

**WK211 Building Effective Human Rights Commissions**  
**Ashraf Mahomed , South African Human Rights Commission (SAHRC)**

Presentation: The "Protection" Mandate of the Human Rights Commission ó Tactics used successfully to advance the commission's strategies

Summary: The South African Human Rights Commission (SAHRC) is one of the national institutions established to entrench and strengthen the protection of human rights and freedoms. It was created to support and strengthen constitutional democracy. Access to courts is limited for various reasons and the SAHRC plays a pivotal role in using different forms of the protection mandate to promote respect for human rights, engender a culture of human rights and monitor and assess the observance of human rights in South Africa. It uses the Bill of Rights in the Constitution to engage with the state and private parties. The different forms of protection can be used innovatively to change perceptions and power relations, provide access to resources, skills and opportunities for vulnerable, marginalised and poor individuals and communities.

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The Case: The SAHRC is one of the national institutions established to strengthen the protection of human rights and freedoms. It was created to support and strengthen constitutional democracy. The SAHRC uses the different forms of protection at its disposal namely subpoena powers, public hearings, investigations, mediations and litigation to:

- (a) Address the denial and systematic violation of human rights and to
- (b) Promote respect for human rights, engender a culture of human rights and monitor and assess the observance of human rights in South Africa.

The Problem: The greatest threats to our democracy have been identified as poverty and inequality and therefore the SAHRC has adopted the following focus areas: Equality, Economic and Social Rights and Access to Information. It recognises that our society is still fundamentally unequal and deeply divided along racial lines and in terms of structural inequality. The vast majority of our people live in abject poverty and in hunger because of large-scale unemployment, lack of access to land, property, resources, education, health care and social services.

The Method: The SAHRC is a constitutional mechanism used successfully to pressure the state and private parties to effect change in terms of the values and principles that underlie the constitution. It endeavours to assist in building a country that is fair to all people (not only its citizens); a country in which all individuals and communities feel and know that they are valued members of society, and that they have rights that: respect human dignity, promote human development, foster human equality and advance human freedom. In short it seeks to assist in the achievement of constitutional equilibrium and adopts constitutional methods and a human rights approach, rather than alternative political means. It is for this reason that the SAHRC continues to strive for the alleviation of poverty and contribute to the achievement of inequality.

The Target: The SAHRC targets all legislation, policies, customs and conduct that present a threat to our constitutional democracy. This involves the systematic: denial of human rights (i.e. civil and political, economic and social rights); denial of access to land; placing huge obstacles in the way of development; discrimination against individuals and communities in terms of access to resources; denial of equal access to education, emergency housing, food,

water, etc. The SAHRC therefore seeks fulfilment of both positive actions and negative obligations on the part of the state and private parties.

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Consider where protection is needed. This usually involves situations where:

- Customs and conduct threatens the rights of others;
- There is abuse of power and skewed power-relations;
- Denial of access to resources, skills and opportunities; and Denial of exercise of rights

#### Slide Nine

The Problem further defined: South Africa has a long and tragic history of colonial conquest, racial domination, social injustice, political oppression, economic exploitation, gender discrimination, and judicial repression. The main casualties of this were human rights and freedom. The local context/environment is therefore a reflection of our terrible historical legacy and this manifests itself in terms of:

- Low consciousness of people regarding their human rights;
- Non-compliance with regulatory framework;
- Inaccessibility of justice system (including cultural alienation experienced by victims); and
- Limited access to courts

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Today South Africa is a constitutional democracy. The Constitution is the supreme law of the land and is adjudicated by the courts and ultimately by the Constitutional Court. Unlike our courts, the SAHRC is not an enforcement mechanism and therefore we need to be innovative about using the different forms of the 'protection' mandate and the tactics employed. The forms of protection and tactics used depend on the cases it handles/initiates.

Subpoena Powers: The first of these forms of protection under consideration is the subpoena powers of the commission. These powers are normally used in investigations and require any person by notice in writing to appear before it at a time and place specified in such notice and to produce all articles or documents in their possession or custody that may be necessary in connection with that investigation. In one case where a community was evicted and relocated to land without the provision of water, sanitation and adequate shelter resulting in a crisis situation, Commissioner Charlotte McClain subpoenaed officials from the provincial and local government including the Minister (MEC) for Housing and Local Government to appear at the site where the people/community were relocated and explain why they did not make adequate provision for the community. The subpoena and media attention sought to show the failings of the authorities in terms of both their positive and negative obligations. This caused much public embarrassment for the MEC and senior officials (the primary outcome of our tactic), and even though the Minister did not arrive at the site his officials were eager to conclude an agreement and provide the necessary administrative undertakings in writing to address the dire situation confronting the people/community - this secondary outcome was the result of a change of our tactics when the Minister failed to arrive. The impact was therefore immediately achieved with the resultant relief for this poor and vulnerable community.

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Public Hearings: Where a class of complaints are handled together, public hearings are normally held and this is used in conjunction with the subpoena power and investigation powers of the Commission. Witnesses are called to appear before the Commission and to produce any article or information that is relevant to the purpose of the hearing. Legal

representation of witnesses is permitted, they are entitled to peruse all documentation and cross-examination of all relevant evidence is allowed.

Recently, the SAHRC held public hearings into Human Rights Violations in Farming Communities. This was motivated by continuing unfair and arbitrary evictions; high-level of non-compliance with existing regulatory framework because of lack of state capacity to enforce same, coupled with high cost of compliance; inaccessibility of justice system (including ongoing problems with Legal Aid and cultural alienation experienced by litigants); the National Land Reform Mediation and Arbitration Panel not delivering the national system for addressing conflict in the way it was supposed to, because it became over-involved with the delivery of services on a case by case basis<sup>1</sup>; absence of independent tenure security contributing to widespread sense of social injustice, thereby threatening rule of law; failure to integrate current regulatory framework within government's overarching rural development strategy.

As a result of these hearings in each province, the SAHRC was able to *inter alia*, make recommendations to the executive and legislature, change its tactics by giving input into multi-stakeholder forums on implementation, and importantly change public perception.

#### Slide Twelve

Investigation: All complaints are assessed and a determination made as to whether the complaint constitutes a *prima facie* violation of, or threat to, a fundamental right. The SAHRC may request further information to be able to make the assessment. If the complaint falls within the jurisdiction of the commission, it then pursues remedies and looks at redress options taking into account both public (e.g. change in administrative procedures) and private sector (e.g. change in conduct) obligations.

One case involved juveniles who were held in custody together with adults awaiting trial prisoners in police cells with the result that they were severely abused and sodomised. This was confirmed by the district surgeon. The SAHRC conducted an investigation after reading about the matter in the media and immediately took a sworn statement from the district surgeon, held meetings with senior police offices, addressed letters to the Minister for Safety and Security. Our tactics involved referring certain key aspects of the case to appropriate statutory bodies that could more effectively and expeditiously deal with those<sup>2</sup> and the SAHRC focused on changing the policies and practices affecting juveniles in police custody. This came about as a result of the intransigence and lack of co-operation by officials in the police station. In so doing, we were able to focus our efforts and interventions and show them that we were not seeking to get anyone fired/dismissed. Once we were able to do this, the authorities agreed to abandon administrative procedures relating to juveniles in custody and they also undertook not to hold juveniles in police cells at all. Once we obtained these agreement and undertakings in writing, we then approached the Minister requesting that this be implemented in all police stations across the country. This systemic approach generated huge impact and changed public officials perceptions.

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<sup>1</sup> A Strategic Review of the Department of Land Affairs's Conflict Management System, Final Report - March 2001, 20.

<sup>2</sup> For example, those complaints involving police negligence were referred to the Independent Complaints Directorate of the South African Police Services for further investigation and redress.

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This involves a process through which the parties in dispute use the services of the SAHRC who controls the process without having any influence on the content, to help resolve a dispute or produce agreement or conciliation.

One example is the Railway Reserve matter. It involves eviction proceedings in the High Court against +-3000 families who occupied a rail reserve between two railway stations. The situation was dangerous for the unlawful occupiers but they had nowhere else to go and the state refused to make land and housing available. The Legal Resources Centre opposed the application for eviction and joined the three spheres of government to the court case. The parastatal in charge of the land refused to compromise, appeared intransigent and looked set to go to court.

When the SAHRC was served with papers as an interested party with a human rights mandate, we sought to resolve the disputes in the case and rectify the act or omission on the part of the parties emanating from the violation of property rights and threat of violation of housing rights in which they found themselves. We approached all the parties and suggested that a mediation be held under the auspices of the SAHRC. The applicant refused and we changed tactics and invoked Chapter 3 of the Constitution (Co-operative Government) that compels organs of state to co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another. The case was therefore diverted away from litigation through the intervention of the SAHRC and the parties are still finalizing the terms of a settlement agreement that will involve remedial steps that include the provision of land and services by the state for each household of that community. Costly and cumbersome litigation proceedings were therefore avoided through the mediation powers of the SAHRC.

### Slide Fourteen

The Commission may bring legal proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.

In the Edgemean matter, a black pupil was attacked by three white people at a public high school. The incident involved the use of racial slurs and physical violence. In a highly emotive context amidst much media attention, the SAHRC initially attempted to conciliate the dispute but later changed its tactics to that of representing the victim i.e. the black pupil, in the newly established Equality Court when conciliation failed and high-powered lawyers were appointed by the perpetrators to defend their conduct. We also encountered increasing resistance from the school authorities who issued press statements attacking the victim and the SAHRC. We then joined the perpetrators, the school and the Provincial Education Department as respondents in the court action before the Equality Court.

On one level our intention was to confront this denial and intransigence on the part of the perpetrators, the school and also the education department for failing to formulate adequate race integration policies and guidelines for public schools; and on another level our intention was to test the workings of the new court. We were instructed to seek *inter alia* a declaratory order from the court; relief for the victims in the form of a public apology; remedial steps that included an audit of the schools policies and practices relating to race; and damages of R10 000 (to a charity of the victims choice). This change in tactics forced the respondents to the negotiating table and they agreed to a settlement agreement on essentially all the terms of relief that we sought. This settlement agreement was made an Order by the Equality Court. Before coming to this symposium, I received formal notice the education department has now

finalized their race integration policy and will soon be implementing the new policy in all public schools.Slide Fifteen

Whilst the SAHRC has made a lot of progress towards achieving our objectives, there is still much more that we can do to entrench and strengthen our constitutional democracy. We have already identified the widespread poverty and inequality that inhibits the full and effective enjoyment of human rights and freedoms. The huge gap between rich and poor, between the haves and have-nots that coincides with race, threatens the existence and survival of our democracy. There are particular structural and institutional challenges facing the SAHRC. These include the fact that alternative mechanisms to Court are not delivering adequately on addressing conflict in the way they were supposed to; in practice, there is a lack of an integrated approach that integrates conflict management, prevention and counseling into the "Protection Cycle" that includes enforcement and; the failure to integrate the current regulatory framework effectively within government and private sector.

#### Slide Sixteen to Eighteen

The fulfilment of the Protection Mandate of the SAHRC consists of four broad phases namely,

- Assessment of human rights violations. ;
- The complaints handling process where the different forms of protection are executed and new and old tactics employed;
- Selection of remedies; and finally
- Monitoring implementation.

It is essentially an iterative process that constantly involves planning, acting, observing and reflecting. In a constantly changing environment this is often difficult to do this in a manner that guarantees constitutional equilibrium. It requires us to constantly change our thinking and approaches, and to consider new tactics under tried and tested methods of protecting human rights. It involves a shift in mindsets between the legal, social, political and economic domains and the recognition that all human rights are interrelated, interdependent and mutually supporting. Our tactics in human rights in terms of the protection mandate should mimic this notion if we are to achieve impact in our local contexts, wherever we find ourselves.

#### Slide Nineteen

Questions for discussion:

- Identify cases where you would be compelled to change tactics due to inadequacy of "protection" mandate or "the system".
- What tactics are possible? Identify and develop the indicators and triggers for new tactics in human rights arising from limited access to the courts.
- Whether and if so, how to use regional instruments to promote the "protection" mandate so that impact is achieved for vulnerable and marginalised people.

#### Slide Twenty

In conclusion, the protection mandate of the commission presents us with a serious mechanism to address the legacy of the past by providing us with opportunities for implementing practical and attainable plans and tactics for the protection and promotion of human rights.

Finally, I wish to thank the New Tactics Team for providing me with an opportunity to come to Ankara, Turkey to share these thoughts with you and for making it possible to meet such a profoundly inspirational bunch of human rights activists.