

Asia Pacific

Bangkok
Beijing
Brisbane
Hanoi
Ho Chi Minh City
Hong Kong
Jakarta
Kuala Lumpur*
Manila*
Melbourne
Seoul
Shanghai
Singapore
Sydney
Taipei
Tokyo
Yangon

**Europe, Middle East
& Africa**

Abu Dhabi
Almaty
Amsterdam
Antwerp
Bahrain
Barcelona
Berlin
Brussels
Budapest
Cairo
Casablanca
Doha
Dubai
Dusseldorf
Frankfurt/Main
Geneva
Istanbul
Jeddah*
Johannesburg
Kyiv
London
Luxembourg
Madrid
Milan
Moscow
Munich
Paris
Prague
Riyadh*
Rome
St. Petersburg
Stockholm
Vienna
Warsaw
Zurich

The Americas

Bogota
Brasilia**
Buenos Aires
Caracas
Chicago
Dallas
Guadalajara
Houston
Juarez
Lima
Los Angeles
Mexico City
Miami
Monterrey
New York
Palo Alto
Porto Alegre**
Rio de Janeiro**
San Francisco
Santiago
Sao Paulo**
Tijuana
Toronto
Valencia
Washington, DC

* Associated Firm

** In cooperation with

Trench, Rossi e Watanabe
Advogados

11 June 2021

Judge Róbert Spanó

President of the European Court, Grand Chamber
The European Court of Human Rights
Allée des Droits de l'Homme, 67000
Strasbourg,
France

Our ref: L. Naidu | 50814701

Your ref: *Mokgadi Caster Semenya v Switzerland* |

Case no: 10934/21

*By registered letter with acknowledgement of receipt and
facsimile (+ 33 3 88 41 27 30)*

Dear Judge Spanó,

Application for leave to intervene in *Mokgadi Caster Semenya v Switzerland* (Case no: 10934/21)

(A) Introduction

1. We write further to our letter dated 13 April 2021.
2. We confirm that we act on behalf of the South African Human Rights Commission (**SAHRC or the Commission**) in this application.
3. Pursuant to Article 36(2) of the European Convention on Human Rights and Rule 44(3) of the Rules of the Court, the Commission respectfully requests leave to intervene as third-party intervener in the matter of *Caster Mokgadi Semenya v. Switzerland* (Application no. **10934/21**), which was communicated on 18 February 2021.
4. The present case concerns the compatibility with the European Convention on Human Rights (ECHR) of measures which affect the dignity of certain women, and which directly discriminate on the grounds of sex and/or other status (namely, intersex and/or physical or biological characteristics and/or gender identity and/or these intersecting characteristics). The applicant complains of discrimination on grounds of sex and/or other status (namely intersex and/or physical or biological characteristics and/or gender identity and/or these intersecting characteristics), in breach of Article 14 in conjunction with Article 8 and/or Article 3. Further, the application refers to the adverse impacts of the Differences of Sex Development (DSD) Regulations on women from the Global South, presenting race and gender discrimination. The discrimination engages the dignity of the Applicant, breaching in particular the positive obligations to respect the Applicant's rights under Article 8 and her enjoyment of those rights without discrimination under Article 14.
5. For the reasons set out below, the SAHRC is uniquely placed to assist the Court in its consideration of these issues.

(B) Background and the mandate of the SAHRC

6. The SAHRC was established in 1995 as the National Human Rights Institution of South Africa. Its independence and impartiality are constitutionally entrenched.¹ The Constitution of the Republic of South Africa (“the Constitution”) requires the SAHRC to exercise its powers and functions without fear, favour or prejudice; and confers on it the mandate to promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in South Africa.
7. The SAHRC is fully compliant with the Paris Principles adopted by the UN General Assembly, and has consistently been accredited as an A-status NHRI by the Sub-Committee on Accreditation (SCA) which falls under the Global Alliance of National Human Rights Institutions (GANHRI).² The SAHRC prides itself on meeting the highest standards of independence and impartiality. It initiates strategic litigation, and regularly intervenes in domestic courts on issues of public importance. In doing so it assists Courts by providing impartial and reasoned submissions within its expertise.
8. In evaluating the claim for violations of Article 14 in conjunction with Articles 8 and/or 3, the Court will need to (a) understand the context of a Black woman from the Global South and (b) adopt an intersectional analysis on the grounds of sex, race and gender identity.
9. The SAHRC has expertise in this regard: it has been instrumental in building and working with a body of jurisprudence that analyses the meaning of non-discrimination, equality and dignity from an intersectional perspective.
10. This is particularly because human dignity and equality are recognised as founding values in the Constitution of South Africa and are enshrined in its Bill of Rights, in the framing of which the ECHR was influential. Section 9 of the Constitution entrenches the right to equality and section 10 provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.
11. In applying these provisions, the South African Constitutional Court has contributed significantly to comparative caselaw on human dignity and equality. It has also analysed and applied the concept of intersectionality, building on this Court’s judgment in *BS v Spain* (application no 47159/08).
12. The Commission has a specific mandate under the South African Equality Act,³ reflecting its considerable expertise in issues of equality, discrimination and dignity. The Commission has extensive expertise and experience in dealing with matters relating to unfair

¹ Chapter 9 of the South African Constitution provides (in section 181) for a limited number of key offices and institutions to “strengthen constitutional democracy in the Republic”. They have a high order of autonomy from the legislature and executive with important checks and balances. No person or government organ may interfere with their functioning. This has been further expanded through rulings by the Constitutional Court.

² The United Nations Office of the High Commissioner for Human Rights is a permanent observer on the SCA and serves as the secretariat to the GANHRI and its SCA.

³ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

discrimination on the grounds of race and sex. It is important to note that in South Africa sex / gender discrimination is expressly defined as including intersex persons.⁴

(C) Scope of proposed intervention

13. If leave to intervene is granted, the Commission currently envisions addressing the following issues:
 - (a) The violation of Articles 8 and Article 3 in conjunction with Article 14;
 - (b) Addressing discrimination based on sex or other status (particularly in relation to intersex, physical or biological characteristics, gender identity, or these intersecting characteristics);
 - (c) Addressing issues of intersectionality arising from the DSD Regulations disproportionately affecting women from the Global South; and
 - (d) The legal test to be applied in respect of the justifications necessary to ensure compatibility with, in particular, Article 14 of the Convention. The SAHRC has the experience in the South African jurisprudence on justification in the context of intersecting race and gender discrimination and can provide valuable insights to the court. Moreover, in the context of international arbitration, and public policy applied by domestic courts to it, South African jurisprudence may offer significant guidance which the SAHRC is well-placed to present.
14. It is the SAHRC's strong conviction that an intervention on these issues would assist the Court in examining the compatibility of the DSD Regulations with, in particular, Article 14 of the Convention in conjunction with Articles 3 and 8.
15. The SAHRC is aware of the constraints on interventions, and will not include any comments on the facts or merits of the case, but address only the general principles applicable to the determination of the case. For these purposes the SAHRC would request 15 pages.
16. We respectfully request leave to intervene accordingly.
17. The SAHRC remains at your disposal for any further information you may require. We can be contacted through our legal representatives at Baker McKenzie. Please direct all communication for the attention of both Xavier Salvatore (Xavier.Salvatore@bakermckenzie.com) and Romain Bizzini (Romain.Bizzini@bakermckenzie.com) at the following address:

Baker & McKenzie A.A.R.P.I

1 Rue Paul Baudry

75008 Paris, France

Tel: + 33 (0) 1 44 17 64 27

⁴ Judicial Matters Amendment Act 22 of 2005.

Fax: + 33 (0) 1 70 91 64 27

18. We would of course be willing to provide further information if it would be of assistance.



Lerisha Naidu

Baker McKenzie

+27 (0) 11 911 4323

Lerisha.Naidu@bakermckenzie.com

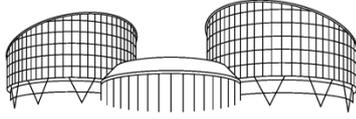


Zahra Al-Rikabi

Brick Court Chambers

+44 (0) 7379 3550

Zahra.Al-rikabi@brickcourt.co.uk



South African Human Rights Commission
Xavier Salvatore and Romain Bizzini
BAKER & McKenzie A.A.R.P.I.
1 rue Paul Baudry
75008 PARIS
FRANCE

THIRD SECTION

ECHR-LE14.8bP3 (mod.)
DAR/elf

31 August 2021

BY POST AND E-MAIL
(Xavier.Salvatore@bakermckenzie.com;
Romain.Bizzini@bakermckenzie.com)

Application no. 10934/21
Semenya v. Switzerland

Dear Madam,

I revert to my letter of 3 August 2021 and I should inform you that the President of the Section has granted leave, under Rule 44 § 3 of the Rules of Court, for you to make written submissions to the Court on behalf of *South African Human Rights Commission*.

In accordance with Rule 44 § 5, the President of the Section has directed that your submissions, which must not exceed ten pages of typescript, should reach the Court by **12 October 2021**. **Please note that no prolongation will be granted.** Furthermore, having regard to the nature of a third-party intervention, these submissions should not include any comments on the facts or merits of the case, but should address only the general principles applicable to the determination of the case. Lastly, I should remind you that submissions must be made in one of the official languages of the Court, English or French (Rule 44 § 6).

In accordance with Rule 44 § 6, your submissions will be forwarded to the parties, who will be given an opportunity to file written observations in reply.

I enclose, for your information, a copy of the subject matter of the case prepared by the Registry and the questions to the parties.

Yours faithfully,

M. Blaško
Section Registrar

Enc.

Posted on May 25, 2021

THIRD SECTION
Application no 10934/21
Mokgadi Caster SEMENYA
against Switzerland
Introduced on February 18, 2021
Communicated on May 3, 2021

SUBJECT OF THE CASE

The applicant is a South African athlete of international level, specializing in middle distance races (800 to 3,000 meters). She has notably won the gold medal in the women's 800 meters at the London (2012) and Rio (2016) Olympic Games. She is also three-time world champion in the discipline (Berlin 2009, Daegu 2011, London 2017).

Following a post-victory gender verification test in the 800 meters event at the Women's World Championships Berlin 2009, the International Association of Athletics Federations (IAAF) has made aware that it should henceforth lower its rate of testosterone below a certain threshold if she intended to match her preferred distances in international athletics competitions at to come.

Despite the serious side effects experienced by the treatment hormonal follow-up, she won in the women's 800 meters event during the Daegu World Championships (2011), and the Olympic Games London (2012).

SUBJECT OF THE CASE AND ISSUES - SEMENYA v. SWISS

Following an interim sentence in the Dutee Chand case of July 24, 2015,¹ in which the Court of Arbitration for Sport (CAS) had temporarily suspended the IAAF regulations then in force, in considering that this had not shown that the athletes hyper androgens had a significant advantage in terms of performance compared to other female athletes, the applicant ceased to follow her hormonal treatment. In 2016, she was once again crowned Olympic Champion in the 800-meter event.

On April 23, 2018, the IAAF published its new regulations entitled "Regulations governing qualification in the female category (for athletes with differences in sexual development) "(DSD Rules).

The applicant refused to accept this settlement which, in her view, required her to undergo hormonal treatments with known bad side effects, to reduce one's natural testosterone level as a condition to be able to participate in the female category during a competition international.

On June 18, 2018, she filed a request for arbitration before the CAS with a view to contesting the validity of said regulation.

By reasoned sentence of April 30, 2019, after a five-day hearing, the TAS dismissed the arbitration request. The majority of the members arrived at the conclusion that the DSD Regulation was certainly discriminatory, but that it was nevertheless a necessary, reasonable and proportionate means to achieve the goals pursued by the IAAF, namely to ensure fair competition.

On May 28, 2019, the applicant filed a complaint with the Swiss Federal Court civil action, arguing, among other things, that she suffered discrimination based on sex (and gender characteristics versus female athletes with DSD compared to female and male athletes without DSD), as well as violations of his human dignity and the rights of her personality.

¹ CAS 2014/A/3759, *Dutee Chand c. Athletics Federation of India (AFI) and IAAF*.

By a judgment of August 25, 2020, notified on September 7, 2020, the Federal Court dismissed the appeal, finding that the IAAF regulations constituted a measure that is suitable, necessary and proportionate to the legitimate aims of equity in sport, and maintaining the "protected class". Before the European Court of Human Rights, the applicant complains of violations of Articles 3 and 8, separately and in combination with Article 14, as well as Articles 6 and 13 of the Convention.

QUESTIONS TO THE PARTIES

1. In light of the allegations made in the Application, and particularly through the examinations undergone, is the obligation under the DSD Rules to take contraceptives to lower her testosterone levels, and by the effect allegedly stigmatizing and humiliating her, is the applicant suffering treatment contrary to her human dignity, physical integrity and psychic, and their social and gender identity, in violation of Article 3 of the Convention?

2. Essentially for the same reasons as those given under point 1), did the applicant suffer a violation of the right to respect for her privacy protected by Article 8 of the Convention? In addition, has she suffered an infringement of the right to practice one's profession (*Platini v. Switzerland* (dec.), no.526 / 18, §§ 52 et seq., 11 February 2020)?

3.1. Has there been a violation of Article 14, taken together with Article 3 and/or 8 of the Convention on the grounds of the discriminatory treatment alleged by the applicant, as a woman with naturally higher testosterone?

3.2. If so, on what criterion was the unequal treatment based? Was there a difference in treatment between people placed in analogous situations? Was there an objective and reasonable justification

for the alleged unequal treatment?

3.3. To your knowledge, how many top athletes are potentially covered by the new DSD Regulation?

3.4. In terms of sport, are there other regulations for correct certain beneficial physical characteristics (e.g. height) in order to ensure the fairness of the competition?

4.1. The allegations of violations above (questions 1-3), arise from interference with the exercise by the applicant of the rights protected by Articles 3, 8 and 14 of the Convention, or failure by Switzerland of its positive obligations to protect the applicant against treatment contrary to these provisions from private entities (in particular the "IAAF")?

4.2. If applicable, did the DSD Regulation constitute a sufficient legal basis, and is the interference allegedly caused by their implementation in pursuit of a legitimate aim within the meaning of Article 8 § 2, and was it proportionate and necessary in a democratic society?

4.3. Did the applicant have guarantees in this case i.e. sufficient institutional and procedural law) before which she was able to present her complaints, and did they render duly reasoned decisions taking into account the case law of the Court (*Platini*, cited above, § 62), including with regard to objectivity medical expert reports and the justification and proportionality of DSD regulation?

5. Has there been a violation of Article 6 (access to court) and/or 13 (effective remedy) on the grounds of the limited review by the Federal Supreme Court?