



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

File Ref No: WC/2008/0518

In the matter between:

Lorraine Van Der Steen

COMPLAINANT

And

Blombosch Homeowners Association

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) and (d) affords 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.

- 2.1 The Commission received a complaint from the Complainant that the Respondent had violated her constitutional right to equality.³
- 2.2 The Complainant is a 64 year old pensioner who suffers from severe muscle dystrophy, fibroses and secondary respiratory dysfunction.⁴ Consequently, the Complainant mobility has been seriously hampered by these disabilities. The Complainant cannot walk more than 10 steps and she has difficulty breathing since she has on average only 50% use of her lung capacity.⁵ These conditions were confirmed by a Medical Practitioner.⁶ Due to her disability, the Complainant cannot walk very far and travels by means of a mobile scooter which was prescribed by her physiotherapist and medical orthotist.⁷
- 2.3 The construction of speed bumps on the road by the Respondent has limited the Complainant's ability to carry out essential daily tasks such as buying food at the shops that are situated one kilometre from the

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 Section 9(3) *The Constitution of the Republic of South Africa, Act 108 of 1996*

⁴ Prof Celie Eales, Rapport Physiotherapist 14 April 2009 .

⁵ Johan Burger, Motivation for wheelchair for mobilization.

⁶ Medical Report.

⁷ Johan Burger, Motivation for wheelchair for mobilization & Prof C.J. Fales, Motivation for wheelchair mobilization 14 April 2009.

Complainant's house.⁸ The Respondent argues that the speed bumps where built as a last resort to force motorist to slow down.⁹

However, by failing to accommodate the needs of the disabled Complainant, the Respondent's actions have impacted on the Complainant to a graver extent than the other residents due to the very fact of her disability.

- 2.4** The Complainant alleges that the Respondent further failed to accommodate her disability by refusing to move a plant on the grass area next to the speed bumps which would provide enough space to allow the Complainant's scooter to pass the obstruction. The Respondent argues that if a safe passageway is made on the left side of the road they also have to make one on the right side and this would defeat the purpose of the speed bumps.¹⁰

It remains ambiguous why a passageway would defeat the purpose of the speed bumps and further why no other reasonable measure was taken by the Respondent to accommodate the needs of the Complainant.

The Complainant alleges that the Respondent continues to violate her constitutional right to equality on the ground of disability due to the fact that the Respondent has not reasonably accommodated her specific needs when the speed bumps where placed.

3 Legal Framework

3.1 Constitutional: Right to Equality

3.1.1 Section 9(3)

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender,

⁸ Correspondence 10-10-2008, Complainant's complaint as filed with the SAHRC

⁹ Correspondence 07-10-2008 : Letter from Hugo Otto, chairperson of the Blombosch Homeowners Association to Mr Van Der Steen.

¹⁰ Correspondence 07-10-2008 Letter from Hugo Otto, chairperson of the Blombosch Homeowners Association to Mr Van Der Steen.

sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

3.1.2 Section 9(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.

3.1.3 Section 9(5)

Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

3.2 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

3.2.1 Section 6

Neither the State nor any person may unfairly discriminate against any person.

3.2.2 Section 9

Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including—

(A) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;

(B) Contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;

(C) Failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

3.2.3 Section 13

- (1) *If the complainant makes out a prima facie case of discrimination*
 - (A) *the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or*
 - (B) *the respondent must prove that the conduct is not based on one or more of the prohibited grounds.*
- (2) *If the discrimination did take place*
 - (A) *on a ground in paragraph (a) of the definition of 'prohibited grounds' then it is unfair, unless the respondent proves that the discrimination is fair*
 - (B) *on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair-*
 - (i) *if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and*
 - (ii) *Unless the respondent proves the discrimination is fair.*

3.2.4 Section 14

- (1) *It is no unfair discrimination to take measures designed to protect or advance or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons*
- (2) *In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:*
 - (a) *the context*
 - (b) *the factors referred to in subsection (3);*
 - (c) *whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned*
- (3) *The factors referred to in subsection (2) (b) include the following:*

- (a) whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact or likely impact of the discrimination on the complainant;
- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) accommodate diversity.

4 Investigation

- 4.1** The Complainant alleges that her constitutional right not to be unfairly discriminated against has been violated.¹¹ Even though the decision she complains of has not been suffered at the hands of the state or a public body, it must be noted that section 9(4) of the Constitution and section 6 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* prohibits unfair discrimination even between private individuals.¹²
- 4.2** According to section 9 of *PEPUDA*, 'no person may unfairly discriminate against any person on the ground of disability'. The Complainant may argue that the Respondent has unfairly discriminated against her on the ground of her disability by 'failing to

¹¹ Section 9(3) *The Constitution of the Republic of South Africa*, Act 108 of 1996.

¹² *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, now referred to as *PEPUDA*.

eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.¹³ The Respondent's decision not to remove the plant that would grant the Complainant access to the road could certainly be considered as restricting her ability to enjoy equal opportunities. Disabled pensioners take a special position in our society and are a marginalised group that have been given specific attention in our Constitution.¹⁴ The Complainant has lost the opportunity to be as independently mobile as others are. It can be argued that the Respondent has failed to reasonably accommodate the needs of the Complainant.

4.3 The Complainant must prove that she is disabled within the meaning of section 9(3). Although there is no specific South African legislation defining the term, there are some legal definitions.¹⁵ Firstly, the *Social Assistance Act* provides us with a definition of a disabled person however this is a definition given in the context of maintenance grants:

*(...) any person who (...) owing to his physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.*¹⁶

4.4 Secondly, according to Section 39 (1)(b) the court must use international law when interpreting the Bill of Rights. The United Nations Convention on the Rights of Persons with disabilities provides that;

Persons with disabilities include those who have long term physical mental, intellectual or sensory impairments which in interaction with the various barriers may hinder their full and

¹³ Section 9(c) *PEPUDA*.

¹⁴ *Permanent Secretary Department of Welfare and Others v Ngxuzza and Others* 2001(85) SA 493 (SCA) .. paragraph 11 and 12.

¹⁵ S. Gutto, 2001. *Equality and non-discrimination in South Africa*, 1ed. New Africa Books. Page 164.

¹⁶ Section 1 in conjunction with Section 9(b) *Social Assistance Act*, No. 13 of 2004.

*effective participation in society on an equal basis with others.*¹⁷

4.5 Thirdly, according to Section 39 (1)(c) of the Constitution, the court may consider foreign law when interpreting the Bill of Rights. In the UK the Equality Act 2010 defines a person as having a disability if,

4.5.1 *Plaintiff has a physical or mental impairment, and*

4.5.2 *The impairment has a substantial and long-term adverse effect on the plaintiff's ability to carry out normal day-to-day activities.*¹⁸

4.6 According to this definition, the Complainant would be defined as disabled because she needs a mobile scooter to travel short distances in order to carry out everyday tasks such as buying food at the shops.

4.7 What constitutes 'unfair discrimination' for the purposes of Section 9 PEPUDA can be interpreted from the jurisprudence on Section 9 of the Constitution as discussed in the decision of *Harksen v Lane NO*.¹⁹

4.8 The first question in the *Harksen* analysis is whether there has been any differentiation between different groups of people. Even though the Respondent did not have the intention of singling out those with disabilities in such a way, its decision has had a greater impact on those with disabilities, as the facts of this case show. As a result, there is de facto differentiation. Although behind the Respondent's action to build the speed bumps there was a rational connection to the legitimate purpose of reducing speed on the road there appears to be no legitimate reason in refusing to remove the plant which could accommodate the Complainant's access, furthermore this would take up minimal resources. In the context of the constitutionality of

¹⁷ Article 1 *United Nation Convention on the Rights of Persons with Disabilities (UNCRPD)* Ratified by South Africa on 30 November 2007 (entered into force 3 May 2008).

¹⁸ Section 6(1) *Equality Act 2010*. (Chapter. 15).

¹⁹ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC), now referred to as '*Harksen*'.

certain legislation, the Constitutional Court stated in another equality case that;

*(...)the only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference(...)*²⁰

4.9 If both the legitimate purpose of regulating road speed and catering for those with disabilities could both be achieved and, in doing so, cost the Respondent very little in the way of time and resources then the Respondent's failure to do was arbitrary or irrational.

4.10 Alternatively, if there was a rational connection to a legitimate purpose, it could be argued that the Respondent has unfairly discriminated against the Complainant. Whether differentiation amounts to unfair discrimination requires a two stage analysis²¹:

4.10.1 *Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*

4.10.2 *If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.*

4.11 The de facto differentiation in this case is on the specified ground of disability. Thus, it must be presumed to be unfair discrimination.

4.12 Thus, the Complainant has a prima facie case for discrimination on the ground of disability. Subsequently, the burden of proof is on the

²⁰ *Jooste v Score Supermarkets Trading (Pty) Ltd* 1999 (2) SA 1 (CC) paragraph 17.

²¹ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) paragraph 53.

Respondent to show either that the discrimination did not take place as alleged or that the discrimination was fair.²²

4.13 The Respondent may try to claim that its actions were fair according to Section 14 of *PEPUDA*. Looking at the relevant factors in Sections 14(2) & section 14 (3) of *PEPUDA*, it does not appear that the Respondent can justify its actions. For example, disabled people have suffered from patterns of disadvantage in the past and continue to do so.²³ The refusal to accommodate the Complainant's disability is likely to have a great impact on her ability to independently undertake everyday tasks, such as going to the shops.²⁴ This is likely to impair her human dignity.²⁵ Importantly, whilst the installation of the speed bump clearly has a legitimate purpose, the same cannot be said for the refusal to remove the plant to accommodate the Complainant.²⁶ Furthermore, there are less restrictive means to achieve the purpose of restricting speed on the road whilst simultaneously allowing access to the road to those travelling by mobile scooter.

4.14 Finally, the *Harksen* analysis requires us to consider:

4.14.1 *If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.*

4.14.2 In *Harksen*,²⁷ Goldstone J stated that the limitations clause test involves 'a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality.' In this context, this analysis may have been subsumed into Section 14 of *PEPUDA*. As suggested above, the Respondent's decision to refuse to move the plant on the side of the road is disproportionate because it serves no rational purpose. The Complainant's case is particularly strong because of the

²² Section 9(5) *The Constitution of the Republic of South Africa*, Act 108 of 1996 & Section 13 *PEPUDA*

²³ Section 14(3)(c) *PEPUDA*.

²⁴ Section 14(3)(b) *PEPUDA*.

²⁵ Section 14(3)(a) *PEPUDA*.

²⁶ Section 14(3)(f) *PEPUDA*.

²⁷ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) paragraph 50

minimal impact accommodation of her disability would have on the Respondent's resources.

4.15 It is useful to compare the UK case law because the provisions in *Disability Discrimination Act 1995*²⁸ and *PEPUDA* are similar. For example, section 9(c) of *PEPUDA* talks about;

4.15.1 *(...)failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.*

4.16 Similarly, section 21(2) of the *Disability Discrimination Act (DDA) 1995* states that,

4.16.1 *Where a physical feature (for example, one arising from the design or construction of a building or the approach or access to premises) makes it impossible or unreasonably difficult for disabled persons to make use of such a service²⁹, it is the duty of the provider of that service to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to*

4.16.1.1 *remove the feature;*

4.16.1.2 *alter it so that it no longer has that effect;*

4.16.1.3 *provide a reasonable means of avoiding the feature;*

or

4.16.1.4 *provide a reasonable alternative method of making the service in question available to disabled persons.*

4.17 The only substantial difference between the two provisions is that whereas Section 21 of the *DDA* applies only to 'providers of services', section 9 of *PEPUDA* applies to all individuals. However, given that our concern here is predominantly to do with the reasonableness of the Respondent's actions, this difference is of no relevance. Therefore, English case law has relevance on this issue.

4.18 In *Ross v Ryanair Ltd*, the airline was found to have unlawfully discriminated against a complainant when it required him to pay to

²⁸ *Disability Discrimination Act 1995* UK (Chapter.50).

hire a wheelchair in order to get to the plane.³⁰ In this case, as well as in *Roads v Central Trains*,³¹ the question that the Court of Appeal posed was whether the respondent had 'taken such steps as it was reasonable for them to have to take in order to provide an alternative means of access for wheelchair users'.³² Moreover, an issue in question was whether, as far as reasonably practicable, the access enjoyed by the disabled was approximate to that enjoyed by the rest of the public.³³ These two issues mirror the Section 9(c) provision in PEPUA.

4.19 In *Ross v Ryanair Ltd*, making the complainant pay to hire a wheelchair treated him less favourably than others who did not have the same problem. The respondent was, therefore, guilty of unlawful discrimination. Moreover, in *Roads v Central Trains Ltd* the respondent had failed to make adequate access for those in wheelchairs to cross from one platform to another at a certain train station. Their proposed alternative was that the complainant should travel to another station where he could get a train which would arrive at the station in issue on the desired platform. The problem with this was that it could extend the complainant's journey by over an hour. The Court of Appeal decided that this alternative was not reasonable given that a taxi, assumed to be of no cost to the respondent, could transfer him from one side of the platform to another.³⁴ Buxton LJ mentioned that if he could take into account the cost of this taxi solution on the respondent then the case might not have been decided in the same way.³⁵

4.20 In the current case, the Respondent's actions are restricting the Complainant's access to the shops and from generally leaving her residence. In refusing to accommodate the Complainant, the Respondent is unfairly restricting her from enjoying equal opportunities to those people who are not disabled and who can travel over the

³⁰ *Ross v Ryanair Ltd* [2004] EWCA Civ 1751.

³¹ *Roads v Central Trains* [2004] EWCA Civ 1541.

³² *Roads v Central Trains* [2004] EWCA Civ 1541 paragraph 14.

³³ *Roads v Central Trains* [2004] EWCA Civ 1541 paragraph 30.

³⁴ *Roads v Central Trains* [2004] EWCA Civ 1541 paragraph 35.

³⁵ *Roads v Central Trains* [2004] EWCA Civ 1541 paragraph 46

speed bumps without difficulties. The Respondent is treating the Complainant less favourably on account of her disability. The fact that the speed bumps are preventing the Complainant from carrying out the most vital daily functions (e.g. purchasing food for herself) and that it would cost the Respondent nothing to accommodate the Complainant's disability, as in *Roads v Central Trains Ltd.* further highlights the unreasonableness of the Respondent's actions. Moreover, the speed bump acts as a barrier to the Complainant's interaction with society. It traps the Complainant in her home and tends to reinforce the idea, with the resulting harm to the human dignity and freedom of movement, that the disabled are less worthy of respect and should stay within the confines of their home.

5 Finding

In conclusion, the Respondent's actions constitute a violation of the Complainant's right to equality under the Constitution and *PEPUDA*. The unreasonableness of the Respondent's conduct is demonstrated by the minimal resources it would take to accommodate the Complainant's disability and the debilitating effect the Respondent's actions are having on the Complainant's daily life.

6 Recommendation

- 6.1** That the Respondent ensures that future construction involving the placing of speed humps, accommodates a space adequate for a wheelchair to move between the curb and speed hump for the disabled to pass more easily.
- 6.2** It is recommended that the current obstacle be removed from the passageways that are not on the main road to allow the Complainant and or other disabled bodies to safely navigate walkways. Modifications of the current situation should be made promptly so that further injustice is not perpetuated.
- 6.3** The rights of the disabled should be taken into consideration if further construction is affected.

6.4 The Respondent provides the Complainant with a letter of apology for the treatment of her situation.

7 Appeal Clause

Should you not be satisfied with this decision, you may lodge an appeal, in writing within 45 days of receipt of this letter. A copy of the appeal form is available at any office of the SAHRC. The appeal should be lodged with the Head Office of the SAHRC – contact details are as follows:

Physical Address:	Appeals Section 33 Hoofd Street 4th Floor, Forum 3 Braampark Braamfontein 2017	Postal Address:	Appeals Section Private Bag X2700 Houghton 2041
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SIGNED: JOHANNESBURG ON THE 02ND DAY OF OCTOBER 2012

B. J. Malatji
COMMISSIONER B J MALATJI
SOUTH AFRICAN HUMAN RIGHTS COMMISSION