



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 Constitution¹ 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
- 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

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)

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

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 low risk⁷ 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.

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

⁶ See Case Notes (28-Jan-2010)

⁷ See Superspar Letter (30-March-2010)

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 measures 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 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

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

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

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.

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

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 substantiated 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.

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

¹⁴ See para 5.2.

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

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.

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.

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

¹⁷ *Id.* para 46.

¹⁸ *See* para 2.4

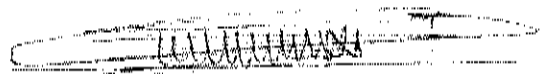
store and they are already granting exemption to those men carrying laptops.

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.

SIGNED IN: Johannesburg ON THE 31st DAY OF October 2012



COMMISSIONER
SOUTH AFRICAN HUMAN RIGHTS COMMISSION