



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: MP/2011/0035

In the matter between:

Nyalungu JB, Mr
(former Educator)

Complainant

And

Dumisani High School Learners

First Respondent

Department of Education

Second 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 (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 as “HRCA”, provides the enabling framework for the powers of the Commission.

Section 9(6) of the HRCA 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, JB Nyalungu, is an employee of the second respondent and a former educator at Dumisani High School (the School) in Mkhuhlu, Mpumalanga.

2.2. The first respondents (herein after referred to as “the learners”) were learners at the School, who are alleged to have labelled the complainant “**a Witch**”. For purposes of this report and in line with the approach adopted by courts, the identity of the parents and the 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”.

2.3. The second respondent (hereinafter referred to as “the department”) is the Department of Education in Mpumalanga and employer of the complainant.

3. Background to the complaint

3.1. The Commission received a complaint from the complainant on 17 March 2011.

3.2. The complainant alleged that on 15 September 2011 at the School, the learners instigated allegations that he is a witch. A grade eight learner reportedly “cried and hysterically claimed that she was seeing the complainant carrying green snakes in both his hands and frightening her with the snakes as she was sitting in class”. The complainant was subsequently called to the principal’s office and the principal informed him formally about the allegations.

3.3. On 20 September 2011, the learners staged a protest and demanded that the complainant be fired or removed from the School as he allegedly practiced witchcraft. Later that day, the School Management, the complainant, the police, the local Induna and the School Governing Body held a meeting to discuss the matter. The complainant was subsequently offered an escort home for safety and he declined it as he felt safe.

3.4. As a result of the accusations, the complainant felt harassed for the whole week. He further felt that the relevant stakeholders, and in particular the department, failed to deal with the harassment at the workplace as, in his view, the department concerned itself only with restoring normality at the School.

3.5. The complainant submitted that the accusations "defamed him and tarnished his character and public image as a human being and a worker". Further that the accusations jeopardised his effectiveness to work within the same school and also impacted on his performance in the interviews for principal which he attended on 23 September 2011 at a nearby school within the same community. Finally, that the accusations affected his family and his image in the church where he

was a pastor and that his employer, the department, failed to inform him about the outcome of its investigation into the matter.

3.6. The complainant submitted that the conduct of the learners and the department violated his right to dignity enshrined in section 10 of the Constitution.

4. Steps taken by the Commission

4.1. After accepting the complaint and on 17 March 2011, the Commission wrote an allegation letter to the department as a party in the matter and in the latter's capacity as *locus parentis* of the learners.

4.2. The department failed to respond to the aforesaid allegation letter. The Commission consequently wrote three follow-up letters between March and July 2011 to the department requesting a response to the allegation letter.

4.3. On 05 August 2011, the department acknowledged receipt of the Commission's letters and directed the Commission to liaise with the department's District Director, Mr MJ Lushaba.

4.4. After numerous correspondences between the Commission and the department, the latter decided to resolve this matter by deploying the

complainant to its District Office with effect from 15 August 2011 and the complainant was informed accordingly.

4.5. The complainant, however, continued his duties at the school and reported for work at the District Office only later. He subsequently requested the Commission in writing to “continue with its mandate to address an infringement of his constitutional rights both as a human being and as an employee of the department”.

4.6. Thereafter, the Commission requested a report from the department on this matter, particularly in relation to the impact of the incident on the human rights of the complainant.

4.7. The department provided the Commission with a report dated 3 June 2013 (see attached copy of the report marked “A”). According to the report, the purpose of the investigation by the department was to establish whether:

(a) The complainant was accused of witchcraft, harassed, victimised and intimidated by the learners;

(b) The department has intervened or not in resolving the matter.

4.8. The department interviewed seven (7) co-employees of the complainant as well as the complainant in the process of its investigation.

5. Applicable Legal Framework

Constitutional and legislative Framework

5.1.1. Section 1 (a) of the Constitution

Section 1(a) of the Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms. These are the foundational values in the Constitution and they form the bedrock upon which the Constitution is based.

5.1.2. Section 10: 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”. This complaint is premised on allegations that the complainant is a Witch.

5.1.3. Witchcraft Suppression Act 3 of 1957

In South Africa, the practice of witchcraft/Wicca is outlawed by the Witchcraft Suppression Act, 1957, whose stated purpose is “to provide for the suppression of the practice of witchcraft and similar practices”. This Act prohibits various activities related to witchcraft, witch-smelling or witch-hunting. It is based on the Witchcraft Suppression Act 1895 of the Cape Colony, which was in turn based

on the Witchcraft Act 1735 of the United Kingdom. It criminalises a number of actions. The following two crimes, the most serious under the act, attract a fine of up to R400,000 or imprisonment for up to 10 years.

- (a) imputing to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard;
- (b) imputing (in circumstances indicating that a person professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or conjuration) the cause of death of, injury or grief to, disease in, damage to or disappearance of any person or thing to any other person.

As of 2012 the constitutional validity of the Witchcraft Suppression Act is under review by the South African Law Reform Commission.

Case Law

The Constitution requires the Commission to consider relevant legislation, including case law, in determining the nature, scope and possible violation of human rights.

(a) In *State v Patel*, 1973, “a farmer in the Northern Cape suddenly found that he had problems he could not account for - his crops failed and machines broke down for no known reason.

He answered the advertisement of a Mr Patel, who gave him two bottles, the contents of which he was instructed to examine and burn. He did so and, on his evidence, his problem ceased and his crops thrived. Patel was convicted in the magistrate's court of pretending to exercise supernatural powers for gain.

He appealed and the appeal court found that as he professed in the advertisement to be able to call up spirits and to counter witchcraft, he had been rightly convicted.

(b) In *Sokhulu v New Africa Publications Ltd t/a “The Sowetan Sunday World” and Others* [2002] 1 All SA 255 (W) Goldstein J stated as follows at 259c – d:

“The right to an unimpaired dignity is protected by the actio iniuriarum. Such can be invoked when a person is subjected to offensive and degrading treatment or is exposed to ill-will, ridicule, disesteem or contempt (Minister of Police v Mbilini 1983 (3) SA 705 (A) at 715G – 716A). In Brenner v Botha 1956 (3) SA 257 (T) Boshoff AJ (as he then was) said at 261 in fin – 262:

'In cases of verbal injury, otherwise than in cases of defamation, the words complained of must impair plaintiff's dignity and must be insulting in the sense that they must amount to degrading, humiliating or ignominious treatment.' *There cannot be an impairment of dignitas without unlawfulness and the question whether this requirement is satisfied or not is an objective one answered by having regard to the prevailing norms of society (De Lange v Costa 1999 (2) SA 857 (A) at 862 B – G).*"

(c) In Minister of Police v Mbilini 1983 (3) SA 705 (A) the following was stated at 715G-716A:

"It is trite law that one of the rights which are protected by the actio injuriarum is the right to an unimpaired dignity. Dignity was defined by Melius de Villiers in 1899 in his well-known work The Roman and Roman-Dutch Law of Injuries at 24 as – 'that valued and serene condition in his social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.' Further on at 24 and at 25 the following is stated:

'Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for moral and social worth to which he may rightly lay claim and of that respect and esteem of his fellow-men of which he is deserving, and against

degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such right'. *These passages have repeatedly been approved by the courts of this country as an accurate statement of the law in regard to the concept of injuria. See e.g. R v Umfaan 1908 TS 62 at 66 and 67; Walker v Van Wezel 1940 WLD 66; S v A and Another 1971 (2) SA 293 (T) at 297.*"

(d) In Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) the following was stated in paragraph 35:

"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 also asserts to inform the future, to invest in our democracy the 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.... Human dignity is also a constitutional value that is of central significance in the limitation analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected."

6. Analysis of the information received during the Investigation

It is common cause that:

- (a) the learners accused the complainant of Witchcraft;
- (b) The learners victimised, harassed and intimidated the complainant after accusing him of witchcraft;
- (c) In August 2010, before the complainant was accused of witchcraft, the School invited a pastor from Swaziland to provide a divine intervention as it was “under attack of evil spirits”.
- (d) The accusation took place from 15 September and culminated into a student protest on 20 September 2010 during which the learners called for the removal of the complainant from the School.
- (e) On 20 September 2010, the principal and other stakeholders in the School convened a meeting to discuss the matter. The meeting was also attended by the police and it resolved that the complainant was safe.
- (f) The department together with other stakeholders held meetings aimed at resolving the impasse at the School.
- (g) The department also provided psychological support to the complainant as well as the affected learners who were referred to Mapulaneng Hospital for psychological assessment.

(h) Although the department has reported that the learners were diagnosed with psychotic dissolution, the Commission is not in possession of a medical report confirming the said diagnosis as well as a report from the department on the impact of the allegations of Witchcraft on dignity of the complainant.

(i) The complainant lodged a grievance with the South African Teachers Union on 13 October 2010 and this process did not resolve this matter.

7. Findings

7.1. In terms of the law, Witchcraft Suppression Act 3 of 1957, Imputing to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or naming or indicating any other person as a wizard is a criminal offence. The effect of this offence is also that it impairs on the dignity of the person who is labeled a Witch. To this end, and in the absence of any medical report to the contrary, the Commission finds that the learners have consciously violated the complainant's right to human dignity entrenched in section 10 of the Constitution.

7.2. The department made considerable effort to address and normalise the situation at the School. This included the redeployment of the

complainant. However, the department failed to deal with impact of the witchcraft accusation on the dignity of the complainant.

7.3. The Commission find the department's decision to address the situation by redeploying the complainant unsustainable. Considering the scourge of witch –smelling and witch-hunting crimes in Mpumalanga, the redeployment has created a bad precedent as it suggests that the department shall in future respond to similar crimes by redeploying its officials.

8. Recommendations

In terms of the Human Rights Commission Act, the Commission is entitled to *"make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution."*

In view of the findings made above, the Commission recommends the following:

8.1. That the department acknowledge to the complainant that it has failed to deal with this matter properly in so far as it impacted on the violation of his right to dignity;

- 8.2. That the department formulates and furnishes the Commission with its policy framework on how it deals with issues around allegations of witchcraft, witch-smelling and witch-hunting within the school environment within three (3) months of signing of this report.
- 8.3. The policy framework referred to in 6.2. above should include department's program aimed at educating learners on the impact of witch-smelling and witch-hunting, and their impact on the right to dignity of the victim(s).
- 8.4. After three months from signing of this Report, and after having attended at the School, should the Commission have determined that there has not been a change in how issues around allegations of witchcraft, witch-smelling and witch-hunting within the school environment have been dealt with, a Public Hearing shall be initiated by the Commission.

9. APPEAL

You have the **right to lodge an appeal** against the findings in this report. 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:

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

**Private Bag X2700
Houghton, 2041**

SIGNED IN Johannesburg ON THE 5th DAY OF December 2013.



Deputy Chairperson
Commissioner P. Govender
South African Human Rights Commission