carte Blanche is a programme aired on the subscription channel, MNET, which is **a signatory to the BCCSA's Code of Conduct for Subscription Broadcasting Service Licensees ("the Code").[9]** It is therefore obliged to comply with the provisions of the Code.[10]

9.7. Of relevance to the present matter is clause 28.4 of the Code which provides that *"Insofar as both news and comment are concerned, broadcasting licensees* ***must exercise exceptional***[11] ***care and consideration*** *in matters involving the private lives, private concerns and dignity of individuals, bearing in mind that the rights to privacy and dignity may be overridden by a legitimate public interest."* (Own emphasis).

9.8. The following rules of the Broadcasting Complaints Tribunal of South Africa's ("the Tribunal") relating to the broadcasting of bodies of deceased persons are of particular relevance to the present complaint:

a) In **Taylor v E-TV** the *"principle of dignity of bodies of deceased persons [was] confirmed."*[12] In that matter, the Tribunal referred to a previous ruling made by it in 2009[13] where it was stated that *"the body of a dead person is protected by common law and legislation... [but] this is not an absolute rule..."*[14] (own emphasis). In making its ruling, the Tribunal took into account the following factors:
   i. When the images were displayed i.e. during a news bulletin largely intended for adult viewing
   ii. The distance of the camera from the images
   iii. Lack of detail of the images
   iv. The duration that the images were displayed on screen

b) In Van Breda v E-TV?,[15]the Tribunal stated that the *"The broadcasting of shots of the body of a dead person could be highly insensitive towards, and therefore traumatic to, the next-of-kin of such person... The point is made to impress upon the media the seriousness with which this Tribunal regards the principle of dignity of the body of a dead person"* (own emphasis). This ruling acknowledges the impact of visual images on the next-of-kin of deceased persons.

c) In *Faull v e-tv,*[16] the Tribunal stated that *"[I]n showing bodies, care must...be taken*

9 The BCCSA Constitution and Code of Conduct for Subscription Broadcasting Service Licensees are available on the BCCSA's website:http://www.bccsa.co.za

10 See clause 3 of the BCCSA Constitution

11 http://www.macmillandictionary.com/dictionary/british/exceptional - Exceptional is defined as follows in the Macmillan Dictionary:
*"extremelygoodorimpressiveinawaythatisunusual...muchmoreorgreaterthanusual...unusualandnotlikely7tohappenorexistveryoften"*
*http://oxforddictionaries.com/definition/english/exceptional*
*"unusual; not typical...unusually good; outstanding"*

12 Taylor v e-tv, 42/2001

13 Goss v SABC, 05/99

14 Taylor v e-tv, 42/2001

15 37/2000, 17 November 2000.

16 23/2006, 8 June 2006.

*not to gratuitously invade the respect for death and the dignity and privacy of persons related to the deceased"* (own emphasis). The public interest justification was upheld by the Tribunal in this matter.

d) In *Swanepoel & Others v SABC,*[17] the Tribunal confirmed that "[It] *must accentuate that only under very exceptional circumstances such photographs [i.e. of bodies of dead persons] may be shown. If the slightest impression of sensationalism had been conveyed, we would have held that the broadcast of the photographs had contravened the Code."* (Own emphasis)."

e) In *Visser v e-tv,*[18] the mother of a young man who had been murdered approximately six years prior to the incident, lodged a complaint with the BCCSA against e-tv for screening scenes of her son's murder in the programme, *Third Degree*. Some scenes included police file photographs of the dead bodies. The majority of the Tribunal found that the broadcast was justified for the following reasons:

*"It is our opinion that the public had a right to be informed by way of a reminder about the events that took place... The re-enactment of the shooting, and the broadcast of police file photographs of the dead bodies, would probably be regarded by many viewers as offensive... However, it is our view that this aspect did not exceed the limits of what might legitimately be defined as documentary... To have excluded the re-enactment and the police-material – however shocking these were – would have been tantamount to withholding information from the public"* (own emphasis).

The majority of the Tribunal found that the mother's right to privacy was not in any manner invaded, as she did not appear in the programme. While the Tribunal acknowledged that the mother would have been disturbed by the programme, it observed that ***"it would probably have been a more prudent choice not to watch the programme".*** One member of the Tribunal had dissented on the basis that the display of images was unwarranted and that the images were not required and were therefore more sensationalist than value-adding.

It is noted that specific statutory protection for personal information of an individual was not in place at the time of the decision.[19]

## International

### United Kingdom

9.9. United Kingdom's broadcasting regulatory authority, Ofcom, published a revised Broadcasting Code in March 2013.[20] The new Broadcasting Code includes the following provision in the chapter on privacy under the heading *"Suffering and distress":*

*"8.19 Broadcasters should try to reduce the potential distress to victims and/or relatives when making or broadcasting programmes intended to examine past events that involve trauma to individuals (including crime) unless it is warranted to do otherwise. This applies to dramatic reconstructions and factual dramas, as well*

17 24/2000, 30 August 2000.

18 15/2009, 23 July 2009.

19 The Protection of Personal Information Act

20 Ofcom's Broadcasting Code is available at: http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/bguidance/.

*as factual programmes.*[21] *(Emphasis added) In particular, so far as is reasonably practicable, surviving victims and/or* ***the immediate families of those whose experience is to feature in a programme, should be informed of the plans for the programme and its intended broadcast,*** *even if the events or material to be broadcast have been in the public domain in the past* (own emphasis).

9.10. In a previous version of the UK Broadcasting code, Ofcom applied an equivalent provision in the *Alyson Evans v ITV1* matter.[22] In that case, Ofcom affirmed that **it is "good practice" for the family to be consulted before the broadcast** of a programme regarding the murder of a family member, given its potential to cause distress. It found that without providing prior notification, the broadcaster violated the family's right to privacy. The Tribunal emphasised that although there was **no specific requirement to obtain the consent** of the family to broadcast the programme, **the family should nonetheless have been informed.**

**Australia**

9.11. Two Australian TV Broadcasting Codes address the broadcast of images likely to cause distress to persons who have suffered personal tragedy. Firstly, the Codes of Practice (2007) for Subscription Broadcast Television of the Australian Subscription Television and Radio Association (enforced by the Australian Communications and Media Authority ("ACMA")) provides that:

*"2.2(c) In broadcasting news and current affairs program[mes] licensees must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there are identifiable public interest reasons for the material to be broadcast.*

9.12. The Privacy Guidelines referred to under clause 2.2 state that *"The public interest is assessed at the time of the broadcast… Whether something is in the public interest will depend on all the circumstances, including whether a matter is capable of affecting the community at large so that citizens might be legitimately interested in or concerned about what is going on… Any material that invades a person's privacy in the public interest must directly or indirectly contribute to the public's capacity to assess an issue of importance to the public, and its knowledge and understanding of the overall subject…knowledge and understanding of the overall subject…* ***It should be proportionate and relevant*** *to those issues, and not disclose peripheral facts or be excessively prolonged, detailed or salacious.*

9.13. Secondly, the ACMA's Commercial Television Industry Code of Practice, 2010 (2010 Code), includes the following provision relating to news and current affairs programmes:

*"4.3 In broadcasting news and current affairs program [mes], licensees…*

*4.3.3 should have* ***appropriate regard to the feelings of relatives…****when including images of dead or seriously wounded people."*

[21] This provision must be read with Ofcom's definition of "warranted":
*"In this section "warranted" has a particular meaning. It means that where broadcasters wish to justify an infringement of privacy as warranted, they should be able to demonstrate why in the particular circumstances of the case, it is warranted. If the reason is that it is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. Examples of public interest would include revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public."*

[22] Crime Secrets, ITV1, Wales (21 September 2005).

9.14. Rulings by the ACMA where clause 4.3.3 of the 2010 Code were applied indicate that **whether or not the broadcast in question is justified, there is an obligation on the broadcaster to take measures to prevent broadcasts concerning the death of a person from causing distress to family members.** A case in point was the *Investigation Report 2623: TCN Channel Nine Pty Ltd, 60 Minutes (1 March 2012)* matter. In this matter, the ACMA received a complaint about a segment of the programme known as *60 Minutes* in which crime scene photographs of the Complainant's sister were shown. Here, the ACMA held that the broadcaster had breached clause 4.3.3 of the 2010 Code for the following reasons:

a) The photograph in question showed the deceased's body lying on the floor with her arms and legs exposed and her torso covered by a sheet. The ACMA was of the view that **it was reasonably foreseeable that the broadcast of the image would significantly distress the deceased's family** members regardless of the time that had passed since her death or the fact that the photograph had formed part of court evidence during the murder trial. The photograph was also displayed twice, for a five second period and then for four second period.

b) Based on the above, the tribunal found that **steps should have been taken to mitigate or prevent distress to the family.** However, this was not done as the family had not been informed prior to the broadcast that the images would be displayed nor had they been informed of the date of the broadcast.

c) In finding a breach of clause 4.3.3, the ACMA emphasized that the image was included in a **repeat-broadcast** even after the broadcaster was fully aware that the Complainant was not happy with the display of the images, thereby **demonstrating 'a total lack of compassion'** for the family.

**New Zealand**

9.15. The New Zealand Television Code of Broadcasting Practice, 2008 contains a provision dealing specifically with distress to surviving family members. Clause G17 provides that:

> *"Broadcasters must avoid **causing unwarranted distress by showing library tape of bodies or human remains which could cause distress to surviving family members.** Where possible, family members should be consulted before the material is used. This standard is not intended to prevent the use of material which adds significantly to public understanding of an issue which is in the public arena and interest."*

9.16. The duty to consult the family is applied strictly by the New Zealand broadcasting authority (the Authority), as evidenced in the *CC and DD and TV3 Network Services Ltd* ruling.[23]

a) The case involved the broadcast of images of the body of the Complainant's grandchild (a baby) and daughter-in-law who were killed in a car-crash. **The Authority noted that the fact that neither the Complainant nor other immediate family members were consulted or notified before the broadcast was the principal reason for the Complainant's distress.** The broadcaster argued that the production company had taken measures to contact persons with the surname of the deceased, to no avail.

[23] 1999:055-057, 27 May 1999.

b) However, notwithstanding the **alleged attempts made by the broadcaster, the Authority found that, given the content of the programme, such steps did not meet the standard** set in clause G17. The Authority further noted that additional steps could have been taken to obtain the contact details of the family through alternative sources but that this was not done.

9.17. Important to note is that the comparative studies above indicate that **the duty to inform the family is not limited to the second part of the enquiry relating to whether or not the broadcast of specific images is in the public interest exclusively,** but rather on the broader duty to exercise care and notify surviving families.

## 10. LEGAL ANALYSIS

This complaint primarily entails a consideration of three human rights; freedom of expression, human dignity and the right to privacy; and the manner in which these fundamental rights intersect with each other in relation to deceased persons and in relation to their surviving next-of-kin.

### FREEDOM OF EXPRESSION

10.1. Freedom of expression is a fundamental right revered by democracies globally. In its first session in 1946, the UN General Assembly adopted resolution 59(I) stating *"Freedom of information is a fundamental human right and … the touchstone of all the freedoms to which the United Nations is consecrated."*[24] It is however also a right which because of its nature, most often has its parameters tested in relation to potential conflicts with the rights to dignity and privacy.

10.2. The European Court of Human Rights has stated: *"Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society".*

10.3. Regarding the role of media specifically, former United Nations Secretary General stated that *"Press freedom is a cornerstone of human rights. It holds governments responsible for their acts, and serves a warning to all that impunity is an illusion".*[25] In a paper prepared by the International Federation of Journalists, it was confirmed that *"[t]he contribution made by journalists is clear: by exposing violations of rights media can improve the climate of democratic debate and reduce corruption in public life. At the same time, media sensitive to the importance of human rights provide reliable sources of information through which citizens, human rights groups, private organisations and public authorities can work together to promote development and to eliminate arbitrary abuse."*[26]

10.4. Notwithstanding the importance of freedom of expression, there remains a clear need for codes of ethics to shape and give content to the enjoyment of the right to freedom

[24] http://www.unesco.org/webworld/publications/mendel/inter_standards.html

[25] *Kofi Annan, UN Secretary General, International Herald Tribune, June 2, 1999*

[26] The Role of Media in Promotion of Human Rights and Democratic Development, December 1999, International Federation of Journalists.

of expression by ensuring that, where appropriate, **best practice guides and mitigates the potential limitation** of other basic rights. That being said, there is also a need to avoid applying very strict or narrow guidelines which **suffocate expression** and to ensure that the very essence of the right is not lost. Limitations to the right are therefore best interpreted exceptionally and narrowly.

**DIGNITY AND PRIVACY**

The Commission thought it prudent to consider this complaint on two broad bases insofar as the alleged violations of basic human rights are concerned. In doing so, it has distinguished between the rights, if any, accorded to a deceased person and secondly those of the deceased's next-of-kin.

## A. The rights of a deceased person

10.5. A central aspect of the complaint before the Commission is whether the rights of the deceased were violated as a result of the Respondent's actions. The Commission was therefore tasked with analyzing whether a deceased person is the bearer of rights and if so, which rights.

10.6. Due regard was accorded to our Common Law for guidance. It is generally accepted in South African law that **a deceased person does not have a legal personality and cannot therefore be the bearer of rights.**[27]

10.7. In *Christian Lawyers,*[28] the scope of legal personality was addressed in relation to the unborn foetus and the right to life under section 11 of the Constitution. The High Court found that the unborn foetus did not have a right to life protected under the Constitution. The Court reasoned that the Constitution contained no express provision affording the foetus legal personality or protection, and further that the word *"everyone"* in the Bill of Rights must be interpreted consistently and that many of the rights extended to **"everyone"** in the Bill of Rights could not be exercised by the foetus. It could be argued that this viewpoint should equally apply to deceased persons.

10.8. Under the Common Law, it is well established that where a person is deceased, there **can be no injury to that person's personality** for the purposes of establishing an *action iniuriarium.*[29]

10.9. However, Article 1(1) of the German Basic law is said to extend to a deceased person. As stated by Botha,[30] *'[p]ersonality rights likewise enjoy posthumous protection."* However, Botha further states that *"the protection afforded to the **personality rights of the deceased [are] temporally bound...**As time goes by, the memory of the deceased fades, and the protection of a person's dignity diminishes accordingly."*[31]

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27 Neethling, Potgieter & Visser, Neethling's Law of Personality (Durban: LexisNexis, 2005) at 13. Hahlo and Kahn Union of SA: Development of its Laws and Constitution 348; Van Heerden, Cockrell and Keightley (eds) Boberg's Law of Persons and the Family (2 ed) (1999) 52; Heaton The South African Law of Persons (3 ed) (2008) 28; Jordaan and Davel Law of Persons (2005) 182.

28 Christian Lawyers Association of SA and Others v Minister of Health and Others 1998 (4) SA 1113 (T).

29 Nevertheless, the law protects the body and regulates the disposal of it. This is not done in the interests of the deceased person but partly in the interests of public health and partly because of respect for the dead. The deceased's former assets are also protected, not in his or her own interests but in the interests of creditors and heirs.

30 Henk Botha "Human dignity in comparative perspective, 2009 Stell LR 171 at 192

31 supra

10.10. The German Constitutional Court has also recognized that the state's duty to protect human dignity continues after death. In the Mephisto case,[32] a son sought to interdict the publication of a novel on the basis that it would defame his deceased father. In that case, the Court held that *"an individual's death does not put an end to the State's duty under Art 1 GG* [i.e. Article 1 of the Germany's Basic Law] *to protect him from assaults on his human dignity".*

10.11. Orr & Siegler talk about respect for the dead as evidenced in certain Common Law crimes e.g. violating a corpse[33]. This view is reiterated in the following South African cases:

10.11.1. In the Crossley case, Patel J held as follows: *"I am of the considered opinion that in this democratic era the higher constitutional value of the right to dignity, embedded in every international human rights instrument, embraces not only those who are living but also those who have departed. They too, like the deceased, need to rest undisturbed with dignity...If such an order [to stop the burial of the deceased] is granted, then that will be the gravest disrespect to the deceased and also violate his family's right to dignity as well as interfere with their religious rights and freedom. It will also result in the gravest injustice to his family and community at large* (own emphasis).[34]

10.11.2. In *Nkosi & Another v Buhrmann,*[35] the court stated that *[f]unreal and burial rituals, after all, serve to express final acknowledgement by the bereaved of the human dignity of the deceased"* (own emphasis).[36] From this statement, it would appear that there may well be instances where a *"person's dignity might receive posthumous protection".*[37]

10.12. Although it would appear that South African law does not afford firm legal protection to deceased persons, this **does not seem to be a decisively answered** legal question as yet. A great deal of room exists for the consideration of expanding protections and increased significance when the diverse cultural and religious traditions honouring the deceased in our country are considered in context. Despite the lack of clear precedent by our courts in this regard, it could however be argued that a trend towards the recognition of posthumous protection may be developing.

10.13. Based on the above, and in keeping with the development of our Common law, it cannot therefore be said at this stage that the deceased's right to privacy, her right to dignity or her right to freedom and security of her person were violated.

**The transmissibility of the deceased's rights (if any)**

10.14. If it is argued that the law does not recognise the deceased as the bearer of rights, it follows then that her next-of-kin have **no right to claim protection of her privacy, dignity or freedom and security of her person.**

[32] 30 BVerfGE 173 (1971).

[33] RD Orr and M Siegler "Is posthumous semen retrieval ethically permissible? J Med Ethics 2002; 28:299 – 303 at 300

[34] Crossley and others v National Commissioner of South African Police Service and others [2004] 3 All SA 436 (T) at para 20

[35] 2002 (1) SA 372 (SCA).

[36] Id at para 55 (emphasis added).

[37] Henk Botha "Human dignity in comparative perspective, 2009 Stell LR 171 at 210

10.15. In addition, non-patrimonial claims for the infringement of personality rights are **neither transmissible nor inheritable.** South African common law no longer recognizes *iniuria per consequentias* – that is, *iniuria* automatically arising from injury to another person and by virtue solely of the plaintiff's special relationship with the injured person. In the past, our common law recognised certain forms of *iniuria per consequentias* – for example, allowing a father to claim *iniuria* where the dignity of his wife or child was injured. However, the Court rejected the *iniuria per consequentias* approach in Meyer v Van Niekerk.[38] Since then, the **Courts have refused to accept that an "indirect *iniuria*" is automatically committed against a person involved in a special relationship with another who is injured.** What is required is evidence of actual injury to the plaintiff, whether caused directly or indirectly.[39]

10.16. On this basis, it would appear that the family **cannot seek to enforce any rights on behalf of the deceased not can they claim injury on the basis of an infringement of *her* rights.** This question is however not before the Commission nor would it be appropriate for the Commission to address it. As such, this aspect is not accorded any particular detail. However, it suffices to state that **the next-of-kin must establish that their own rights were infringed, whether directly or indirectly, by the broadcast of images** of the deceased's body.

## B. The rights of the deceased's next-of-kin

At this stage, questions relating to the application of the Constitution and statutory frameworks directly ascribing certain rights to deceased persons have been rendered to the realm of philosophy for the most part. However, in considering the rights of the next-of-kin, **the Commission has sought to be guided by the Constitution, the Code and comparable foreign codes, decisions of both the domestic and those of the international broadcasting tribunals.**

**Privacy**

10.17. The right to privacy as enshrined under section 14 of the Constitution has to some extent been defined by the Constitutional Court in *Bernstein v Bester* where the court adopted a two-part 'reasonable expectation of privacy test'.[40] The first part of the test aims to establish whether there is **a *subjective* expectation of privacy** and the second part considers whether the expectation is *objectively reasonable*.[41] Notwithstanding its partly subjective nature, the right to privacy at the very least embraces the right to be free from intrusions and interference in one's personal life and to be **protected from the publication of private facts.**

10.18. In the case of *NM v Smith,*[42] the Constitutional Court defined "private facts" as *"those matters the disclosure of which will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances and in respect of which there is a will to keep them private.*[43] On this definition, it is

38 1976 (1) SA 252 (T) 256.

39 For a general discussion, see Neethling's Law of Personality at pp. 61-63.

40 Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC), para 16.

41 Centre for Social Accountability v Secretary of Parliament and Others 2011 (5) SA 279 (ECG), para 71.

42 NM and Others v Smith and Others 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC).

43 NM v Smith, para 34.

certainly arguable that there was a breach of the right to privacy of the deceased's next-of-kin as the **disclosure of images of the deceased's body caused her family mental distress, thereby satisfying the subjective leg** of the enquiry.

10.19. The more difficult question is **whether this distress was objectively reasonable,** taking into account conflicting rights such as the right to freedom of expression.[44] Whether there was an infringement of the constitutional right to complete privacy is thus informed by the determination of whether the **broadcast of the images were justified in the public interest** (see below).

10.20. Another important consideration at the second leg of the enquiry is the importance of individual independence and the extension of the right to privacy to protect personal autonomy, including the entitlement of persons to make decisions about such matters as their family, home and body, and controlling the distribution and use of information in respect of these matters.[45] In this respect, the jurisprudence suggests that the **parents' subjective expectation of control over the images of the deceased's body was objectively reasonable and should therefore have been protected under the right to privacy.**

10.21. This position has also been confirmed in foreign jurisprudence where the family's right to privacy in respect of the images relating to the death of a family member was considered. In *National Archives and Records v Favish,*[46] the US Supreme Court held that the Freedom of Information Act ***"recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images"*** and that ***"[the] Court has little difficulty in finding a case law and traditions the right of family members to direct and control disposition of a deceased's body and to limit attempts to exploit pictures of the deceased's remains for public purposes.*** *The well-established cultural tradition of acknowledging a family's control over the body and the deceased's death images has long been recognized at common law".* In *Catsouras,*[47] the Californian Court of Appeals relied on a four part enquiry to test invasion of privacy: *"'(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern."* The Court held that *"on issue of first impression, the deceased's family members had sufficient privacy interest in the accident scene photographs to maintain invasion of privacy action".*

10.22. Unlike under the Common Law action for infringement of privacy (the *action iniuriarium*), **there is no fault requirement for a breach of the constitutional right to privacy.**[48]

10.23. The only remaining consideration is whether the infringement of the family's right to privacy was justified in terms of **section 36** of the Constitution[49] In this respect, the first

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[44] Section 16(1) of the Constitution provides: *"Everyone has the right to freedom of expression, which includes –*
*a) freedom of the press and other media;*
*b) freedom to receive or impact information or ideas;*
*c) freedom of artistic creativity; and*
*d) academic freedom and freedom of scientific research".*

[45] See, for example, Case and Curtis v Minister of Safety & Security 1996 (2) SA 617 (CC); National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC); De Reuck v Director of Public Prosecutors, WLD 2004 (1) SA 406 (CC). See also Rautenbach (2001) TSAR 117-8; McQuoid-Mason 2000 ActaJuridica 248-9.

[46] (2004) 541 U.S. 157 at para 1

[47] Catsouras v State of California Highway Patrol et al. 181 Cal. App. 4th 856 (2010) 104 Cal. Rptr. 3d 352 (Cal. App. 4 Dist. 2010), Court of Appeals for the State of California, 29 January 2010.

[48] See D McQuold Mason, 'Privacy' in Constitutional Law of South Africa 2ed (Juta, 2012), 3834 – 38-35.

[49] Section 36 – Limitation of rights

requirement under the limitations clause is that only a *"law of general application"* can validly limit a right in the Bill of the Rights. In this case, the limitation was occasioned by an isolated practice i.e. Carte Blanche's broadcast and as such, not a law of general application?. The infringement of the right is thus not justifiable under Section 36 of the Constitution and a further analysis of the limitations clause is not required.

**Dignity**

10.24. Under the common law, injury to dignity (as opposed to the broader concept of dignitas) is limited to insult or injury to a person's feelings of self-worth.[50] There is no allegation of insult on the part of the deceased's parents. However, they claim **emotional trauma and distress** as a result of viewing the images of their daughter's dead body.

10.25. Neethling, Potgieter and Visser observe that there is little indication in South African case law that the *action iniuriarium* extends to claims for wounded feelings. However, they advocate for the common law recognition of such claims, where **the conduct not only fringes *subjective* feelings, but where the violation is *contra bonos mores* (or contrary to the legal convictions of the community).** They contend that such a development has been indirectly recognised under the common law under *iniuria* (such as privacy or defamation).[51]

10.26. However, over and above the common law analysis, it is probable that such injuries would **constitute a violation of the broader concept of human dignity** as set out in the Constitution.[52] This has been confirmed by the Constitutional Court in ***C and Others v Department of Health and Social Development, Gauteng and Others*** where the Court held that human dignity is associated with ***"the dignity of family life."***[53] The Court has also held that family relationships *"have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others."*[54]

10.27. In assessing whether the Respondents actions constituted a violation of human dignity of the family members of the deceased, regard has been made both to section 36 and the facts of the complaint. In this respect, the application of section 36 is dispensed with on the basis that the violation cannot be said to be justifiable in terms of section 36 of the Constitution as the **conduct in question was not in terms of a law of general application (see paragraph 10.23 above).**

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*"(1) The rights in the Bill of Rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account ali relevant factors, including –*
*The nature of the right;*
*a) The importance and the purpose of the limitation;*
*b) The nature and extent of the limitation;*
*c) The relation between the limitation and its purpose; and*
*d) Less restrictive means to achieve the purpose.*
*(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights"*

50 Le Roux and Others v Dey 2011 (3) SA 274 (CC), para 138.

51 See Neethling's Law of Personality Rights, pp. 199-201.

52 Section 10 of the Constitution provides:
*"Everyone has inherent dignity and the right to have their dignity respected and protected".*

53 C and Others v Department of Health and Social Development, Gauteng, and Others 2012 (2) SA 208 (CC), para 23.

54 Dawood and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC), para 30.

**PUBLIC INTEREST AND MITIGATION ANALYSIS**

10.28. Guided by the rulings of tribunals in comparative mandates and at the domestic level, it would appear that a **general rule against broadcasting the bodies of deceased persons exists** for the purposes of protecting the next-of-kin from trauma, protecting their dignity and privacy and respecting the dignity of the body of a deceased person. The rule is also applied more vigorously where such images are also deemed to be sensationalist and distasteful. The **rule however, does not apply to exclude such content in every instance.** In general, exceptions allowing such content are permissible where:

10.28.1. It is in the **public interest to receive such information;** and

10.28.2. **Mitigating measures are adopted to minimise negative impact** on next-of-kin and sensitive viewers.

10.29. On this basis, central to the present consideration is an analysis of the Code, other comparable standards in foreign mandates and the abovementioned rulings of various tribunals and forums as against the specific contextual and factual background of the matter at hand. Part of such assessment entailed a consideration of the following:

10.29.1. The **purpose of the broadcast** and the need for displaying the images in relation thereto. This analysis included an interrogation of the **actual value of displaying the images and whether omitting the images** would have amounted to non-disclosure **due to its material nature** in relation to the purpose of the broadcast:

i. The broadcast was aired more than **three years after** the deceased's murder. The public interest value in showing the **specific images of the deceased** is therefore questionable although related on-going formal civil based legal processes were receiving some attention from the media. On the other hand, the period of time that had elapsed since the event, could be deemed to have increased the **objective documentary value** of the images and **to have lessened the shock factor.**[55]

ii. The **primary subject** of the broadcast did not appear to be the murder of the deceased but the quality of the investigation and the **investigative methods employed by the SAPS Forensic Unit.** Displays of the **images relating to the deceased were therefore not material** to the broadcast and editing out the photographic image of the deceased was therefore an option open to a sensitive editor/producer.

iii. The efficiency of the SAPS has however always been of particular public interest, given high crime rates in the country. The programme content, detailing the technical process of forensic investigations appear therefore to be of a documentary nature with a **focus on the quality of the forensic evidence gathering** as opposed to the deceased herself.[56]

10.29.2. Details of the **actual images** displayed, including **content, length of time** that the images were displayed for and **time of the broadcast** were also considered as **mitigating measures** that had to be borne in mind. These were:

[55] In Visser, the Tribunal did not consider the period of time that had elapsed between the murder and the broadcast.

[56] However, an indirect linkage may be possible based on allegations of a problematic forensic investigation into the deceased's murder

i. The body of the deceased was **covered,** with only her feet and leg visible;
ii. **Two visuals** were aired
iii. The shots in question were **brief and were not a central feature** of the programme;

10.30. Balancing the circumstances set out above against previous rulings of the Tribunal, it is possible that the **display of the images in question** may be deemed to have been unwarranted and not in the public interest. As a result, there would be **no justifiable basis for a departure from the degree of care** required in terms of Clause 28.4 of the Code.

10.31. However, even if it is argued that the broadcast was in the public interest, it would appear from comparative standards that Carte Blanche ought to have at least **informed the family that the images would be displayed** during the broadcast to protect them from suffering any trauma and / or emotional distress. In this regard, it is noted that the **whereabouts of the Complainant were known** to the Respondent and such a step would therefore **not have constituted an undue burden or unreasonable on the Respondent.** While the Code does not expressly require that such steps be taken, the obligation is arguably implicit in clause 28.4, which provides that *"broadcasting licensees must exercise **exceptional care and consideration** in matters involving the private lives, private concerns and dignity of individuals"* (own emphasis). Exceptional in this instance implies **a standard beyond that which is reasonably necessary.** This interpretation is supported not only by a common understanding of the **ordinary meaning** of the word[57], but in the context of the Constitution and potential for negative impacts on the existing rights of others. The standard is also one which appears to have been crafted in broad terms, allowing **broadcasters maximum control in relation to the means through which "exceptional care and consideration" is to be affected.** Indeed this level of obligation is articulated in various forms of the foreign broadcasting standards described above.

**The relevance of the source or ownership of the images**

10.32. In his complaint, the Complainant specifically requested information about the Respondent's source of information. In this regard, the Commission has been guided in its considerations by **established judicial precedent and media practice** regarding **non-disclosure of journalistic sources** which are central protections to the independence of the media and its ability to provide information to the public.

10.33. Nonetheless, the Commission notes that although the material used was not the property of the deceased or the property of the deceased's next of kin, an analysis of the Code and Tribunal findings (as well as comparable foreign codes and findings) appears to indicate that the **source of the images in this case is largely immaterial to the final ruling,** save for perhaps being one of many factors to consider from a contextual point of view.

10.34. In this respect, the source of the images may have a bearing on whether the subjective feelings of distress experienced by the family of the deceased are objectively reasonable and / or whether the broadcast of the images is justified in the public interest. In respect of the former question, it may be of particular relevance if the images had **already been disclosed in the public domain.**

[57] Note 12 above

## 11. FINDINGS

In arriving at its finding, the Commission has specifically borne the following in mind:

11.1. The Commission has been especially **mindful of the mandateal authority of the BCCSA** in complaints of this nature. While to a large extent the Commission has sought to draw on and be guided by the considerations of the BCCSA, it has attempted to **contribute to the valuable body of precedence** created by the BCCSA. In this instance the Commission has relied heavily on its vision *"to transform society and restore dignity"* and its constitutional mandate to promote respect for human rights and provide redress where appropriate. At this point in our development as a society governed by the rule of law, the complaint before the Commission **provided an important platform through which to encourage good corporate citizenship, respectful of basic rights** without unduly compromising hard earned freedoms like the freedom of expression.

11.2. While the question as to whether the right to privacy or dignity in South African law attaches to a deceased person has not been definitively pronounced on, the rights of her living family members remain relevant. Having considered the jurisprudence of our courts, comparative mandates and valuable philosophical theories around this complex question, the Commission recognises the need to approach this issue on **a case by case basis** at this stage and to lean towards a subjective test for this purpose. Given the complexity of the question posed and lack of clear precedent, the Commission has elected to limit its findings on the basis of the alleged violation of rights of the deceased's next-of-kin.

Based on the above considerations, the Commission finds as follows:

11.3. Guided by decisions of domestic and comparative bodies, the broadcasting of the images could be deemed to have contravened clause 28.4 of the Code in that the degree of ***"exceptional care and consideration"*** that is required in terms of that provision was not exercised. Carte Blanche's broadcast of the images of the deceased's body **violated the rights to privacy and dignity of the Complainant and his wife.** The violation is apparent when considered both in the context of constitutional protections for privacy and dignity, and against the Code to which the Respondent voluntarily ascribes in that:

11.3.1. The broadcast of **the particular images of the deceased** was not justified in the public interest, given the subject-matter of the programme and the timing of the broadcast, nor is the public nature of the photographs relevant to the enquiry as it does not exclude the obligation placed on the Respondent in terms of Clause 28.4 of the Code; and further;

11.3.2. Even if the inclusion of the images was justified in the public interest, the Respondent **ought to have exercised a certain degree of care and informed the family** of the broadcast prior to its airing.

11.4. Although **prior consent from the next-of-kin may not have been necessary, prior notification at the very least was required** to mitigate the impact on the next-of-kin allowing them the opportunity to avoid the broadcast at the times in question and / or to **psychologically prepare them** for its airing. This would have constituted a minimum standard of care for the next-of-kin as required in terms of the standard of exceptional care as set out in the Code.

## 12. RECOMMENDATIONS

Taking into consideration the findings set out above, the Commission makes the following recommendations:

12.1. That the Respondent tender **an unconditional apology to the Complainant within 6 (six) weeks from date of receipt of the Commission's report.** In considering the form of apology and the issuing thereof, the Commission is mindful of the **need to limit unwarranted negative impact on the integrity of the Respondents reporting,** the need to recognize and affirm the experience of the Complainant and the **need to increase awareness of the duty of exceptional care required of the Respondent.** In the circumstances, the Commission is of the view that the **apology to the Complainant be tendered by the Respondent through the Commission as a constitutional body.** The terms of such apology are to be settled by the Commission and Respondent within **4 (four) weeks** hereof.

12.2. That the **Respondent puts in place measures** to ensure that all future matters of a similar nature are dealt with in a manner that gives **maximum regard to the level of care required in terms of Clause 28.4 of the Code** i.e. that next of kin are provided with reasonable prior notification of any broadcast of images which have the potential of causing them trauma or emotional distress. The Respondent is to **provide the Commission with written confirmation that such steps will be implemented** within **6 (six) weeks** from date of receipt of the Commission's report; and

12.3. That the **BCCSA consider codifying and providing best practice guidelines** in consultation with its membership with regard to the content of 28.4 of the Code, particularly in regard to deceased persons; and provide the Commission with **confirmation of such undertaking within 4 (four) weeks** from date of receipt of the Commission's report.

## 13. APPEAL

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

**Private Bag X2700**
**Houghton**
**2041**

**Signed on the 10th day of November 2014.**
**South African Human Rights Commission**


COMPLAINT NO: Free State/2010/0060

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: FS/2010/0060*

In the matter between:

**Izak Van Niekerk** **Complainant**

and

**Living Hope Ministries** **Respondent**

## REPORT

*(In terms of Article 21 of the Complaints Handling Procedures of SAHRC)*

## 1. Introduction

1.1. The South African Human Rights Commission (hereafter referred to as the "Commission") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, Act 108 of 1996 (herein referred to as the "Constitution").

1.2. The mandate of the Commission in terms of s 184 of the Constitution is *"to make steps to secure appropriate redress where human Rights have been violated".*

1.3. This mandate in terms of s 184 obliges the Commission to:

1.3.1. Promote respect for human rights;

1.3.2. Promote the protection, development and attainment of human rights;

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. Further, the Commission has the powers, as enabled by national legislation to perform its functions, including the power to –

1.4.1. To investigate and report on the observance of human rights;

1.4.2. To take steps and secure appropriate redress where human rights have been violated;

1.4.3. To carry out research; and

1.4.4. To educate.

## 2. The Parties

2.1. The Complainant is Mr Izak Van Niekerk, an adult male based in Kroonstad in the Free State Province.

2.2. The Respondent is Living Hope Ministries, a Christian organisation, operating as a church, in the Free State Province.

2.3. The Respondent is vicariously liable for the acts of its founder, and senior Pastor, acting in the course of his position as such.

## 3. Background to the Complaint

3.1. At all times material hereto, the Respondent was publisher of a Christian publication entitled **"Die Raadsplan,"** authored by the Lead Pastor of the Respondent organisation, Mr W. H Smith.

3.2. On or about the 18th of May 2010, the SAHRC (FS) received a written letter of complaint from the Complainant.

3.3. The Complainant alleges that the Respondent authored and published a racially offensive book entitled the **"Die Raadsplan".**

3.4. The Complainant further alleges that the book was distributed by the Respondent in various Christian book stores within the Republic of South Africa.

3.5. The Complaint alleges, yet further, that in the publication the Respondent depicts the white races of the world as the divinely ordained to be a superior race, which must rule over all other races; and that if any person other than a white man is at the pinnacle of society will lead to chaos and destruction.

3.6. The Respondent requests the Commission to investigate the matter urgently, and stop the further publication and distribution of this book.

## 4. Key Quotes from "Die Raadsplan"

4.1. To illustrate the nature of the work, the following key extracts are quoted from **"Die Raadsplan":** "Om naak te loop en gedurig op die uitkyk te wees vir wat hul kan roof, is kenmerkend van die swarte van Afrika.[1] **(Translated: "To walk around naked and constantly being on the lookout for "hulk and roof" is characteristic of the African Black".)**

4.2. "Enige verwysing na die swarte in die Bybel moet onder die woord *dier, of diere van die land of diere van die aarde gesoek* word. Die swarte en *Mongoloiede* word nooit onder die term mens ingesluit nie. Die swarte of Negroide is 'n totalla aparte skepping van die Adamiteise *mens*. Daar is nie 'n enkele aanduiding in die Bybel dat veelrassige huwelike toelaatbaar is nie!"[2] **(Translated: "Any reference to these Blacks in the Bible must be searched for under the word "animal" or animals of the land or animals of the earth. The Blacks and the *Mongolese* are never included under the term *"man/human being".* The Black or Negroid are a totally separate creation of the *Adamic* man. There is not a single indication in the Bible that interracial marriage is permissible"). (Smith's emphasis).**

4.3. "Die swarte is 'n ras wat vernietig en het al baie beskawings verwoes."[3] **(Translated "The Blacks are a race that destroyed and have destroyed many civilisations".)**

4.4. "Hy sal nooit wat hy van die witman ontvang het in stand kan hou nie. Daarvan getuig die agteruitgang van ons totale infrastuktuur. Goeie, vrugbare en voortstrewende plase wat aan hulle gegee is, is vandag niks anders as plakkerskampe vol erosie nie. Wanneer sal ons volk se oe oopgaan vir die waarheid en hulle ophou om perels aan die varke en honed te gee?"[4] **(Translated: "He will never be able to maintain what he has received from the white man. The deterioration of our entire infrastructure is a testimony to this. Good fertile and prosperous farms given to them, are nothing more than shantytowns/ squatter camps full of erosion. When will our nation's eyes be opened to the truth and they will stop giving pearls to swines and dogs.")**

1 Smith: 112

2 Smith: 113

3 Smith: 115

4 Smith: 116

4.5. Witmens wat vir swartes werk, hulle kleintjies aanneem en grootmaak en met hulle trou, sal gou uitvind dat daar 'n vloek op hulle is. Dit is net so onvanpas soos 'n leeu en 'n hyena wat besluit om 'n gesin te begin. Witmense wat deel uitmaak van YAWEH se volk en voor die swart barbare kruip in die stof, met hulle meng en hulle aanry kerk toe en se dat dat YAHSHUA swart was, moet hulle reghou vir YAHWEH se komende oordeel."[5] **(Translated: "White people working for blacks, adopting and raising their young and marrying them, will soon find that there is a curse resting on them. This is just as inappropriate as a lion and a hyena who decide to start a family. White people who belong to the YAWEH people and who crawl in the dust before these black savages, who mix with them and them cart them off to the church and say YESHEWA was black, they should prepare themselves for the coming judgement of YAHWEH.")**

4.6. "Predikante (Baalpriesters) se by begrafnisse waar wit mense deur swart barbare vermoor is, dat hulle die swartes moet vergewe, want hulle is ons naaste – g'n wonder die Afrikaner het ruggraatloos geword het en die heiden toelaat om te maak net wat hy wil nie."[6] **(Translated: "At funeral where white people have been murdered by black savages, Priests say that they should forgive Blacks, for they are our neighbours (fellow-men) – no wonder the Afrikaner has become spineless and the heathen are allowed to do just what he wants.")**

4.7. "Apartheid is skriftuurlik. Elohim wil he dat sy volk nie vermeng met ander volke nie en dat volke hulself binne die grense wat hy gestel het, hou (Handleinge 17:26). Oortreding daarvan is strafbaar deur Elohim. Die huidige gelykheids- en vermengingsbeleid van die regering in Suid-Afrika en die res van die wereld, is die gees van die duiwel."[7] **(Translated: "Apartheid is scriptural. God does not want His people to be mixed with other people. He wants his people to remain within the boundaries He has set for them (Acts 17:26). To breach or offend this is punishable by God. The current equity and mixing policy of the Government of South Africa and the rest of the world is the spirit of the devil.")**

## 5. Preliminary Assessment

5.1. The Provincial Office of the Free State made a preliminary assessment of the complaint. The preliminary assessment of the Office was:

5.1.1. That the Respondent's publication constituted a *prima facie* violation of **Sections 9 (equality) and 10 (human dignity) of the Constitution;** and further,

5.1.2. That the Respondent's statements in its publication *prima facie* amounts to hate speech within the meaning of *Section 10 of the Promotion of the Equality and Prevention of Unfair Discrimination Act 4 of 2000.*

5.1.3. That the Respondent's publication **prima facie** amounts to an infringement of *Section 12 of the Promotion of the Equality and Prevention of Unfair Discrimination Act 4 of 2000.*

5.1.4. That the assessed violations *falls within the mandate and jurisdiction* of the South African Human Rights Commission;

[5] Smith: 592

[6] Smith: 567

[7] Smith: 222

5.1.5. That the possible defences that are open to the Respondent in support of its publication of the **"Die Raadsplan"** were Sections 15 of the Constitution *(freedom of religion, belief and opinion)* and Sections 16 *(freedom of expression).*

5.1.6. That the Commission is the organisation that is best positioned to effectively and expeditiously deal with the complaint.

## 6. Motivation for undertaking investigation

6.1. Racism has the potential to demean persons in their inherent humanity and dignity. For this reason, both the spirit and text of the South African Constitution abhor the unequal treatment of persons on the basis of criteria such as biological attributes and other social characteristics.

6.2. The founding provisions of the Constitution provide that the Republic of South Africa shall be a *"sovereign, democratic state founded on the values of human dignity, non-racialism",* amongst others.

6.3. Beyond the founding provisions, the Bill of Rights in the Constitution provides that everyone should be equal before the law, and directs that the state should not unfairly discriminate ***directly or indirectly*** *against anyone on the grounds of race, culture, ethnic or social origin, colour and belief,* amongst others.

6.4. In order to strengthen this constitutional prescription, the text of the Bill of also creates various *state institutions to support this new constitutional democracy* Rights with a mandate to create a culture of democracy and human rights in South Africa, and to progressively reverse the racial inequalities of the past.

6.5. The South African Human Rights Commission is one of such institutions; vest with powers to investigate and report on the observance of human rights, and to take steps to secure appropriate redress where human rights have been violated.

6.6. The facts of the present case invite the Commission to evaluate the allegations of the Complainant and the possible defences of the Respondents, and make a determination regarding the appropriateness of the content of the Respondent's publication in an open and democratic South Africa built on foundational values of equality and human dignity.

## 7. Steps taken by the Commission

7.1. Pursuant to the assessment of this complaint, the Commission sent a letter of allegation to the Respondent in May, 2012.

7.1.1. presenting the preliminary analysis of the Commission;

7.1.2. inviting the Respondent to respond to the allegations;

7.1.3. calling for a response within twenty-one (21) days.

7.1.4. recommending the removal of the book from all bookstores;

7.1.5. advising the cessation of further distribution;

7.1.6. advising to refrain from publishing oral or written statements of a similar nature.

7.2. On the 26 May 2012, the Commission received a written response from the Respondent.

7.3. In his written response, the Respondent neglected and/or refused to respond to the substance of the allegation; instead, the Respondent offered to:

7.3.1. cover two pages[8] in the book that contained demeaning pictorial depictions of African people in the current stock of publications; and to

7.3.2. replace them with re-written and updated amended pages in future re-prints.

# 8. Applicable Law

## 8.1. International Legal Instruments

### 8.1.1. Universal Declaration of Human Rights, 1949

**Article 1**

*"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*

### 8.1.2. International Convention on the Elimination of all Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination defines *"racial discrimination"* as unfair differentiation based on *"race, colour, descent, or national or ethnic origin".*

**Further,**

""CERD provides that *states who are parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin or which attempts to justify or promote racial hatred and discrimination in any form and undertake to adopt immediate and positive measures designed to eradicate all incitement to or acts of such discrimination and to this end with due regard to the principles embodied in the universal declaration of human rights and the rights expressly set forth in article 5 inter alia that participating states:*

a) *declare an offence punishable by law of all dissemination of ideas based on racial superiority or hatred incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin and also the provision of any assistance to racial activities including the financing thereof;*

b) *declare illegal and prohibit organisations and also organised and all other propaganda activities which promote and incite racial discrimination and further that such states recognise participation in such organisations or activities as an offence punishable by law."*

### 8.1.3. International Covenant on Civil and Political Rights

**Article 2**

*"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights*

[8] Smith: 105, 106.

*recognized in the present Covenant, 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."*

**8.2. Regional Legal Instruments**

**8.2.1. The African Charter on Human and Peoples' Rights.**

**Article 2**

*"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."*

**8.3. National Constitution**

The following provisions of the National Constitution are applicable:

**8.3.1. Section 9, Constitution of South Africa (1996)***(Right to Equality)*

*"9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law;*

*(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may taken;*

*(3) The state may not unfairly discriminate directly or indirectly against anyone on or more grounds including... race;*

*(4) No person many unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection;*

*(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

**8.3.2. Section 10, Constitution Act of South Africa (1996)** – *(Right to Human Dignity):*

*"Everyone has the inherent dignity and the right to have their dignity respected and protected".*

**8.3.3. Section 16 (2)(c), Constitution Act of South Africa (1996)** – *(Freedom of expression must not be used to incited hatred).*

*[The right to freedom of expression]"... does not extend to (c) advocacy of hatred that is based on race ... and that constitutes incitement to cause harm".*

**8.4. Domestic Legislation**

**Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act')**

**8.4.1. The Framework of the Equality Act**

The Equality Act was assented to in order to give effect to the constitutional imperative, but also to 'prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech.

In its preamble, the statute recognizes that, despite 'significant progress made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy'.

Accordingly, the Equality Act 'endeavours to facilitate the transition to a democratic society, united in diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom'.

**8.4.2. Section 10, of the Equality Act** provides that:

*"No person may unfairly discriminate against any person on the ground of race..." And "...no person may use language that incites hatred...violence".*

**8.4.3. Section 12 of the Equality Act** provides that:

*"12. No person may –*

*a) disseminate or broadcast any information;*

*b) publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bone fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication or any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section".*

**8.4.4. Section 24 of the Equality Act** provides that:

**Section 24(1)** *"Any person who knowingly distributes a publication that does within the context, amount to-*

*a) Advocate hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm shall be guilty of an offence."*

**8.5. Relevant Case Law**

**8.5.1. Islamic Unity Convention v Independent Broadcasting Authority and Others 2002(4) SA 294 (CC) (2002(5) BCLR 433(CC).**

In this case the Court confirmed that prohibition against the broadcasting of any material which is *"likely to prejudice relations between sections of the population'.*

The court further stated that *"the pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself".*[9]

**8.5.2. In Freedom Front v South African Human Rights Commission[10]**

the court considered the meaning of "harm" and came to the conclusion that harm cannot and should not be restricted to physical or actual harm. It found that the term harm was broader than physical harm. The reference to race, gender,

[9] Para 29

[10] 2003 (11) BCLR 1283 (SAHRC)

ethnicity and religion, was meant to prevent unwarranted intrusion into the right of freedom of expression. Harm must also be interpreted to refer to impacts upon dignity, and psychological, emotional and social harm that can be caused by hate speech. It may therefore cause psychological harm and evoke a sense of hostility.[11]

8.5.3. The court held that:

*""Calling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred, unless the context clearly indicates otherwise".*[12]

**8.5.4. In Human Rights Commission of South Africa v South African Broadcasting Corporation**[13] it was held that derogatory and inflammatory statements about the Indian population in a Zulu song ("Amandiya") were advocacy of hatred based on race. The song, according to the Commission,

*"polarises Zulus with Indians which by demeaning Indians: they were the cause of the poverty of Zulus, and were worse than Whites, and have turned an important clan (Zulus) into clowns, have dispossessed them, have suppressed them and play the fool with them".*[14]

**8.5.5. R v Keegstra**

The Canadian Supreme Court in this case said:

*"a response to humiliation and degradation from the individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to a community at large is closely linked to the concern and respect accorded the groups to which he or she belongs. The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target-group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with outsiders or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.*

Further, the Court said per Dickson C J C that:[15]

In my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. As Cory J.A. stated in **R. v Andrews**...: ...*"Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition..." ...*

11 See p 1292A to 1295F; p 1298A to p 1298B; p 1299C to p 1299E

12 See p 1290

13 Human Rights Commission of SA v SABC 2003 (1) BCLR 92 (BCCSA)

14 Broadcasting Complaints Commission of South Africa adjudicates complaints of violations of the Broadcasting Code, which prohibits broadcasting of hate speech.

15 [1990] 3 5CR 697, 3 CRR (2d) 193.

*Hatred in this sense is a most extreme emotion that belies reason; an emotion that if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation."*

8.5.6. In the Equality Court decision of the **Malema-case** Lamont J made the following statement:

*"All hate speech has an effort, not only upon the target group but also upon the group partaking in the utterance. That group and its members participate in a morally corrupt activity which detracts from their own dignity. It lowers them in the eyes of right minded balanced members of society who then perceive them to be social wrongdoers. In addition, to the extent the words are inflammatory; members of the group who hear them might become inflamed and act in accordance with that passion instilled in them by the words[16]"*

## 9. Analysis of Complaint

9.1. The Constitution of South Africa entrenches the right to freedom of speech and expression.[17]

9.2. Generally speaking, any person is free to express himself in speech or otherwise in a democracy. A reading of this provision, read together with sections 10 and 12 of the Equality Act, suggests that *offensive religious speech is permitted, as long as such speech does not amount to the advocacy of hatred based on religion and which constitutes incitement to cause harm.[18]*

9.3. In the present case, the Respondent sought to exercise its right to express itself with respect to its religious thoughts, ideas, ideologies and theology. In doing so, the Respondent made a series of statements and assertions which in both substance and effect stated that the white race is superior to other non-white races. These statements are patently offensive.

9.4. The central theme of the publication is founded on the theology and logic asserts that the white man is the *"Son of God"*, and that the white race is supreme to that of non-white races.

9.5. A review of the Constitution indicates that the only constraint to free speech relating to religion is found in section 16(2)(c) of the Constitution. This section expressly refers to religion as one of the four (4) grounds which a complaint of hate speech may be based.

*9.6. In casu,* the **question therefore for determination for the Commission was whether in the exercise of its freedom of expression, and the exercise of the right to hold religious beliefs, the Respondent has exceeded the threshold of sincerity and has trespassed into the realm of hate speech.**

9.7. It would seem from an analysis of relevant constitutional provisions and case law that the exercise of the right to express oneself freely is not limited to inoffensive ideas,

[16] *Afri-Forum and Another v Malema and Others* (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240 (Equality Court); [2011] 4 All SA 293 (Equality Court); 2011 (12) BCLR 1289 (EqC)

[17] Section 15, Constitution of South Africa

[18] Van Rooyen 2011: 3.

but also extends and includes the right express offensive ideas.[19] In other words, one is permitted to express himself on ideas, even if such ideas are offensive.

9.8. This widely couched liberty to express oneself is also acknowledged in foreign jurisprudence. In the European Court of Human Rights, **Handyside v The United Kingdom** the Court pointed out that the right to freedom of expression is:

*"applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb … Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."*

9.9. The legal parameters and thresholds for the expression of offensive religious beliefs in democratic South Africa has exercised the mind of jurists in the Constitutional Court, and is set out in the Constitutional case of **Pillay[20]**, cited above.

9.10. In the Pillay-case it was held that claims based on religious grounds may be successfully supported by the Respondent if he is able to show that he was sincere in his or her religious belief. If not, the infringement is not justified.

9.11. This suggests that the right to religion is not impenetrable and absolute in South African law; the question, always, should be **whether the publications are capable of being construed as meeting the prerequisites of hate speech set out in the Equality Act.**

9.12. This principle was further emphasised in the case of **Islamic Unity Convention v Independent Broadcasting Authority & Others[21]** in which the Court emphasized that offensive ideas and statements will only be excluded from protection if it constitutes propaganda for war, incitement of imminent violence and egregious hate speech in terms of Section 16(2) (c) of the Constitution.

9.13. This Constitutional provision is also reflected in the wording of **Section 10 of the Equality Act[22]**, discussed below.

9.14. Section 10 of the Equality Act[23] (as set out by **Lamont J in the Malema-case)** defines what may not be published [by any person in exercise of this freedom of expression and/or religion]:

1. "A person may not publish,

   against any person including a juristic person, a non-juristic entity, a group or category of persons,

   a) words concerning race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth,

   b) *or words concerning any other ground where the discrimination based on that ground:*

[19] *De Reuck v Director of Public Prosecutions, WLD and Others 2004 (1) SA 406 (CC).*

[20] *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC)

[21] 2002 (4) SA 294 (CC), 2002 BCLR 433 (CC) ('Islamic Unity')

[22] The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

[23] Act 4 of 2000.

*c) causes or perpetuates systemic disadvantage;*

*d) undermines human dignity; or*

*e) adversely effects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground referred to supra in para*

9.15. South Africa is party to several treaties that advocate the eradication of hate speech including **International Covenant on Civil and Political Rights. It is, however, the 1965 Convention on the Elimination of All forms of Racial Discrimination (CERD)** that provides the best description:

*"CERD provides that states who are parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin or which attempts to justify or promote racial hatred and discrimination in any form and undertake to adopt immediate and positive measures designed to eradicate all incitement to or acts of such discrimination and to this end with due regard to the principles embodied in the universal declaration of human rights and the rights expressly set forth in article 5 provide inter alia that participating states:*

*a) declare an offence punishable by law of all dissemination of ideas based on racial superiority or hatred incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin and also the provision of any assistance to racial activities including the financing thereof;*

*b) declare illegal and prohibit organisations and also organised and all other propaganda activities which promote and incite racial discrimination and further that such states recognise participation in such organisations or activities as an offence punishable by law."*

9.16. If one concludes from the statements above that **"Die Raadsplan"** is hurtful, promotes hatred, incites harm, propagates hatred the definition of hatred is of great importance. The Canadian Supreme Court case of **R v Keegstra** Dickson C J C held:[24]

*'In my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. As Cory J.A. stated in R. v Andrews...: "Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition..." ... Hatred in this sense is a most extreme emotion that belies reason; an emotion that if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.*

9.17. Although this definition of hatred is sourced from a court outside our borders, it is equally applicable here.[25]

9.18. There can be little argument from any reader of the Respondent's publication, that the *content* of the book as well as the *context* within which the offensive remarks are

[24] [1990] 3 SCR 697, 3 CRR (2d) 193.

[25] Section 39 of the Constitution entreats adjudicators of the Bill of Rights to consider foreign law.

published, attracts an emotion that if exercised by white people against non-white people will imply that white people are being called upon to despise, scorn, deny respect and subject non-white people to ill-treatment.

9.19. In the *U.S. Holocaust Museum's Sudikoff Annual Interdisciplinary Seminar* on Genocide Prevention it was emphasized that the *context* where the alleged hate speech occurs is of paramount importance in determining its nature:

*"The context in which speech occurs helps determine its impact, as does the position of the person or persons speaking. Additionally hate speech alone does not indicate impending violence. It is only by analyzing contextual clues that the potential threat of any given speech can be evaluated."*[26]

9.20. In this regard, the Commission is unable to ignore the fact that the offensive references to racial superiority of the white population, and the inferiority of the non-white population is being published and disseminated by the Respondent within the South-African socio-political context.

9.21. The history of South Africa and the legacy of white supremacy and subjugation and humiliation of non-white South Africans is widely publicized and needs no further detail. This history is a key factor in determining whether the Respondent's publication should be construed as an expression that constitutes hate speech and an unacceptable exercise of freedom of expression and religion or not.

9.22. In the view of the Commission, the history and social context of South Africa render the Respondent's publication racially discriminatory and amounting to hate speech.

9.23. In the Equality Court decision of the **Malema-case Lamont J** made the following statement:

*"All hate speech has an effect, not only upon the target group but also upon the group partaking in the utterance. That group and its members participate in a morally corrupt activity which detracts from their own dignity. It lowers them in the eyes of right minded balanced members of society who then perceive them to be social wrongdoers. In addition, to the extent the words are inflammatory; members of the group who hear them might become inflamed and act in accordance with that passion instilled in them by the words*[27]*"*

9.24. Accordingly, the Commission in the present case does not only consider the effect of hate speech on the target group, but also takes into consideration the effect of hate speech on the speaker.

9.25. Drawing all these strands together, the Commission is unable to find that the statements of the Respondent were sincere and reasonable, within the context of South Africa's apartheid history.

9.26. Instead, it is the view of the Commission that the publication has the effect of undermining and regressing the gains that South Africa has made through constitutional values of equality and dignity. It has at its core the purpose of reverting the thoughts and ideas

[26] United States Holocaust Museum 2009: 7.

[27] Afri-Forum and Another v Malema and Others (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240 (EqC); [2011] 4 All SA 293 (EqC); 2011 (12) BCLR 1289 (EqC)

of congregants of the Respondent Church to pre-democratic South African values of white supremacy and black inferiority. It provides reinforcement for pre-democracy stereotypes that used white racial superiority as an argument to justify privileges and social hierarchy of whites people.

9.27. To allow the Respondent to persist in its publication of these views, the Commission would be permitting the Respondent to counter current efforts by other institutions to debunk the theory of racial superiority and racial differences in this country.

9.28. In the result, the Commission concludes that such a publication as the **"Die Raadsplan"** is one that is unacceptable in a free and democratic dispensation that espouses equality as its central theme.

## 10. Finding

10.1. After a thorough and careful academic analysis the Commission finds that the Respondent's publication violates the following fundamental constitutional rights:

a) The Right to Equality on the grounds of race (s 9);

b) The Right to Human Dignity (s 10).

10.2. The Commission further finds that the quoted sections of the said publication, both in terms of its content and its effect can reasonably be construed to demonstrate an intention to be hurtful and to promote hatred through the dehumanisation of African, Indian and Coloured people (all non-white people).

10.3. Accordingly, the Commission finds that the Respondent's publication has met the requirements of Section 16 (2) (c) of the Constitution and Section 10 of the Equality Act that prohibit hate speech.

10.4. The Commission rejects the possible defence available to the Respondent that the publication was made in exercise of the freedom of religion of freedom of expression.

10.5. In conclusion, the Commission finds that the **"Die Raadsplan"** is an example of systemic unfair discrimination that is embedded in ideologies, beliefs and attitudes that undermine the aspirations of our constitutional democracy, as referred to in the preamble of the Equality Act".

## 11. Recommendations

11.1. The Films and Publications Board is advised to take the necessary steps to remove the offensive publication from all public channels of distribution, and to mete out appropriate administrative and other sanctions in terms of the Films and Publications Act.

11.2. The Institute for Race Relations of the University of the Free State, in collaboration with the Governing Council of South African Council of Churches, engage the Respondent (including its leadership and associated institutions) in a series of *Race Relations Sensitisation Workshops,* and report in writing to the Commission on the progress achieved thereby no later than six (6) months from the date of this finding.

The Commission makes this finding **without prejudice** to the entitlement of the Complainant or any other party, including the Commission, to institute legal proceedings against the Respondent in the Equality Court for any additional competent or alternative relief provided for in Section 21 of the Equality Act.

## 12. APPEAL

You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days of the date of receipt of this finding,** by writing to:

**Private Bag X2700**
**Houghton**
**2041**

**Signed in Johannesburg on the 21st day of February 2013.**

**South African Human Rights Commission**


# COMPLAINT NO: Western Cape/2010/0424

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: WC/2010/0424*

In the matter between:

**Jo Anne Du Plooy** — COMPLAINANT

and

**Alex Blaikie Montessori Center** — FIRST RESPONDENT

**Ms. Bronwyn Thomas** — SECOND RESPONDENT

## REPORT

## 1. Introduction

1.1. The South African Human Rights Commission (hereinafter referred to as the "SAHRC") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996.

1.2. The SAHRC and the other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".

1.3. The SAHRC is specifically required to:

1.3.1. Promote respect for human rights;

1.3.2. Promote the protection, development and attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. *Section 184(2) of the Constitution*[1] empowers the SAHRC to investigate and report on the observance of human rights in the country.

1.5. Further, *section 184(2) and (d)* affords the Commission authority to carry our research and to educate on human rights related matters.

1.6. The *Human Rights Commission Act, 54 of 1994,* hereinafter referred to as "the Act") further supplements the powers of the SAHRC.[2]

## 2. Complaint

2.1. The Complainant, Jo-Anne Du Plooy, is the mother of a four-year-old daughter, Amelia. She attends Alex Blaikie Montessori Centre which is an educational institution. She alleges that around 29th of November 2010 Amelia accidentally or deliberately stepped on the arm of another child named Zoë Kidd-Anderson. Zoë reported the incident to the principal, Bronwyn Thomas.

2.2. The Complainant alleges Ms. Thomas then instructed Zoë to retaliate against Amelia by standing on Amelia's arm. The Complainant further alleges that as punishment for this

[1] The Constitution of the Republic of South Africa Act 108 of 1996

[2] Findings and recommendation of the Commission in the matter of Van Onselen, Gareth on behalf of the Democratic Alliance number FS/2010/0231.

incident, Zoë was required to stay on the floor of the institution without a mattress for an hour.

2.3. The above complaint raises the issue whether or not Section 28 of the Constitution has been infringed which protects the rights of children.

## 3. Constitutional Provision

3.1. *Section 28 of the Constitution holds that;*

*1) Every child has the right –*

*d) To be protected from maltreatment, neglect, abuse or degradation.*

*2) A child's best interests are of paramount importance in every matter concerning the right.*

## 4. Response to Allegations

4.1. Ms. Thomas (2nd Respondent) denies the allegations. She admits that Zoë did approach her to say that Amelia stood on her arm. Ms. Thomas states that when the incident was reported, she spoke to the two children and denies completely the allegation that she had allowed one child to stand on the other's arm as a form of punishment.

4.2. She also denies that she removed the child's mattress as the result of the incident. According to her, Zoë's mattress was only removed 4-5 minutes and then returned to her for a separate incident.

## 5. The Investigation

5.1. The Department of Social Development conducted an investigation and issued findings. The Department highlighted that the institution has complied in terms of the Child Care Act and its application was processed by the Department.

5.2. According to the Department, the facility is well organized, well managed, and a conducive institution for children. The Department held that the above allegations were difficult to prove.

5.3. According to the Department, Ms. Thomas (2nd Respondent) denies that she instructed a child to stand on another child's arm. In all, none of the staff that was interviewed, had witnessed the incident or could recall that it took place, though it is alleged that they were present when it took place.

5.4. The school further alleges the parents took advantage of the fact that their children were too young to account for themselves and therefore embellished the story regarding the incident.

5.5. What made matters to be more difficult was the fact that the Complainant provided no witnesses to validate her child's account.

5.6. Having considered the seriousness of the allegations, the Department recommended that, the facility needs to be monitored for an extended period of time in order to gain deeper understanding on the school's treatment of the children.

## 6. Findings

6.1. The following findings are not contested:

6.1.1. That there was a report of an alleged incident by Zoë.

6.1.2. The time on which the incident is alleged to have happened.

6.2. What is contested is the manner in which the incident was handled by Ms. Thomas (2nd Respondent) and her staff.

6.3. What must also be established is whether the alleged allegations amount to corporal punishment? If they did, the first question is whether the 2nd Respondent is liable under the South African Schools Act.[3] The second question is whether the 2nd Respondent violated section 28 of the Constitiution.[4]

6.4. In the *Christian Education South Africa v Minister of Education*[5]*,* the question on corporal punishment was dealt with[6] accordingly should it be established that corporal punishment was used by Ms. Thomas she could be held accountable in terms of the aforementioned court ruling.

7. However, given the fact that no reliable witness can attest to what really happened, it cannot be held that the alleged actions constitute an outright violation of Section 28. In a serious matter like this, the facts should not be clouded by ambiguity. Therefore, further evidence would be required to deem the actions as a violation of human rights.

## 8. Recommendation

8.1. The recommendation made by the Department of Social Development should be followed, and weekly monitoring should take place.

8.2. The Principal or School Management should inform parents about the policies, programmes and practices of the institution.

8.3. When a child (via their parents) submit a complaint or alleges misconduct, the school administrations should have a system to handle these complaints and record the relevant information regarding the claim.

9. In respect of the current matter parties should find reconciliation. This can be facilitated by the SAHRC.

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[3] *South African Schools Act* NO. 84 of 1996 Section 10
1) *No person may administer corporal punishment at a school to a learner.*
*2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.*
Complemented by the *Employment of Educators Act* NO. 76 of 1998 Section 18(5)(f)
*An educator may be dismissed if he or she if found guilty of contravening section 10 of the South African Schools Act, 1996 (Act No. 84 of 1996).*

[4] Section 28(2) of the Constitution which protects the best interests of the child should be seen as a right and not as a mere guiding principle. (T. Boezaart, 2009., Child Law in South Africa, Juta 1st edition, Page 280)
Concerning evidence the court held that *"technical matters such as which party bears the onus of proof should play a diminished role in matters where the court are guarding the best interests of a child"* (AD v DW 2008 (3) SA 183 (CC) Paragraph 55)

[5] *Christian Education South Africa v Minister of Education,* 2000 (10) BCLR 1051 (CC), Paragraph 10

[6] *S v Williams and Others* (CCT20/94) [1995], Paragraph 48 and 49

**Appeal Clause**

Should you not be satisfied with this decision, you may lodge an appeal, in writing within 45 days of receipt of this letter. A copy of the appeal form is available at any office of the SAHRC. The appeal should be lodged with the Head Office of the SAHRC – contact details are as follows:

**Private Bag X2700**
**Houghton**
**2041**

**Signed in Braamfontein on the 24th day of July 2012**
**South African Human Rights Commission**


# COMPLAINT NO: Western Cape/2010/0379

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: WP/2010/0379-BV*

In the matter between:

**Mrs. Vicky O'nel obo**
**Mr. Peter Onel** **Complainant**

and

**Department of Environmental Affairs;**
**Mr. Henry Valentine** **Respondent**

# DRAFT REPORT

## 1. Introduction

1.1. The South African Human Rights Commission (hereinafter referred to as the "SAHRC") is an Institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996 (hereinafter referred to as the Constitution).

1.2. The SAHRC and the other Institutions created under Chapter 9 of the Constitution are described as "slate institutions supporting constitutional democracy".

1.3. The SAHRC is specifically required to:

1.3.1. Promote respect for human rights;

1.3.2. Promote the protection, development and attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. Section 184(2) of the Constitution empowers the SAHRC to investigate and report on the observance of human rights in the country.

1.5. Further, sections 184(2) and (d) afford the SAHRC authority to carry out research and to educate South Africans on human rights-related matters.

1.6. The *Human Rights Commission Act, 54 of 1994,* (hereinafter referred to as "the HRC Act") further supplements the powers of the SAHRC.

## 2. The Complaint

**The SAHRC received a complaint from Mr. Peter Onel (hereinafter referred to as the Complainant) on the 18 November 2010.**

**2.1. The Facts:**

2.1.1. The Department of Environmental Affairs (herein, "Environmental Affairs"), advertised in national newspapers and broadcast on radio an appeal for Electrical Engineers and others to apply for a job with the Department. Complainant, Mr. Peter Onel, responded to the radio appeal. In 2010, he was 75 years old. Complainant avers that he telephoned the South African National Antarctic Programme (hereinafter referred to as, "SANAP"), during which Respondent, Mr. Henry Valentine, director of Antarctica and Islands at Environmental Affairs,

invited the Complainant to come for an 'interview.' The Complainant believed he was being interviewed for the position of electrical engineer. Complainant met with Respondent a second time. The Complainant spent half an hour discussing his experience in electrical and engineering fields and the job requirements with the Respondent. According to the Complainant, the Respondent agreed the Complainant was sufficiently qualified for the position: "it was agreed that [Complainant] was sufficiently qualified." The Complainant says he was not offered and application form because "Respondent told [Complainant] that [SANAP] couldn't take him on because of his age." The position was filled by another person[1].

2.1.2. Environmental Affairs formally responded to Mr. Onel in a letter to the SAHRC written on July 28, 2011 by citing section 6 (2) (b) of the Employment Equity Act, 1998 (Act No. 55 of 1998) stating that *"it is not unfair discrimination to... exclude...any person on the basis of an inherent requirement of a job."* As per the aforementioned correspondence the Respondent cites that section 7 (1) (b) of the Employment Equity Act states that *"medical testing of an employee is prohibited unless it is justifiable in light of medical facts, employment conditions...or the inherent requirements of a job."* Candidates for the position the Complainant was seeking had to pass a very elaborate and stringent medial test. According to the Respondent no country with a station in Antarctica has ever allowed a person over 60 years old to go on an expedition; the average age of overwintering members is normally between 30 and 40 years. During one of the interviews, the Respondent explained the harsh conditions of the job to the Complainant, but "at no stage was he told that he would be disqualified from applying due to his age. He was still free to make an application..." In its reply to the SAHRC the Respondent states that the Complainant would have been evaluated fairly had he applied.[2]

2.1.3. It is undisputed that the Complainant never formally applied for any position. Environmental Affairs argues that the meetings that took place were not 'interviews' but were rather informational in nature. The Complainant was never formally invited for an interview.[3]

**2.2. The Legal Analysis under the Employment Equity Act:**

2.2.1. The Employment Equity Act, No. 55 of 1998 (herein, "Equity Act") is designed to provide for employment equity.[4] Section 6 of the Equity Act prohibiting unfair discrimination, applies to both employees and applicants for employment. Chapter 2, Section 6, part 1 of the Equity Act, reads "no person may unfairly discriminate, directly or indirectly against an employee, in an employment policy or practice on [the ground of age.]" However, "it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."[5]

1 Letter from Environmental Affairs, dated 28/05/2011, page 2.

2 Ibid at page 3.

3 Ibid at page 2.

4 Employment Equity Act, No. 55 of 1998.

5 The Employment Equity Act, No. 55 of 1998, Chapter 2, Section 6 (2).

2.2.2. The Equity Act does not define 'applicant,' but the scope of the word should be interpreted according to the nature and purpose of the Equity Act. The purpose of the Equity Act is to promote, "equal opportunity and fair treatment in employment through the elimination of unfair discrimination."[6] Section 6 of the Equity Act on unfair discrimination specifically refers to employees and applicants.[7] Employment policy or practice is defined to include, "recruitment procedures, advertising and selection criteria."[8] Textually, the Equity Act prohibits any person from unfair discrimination of applicants during recruitment procedures and advertising, among other practices. Therefore, an applicant is a person who is in a recruitment procedure.

2.2.3. Consequently, the Equity Act does not define an applicant as a person who has formally filled out paperwork for employment. The scope of the protection begins earlier, during recruitment procedures and advertising. Indeed, it would be inconsistent with the prevention of unfair discrimination to permit an employer to trim the potential applicant pool through discriminatory practices and then argue that the person was not covered under the Act because he or she did not fill out the necessary paperwork. The Act promotes equal opportunity and fair treatment for any applicant in a recruitment procedure, which includes applicants, who have not filled out paperwork, applicants that have formally applied by filling out paperwork, and employees.

2.2.4. Recruitment procedure is also not defined in the Equity Act. A common sense definition of the word, 'recruitment procedure' would at least include a procedure whereby an employer advertises for potential applicants, who respond to the advertisement. When that employer then engages with a person about the qualifications necessary to perform the job the employer was advertising for, then that is further evidence of recruitment. After an employer takes these steps, a person is an applicant in a recruitment procedure under the Equity Act. At that point, the employer may not unfairly discriminate under Section 6 of the Equity Act.

2.2.5. Age is a listed ground upon which an employer may not unfairly discriminate under the Equity Act.[9] If being a certain age is an inherent part of the job, then the Equity Act explicitly states it is not unfair discrimination to use it as a ground to reject an applicant.[10]

2.2.6. The violation of the Equity Act occurs at the moment the employer unfairly discriminates against an applicant. If the applicant subsequently decides to remove him/herself from the applicant pool because he/she believes an application would be futile, the wrong still occurred as the person was covered under the Equity Act and, therefore, that person may still state a claim as an applicant under its provisions. However, the applicant for a position may decide on his or her own that he/she no longer wishes to pursue the job. Once the applicant has removed him/herself from the applicant pool, he/she is no longer covered under the Equity Act.

6 The Employment Equity Act, No. 55 of 1998, Section 2.

7 The Employment Equity Act, No. 55 of 1998, Section 6.

8 The Employment Equity Act, No. 55 of 1998, Section 1.

9 The Employment Equity Act, No. 55 of 1998, Section 6 (1).

10 The Employment Equity Act, No. 55 of 1998, Section 6 (2).

2.2.7. The burden of proof shifts to the employer once an applicant or employee under the Equity Act has properly alleged unfair discrimination. Section 11 of the Act states that, *"whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair."* Therefore in factual disputes that cannot be resolved, an employer will not be able to meet its burden that the discrimination is fair.

**2.3. Application of the Law to the Complaint**

2.3.1. The Complainant should be considered an applicant under the Equity Act. The Respondent had established a recruitment procedure for applicants to follow and the Complainant was following that procedure. The Complainant responded to the Department's general advertisement for a position that he was qualified to seek. The Complainant had two discussions with Respondent, a senior supervisor, who could reasonably be presumed to be involved in recruitment and hiring. At the two meetings, the Respondent individually discussed with the Complainant the job requirements and agreed that the Complainant was qualified.[11]

2.3.2. The Respondent argues that the Complainant is not an applicant because the Respondent did not hand over to the Complainant an application form and that the discussions were merely informational. These facts alone are not enough to conclude that the Complainant was not an applicant in a recruitment procedure. Indeed, an information session for the applicant was a step in the recruitment procedure. The Respondent may not have been interested in hiring the Complainant after the discussions, but the Complainant was still an applicant for that position in a recruitment procedure laid out by the Respondent at the time the alleged violation of the Equity Act occurred. The Complainant is therefore still protected from unfair discrimination under the Equity Act.

2.3.3. According to the Complainant, the Respondent told him that he should not formally apply because he was too old. Rejecting the Complainant because he is too old without considering the Complainant's qualifications for the job would be *prima facie* unfair discrimination[12].

2.3.4. In terms of section 6 (2) of the Equity Act an employer may reject an applicant on a listed ground without considering his or her other qualifications if the listed ground is an inherent requirement of the job. However, by the Respondent's own admission the Respondent would have fully evaluated the Complainant, including his other qualifications, had he formally applied for the position. Age cannot therefore be considered an inherent requirement of the job based upon SANAL's own admission. The average age of other employees that have successfully been sent to Stations in the Antarctic by other countries does not matter, once SANAL admits that being below a certain age is not an inherent requirement of the job.

[11] Neither Respondent nor Complainant in their correspondences to the Commission have verified the dates on which these two meetings respectively took place.

[12] The Equality Act defines discrimination as "any act or omission..., condition or situation which directly or indirectly... (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds;"

2.4. CONCLUSION

2.4.1. An applicant has been unfairly discriminated against under the Equity Act if an employer uses age as a basis to reject or dissuade an applicant in a recruitment procedure when age is not an inherent requirement of the job. If an applicant fails to submit his or her formal application because the applicant believes the employer would not fairly consider the applicant because of a listed ground, such as age, this is evidence of unfair discrimination.

2.4.2. This case turns on a factual dispute as to what happened at the meetings between the Respondent and the Complainant. Would an applicant in the Complainant's position have believed that SANAL would not have fairly considered his application because he was too old? In other words, was it reasonable to believe that submitting an application was futile?

2.4.3. If Complainant's account is relied upon and the Respondent did say explicitly that SANAL would not consider his application due to his age or implied the same, then the Complainant can state a claim of unfair discrimination under the Equity Act. SANAL cannot rescue their position by arguing that being below the Complainant's age is an inherent requirement of the job because, by their own admission, the Complainant would have been fully considered had he formally applied. However, if the Respondent's version were relied upon that the Complainant reconsidered his decision to apply because he thought the nature of the assignment and the requisite medical testing would be too difficult then the Respondent would not be guilty of any unfair discrimination.

2.4.4. Under Section 11 of the Equity Act once unfair discrimination has been alleged the burden of proof shifts to the employer. Given the evidence presented to the SAHRC, it is unlikely that SANAL will be able to meet its burden that it treated the Complainant fairly. It is unlikely that the Complainant, who attended two meetings with the Respondent, would have unilaterally reconsidered his decision to apply had he reasonably thought he would have been considered fairly. Therefore, the SAHRC believes that SANAL violated the Complainant's right not to be unfairly discriminated against by virtue of age under section 6 (1) of the Equity Act.

**2.5. RECOMMENDATIONS**

2.5.1. Section 60 of the Equity Act requires that an "employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of the Act" before an employer may be held liable. SANAL must review its recruitment process to ensure compliance with the Act and ensure all their employees are trained accordingly. In the light of this SANAL must formally review all applicants regardless of age unless being under or over a certain age is an inherent requirement of the job. SANAL must determine what the inherent requirements of the job are in advance and give applicants notice of the requirements or access to the requirements when appealing for applicants at the beginning of the recruitment process i.e. at the advertisement phase.

2.5.2. If SANAL does not take these steps, they will be in contravention of the Act unless they can prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the Act.

2.5.3. The Complainant was treated unfairly and his right to equality was infringed. Aged persons deserve special protection under our dispensation. Recognition of the time and effort that the Complainant took to attend meetings with the Respondent should be acknowledged. He, the Complainant demonstrated a willingness to serve his country which is commendable. The Respondent, Mr. Valentine, should be required to apologize to the Complainant.

2.5.4. The Respondent should review their policy in respect of extreme winter expeditions and look at measures that do not indirectly discriminate against prospective applicants based on age. The policy should clearly set out the requirements both professional and medical on which ALL applicants will be evaluated.

## 3. APPEAL CLAUSE

Should you not be satisfied with this decision, you may lodge an appeal, in writing within 45 days of receipt of this letter. A copy of the appeal form is available at any office of the SAHRC. The appeal should be lodged with the Head Office of the SAHRC – contact details are as follows:

**Private Bag X2700**
**Houghton**
**2041**

**Signed at Johannesburg on the 2nd day of October 2012**
**South African Human Rights Commission**


# COMPLAINT NO: Mpumalanga/2010/0030

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: MP/2010/0030*

In the matter between:

**Ms Hazel Oortman obo Minor Child X** — **Complainant**

and

**St. Thomas Aquinas School** — **First Respondent**

**Department of Education, MP** — **Second Respondent**

## REPORT

*(In terms of Procedure 21 of the Complaints Handling Procedures of the South African Human Rights Commission promulgated in terms of the Human Rights Commission Act, 1994)*

## 1. Introduction

1.1. The South African Human Rights Commission (hereinafter referred to as the "Commission") is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa Act, 108 of 1996 (hereinafter referred to as the "Constitution").

1.2. The Commission is specifically required to:

1.2.1. Promote respect for human rights;

1.2.2. Promote the Protection, development and attainment of human rights; and

1.2.3. Monitor and assess the observance of human rights in the Republic.

1.3. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.

1.4. The Human Rights Commission Act, 54 of 1994 (hereinafter referred to as the "Human Rights Commission Act"), provides the enabling framework for the powers of the Commission.

1.5. Section 9(6) of the Human Rights Commission Act determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

1.6. Article 3(b) of the Commission's Complaints Handling Procedures, provides that the Commission has the jurisdiction to conduct or cause to be conducted any investigation on its own accord, into any alleged violation of or a threat to a fundamental right.

## 2. The Parties

2.1. The Complainant is Ms Hazel Oortman acting on behalf of her 14 year old child with disabilities, Minor X, who was a grade 5 learner at St. Thomas Aquinas School.

2.2. The 1st respondent is St Thomas Aquinas School, a public school n the Mpumalanga Province (hereinafter referred to as "the 1st Respondent").

2.3. The 2nd Respondent is the Department of Education, cited in it's capacity as an interested party in the subject-matter of this complaint, as well as the state regulator of the 1st Respondent.

2.4. For purposes of this report, and in line with the approach adopted by courts, the identity of parents and learners is not disclosed. In **Governing body of the Rivonia Primary School and another v MEC for Education Gauteng Province and another [2012] 1 All SA (GSJ) at paragraph [96-98] and Johncom Media Inv LTD v M and others 2009 (4) SA 7 (CC) at PARAGRAPH [42],** the court held that "disclosing identities of children or their parents could be prejudicial to [the learner] and has the potential to isolate the child involved".

## 3. Background of the Complaint

3.1. On 8 April 2010 the Commission received a written complaint from the Complainant.

3.2. At all times material hereto, the built environment of the 1st Respondent School generally did not provide for adequate access for learners with disabilities.

3.3. At all times material hereto, Minor Child X was a child with disabilities who transported herself by means of a wheelchair; but that in view of the fact that the 1st Respondent did not have a built environment that was wheel chair friendly, Minor X was required to access the school buildings by means of the use of her hands and knees.

3.4. The Complainant alleges in his complaint that the Principal of the 1st Respondent regularly shouted at and neglected Minor child X, and that as a consequence the 2nd Respondent had vicariously violated Minor X's fundamental human rights enshrined in the Constitution.

3.5. The Complainant alleges further that as a result of this violation of Minor X's rights, the Complainant had had no option but to withdraw the child from enrolment at the school.

3.6. At the time of lodging the complaint with the Commission, the Complainant had already instituted proceedings regarding this matter against the Respondent in the Equality Court at the Witbank Magistrate's Court.

3.7. The Complainant sought relief from both the Commission and the Equality Court to cause the 1st Respondent School to develop the built environment of the school to make the school wheelchair friendly, and for the Principal of the 1st Respondent to be removed from the school.

## 4. Assessment of Complaint

4.1. In its preliminary assessment of this complaint, the Commission's North West Provincial Office found the Respondent's constitution to be unconstitutional and its conduct to constitute *prima facie* violations of:

4.1.1. **Section 9** of the Constitution of the Republic of South Africa, 1996 ("the Constitution") – Equality on the ground of disability;

4.1.2. **Section 10** of the Constitution – Human dignity;

4.1.3. **Section 29** of the constitution – Education.

4.2. The Commission also made preliminary assessment that:

4.2.1. The investigation of the alleged violations fell within the mandate and jurisdiction of the Commission;

4.2.2. The Commission is the organization best placed to effectively and expeditiously deal with the complaint.

## 5. Steps taken by the Commission

5.1. On 28 April 2012 the Commission faxed a letter to the clerk of court and the Respondents attorneys advising that the Commission would be representing the Complainant in this matter.

5.2. On 5 May 2012, the Commission received a notice in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (hereinafter referred to as "PEPUDA"),to appear at a Directions Hearing.

5.3. On 16 July 2010, the Commission represented the Complainant in court during the directions hearing and the court reserved judgment.

## 6. Outcome of Equality Court Proceedings

6.1. On 3 December 2010, the Commission was provided with a copy of the Judgment of the Equality Court.

6.2. The court made the following order:

6.2.1. That "the 1st Respondent unfairly discriminated against Minor X by failing to take necessary steps to accommodate her";

6.2.2. That the 1st Respondent may not refuse to re-admit Minor X as a learner at the Respondent on the ground of her physical disability;

6.2.3. That in the case of Minor X being re-admitted, the 1st Respondent takes reasonable steps to remove all obstacles to enable her to have access to all classrooms and toilet allocated to her by using a wheelchair;

6.2.4. That reasonable steps should be taken to benefit not only Minor X but also to other persons with physical disability in future;

6.2.5. To build ramps at the classes and toilet where she has to attend and use;

6.2.6. That a toilet and washbasin be built for disabled persons;

6.2.7. That the 1st Respondent investigates the alleged strained relationship between Minor X and her teachers and takes the necessary steps to resolve the problems; and

6.2.8. That Minor X's teachers should receive the necessary training and gain experience in handling children with disabilities.

## 7. Steps taken by the Commission after the Judgment

7.1. On 24 July 2012 the Commission convened a meeting at the 1st Respondent School with the chairperson of the Board of Governors of the 1st Respondent.

7.2. The purpose of the meeting was to conduct an inspection on the progress, if any, made by the 1st Respondent in terms of complying with the court order and to discuss Minor X's right to education envisaged by section 29(2) of the Constitution going forward.

7.3. The Commission observed that the 1st Respondent had a newly built wheelchair friendly building, and that there were further plans to progressively make the built environment of the School wheelchair friendly.

7.4. The 1st Respondent also indicated the willingness and availability of the teachers at the 1st Respondent to undergo training and gain experience in handling children with disabilities.

7.5. The 1st Respondent further indicated that Minor X is welcome to register at the Respondent for the year 2012 on condition that she pays 50% of the outstanding school fees of R20 000.00 and applies for readmission as she had been out of school for more than a year.

7.6. On 2 August 2012 the Commission convened separate meetings with the complainant as well as with Minor Child X to provide them with a feedback on the outcome of the meeting with the 1st Respondent.

7.7. The Complainant then informed the Commission that she would not want Minor X to return to the 1st Respondent unless the Principal of the School resigned. She also informed the Commission that she has already submitted application forms for Minor X to enrol at another Respondent, preferably a public Respondent, in 2013.

7.8. Subseque3ntly, Minor X herself indicated that she did not want to return to the 1st Respondent because *"the teachers were shouting her and she did not want to be shouted at".*

7.9. Minor X further indicated that she was interested and looking forward to attending school at an alternative school in Witbank.

## 8. Analysis of the Complaint

8.1. The complaint is based on alleged violations of the right to dignity, equality and the right to education.

8.2. It is unnecessary for the Commission to consider the facts of this case and to arrive at a finding as the Equality Court has adequately traversed all aspects of this case in its Judgement.

8.3. The finding of the Equality Court resonates with the Commission's own assessment of the matter on its merits, namely that the 1st Respondent has violated the rights of equality and the right of education: and further, the right to dignity.

8.4. On the findings and recommendations of the Court, the Commission makes two key observations arising from its own investigation of this matter as well as perusal of the text of the judgement.

8.5. First, the Commission observes that the issue of whether the 1st Respondent possessed a school policy that guided the Schools provision of support to learners with disabilities.

8.6. Second, the Court did not stipulate time-frames for the implementation of the various elements of its order.

## 9. Findings

9.1. Based on the court's evidence adduced during the trial and the court's judgement, the Commission finds that the 1st Respondent failed to take the necessary steps to accommodate Minor X.

9.2. That the 1st Respondent violated Minor X's right to equality as enshrined in section 9 of the constitution, particularly the right not to be discriminated against on the basis of disability as decided by the court.

9.3. Furthermore, that the 1st Respondent violated Minor X's right to dignity and education as protected by sections 10 and 29 of the Constitution.

## 10. Recommendations

Following the judgement of the Equality Court, the Commission conducted and inspection at the 1st Respondent and observed that the school is taking reasonable steps to become user-friendly to learners with disabilities.

10.1. That the 1st Respondent provide the Commission with a report annually, no later than 30 April 2014, on the steps taken to comply with the following orders of the Equality Court:

*10.1.1. That in the case of Minor X being re-admitted, the 1st Respondent takes reasonable steps to remove all obstacles to enable her to have access to all classrooms and toilet allocated to her by using a wheel chair;*

*10.1.2. That reasonable steps should be taken to benefit not only Minor X but also to other persons with physical disability in future;*

10.2. That the 1st Respondent hosts a disability rights sensitisation workshop for all educators at the school to be provided by the South African Human Rights Commission within 3 (three) months from date of this Finding.

10.3. That the 2nd Respondent undertakes a disciplinary investigation into the allegations of verbal abuse of Minor X by the Principal of the School.

## 11. APPEAL

11.1. You have the **right to lodge an appeal** against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing **within 45 days** of the date of receipt of this finding, by writing to:

**Private Bag X2700**
**Houghton**
**2041**

**Signed in Johannesburg in September, 2013**

**South African Human Rights Commission**


# COMPLAINT NO: North West/2010/0175

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: NW/2010/0175*

In the matter between:

| | |
|---|---|
| **South African Human Rights Commission** | **Complainant** |
| and | |
| **Suzan Busisiwe Moagi** | **First Respondent** |
| **Dihatswane Primary School** | **Second Repondent** |
| **Governing Body of the Dihatswane Primary School** | **Third Respondent** |
| **Member of the Executive Council (Department of Education-North West Province)** | **Fourth Respondent** |

## REPORT

*(In terms of Article 21 of the Complaints Handling Procedures of the South African Human Rights Commission – promulgated in terms of the Human Rights commission Act, 1994)*

## 1. Introduction

1.1. The South African Human Rights Commission [hereinafter referred to as the **"Commission"**] is an institution established in terms of Section 181 of the Constitution of the Republic of South African Act, 1996 [hereinafter referred to as the **"Constitution"**].

1.2. The Commission and other institutions created under Chapter 9 of the Constitution are described as "state institutions supporting constitutional democracy".

1.3. The Commission is specifically required to:

1.3.1. Promote respect for human rights;

1.3.2. Promote the protection, development and attainment of human rights; and

1.3.3. Monitor and assess the observance of human rights in the Republic.

1.4. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights related matters.

1.5. Further, section 184(2) (c) and (d) affords the Commission authority to carry out research and to educate on human rights related matters.

1.6. The Human Rights Commission Act[1] further supplements the power of the Commission and provides the enabling framework for the powers of the Commission.

1.7. Section 9(6) of the Human Rights Commission Act determines the procedure to be followed in conducting an investigation regarding the alleged violation of or a threat to a fundamental right.

## 2. The Parties

2.1. The First Respondent is Ms Suzan Moagi, acting in her capacity as the Chairperson of the Governing Body of the Dihatswane Primary School [hereinafter referred to as **"First Respondent"**].

[1] 54 of 1994

2.2. The Second Respondent is the Dihatswane Primary School, cited by virtue of the fact that the principal and educators owe a duty of care to all the learners during school hours [hereinafter referred to as **"Second Respondent"**].

2.3. The Third Respondent is the Governing Body of the Dihatswane Primary School [hereinafter referred to as **"Third Respondent"**], as a governing body vested with the governance of a public school in terms of section 16 of the South African Schools Act[2] [hereinafter referred to as the "Schools Act"].

2.4. The Fourth Respondent is the Member of the Executive Council for Basic Education in the North West Province [hereinafter referred to as the **"Fourth Respondent"**], cited in his/her capacity as the bearer of constitutional and statutory responsibilities in respect of the provision, administration and funding of public schools in the North West, arising from the constitution and the Schools Act.

## 3. Background to the Complaint

3.1. On or about the 3rd of August 2010 the Commission was approached by a certain journalist from the national newspaper, 'The Star', who informed the Commission of a certain case of indecent assault of two minors at the Dihatswane Primary School.

3.2. During the investigation, the following facts were revealed;

3.2.1. On or about the 24th of January 2007 the First Respondent indecently assaulted two minor children[3], namely a minor male aged 6 years of age at the time of the incident and a minor female aged 11 years of age at the time of the incident.

3.2.2. The two minor children were both pupils at the Second Respondent at the time of the incident.

3.2.3. The First Respondent visited the teacher's lavatory or toilet at the school to conduct a "spot check" in other words to endure that the said toilet was not in an untidy or unhygienic state.

3.2.4. The First Respondent discovered that the toilet was in an unhygienic state as a pupil(s) had relieved him/herself on the floor and wall of the toilet. As a result there was human excrement on the floor and wall.

3.2.5. The First Respondent proceeded to search for the supposed culprit(s), by going form class to class questioning the pupils about the identity of the pupil or pupils who had left the teachers toilet in such a filthy state.

3.2.6. The First Respondent was able to obtain the identities of the two abovementioned minors from their respective Grade R and Grade 3 classmates. The First Respondent then instructed both minors to follow her to the teachers' toilet.

3.2.7. The First Respondent then forcefully instructed the Grade R and Grad 3 pupils to eat excrement from the floor and lick excrement from the wall of the toilet respectively. As the minors were afraid of the First Respondent they carried out the First Respondent's sordid instruction.

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[2] Act 84 of 1996

[3] *In Governing body of the Rivonia Primary School and another v MEC for Education Gauteng Province and another [2012] 1 All SA (GSJ) at paragraph [96-98] and Johncom Media Inv LTD v M and others (4) SA 7 (CC) at paragraph [42], the court held that "disclosing identities of children or their parents could be prejudicial to [the learner] and has the potential to isolate the child involved".*

3.2.8. The First Respondent was charged with indecent assault of minors and found guilty by a court of law, and was sentenced to a six (6) month jail term or a fine of R1000 (one thousand rand) for each count.

3.2.9. The First Respondent appealed the sentence and the appeal was not granted. The First Respondent paid the fines imposed by the court.

3.2.10. The First Respondent was relieved of her duties as the Chairperson of the School Governing Body (SGB) when the matter was reported to the principal.

## 4. Preliminary Assessment

4.1. In its preliminary assessment of the papers collated during the Commission's investigation, namely newspaper article, witness statements and court papers, the Commission's North West Provincial Office found the First Respondent's conduct to constitute *prima facie* violation of:

**4.1.1. Section 10** of the Constitution – Human dignity'

**4.1.2. Section 12** of the Constitution – Freedom and Security of the Person; and

**4.1.3. Section 28** of the Constitution – Children's Rights.

4.2. The Commission also made preliminary assessments that:

4.2.1. The investigation of the alleged violation fell within the mandate and jurisdiction of the Commission;

4.2.2. The First Respondent is an indigent as such pursuing a civil claim against her would be futile; and

4.2.3. That the Commission is the organization best placed to effectively and expeditiously deal with the complaint.

## 5. Steps taken by the Commission

5.1. The Commission was never required to investigate the truthfulness or otherwise of the occurrence of the incident. The Commission's investigation merely focussed on whether such violation of the minors' human rights could have been avoided and how same could be avoided in the future.

5.2. The commission only became aware of the matter after the matter had gone to trial and the First Respondent had been found guilty. To that end, to investigate the matter afresh did not seem necessary, as the court in its successful conviction had also proved the violation of the human rights of the First Respondent.

5.3. After being made aware of the incident, the North West Provincial Office of the Commission took the following steps;

5.3.1. On or about the year 2011, the Commission visited the Second Respondent and held consultations with its principal;

5.3.2. The principal informed the Commission that;

5.3.2.1. As soon as he had became aware of the incident, she convened a meeting with the parents of the minors concerned and reported the matter to the Department of Education.

5.3.3. Held consultations with the parents of the minors whose rights were violated;

5.3.4. Prepared a preliminary report based on information collated during the abovementioned consultations;

5.3.5. The Commission's attempts to engage with various stake holders, namely the Department of Education [North West Province] and South African Police Service [hereinafter referred to as the "SAPS"] proved to be difficult as the officials from the respective departments were always not available;

5.3.6. The Commission was however able to arrange a meeting with a SAPS official, who furnished the Commission with a copy of the docket, with regards to the charge against the First Respondent, and as well as meet with the District Director of the Department of Education, who on or about the 1st of November 2010, furnished the Commission with a report with regards to the indecent assault of the minor learners;

5.3.7. The Fourth Respondent provided a report to the Commission which indicated several steps that the Fourth Respondent had taken after having been made aware of the incident. The Fourth Respondent took the following steps;

5.3.7.1. Provided counselling to the affected learners; and

5.3.7.2. Attempted to relocate the learners to a different school, but the request was denied by the parents of the minors;

5.3.8. The Commission further enquired from the Department of Education whether the Department had policies in place that were aimed at protecting learners against abuse by educators and SGB members;

5.3.9. The District Director telephonically informed the Commission that the Provincial Departments did not have such policies in place and they relied on the national legislation such as the Schools Act and provision protecting children in the Constitution;

5.3.10. The Commission was informed by a social worker from the Department of Social Development that the affected minors had undergone 3 (three) counselling sessions, and further counselling would be provided;

# 6. Applicable Legal Framework

## 6.1. International Legal Instruments

### 6.1.1. United Nations Convention on the Rights of the Child ["UNCRC"]

**Article 19**

Provides that *"the State should take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".*

**Article 37**

Complements Article 19 by emphasising the need for protection of children from

all forms of violence. The article provides that *"no person is allowed to punish a child in a cruel and harmful way".*

#### 6.1.2. International Covenant on Civil and Political Rights ["ICCPR"]

**Article 7**

Provides that *"no one shall be subjected to cruel, inhuman or degrading treatment or punishment..."*

The Human Rights Committee have interpreted Article 7 in *"General Comment no.20"*[4], to include that the article must be interpreted to include acts that cause mental suffering and it is appropriate to emphasize in this regard, that the article protects in particular children, pupils and patients in teaching and medical institutions.

### 6.2. Regional Legal Instruments

#### 6.2.1. The African Charter on the Rights & Welfare of the Child

The Charter recognizes the need for African states to take appropriate measures to promote and protect the rights and welfare of the African Child.

**Article 11(5)**

Provides that parties to the Charter should *"take all appropriate measures to ensure that a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child".*

**Article 16**

Provides that *"States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse/neglect or maltreatment".*

**Article 20**

Requires that parents or caregivers should ensure that *"domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child".*

**Article 21(1)**

Provides that State Parties should *"take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and those customs and practices prejudicial to the health or life of the child".*

[4] HRI/GEN/IRev.4 Page 108

# 7. National Constitution

The following provisions of the National Constitution are applicable:

**7.1. Section 28 of the Constitution – Children**

*"1. Every child has the right-*

*...*

*(d) to be protected from maltreatment, neglect, abuse or degradation"*

**7.2. Section 10 of the Constitution –** Human Dignity:

*"Everyone has inherent dignity and the right to have their dignity respected and protected."*

**7.3. Section 12 of the Constitution –** Freedom and Security of the person

*"Everyone has the right to freedom and security of the person, which includes the right-*

*...*

*(c) to be free from all forms of violence from either public or private sectors;*

*...*

*(e) not to be treated or punished in a cruel, inhuman or degrading way."*

# 8. Domestic Legislation

**8.1. South African Schools Act[5]**

**Section 8**

[1] *Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school;*

*.....*

[5] *A code of conduct must contain provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings;*

**8.2. National Education Policy Act[6]**

*Section 3(4)(n) of the Act provides that the Minister of Education shall determine national policy for the:*

*"control and discipline of students at education institutions: Provided that no person shall administer corporal punishment, or subject a student to psychological or physical abuse at any education institution".*

**8.3. North West Schools Education Act[7]**

8.3.1. Section 7 provides that;

*8.3.1.1. (1) A governing body of a public school shall, after consultation with the learners, parents and educators of the school, adopt a code of conduct for the learners.*

[5] 84 of 1996

[6] 27 of 1996

[7] 3 of 1998

*8.3.1.2. (2) A Code of conduct referred to in subsection (1) shall be directed at enabling a disciplined and purposeful school environment to be established, dedicated to the improvement and maintenance of the quality of the learning process.*

**8.4. South African Council for Educators Code of Professional Ethics**

8.4.1. This Code, drafted pursuant to section 5(c) of the South African council for Educators Act 31 of 2000, governs the conduct of all educators registered with the South African Council for Educators ["SACE"].

***8.4.2. Section 2(3)*** of the Code provides that educators registered with the SACE *"acknowledge, uphold and promote basic human rights, as embodied in the Constitution of South Africa".*

***8.4.3. Section 3*** then stipulates that an educator *"[respect] the dignity, beliefs and constitutional rights of learners and in particular children" and further "[strive] to enable learners to develop a set of values consistent with the fundamental rights contained in the Constitution of South Africa".*

**8.5. Regulations Relating to the Disciplinary Proceedings Dealing with Misconduct of Learners[8]**

8.5.1. Code of Conduct

**8.5.1.1. Section 3 of the Regulations states that,** *"Subject to any applicable law, a governing body of a school shall draw and adopt a code of conduct for that school after consultation with the learners, parents and educators of the school".*

(2) *A code of conduct shall conform to the following principles:*

(a) The code shall not be in conflict with but protect the rights of learners as enshrined in the Bill of Rights, the South African Schools Act, 1996, the North West Schools Education Act, 1998, and any applicable law;

(b) any learner accused of contravening the code-

(i) shall be presumed innocent until proven guilty;

(ii) shall be given a fair hearing on the charges alleged against him or her;

**8.6. The Education & Training Unit[9]** states that the functions of the of a School Governing Bodies are namely;

8.6.1. To promote the best interests of the school;

8.6.2. One of the important roles of school governing bodies is to consult learners, parents and teachers about a Code of Conduct for the school. The code of conduct sets out school rules and says what punishments can be given if the rules are broken. The code of conduct also sets out a grievance procedure so that parents and learners can take up a matter if they feel they have been badly treated by a teacher or another learner at the school;

8 Provincial Gazette for North West No 7014 of 05 July 2012

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8.6.2.1. The kinds of punishments that schools can use include a demerit system, detention, picking up rubbish on the playing field and so on. Degrading punishments such as cleaning the toilets are not allowed. In 1997, the government banned corporal punishment such as hidings and canings in schools. The reason for this is that the Constitution says that no one should be punished or treated in a cruel or degrading way;

8.6.2.2. For serious offences the school may suspend a learner for up to one week from school. This can only happen once there has been a fair hearing where the learner has had a chance to put his or her side of the story.

8.6.2.3. If a school feels that the offence which the learner has committed is so serious that he or she should be expelled from the school, the learner can be suspended from the school while the provincial head of Department decides whether or not to expel the learner. Only the provincial Head of Department can expel a learner from a school. The principal cannot take such a decision. If a learner is expelled, he or she can appeal to the MEC f Education to re-consider the case.[10]

# 9. Relevant Case Law

## 9.1. The right to be protected from maltreatment, neglect, abuse or degradation

### *9.1.1. Christian Education South Africa v Minister of Education* ("Christian Education Case")[11]

9.1.1.1. Although this case involved the issue of corporal punishment in schools, the court also touches on the issue of unlawful punishment in schools and mentioned in passing that such punishment should be banned as it not only affects the child physically but also psychologically and emotionally. The court stated that *"the outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children".*

### 9.1.2. SvM ("SvM")[12]

9.1.2.1. The court in this case seems to have delved into section 28 of the Constitution and highlighted the importance of this section with regards to protecting children's rights. Further, the court points out that section 28 was not a product of the drafters of our Constitution but rather section 28 attains its wording from international instruments that were drafted to enhance children's rights. The learned judge Sachs defines in ringing tones the duty resting upon our courts to enforce children's rights: In linking section 28 of the Constitution with international

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11 2000 (4) SA 757

12 2007 ZACC 18; 2008 (3)SA 232

instruments, the learned judge stated that; *"regard accordingly has to be paid to the import of the principles of the CRC* [United Nations Convention on the Rights of the Child] *as they inform the provisions of section 28 … The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of section 28, I believe, is the right of the child to be a child and to enjoy special care…"*[13]

9.1.2.2. The learned judge further goes on to state that *"individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."*[14] This case alludes to the idea that a child's growth must not be interfered with by exposing the child to an unsecure environment, as any form of unlawful interference might actually affect the child's natural growth pattern.

9.1.2.3. The judge further points out that society is not perfect, that children will be/or are exposed to harm, but he maintains that all should be done to protect children from any harsh aspects of the community that may interfere or diminish the child's enjoyment of his/her rights. In this regard the judge states that *"no constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximize opportunities for them to lead productive and happy lives. Thus, even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk…."*

9.1.3. Due to the fact that children are dependent on parents, caregivers and guardians, they are more susceptible compared to mature adults, and as a result, more care should be exercised when dealing with children. One cannot treat a child as you would treat an adult; a greater degree of care is required in this instance. This in part seems to have been the reasoning of the court in the case of *Centre for Child Law v Minister for justice and Constitutional Development* discussed below.

[13] At par 17

[14] At par 19

***9.1.3.1. Centre for Child Law v Minister for Justice and Constitutional Development and Others.* ["Centre for Child Law Case"][15]**

9.1.3.1.1. The court in this case stated that (commenting also on section 28 of the constitution) *"the Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults."*[16]

9.1.4. The position on the need for children to be nurtured was further affirmed by Ngcobo J in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development, Albert Phaswane and Aaron Mokoena* (Centre for Child Law, Childline South Africa, RAPCAN, Children First, Operation Bobbi Bear, POWA and Cape Mental Health Society as Amici Curiae)[17] in which the learned judge stated that:

*"what must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion. This means that the child must be treated in a caring and sensitive manner. This requires taking into account [the child's] personal situation, and immediate needs, age, gender, disability and level of maturity. In short, [e[very child should be treated as an individual with his or her own individual needs, wishes and feelings. Sensitivity requires the child's individual needs and views to be taken into account."*[18]

**9.2. The right to human dignity**

**9.2.1. S v Williams[19]**

9.2.1.1. The court in the above case, referring to punishment in general held that *"the Constitution required that measures that assail the dignity and self-esteem of an individual will have to be justified; there is no place for brutal and dehumanising treatment and punishment..."*[20]

9.2.1.2. The court commenting on the right to dignity also held that *"the basic concept underlying the prohibition of cruel, inhuman or degrading punishment is the dignity of man and the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity."*[21]

15 2009 (6) SA 532 (CC)

16 At par 26

17 [2009] ZACC 8

18 At par 61

19 1995 (3) SA 632 (CC)

20 At Par 58

21 Langa J at par 35

***9.2.2.S v Makwanyane***[22]

9.2.2.1. In this case, Chaskalson P held that *"the right to dignity is one of the relevant factors that must be taken into account to determine whether a punishment is cruel, inhuman or degrading."*[23]

## 10. Analysis of the Complaint and Application of Principles

10.1. Children as indicated in several cases above are more vulnerable as compared to adults and more care and attention should be directed at children as they sometimes lack the capacity to reason the same way an adult would reason. To that end, any individual place in a position of guardian or caregiver should not take advantage of the child's susceptible nature but rather endeavour to protect the child from any form of violence and/or abuse.

10.2. In the present complaint, two minor children were indecently assaulted by an individual who was supposed to act in their best interest and protect the minor children from any form of harm, violence and/or abuse. As a member of the governing body, the particular member is placed in a position of guardianship towards the learners. This is so because the particular member performs his/her duty in furtherance of the school's mandate to educate learners and also due to the fact that as a member of the governing body the individual comes into contact with learners at the particular school on a regular basis.

10.3. Another worrying fact with regards to this complaint is the attitude or rather stances taken by the educators in whose classes the two assaulted minors were forcibly removed. The facts reveal that the First Respondent went into the classrooms of the two minors and forced them to leave their respective classes in the presence of their educators and there is no evidence to suggest or to show that the educators made an attempt to stop the learners from being forced out of the classroom. The same educators are said to have laughed when they were informed of the punishment that had been meted out on the minors by the First Respondent which is disturbing considering the sordid nature of the punishment.

10.4. The reaction of the educators mentioned above gives one the impression that degrading treatment of learners is something that is prevalent at the school and also something that has become accepted or rather acceptable as a form of punishment. What this highlights then is the worrisome situation whereby the very same people who are given the responsibility to care for learners are in fact condoning the ill-treatment of these learners, and leaving the learners with no avenue of escape as the very same people who should protect them are in fact in collusion with the aggressor.

10.5. To force learners to consume human excrement is cruel, degrading and harmful to the learner's health. The sordid nature of the punishment itself is likely to affect the victim psychologically. This form of punishment is in contravention of Article 37 of the UNCRC and Article 7 of the *ICCPR* which clearly state that *"no person is allowed to punish a child in a cruel and harmful way"* and *"no one shall be subjected to cruel, inhuman or degrading treatment or punishment"* respectively.

[22] 1995 (3) SA 391

[23] Par 94 & 135

10.6. As the indecent assault supposedly occurred as a result of an attempt by the First Respondent to discipline the two minor learners for leaving the toilet in an unhygienic state, the discipline went beyond what may be considered as reasonable and humane punishment of a learner. This is contrary to regional instruments that state that *"domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child".*[24] Discipline must be reasonable and should and cannot be in violation of the learner's dignity. The dignity of the child is also protected by section 10 of the Constitution which recognizes that everyone has an inherent dignity and the right to have their dignity protected and respected.

10.7. Section 28 of the Constitution requires children to be protected from *maltreatment, neglect, abuse or degradation.* To force a child to consume human excrement amounts to abuse of the child as the child is forced to consume waste that is harmful to his health and the child is left in a state of shock and feels degraded which affects the child emotionally and psychologically, and is likely to have a negative impact on the child's growth.

10.8. To force a child to consume human waste, with the perpetrator fully aware of the harmful effects the human waste will or might have on the child's health is undoubtedly some form of perpetration of violence against the child. Such conduct by the First Respondent is contrary to section 12 of the Constitution which guarantees everyone's right to freedom and security, and included therein is the right to be free from all forms of violence from either public or private sectors.

10.9. A school governing body is required by the Schools Act and the North West Schools Education Act to adopt a code of conduct after consultation with learners, parents and educators. This code of conduct must contain due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings. The nature of punishment meted out on the minors by the perpetrator in our current matter could not have been the *"disciplinary proceedings"* that was envisaged by the act. The parents, educators and learners could never have agreed to such form of punishment during consultations with the governing body. The perpetrator have therefore conducted herself in a manner that is contrary to the above-mentioned legislation which clearly allude to the fact that disciplining of learner should not go beyond what is acceptable, but should instead rest within the perimeters of reasonableness and the punishment should at all times consider the best interest of the learner. Forcing minors to consume human waste can never be considered as proper disciplinary procedure.

10.10. In the current case, the second, third and fourth Respondents indicated that when the incident occurred they did not possess a code of conduct as required by section 8 and section 7 of the Schools Act and the North West Schools Education Act respectively. The availability of a code of conduct would have informed the educators in whose class the assaulted minors were forcibly removed that such conduct was not in conformity with the Schools Act and the North West Schools Education Act, and that such conduct was beyond the authority of a member of a school governing body.

[24] Article 20: African Charter on the Rights & Welfare of the child

## 11. Application of Case Law

11.1. To force minor learners' to consume human waste would be considered as physical punishment, and according to the Constitutional Court in ***the Christian Education Case,*** physical punishment in schools has been outlawed and to that end, to allow educators to physically punish learners would be contrary to the spirit and purport of our constitution, which strives to promote the respect for the dignity and physical and emotional integrity of all children.

11.2. According to the ***Christian Education Case,*** physical punishment also exposes the learners to physical and emotional abuse. This is evident from our current matter whereby the two assaulted minors were so traumatized by the assault to the extent that for a few days they could not eat their meals at home, and the fact that they also required sessions of counselling.

11.3. Physical punishment of a learner exposes the learner to an insecure environment which unceremoniously interferes with the learner's enjoyment of the right to childhood. In the current matter, the First Respondent physically punishes two minor learners, therefore exposing the minors to violence or rather creating an unsafe environment. The conduct of the First Respondent is contrary or in conflict with Sachs J's ruling in ***S v M*** whereby the learned judge emphasized the fact that children have the *right to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.*

11.4. By instructing the minors to consume human waste, the First Respondent took advantage of the vulnerable nature of the minor learners as she knew they would not object to the punishment out of fear for the First Respondent. The First Respondent was at all times aware that the minors would obey her instruction out of fear, not only because she was an adult but also because she was a member of the Second Respondent and the learners regarded her as an authoritative figure of the Second and Third Respondents. The courts have emphasized the fact that the susceptible nature of children should not be exploited but children should rather be afforded more care and nurturing. This is evident from the ***Centre for Child Law*** Case whereby the court reiterated that due to their vulnerability, children are unable to protect themselves as such adults in their charge should protect the children. The educators failed to protect the learners even though they had a duty of care towards the learners and allowed the First Respondent to take advantage of the children.

11.5. The two minors felt degraded and rightly so, because the ordeal they were made to endure by the First Respondent was very humiliating and demeaning. Such impairment of the learner's dignity is contrary to the reasoning of the court in ***S v Williams*** where the court accentuated the importance of the right to dignity and the fact that our society and modern democracy had no place for such an unjustifiable assault on the self-worth of any human being. The court stated that *"the Constitution required that measures that assail the dignity and self-esteem of an individual will have to be justified; there is no place for brutal and dehumanising treatment and punishment."* As highlighted above the learners felt humiliated and demeaned when they were forced to consume human waste

by the First Respondent and the First Respondent's conduct as indicated by the court in ***S v Williams*** has no place in this new Constitutional era.

11.6. The court in ***S v Williams*** went further to state that *"the basic concept underlying the prohibition of cruel, inhuman or degrading punishment is the dignity of man and the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity."* In application of this principle, to force any person to consume human waste could never be regarded as decent in any society.

## 12. Finding

12.1. To force any learner to consume human waste is degrading and demeaning to the learner and far exceeds the normal punishments meted out on learners at schools, namely detention and picking up of litter around the school. The conduct of the member of the First Respondent diminished the learners' human dignity.

12.2. The educators failed to exercise their duty of care because the moment learners enter the Second Respondent's premises, the duty of care is transferred from parent to the educator. The educator should therefore do all in his/her power to protect the learners from any form of abuse and violence. The two educators did not resist when the First Respondent removed the learners from their respective classrooms and are said to have laughed when the First Respondent informed them about how she had punished the children. The conduct of the educators gives one an impression that unusual and degrading punishment of learners is acceptable within the Second Respondent.

12.3. The Second Respondent failed in its duty of care towards its learners and members of the Second Respondent, namely, the educators are not well versed with regards to applicable codes of conduct when dealing with vulnerable learners.

12.4. The Third Respondent also failed in its duty of care towards the learners, by failing to draft a code of conduct as required by the Schools Act, which would have facilitated consultation between the second Respondent and parents, learners and educators as provided in section 8(5) of the Schools Act.

12.5. The Fourth Respondent also failed the learners as it did not ensure that the Second Respondent and other schools in the area had codes of conduct which would clearly set out the functions of the Third Respondent and what is acceptable as a form of punishment.

## 13. The Commission finds as follows:

13.1. The First and Second Respondent acted in violation of sections 10 (Human Dignity), 12 (Freedom and Security of the person) and 28 (1) (d) (Right to be protected from maltreatment, neglect, abuse or degradation) of the constitution;

13.2. The Second Respondent violated the abovementioned rights by failing to provide a secure environment free from abuse and violence for the learners.

13.3. The Third Respondent violated the abovementioned rights, by the mere fact that it did not possess a code of conduct and the fact that a senior member of the Third Respondent indecently assaulted the learners.

13.4. The educators from which the minors were forcefully removed by the First Respondent acted in violation of section 2 (3) and 3 of the South African Council for Educators Code for Professional Ethics (and educator must protect the learner from all forms of harm), Sections 10 (Human dignity), 12 (Freedom and Security of the person) and 28 (1) (d) (Right to be protected from maltreatment, neglect, abuse or degradation) of the constitution;

13.5. The Fourth Respondent also violated the above mentioned rights by failing to ensure that the Second and Third Respondents were in compliance with the Schools Act.

13.6. The Respondents acted in contravention of section 8 of the Schools Act.

## 14. Recommendations

14.1. The Commission makes the following recommendations;

14.1.1. That the Third Respondent should, after 31 (thirty-one) days of receipt of this finding, produce a drafted code of conduct and hold further consultations or educative workshops with learners, educators and parents, to mitigate the chances of a similar incident reoccurring at the school.

14.1.2. That the Fourth Respondent, after 31 (thirty-one) days of receipt of this finding, submit a report to the Commission indicating the steps that it has taken in order to prevent similar violations of rights.

14.1.3. That the Fourth Respondent should furnish the Commission with a detailed report on its investigation on corporal punishment at the school. The report should include but not be limited to the steps the Fourth Respondent has taken to ensure that corporal punishment in schools is eradicated;

14.1.4. That the Second Respondent furnish the commission with a report detailing the steps that it took to discipline the educators from whose class the minors were forcibly removed;

14.1.5. That the Second Respondent furnish the commission with a report which verifies that corporal punishment is not being allowed to continue unchecked at the school;

14.1.6. That the Second Respondent furnish us with a report of the measures that it has put in place to avoid similar incidents and to ensure that the school is free of corporal punishment; and

14.1.7. The Fourth Respondent should after 31 (thirty-one) days of receipt of this finding, also hold educative workshops with educators separately with a view of instilling the fundamental principle that the educators owe the learners a duty of care, especially when the learners are in their classrooms.

## 15. Appeal

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding, by writing to:

**Private Bag X2700**
**Houghton**
**2041**

**Signed on 14th day of January 2014**
**South African Human Rights Commission**


# COMPLAINT NO: NORTH WEST/2010/0152

# SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

*File Ref No: NW/2010/0152*

In the matter between:

| | |
|---|---|
| **Ellen Msimang** | **Complainant** |
| and | |
| **Gary Player Health Spa** | **1st Respondent** |
| **Falcon Labour Hire (PTY) LTD** | **2nd Respondent** |
| **Nthabiseng Panana** | **3rd Respondent** |
| **Rhonda Kwele** | **4th Respondent** |

# REPORT

*(In terms of the Article 21 of the Complaints Handling Procedures of the SAHRC)*

## 1. Introduction

1.1. The South African Human Rights Commission (the Commission) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa (the Constitution).

1.2. The Commission is specifically required to:
   a) Promote respect for 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.

1.3. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.

1.4. The Human Rights Commission Act, 54 of 1994, provides the enabling framework for the powers of the Commission.

1.5. Section 9(6) of the Human Rights Commission Act determines the procedure to be followed in conducting an investigation regarding the alleged violation of or threat to a fundamental right.

## 2. Parties

2.1. The Complainant in this matter is Ellen Msimang, an adult female who was employed at Gary Player Health Spa as an assistant (the Complainant).

2.2. The first Respondent is Gary Player Health Spa, a company registered in terms of the Companies Act[1], and conducting its business at Sun City Resort, Rustenburg (the 1st Respondent).

2.3. The second Respondent is Falcon Labour Hire (Pty) Ltd, a security company registered in terms of the Companies Act[2], conducting its business from Plot 211, Donkerhoek, Rustenburg (the 2nd Respondent).

[1] 71 of 2008.

[2] Id.

2.4. The third Respondent is Nthabiseng Panana, an adult female who at all material times was employed by the second Respondent as a security officer (the 3rd Respondent).

2.5. The fourth Respondent is Rhonda Kwele, an adult female who at all material times was employed as a line manager at Gary Player Health Spa (the 4th Respondent).

## 3. Background to the complaint

3.1. The Commission received a complaint from the Complainant through the Commission's North West Provincial Office (the Provincial Office) on Wednesday, 28 July 2010.

3.2. In her complaint form, the Complainant alleges that:

3.2.1. On Saturday the 22nd of May 2010 at about 14h00 while busy conducting her duties as an assistant at the Spa, she and two of her colleagues[3] were urgently called to the Spa's reception area by the second Respondent;

3.2.2. Upon arrival at reception the fourth Respondent instructed the Complainant and her two colleagues, for reasons not disclosed to them, to stand to one side;

3.2.3. Whilst the Complainant and her two colleagues were standing aside as instructed by the third Respondent, four male Security guards employed by the second Respondent were called to the reception area;

3.2.4. Upon arrival of the four male security guards at the reception area, the Complainant and her two colleagues were informed by the fourth Respondent that on 22 May 2010, R200 (two hundred rands) belonging to a guest[4] had gone missing in the changing rooms;

3.2.5. To the surprise of the Complainant and her two colleagues, the fourth Respondent instructed the four male security guards to conduct a search on the persons of the Complainant and her two colleagues;

3.2.6. The four male security guards refused to follow the fourth Respondent's instruction;

3.2.7. The fourth Respondent then called a female security guard (the third Respondent) to the reception area;

3.2.8. The third Respondent was instructed by the fourth Respondent to conduct a bag search and body searches on the persons of the Complainant and her two colleagues;

3.2.9. The fourth Respondent requested that the Complainant and her colleagues consent to a body search;

3.2.10. The third Respondent then led the Complainant and her two colleagues to the staff changing room where they were instructed to remove the top layer of their clothing and their brassieres;

3.2.11. The third Respondent then 'vigorously shook' the Complainant and her two colleagues' clothing and brassieres in an attempt to find the allegedly stolen money;

[3] Monica Tlou and Jacobeth Moeng, who are/were also employed as assistants at Gary Player Health Spa (they were also strip searched during the incident).

[4] A woman named Hellen Bailiey.

3.2.12. The third Respondent then ordered the Complainant and her two colleagues to take off their trousers and underwear and to bend over;

3.2.13. The Complainant's colleagues did as instructed and the third Respondent searched their private parts;

3.2.14. The Complainant, however, informed the third Respondent that she was unable to take off her underwear and to bend over as she was menstruating;

3.2.15. Notwithstanding the Complainant's objection to the instruction, the third Respondent insisted that the Complainant remove her underwear and bend over;

3.2.16. The third Respondent then asked the Complainant why she was able to "open her legs to nurses" but was unable to open them during the search;

3.2.17. The Complainant eventually removed her underwear and revealed her bloody sanitary pad which the third Respondent opened and searched;

3.2.18. The Sunday times and Sowetan[5] newspapers reported on the complaint in issue under articles entitled "Maids forced to strip naked in public" and "A search of women denied" respectively.

3.3. A letter dated 9 June 2010, written by the Spa and addressed to the woman[6] from whom the money was allegedly stolen, was received by the Provincial Office. In the letter, she was informed that an internal investigation had been conducted by the Spa and had included taking the following steps:

a) Identifying and questioning staff potentially involved and recording of such statements; and

b) Searching of the area and of the body of the person the guest suspected of stealing her money. The letter further stated that all relevant information had been handed to Falcon Security as well as the Guest Management Department.

3.4. It was recorded in the letter that no evidence was found that the Complainant her two colleagues stole the money. Further, there was no evidence of forceful entry having been used to access the locker from which the money disappeared. Lastly, the body search of the Complainant and her two colleagues did not result in the money being found in their possession.

3.5. A *crimen injuria* case was opened with the South African Police Service (SAPS) at Sun City Police Station on 6 July 2010.[7] The matter is still pending and was referred to the Mogwase Magistrates Court in January 2013 where it was postponed *sine die* as the attorney of record for the Complainants had withdrawn and a new attorney of record had to be appointed.

## 4. Preliminary Assessment

The Provincial Office made a preliminary assessment of the complaint, finding that:

- The alleged incident constituted a *prima facie* violation of human rights. In particular, the assessment determined that Sections 10, 12, 14 and 35(1)(c) of the Constitution had *prima facie* been violated;

5 Dated 07 July 2010.

6 Hellen Bailey.

7 Under CAS 49/07/2010.

- The alleged violation fell within the mandate and jurisdiction of the South African Human Rights Commission;
- The alleged violation merited a full investigation in terms of the Complaints Handling Procedures of the Commission; and
- The Commission is best placed to deal with the Complaint effectively.

## 5. Steps taken by the Commission

5.1. The Provincial Office sent an allegation letter to the manager of the first Respondent on 12 August 2010.

5.2. In the allegation letter the Commission:

a) Advised the manager of the Spa of the complaint lodged against the first Respondent;

b) Put it to the manager that the Complainant and her two colleagues had consented to a body search, but not to a naked search;

c) Advised the first Respondent of the preliminary assessment of the human rights violated;

d) Invited the first Respondent to respond to the allegations; and

e) Called for a response within 21 days.

5.3. On 5 September 2013, after the first Respondent failed to respond to the allegations set out in the Commission's letter dated 12 August 2010, the Provincial Office forwarded a follow up allegations letter requesting a response to the allegation of the letter dated 12 August 2010. The first Respondent's policy and procedures for the conducting of searches on employees was also requested. A period of seven days was given to the first Respondent, the first Respondent therefore had until 12 September 2013 to forward its response. On 6 September 2013, the first Respondent, through its attorney (Rontgen & Rontgen Incorporated) sought an extension to the response date, which date was extended to 27 September 2013. The reason for the extension was to allow for consultation between the first Respondent and its attorney.

5.4. On 26 September 2013, a letter of response was received from the first Respondent's attorney. In brief, it was recorded in the letter that Mr Steve Gavagnin[8], was not present at the time of the search and cannot therefore comment on what he did not witness. However, that according to several telephone calls made to him by the fourth Respondent, he believes the following to have transpired:

5.4.1. There was an allegation of theft made by one of the guest, Ms Hellen Baylie;

5.4.2. That the fourth Respondent had called security to deal with the said theft allegation;

5.4.3. That the Complainant and her two colleagues asked to be "body searched" as they denied the said allegations;

5.4.4. That Mr Gavagnin instructed the fourth Respondent that if the three women consented to the said search, she must proceed with it and that it should be conducted by the second Respondent's employees;

[8] The Director of the Spa.

5.4.5. Mr Gavagnin was never informed nor was he aware of any "naked body search". Further that he was only aware of a "normal body search"; and

5.4.6. That one of the women, the Complainant, had refused to be searched. As a result of the refusal, Mr Gavagnin informed the fourth Respondent to order all parties involved to discontinue the search of the Complainant.

5.4.7. That while on the phone with the fourth Respondent, the phone was handed to one Bertha Motsilanyane, a shop steward who informed Mr Gavagnin that the Complainant has withdrawn her objection and is now willing to be searched.

5.4.8. In addition, the first Respondent's attorney stated in the same letter that the search was not conducted by any personnel directly involved with the first Respondent. It was recorded further that as far as Mr Gavagnin is concerned, the search was conducted in a respectable manner and "nothing was done out of the ordinary". The letter further records that at not stage did any person involved with the first Respondent violate the Complainant's right to dignity and/or any other rights. Lastly, the letter records that "Falcon Security" is an independent security company and that the first Respondent cannot be held responsible for their (second Respondent's) actions.

## 6. Response from the Second Respondent

6.1. The second Respondent addressed correspondence[9] to the Provincial Office in response to the allegation levelled against it.

6.2. In its correspondence the second Respondent stated the following;

a) "A complaint was received from the Manager on duty at the Spa at the GPCC[10] regarding missing money from a guest locker;

b) The Complaint was attended by our personnel on duty;

c) During the interview with the abovementioned ladies, (Complainants), two of the ladies requested to be searched;

d) One of our security managers then went to fetch a female security officer to conduct the search;

e) On arrival of the female officer, she went into the change room with the ladies, where they took off their clothes, our security officers are adamant that she never requested them to take their clothes off. She also stated that she never searched their person and also only searched their person (sic) and belongings.

f) There were no males in the change room at the time.

g) On completion of our investigation we concluded that there was no malicious intent from our female security officer who concluded the searches."

6.3. Moreover, the second Respondent stated in its response that it had identified a need for additional training for its staff members to be more sensitive when conducting searches. The second Respondent also acknowledged that the female security guard/officer (the third Respondent) should have informed the ladies to put their clothes back on and should not have carried on with the search until they were fully clothed.[11]

9 Dated 16 August 2010.

10 Gary Player Country Club.

11 Page 2 of letter dated 16 August 2010.

6.4. The second Respondent further stated that they had taken corrective measures by compiling a *"Search* Policy & Procedure" approved by the Executive Management of Sun City Resort. The said policy accompanied their letter of response.

6.5. The policy does not allow any strip searches to be conducted. It states that the person who is searched must be treated with respect and in an ethical manner. The policy states further that where there is a possibility that a suspect has hidden stolen property under their clothes, the suspect may be escorted to the SAPS, alternatively, SAPS is to be contacted to assist with the search.

6.6. It was also stated by the second Respondent that all their current employees underwent training on the policy. Moreover, that all new employees receive training on the policy during their induction process.

## 7. Statement of Witnesses

7.1. The Provincial Office wrote a letter[12] to the Station Commander of the SAPS in Sun City with the view of obtaining sworn statements made by the Complainant and other witnesses.

7.2. In the response, sworn statements of witnesses,[13] the Complainant and the Respondents were received.

7.3. The sworn statements that were received from the SAPS included the statement of Rhonda Kwele, the fourth Respondent (the line manager), the third Respondent, the Complainant and two of her colleagues. The fourth Respondent's statement confirmed that a naked body search was conducted on two of the Complainant's colleagues in her presence and that she was later informed by the third Respondent that the Complainant had also undergone a naked body search, though this did not take place in her presence.[14]

7.4. The sworn statement from the third Respondent, confirmed that she conducted a naked body search on the Complainant and her two colleagues and that she specifically requested that the Complainant undress after the Complainant's line manager left the room. She stated that the Complainant had initially refused to undress because she stated that she was menstruating, but that she later complied when everyone had left the staff changing room where the search was being conducted. The third Respondent stated that the Complainant and her colleagues had, in the presence of her supervisor, requested a body search.

7.5. The Complainant made a sworn statement to the SAPS that the line manager, the fourth Respondent, in the presence of the female security officer, the third Respondent, requested that the Complainant and her two colleagues strip naked in order for a search to be conducted on them. The Complainant's two colleagues complied but the Complainant initially refused because she indicated that she was menstruating. The Complainant stated that the third Respondent told her that if she did not undress, she (the third Respondent) would undress the Complainant herself. The Complainant stated further that she was told that if she did not comply, she would be deemed to have stolen

[12] 18 August 2010. A letter of reminder was sent on the 1st of September 2010 and a response was received on the 9th of September 2010.

[13] The two colleagues and the guest Ms Hellen Bailiey.

[14] Dated 6 July 2010.

the money that was sought to be recovered. The Complainant stated that she complied and afterwards, she and her two colleagues were led to the line manager's office and were requested to sign a statement that they consented to being searched.

7.6. The Complainant's colleague, Monica Tlou, stated in her sworn statement that the Manager, the fourth Respondent and the female security officer, the third Respondent, requested that she and her two colleagues undress in order to be searched. She stated that the Complainant initially refused because she said she was menstruating but later complied after they exited the staff room. Afterwards, she and her two colleagues were led to the Manager's office were they were asked to sign a statement that they consented to the search.

7.7. Moeng Bogaisi Jacobeth, the Complainant's colleague also made a sworn statement stating that the manager requested that they should be searched and they agreed. She stated that their bags were initially searched and afterwards, the third Respondent, the security guard, in the presence of the manager asked them to undress, including the removal of their underwear. She stated further that she and her other colleague left the Complainant in the staff room where they were being searched because the Complainant had initially refused to be searched because she was menstruating. She stated that they were later called by the Manager and handed a note saying they agreed to be searched. Ms Jacobeth denied in her statement that she and her colleagues consented to a naked body search.

## 8. Applicable International Legal Framework

8.1. The Universal Declaration of Human Rights, 1949 provides as follows:

Article 1

*"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*

Article 5

*"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

Article 12

*"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

8.2. Globally, women are recognised as victims of inherent disadvantage and harm in society. As a result, the United Nations General Assembly passed a declaration to eliminate violence against women. The Assembly defines violence against women as:

*'any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.'*

The declaration notes that that this violence could be perpetrated by assailants of either gender.

8.3. The Protocol to the African Charter on Human and Peoples' Rights also advocates for the elimination of discrimination against women in Article 2, which provides as follows:

*"Elimination of Discrimination Against Women*

*1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:*

*a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;*

*b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;*

*c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;*

*d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;*

*e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.*

*2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."*

8.4. The above protocol requires state parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. Article 3 of the Protocol recognises the dignity inherent in all human beings and Article 4 provides that:

*'every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.'*

8.5. The international protections offered by the Universal Declaration and the African Charter are also enshrined in the domestic constitutional framework of South Africa.

## 9. Constitutional framework

9.1. The preliminary assessment of the Provincial Office indicated that the rights alleged to have been violated are section 10 (the right to inherent human dignity), section 12 (the right to Freedom and Security of a person), section 14 (the right to Privacy) and section 35 (1) (a) (the right of arrested or detained persons not to be compelled to make any confession or admission that could be used in evidence against them) of the Constitution. Each of these rights as well as the constitutional values applicable to this complaint are set out below.

9.2. Section 1(a) – Foundational values

Section 1(a) of the Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, being the foundational values of the Constitution and forming the bedrock upon which the Constitution is based.

9.3. Section 7 – Rights

Section 7 (1) stipulates that the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.

9.4. Section 10 – The right to human dignity

Section 10 recognises the right of everyone to have their inherent dignity respected and protected.

9.5. Section 12(a), (c) and (e) – The right to Freedom and Security of the Person.

Everyone has the right to freedom and security of the person, which includes the right:

- not to be deprived of freedom arbitrarily or without just cause {subsection(a)};
- to be free from all forms of violence from either public or private sources {subsection (c)}; and
- the right not to be treated or punished in a cruel, inhuman or degrading way {subsection (e)}.

9.6. Section 14 – The right to Privacy

Section 14(a) recognises the right of every person to privacy, which includes the right not to have their person searched.

9.7. Section 35 (1) (c)

This section recognises the right of everyone who is arrested for allegedly committing an offence not to be compelled to make any confession or admission that could be used against them.

## 10. Relevant Case Law

10.1. Human Dignity

In *S v Makwanyane,*[15] O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity in the following terms:

"The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in Chapter 3."[16]

[15] *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) [1995] ZACC 3; 1995 (3) SA 391 (CC) at para 327.

[16] Id at para 328.

In the case of *Thomas and Another v Minister of Home Affairs and Others*[17] it was held that:

*"...the value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhumane or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it clear that dignity is not only a value that is fundamental to our constitution, it is a justifiable and enforceable right that must be respected and protected."*

10.2. Privacy

In the case of *Bernstein v Bester* NO[18], Ackerman J mentioned some examples of breaches of privacy and specifically included *"peeping at a woman while she is undressing."*

10.3. The link between the right to dignity and the right to privacy

In the decision of *National Coalition for Gay and Lesbian Equality,* the court recognised a close link between the rights of dignity and privacy, holding specifically that the "...rights of equality and dignity are closely related, as are the rights of dignity and privacy."[19]

10.4. Freedom and Security of a person

Similar to the instant case, the case of *Beard v Whitmore Lake School District*[20] related to the unreasonable nature of a search. In that case a student reported that $364 had been stolen from her gym bag during a physical education class. In response to the alleged theft, teachers searched the entire class of 20 boys and five girls in their respective locker rooms. Boys were required to undress to their underwear. Similarly, girls were required to undress in front of each other. At the conclusion of the search, no money was found.

A suit was filed by the American Civil Liberties Union of Michigan on behalf of students impacted by the search claiming Fourth Amendment rights violations against unreasonable search and seizure and a Fourteenth Amendment rights violation involving an equal protection violation.

The case was ultimately ruled on by the Sixth Circuit Court of Appeals. The Sixth Circuit Court focused on several factors that made the strip search unreasonable. One, recovery of money was the primary basis for conducting the search, which did not, in the court's opinion, pose a health or safety threat. Secondly, the search did not involve one or two

[17] *Thomas and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 35.

[18] 1996 (2) SA 751 (CC) at [71].

[19] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998).

[20] Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 601 (6th Cir. 2005)

students but rather a large number of students who did not consent to the search. The court emphasized that school leaders have a real interest in maintaining an atmosphere free of theft but a search undertaken to find money serves a less weighty governmental interest than a search undertaken for items that pose a threat to the health and safety of students.

## 11. Domestic Legislation

11.1. Private Security Industry Regulation Act[21] (the Act)

The Act establishes an Authority that oversees the Private Security Industry. The primary objects of the Authority, given in section 3, are "to regulate the private security industry and to exercise effective control over the practice of the occupation of security service providers in the public and national interest and the interest of the private security industry itself, and for that purpose to promote a legitimate private security industry which acts in terms of the principles contained in the Constitution and other applicable law."

11.2. The Code of Conduct[22] issued in terms of the Act.

11.2.1. Section 8(1) makes provision for the general obligations of the private security industry towards the public and provides as follows:

*A security service provider must at all times act in a manner which:*

*a) does not threaten or harm the public or national interest…*

11.2.2. Further, section 8 (2) provides that:

> *A security service provider may not infringe any right of a person as provided for in the Bill of Rights and, without derogating from the generality of the foregoing –*
>
> *…c) may not break open or enter premises, conduct a search, seize property, arrest, detain, restrain, interrogate, delay, threaten, injure or cause the death of any person, demand information or documentation from any person, infringe the privacy the communications of any person, unless such conduct is reasonably necessary in the circumstances and is permitted in terms of law.*

## 12. Analytical framework

12.1. The South African Constitution places human dignity and equality as the central theme to our constitutional order.

12.2. According to Currie and De Waal, 'the determination of whether an invasion of the common law right to privacy has taken place is a single enquiry. It essentially involves an assessment as to whether the invasion is unlawful.'[23] The assertion has also been made that in the case of female prisoners' expectation of privacy, the courts have held that gender and gender differences must matter because the courts imbue women with a sense of modesty and a greater need for privacy than men.[24]

[21] 56 of 2001.

[22] Of 2003.

[23] Currie I & De Waal J; Bill of Rights Handbook 6th ed (Juta & Company Ltd 2013) at page 295.

[24] Jurado, R, "The essence of her womanhood defining the privacy rights of women prisoners and the employment

12.3. When a constitutional right is infringed, it is important to determine whether such infringement is justified in terms of section 36 of the Constitution.

12.4. The Limitation of Rights

Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

a) The nature of the right;

b) The importance of the purpose of the limitation;

c) The nature and extent of the limitation;

d) The relation between the limitation and its purpose; and

e) Less restrictive means to achieve the purpose.

12.5. Interpretation of the Bill of Rights

Section 39 of the Constitution provides that, when interpreting the Bill of Rights, a court, tribunal or forum –

a) Must promote the values that underlie an open and democratic society base on human dignity, equality and freedom;

b) Must consider international law; and

c) May consider foreign law.

12.6. When considering the justifiability of a limitation it is necessary in terms of the section 36 limitation clause to carry out an analysis, weighing up the extent of the violation against the purpose thereof

12.7. In the present matter, to determine whether the dignity of the Complainant was impaired, the question that should be asked is whether the conduct diminishes the feelings of self-worth of the Complainant. A strip search is generally humiliating, uncomfortable, and of an invasive nature, and in the instant case affected the dignity of the three women.

12.8. The right to dignity is at the heart of the South African Constitution. It is the basis of many other rights. The basis is that of recognising that every person has worth and value and must be treated with dignity. This is also highlighted in the international treaties South African has assented, which are mentioned above.

12.9. This right to dignity is further relevant the specific social context in South Africa. In many instances, past and present, women's basic rights have been violated within society. Women are vulnerable to violence and unjust treatment due to economic inequalities and gross abuse of power as is evident in the instant case.

12.10. The Respondents allege that the strip search was conducted with the consent of the Complainant and her colleagues. The statements obtained from the SAPS contradict this claim. The evidence of the Complainant and threat of her colleagues are consistent with regard to the claim that only after the strip search was conducted did the manager attempt to obtain their consent, retrospectively.

rights of women guards", 1998-199 Journal on Gender, Social Policy and the Law – Vol 7 at 4.

12.11. The third Respondent confirmed in her statement to the SAPS that she requested the Complainant to undress in order for her to search the Complainant. This was subsequent to receiving instructions from the fourth Respondent.

12.12. The fourth Respondent also confirmed in her statement to the Police that she and the third Respondent were present in the room when the Complainant's two colleagues stripped naked to be searched. At no time did the fourth Respondent take steps to prevent the ladies from taking off their clothes, on the contrary, she instructed the third Respondent to conduct the body searches in her presence.

12.13. The first Respondent alleges in its response to the Commission that it cannot be held liable for the conduct of the third Respondent because she is employed by the second Respondent and no employee of the first Respondent was involved in the alleged incident.

12.14. The evidence obtained contradicts the statement of the first Respondent in many respects. Firstly, the fourth Respondent was an employee of the first Respondent when she was present in the room where the Complainant's colleagues took off their clothes to be searched. Her presence in the room without objection to the conduct of the ladies as well as her instruction to the third Respondent to proceed with the search confirms her association with the violation of the dignity of the Complainant and her colleagues and the first Respondent can be held vicariously liable for the conduct of the fourth Respondent. Secondly, the third Respondent, though an employee of the second Respondent, acted under instructions and in the presence of the employee of the first Respondent when the violation of the dignity of the Complainant's colleagues took place. When the fourth Respondent was later informed that the Complainant had complied with the request to be strip searched, the fourth Respondent gave no indication of her objection to this conduct.

12.15. The first and fourth Respondents' claim that the search was conducted with the consent of the Complainant and her colleagues is implausible given the evidence obtained from the Complainant and her colleagues and confirmed by the third Respondent's statement to the Police. The third Respondent stated that the Complainant initially refused to undress because she was menstruating. Indeed, in light of the Complainant's objections to being searched in this manner, which objections were testified to in the statements of her two colleagues, it is clear that the Complainant could not have given informed prior consent to the search procedure. It also seems unlikely that the Complainant would have consented to such conduct considering the impact on her dignity and privacy

12.16. Right to Privacy

A strip search constitutes an interference with the privacy of the individual concerned.

12.17. In *Berstein* above[25], it was recognised that common law recognises the right to privacy as an independent personality right. Privacy is therefore, a valuable aspect of one's personality. The right to privacy is protected in terms of both common law and the Constitution in South Africa. The right is however not absolute[26] as there are competing factors such as maintaining law and order that can bear a significant limitation on the right. A careful weighing up of the right to privacy and other factors is necessary.

[25] See fn 25 supra.

[26] Section 36 of the Constitution.

12.18. In the case of a constitutional invasion of privacy the following questions need to be answered: (a) Has the invasive law or conduct infringed the right to privacy in the Constitution? (b) If so, is such an infringement justifiable in terms of the requirements laid down in the limitation clause (Section 36) of the Constitution?[27]

12.19. The act of causing the Complainant and her colleagues to strip naked in the presence of the third and fourth Respondents and of one another, is undeniably and invasion of their privacy. The request directed at the Complainant and her colleagues to do so was unlawful in that it violates her constitutional rights to privacy and dignity. Even if we are to assume that the Complainant and her colleagues stripped naked without a request to do so, the presence of the third and fourth Respondents while they did so, without their raising objection thereto would also amount to wrongful conduct.

12.20. Members of the private security industry are required by law[28] to uphold the values enshrined in the Constitution. They are further prohibited from conducting strip searches.

12.21. Although only of persuasive authority in South Africa, the American case of *Whitmore*[29] is relevant in that, the court considered a similar search, conducted under similar circumstances, and held that such a search would only be justifiable in circumstances where there are health and safety concerns. In this case there were no health and safety concerns and the search was therefore not justifiable on those grounds.

12.22. Freedom and Security of the Person

Searching of any person that involves the exposure of that person's naked body, and in particular the most private parts thereof, to the gaze of another person, is degrading to the person being so exposed. The conduct of the third and fourth Respondents with regard to the Complainant and her colleagues was inherently inhumane, and amounted to a degrading assault upon their physical, emotional and psychological integrity.

## 13. Findings

Based on the analyses above, the Commission makes the following findings:

13.1. The search was conducted in a manner which was degrading in that it was a strip search. The fact that the search was conducted in the presence of others added to the indignity of the situation The Respondents' search of the Complainant and her colleagues constitutes a violation of their rights to human dignity, privacy and freedom and security of their person.

13.2. The Respondents have further contributed to the persistent and widespread violation of the rights of women in general.

13.3. Further, the Respondents' act of causing the Complainant and her colleagues to undress diminished the self worth, confidence and emotional well being of the Complainant and her colleagues.

13.4. The Respondents' conduct contradicts the values enshrined in the Constitution. In the case of the second Respondent, the Act specifically requires them to uphold the

[27] *S v Makwanyane* supra at para 102.

[28] See fn 22 supra.

[29] See fn 26 supra.

values enshrined in the Constitution. In the current constitutional dispensation, an unlawful interference with a person's right is a constitutional infringement. The second Respondent further failed to exercise its duties in line with the Bill of Rights as required by the Code of Conduct[30] prescribed by the Act.

13.5. Regarding the second Respondent, we find it sufficient that they have rolled out a policy that prohibits strip searches and that calls for intervention from the SAPS if a situation should arise requiring the conduct of a body search.

## 14. Recommendations

14.1. The Human Rights Commission Act[31] provides that:

*"The Commission may, in the manner it deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by it."*

14.2. In view of the findings set out above, the Commission recommends the following:

a) The first and second Respondents are directed to offer an unequivocal and unconditional written apology to the three affected women within one month of date of this finding;

b) The unequivocal and unconditional written apology is to be handed to the three affected women and also to be published in the local newspapers within one month of date of this finding;

c) The Private Security Industry Regulation Authority[32] is to provide the Commission with a Report within six months of date of this finding on the steps it intends to take to promote constitutional values in its operations;

d) The Private Security Industry Regulation Authority is also, in terms of sections 3(j) and (n) of the Private Security Industry Regulation Act, required to train their members to act in a manner that will promote the values of the Constitution and that will not violate the rights of any person. The Regulation Authority is further required to furnish their action plan in this regard to the Commission within six months of date of this finding; and

e) The Commission retains the ability to proceed to institute legal proceedings in an appropriate court of law should the recommendations listed above not be complied with within the timeframes stipulated.

[30] See fn 22, Supra.

[31] Section 15(1), of Act 54 of 1994.

[32] Authority established in terms of the Security Industry Regulation Authority Act 56 of 2001 to oversee the Private Security Industry.

## 15. Appeal

You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding. Your written appeal can be directed to either of the following two addresses or alternatively may be faxed to the number given below:

**Private Bag X2700**
**Houghton**
**2041**

**Signed in Johannesburg on the 20th day of December 2013**
**South African Human Rights Commission**

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