

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 Act¹, 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 Act², conducting its business from Plot 211, Donkerhoek, Rustenburg (the 2nd Respondent).

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).

¹ 71 of 2008.

² Id.

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 colleagues³ 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 guest⁴ 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 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 Bailley.

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;

3.2.12 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 Sowetan⁵ 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 woman⁶ 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.

⁵ Dated 07 July 2010.

⁶ Hellen Bailey.

⁷ Under CAS 49/07/2010.

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;
- 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 Gavagnin⁸, 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;

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

⁸ The Director of the Spa.

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 no 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 correspondence⁹ 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 GPCC¹⁰ 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;

⁹ Dated 16 August 2010.

¹⁰ Gary Player Country Club.

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

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.

¹¹ Page 2 of letter dated 16 August 2010.

7. Statement of Witnesses

7.1 The Provincial Office wrote a letter¹² 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

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 Bailey.

¹⁴ Dated 6 July 2010.

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 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 where 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

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

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.

¹⁷ *Thomas and Another v Minister of Home Affairs and Others*¹⁷; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 35.

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* NO¹⁸, 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

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)

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 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 Act²¹ (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 Conduct²² 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. . . .*

²¹ 56 of 2001.

²² Of 2003.

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

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.

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 rights of women guards" ,1998-1999 Journal on Gender, Social Policy and the Law - Vol 7 at 4.

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 based 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 Africa 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.

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* above²⁵, 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 absolute²⁶ 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.

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 an 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 law²⁸ 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

²⁵ See fn 25 supra.

²⁶ Section 36 of the Constitution.

²⁷ *S v Makwanyane* supra at para 102.

²⁸ See fn 22 supra.

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 analysis 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 values

²⁹ See fn 26 supra.

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 Conduct³⁰ 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 Act³¹ 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 Authority³² 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;

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.

(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.

15. **Appeal**

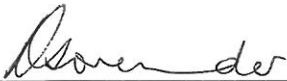
You have the right to lodge an appeal against this decision. Should you wish to lodge such an appeal, you are hereby advised that you must do so in writing within 45 days of the date of receipt of this finding. Your written appeal can be directed to either of the following two addresses or alternatively may be faxed to the number given below:

Physical Address:	The South African Human Rights Commission Appeals Section 33 Hoofd Street 4th Floor, Forum 3 Braampark Braamfontein 2017	Postal Address:	The South African Human Rights Commission Appeals Section Private Bag X2700 Houghton 2041
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Fax number: 011 403 0567 (Attention – Appeals Section)

The Chairperson, Adv M.L. Mushwana
South African Human Rights Commission

SIGNED AT JOHANNESBURG ON THIS 20TH DAY OF
DECEMBER. 2013.



Pregs Govender

Deputy Chairperson

South African Human Rights Commission