



Proposed amendment to Human Rights Commission Act

Preliminary Comments to the Portfolio Committee on Private Members' Legislative and

Special Petitions
Tuesday, 13 October 2009

"The danger of these proposals is that they may impose obligations which are not implementable, and having raised people's expectation, it will be deemed as if the SAHRC is failing to discharge its duty or letting the citizens down." Comment from senior member of staff in the SAHRC

Introduction

1. The South African Human Rights Commission (SAHRC) received a request on Thursday, 8 October 2009 to come and discuss with the Portfolio Committee on Private Members' Legislative and Special Petitions, a Bill which has been proposed by the Hon. Vuyile Mntsho. The proposed Bill extends the Commissions power to litigate in competent courts and tribunals within the borders of South Africa, to include, international courts and tribunals as well. The proposed Bill raises a number of interesting factors for consideration.

2. South Africans have been vociferous in their condemnation of the manner in which Castor Semanya has been treated by Athletics bodies, the media and the like. She has been stripped of her rights to dignity and privacy through intense media speculation regarding her sex. The suggestion that she may be intersex has witnessed serious ignorance within the public domain as to the difference between sex and gender, and knowledge about intersex. The discourse has frequently used archaic and degrading language in discussing intersex persons. The SAHRC has responded to the debacle both publicly and behind the scenes with various role-players (see for example the Press Release dated, 11 September 2009, attached marked "A").

The mandate of the SAHRC

3. The mandate of the SAHRC is set out in section 184 of the Constitution.¹ This section states as follows:

The South African Human Rights Commission

Functions of the South African Human Rights Commission

184. (1) The South African Human Rights Commission must—

- (a) promote respect for human rights and a culture of 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.²

This broad mandate is further amplified in the Human Rights Commission Act 54 of 1994 (HRC Act). Additional functions and duties are set out in the Promotion of Equality and Prevention of Unfair Discrimination act 1/2000 (PEPUDA) and the Promotion of Access to Information Act 2/2000 (PAIA). The Commission is accountable to Parliament, more specifically it accounts to the Portfolio Committee on Justice and Constitutional Development in the National Assembly.

In terms of the Commissions mandate it regularly participates in legislative processes. The comments contained herein are based on human rights principles and law together with the experiences gained by the Commission in its daily work of interacting with various role-players and individual members of the public.

Current status of Commission

4. The end of September 2009 marked the end of the Commissions second term. The President has confirmed the names of the new Commissioners (except for Adv. Loyiso Mpumliwana). Currently the HRC does not comply with the HRC Act in that there are not five (5) full time commissioners. The proposed Amendment to the HRC Act may be of some significance and is certainly one which is of a policy nature. It would be legally appropriate that the proposed Amendment Bill is considered by the new Commissioners when they take office. Commissioners are responsible for providing strategic and policy guidance. The comments contained in this document are therefore the preliminary comments emanating from the Secretariat of the Commission. The

¹ Act 108/1994

² Ibid.

comments in no way bind the Commission to a particular position and are merely to stimulate and engage in debate on the proposed amendment Bill.

The need for an HRC Amendment Bill

5. Since the coming into force of the final Constitution there has been a need for the Human Rights Commission Act 54/1994 to be amended. This is occasioned by virtue of the fact that a number of sections in the Act speak to the interim Constitution and/or matters that were dealt within in the interim Constitution now need to be dealt with and/or clarified in the Act. The Commission has engaged regularly on the need for these amendments, however, to date, the Amendment Bill is yet to be placed before Parliament. It has recently been indicated publicly by the Deputy Minister of Justice & Constitutional Development, Andries Nel, that the Amendment Bill will be placed before Parliament shortly. It may pragmatic for the current issue to be dealt with through that process that is being driven by the Department of Justice and Constitutional Development rather than amendments being made in a piecemeal and ad hoc manner.

Objective of the proposed amendment

6. The objectives of the proposals states as follows:

"The proposals seek to empower the Commission on Gender Equality and the Human Rights Commission to be able to actively champion the gender and human rights of all South Africans when such rights are violated both in the Republic and outside the Republic of South Africa."

The Constitution and the Human Rights Commission Act 54/1994 (the Act) currently provides the necessary legal framework for the Commission to actively champion the human rights of all South Africans, including all non South Africans whose rights are violated *within* our domestic borders. The proposed objective seeks to empower the Commission to actively champion the rights of South Africans whose rights are violated in other legal jurisdictions.

7. The meaning of the term 'actively champion' is unclear. Where a South African's rights are violated abroad, there is nothing precluding the SAHRC from commenting on the matter, conducting advocacy and awareness on the issues raised by the violation, making inquiries with government on steps that are being taken and advising

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government on possible steps and remedies that could be taken, to mention but a few actions and activities. However there are constitutional limitations to these actions.

Need to define international courts and tribunals

8. Consideration of the proposed Amendment would be greatly assisted if the Commission had clarity as to which international courts and tribunals are being referred to. The Objective of the Amendment Bill implies that the proposed amendment is seeking to provide the Commission with the power to litigate in domestic courts abroad. However, the proposed amendment, as it is currently drafted, on a narrow interpretation would be providing the Commission with the power to litigate in international courts such as the International Criminal Court. The Commission is also unclear as to which international forums could be used to address matters of a civil nature.

The Constitution specifically limits the jurisdiction of the SAHRC to the Republic

9. Section 181(1) of the Constitution is clear. It states

"The following state institutions strengthen constitutional democracy in the Republic:
(i) The Public Protector;
(ii) The Human Rights Commission;"

Section 181(1) is repeated in Section 184 which states that the Human Rights Commission must promote, protect and monitor human rights in the Republic.

Section 2 of the Constitution upholds the supremacy of the constitution as the supreme law of the land. Law that is inconsistent with the Constitution is invalid. Thus, the constitutional framework specifically limits the Commission to carrying out its mandate inside the country. The proposed amendment may thus have to be accompanied with a constitutional amendment if it were to be further considered.

The approach of the SAHRC to human rights violations outside of South Africa

10. On a number of occasions the SAHRC has received complaints from South Africans abroad requesting our intervention. Complaints have been received from Ireland, Botswana, Swaziland, and the United Kingdom to name but a few countries. Whilst each complaint is dealt with on a case by case basis, taking into consideration the facts of the matter, the general approach of the commission is to provide advice and direct the complainant to the appropriate government authorities who are mandated to assist the official abroad.

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Thus, for example, should the SAHRC be contacted by an individual who is currently in a Brazilian prison having been caught transporting drugs and the person is complaining about the prison conditions in that country, the Commission would advise the person to contact the South African Consulate in that country. The Commission may also alert the relevant South African officials in the Department of International Relations Cooperation (DIRCO) to the matter. Should however, a family member of the imprisoned drug mule contact the Commission and complain that South African officials are not carrying out their duties in that they are failing to assist the family member, thereby causing a violation of the drug mules rights the Commission could certainly investigate the matter.

11. The Commission can thus take steps inside South Africa that may assist a South African abroad. This would be in keeping with its constitutional mandate to promote respect for human rights and a culture of human rights. Thus a matter that occurs abroad to a South African may have direct relevance and/or be an awareness moment to debate and promote human rights. For example, where a South African is found guilty of a crime in another country and is sentenced to death, the Commission does not have jurisdiction to launch legal proceedings in the foreign country to assist the person. The Commission may however actively comment and debate the issue of the death penalty.

Mandate of the Commission is not legally recognized in other countries

12. The Commissions' constitutional mandate and powers only have applicability in South African territory. It is therefore not in a position to use its powers of investigation and for these to be recognized within another country.

Commission's legal personality abroad would depend on the laws of the domestic country

13. Should South African law give specific power to the Commission to bring proceedings on behalf of South African abroad, it would be dependent on the other countries domestic laws whether this would be recognized.

The limitation on beneficiaries of the Amendment

14. The South African constitution is specifically crafted in a manner whereby the rights enshrined therein are applicable to everyone, subject to well recognized legitimate

limitations (e.g. the right to vote). Further consideration is needed as to who should benefit from this amendment. For example, should a person who has been granted refugee status in South Africa and whilst traveling abroad be in need of having her rights actively championed also not benefit from such an amendment? Alternatively, why should such a person be excluded?

The constitutive acts of international and regional courts and tribunals determine who has access to approach the court/tribunal.

15. In order to consider the proposed amendment the Commission would need to know which international courts and tribunals are being referred to. For example, at a regional level the African Court of Justice and Human Rights (ACJHR), which is not yet fully functioning, does not provide direct access to NHRIs. An extract from the Commissions' Regional Strategy Paper is attached marked "C". Thus at a regional level the SAHRC can not legally approach the Court in its own name or on behalf of an individual.

Financial implications of the legislation

16. There would be clear financial implications for the SAHRC if it were to actively embark on litigation in foreign jurisdictions asserting the rights of South Africans abroad. Legal proceedings outside of South Africa would require vast resources. Domestic lawyers in the foreign country would have to be used as the commissions' lawyers will all likelihood not have the rights of appearance in the foreign court. This would contribute to increasing the costs of such an exercise. Litigation would also be costly due to international travel and accommodation costs not occasioned in matters conducted in South Africa. Costs of litigating in most countries abroad are exorbitant. Thus the proposed amendment potentially has significant budgetary implications for the Commission which is provided with its funds by the State.

Comparative Analysis -The jurisdiction of other National Human rights institutions (NHRIs)

17. The Commission would require more time to conduct a comparative analysis on the jurisdiction of other NHRIs around the world. A brief perusal of some of the better known Commonwealth and regional NHRIs does not indicate that these institutions constitutive acts provide them with the jurisdiction to litigate in international courts,