FEATURE

The Role of the SAHRC in Facilitating Access to Justice through Litigation

Mohamed Shafie Ameermia and Peacemore Mhodi

Access to justice is a major issue, one receiving recognition locally, regionally and internationally. For instance, it is recognised as a fundamental human right in the Universal Declaration on Human Rights (UDHR). The UDHR declares that, as a human right itself, it is also a vital ingredient in the protection and enforcement of other human rights: 'everyone has the right to an effective remedy by the competent tribunals for acts violating the fundamental rights granted him by the Constitution or by law' (UDHR: article 8). Moreover, the Sustainable Development Goals (SDGs), particularly in SDG 16, call for all societies to 'promote peaceful and inclusive societies for sustainable development, [and] provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. In South Africa, the Constitution in section 34 guarantees the right to have access to courts.

Conceptualising the right of access to justice

The concept of access to justice has evolved from being understood narrowly as entailing accessing legal and other state services to being understood broadly as a right which ensures the attainment of social justice, economic justice and environmental justice, amongst others. The right of access to justice, particularly in the South African context, is regarded as a right that unlocks all the other rights in the Constitution.

There is, as such, a need to move from a formalistic, legalistic perspective on access to justice to a socio-economic perspective. This shift would help to ensure that more resources are directed to enabling the marginalised and vulnerable in society to have enhanced access to justice through extended legal services and assistance.

Challenges to accessing justice

Despite the legal recognition of the right of access to justice and its constitutional entrenchment, accessing justice remains but a wishful dream for a significant number of people. Globally, it is estimated that more than five billion people around the world are outside

the protection of the law (Task Force on Justice 2019: 18). Lacking access to efficient and effective justice institutions, they are at risk of exploitation by state and non-state actors. Barriers to access to justice include poverty, inequality, unemployment, illiteracy and discrimination (Bingham Centre for the Rule of Law 2014: 14).

In South Africa, the triple challenges of poverty, unemployment and inequality are the greatest barriers to access to justice. This means there is a correlation between being poor and being unable to access justice. South African society is beset by great disparities in wealth and an ever-widening chasm between the haves and have nots that prevent vulnerable groups from being able to access justice given that the cost of legal services is prohibitive to them. According to a research, the average black South African household would need to save a week's income in order to afford a one-hour consultation with a legal practitioner (AfriMAP & Open Society Foundation of South Africa 2005: 29).

Another barrier to access to justice in South Africa is lack of education. Access to economic resources is still largely defined by levels of literacy and education. Thus, the unpleasant nexus arises in which those who are poor are mostly illiterate and lack the capacity to understand and enforce rights, as a result of which they are not able to access justice. Numerous surveys point to the dearth of constitutional literacy in the country (Foundation for Human Rights 2014: 11). This means that, to address the access to justice deficit, it is imperative to bolster initiatives aimed at fostering constitutional literacy.

How to enable refugees' access to justice

TNational human rights institutions (NHRIs) are considered to play a salient role in protecting and promoting human rights locally and regionally. According to Cardenas (2003), NHRIs exist to 'promote' or 'protect' human rights. Hence, they play a crucial role in ensuring access to justice. In terms of the Paris Principles (1993), NHRIs are tasked with a myriad functions all aimed at ensuring access to justice for all human rights. This stems from the realisation that NHRIs are a vital cog among the institutional mechanisms created by states to further access to justice and advance the implementation and realisation of human rights.

The South African Human Rights Commission (SAHRC), an NHRI, is a state institution supporting constitutional democracy and mandated, among other things, 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 the Republic (Constitution: section 184(1)). The SAHRC is an avenue through which every person may access justice. It has exercised this function in various ways, including by receiving complaints, conducting national inquiries, and regularly monitoring the extent to which the state has taken measures to progressively realise the rights in the Bill of Rights.

The SAHRC is also vested with the powers to make ***amicus*** interventions to guide courts on how to interpret and apply international human rights instruments, and to pursue public interest litigation in its own name, or on behalf of a person or a group or class of persons (South African Human Rights Commission Act 40 of 2013: section 13).

The selection of court cases below highlights how the SAHRC has used litigation as a means to further access to justice by vulnerable and marginalised persons in South Africa.

The SAHRC's use of litigation to enhance access to justice

The SAHRC defines vulnerable groups as those sectors of society with diminished and poor capacities in comparison to those of more empowered sectors of society. These groups are generally prone to socio-economic hardships, discrimination and human rights abuses. In view of that, and recognising that the right of access to justice deserves a broader definition if poverty and inequality are to be tackled meaningfully, the SAHRC has at times used litigation to foster access to justice.

For instance, it has intervened as a friend of the court in the High Court cases of ***Nedbank Ltd v Thobejane and related matters***, ***National Credit Regulator v Standard Bank*** and the Constitutional Court case of ***University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services and related matters.*** The common thread in these cases is that they dealt with vulnerable members of society.

1. University of Stellenbosch

The case of ***University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others and related matters*** 2016 (6) SA 596 (CC) (***University of Stellenbosch***) culminated in the Constitutional Court, having arisen in the Western Cape High Court where the SAHRC had intervened as friend of the court to champion the human rights of people who are poor and vulnerable. The matter concerned low-income earners whose salaries were subject to emoluments attachment orders (EAOs) for the payment of oftentimes trifling debts, resulting in considerable rights violations. In terms of an EAO, a person's salary may be attached should he or she be in arrears and fail to make alternative arrangements regarding the settling of the debt.

The SAHRC was concerned mainly about the constitutionality of the provisions relating to EAOs in the Magistrates' Courts Act 32 of 1944 (MCA). It was the contention of the SAHRC that the absence of judicial oversight by a magistrate in the issuing of an EAO had an egregious impact on the rights of the marginalised and the vulnerable. The SAHRC's submissions were anchored on the fact that, in terms of international law, states have a duty to prevent and remedy human rights abuses committed on their territory by private parties, this through creating effective judicial measures to prevent or punish the infringement of a debtor's rights.

Judge Desai in the Western Cape High Court declared section 65J(2) of the MCA unconstitutional to the extent that it allowed for the issuing of EAOs without judicial oversight. Desai J said he frowned upon the practice of credit providers' 'forum shopping', that is, shunning courts that are accessible to debtors and their employers, and instead choosing courts that have no jurisdiction and are far removed from the debtor's influence. In that regard, Desai J held that in proceedings brought by a creditor for the enforcement of any credit agreement concluded in terms of the National Credit Act 34 of 2005, it would be impermissible for a judgment debtor to consent in writing to the jurisdiction of a magistrates' court other than that in which that debtor resides or is employed.

In the light of the fact that the Western Cape High Court had ruled on the constitutional validity of the MCA, the Constitutional Court had to confirm the order of constitutional invalidity made by the High Court. In ***University of Stellenbosch***, heard at the Constitutional Court, the SAHRC intervened as a friend of the Court and made submissions on the treatment of EAOs in international law and other jurisdictions, as well as the appropriate remedy for the court to order in these circumstances.

In a judgment handed down on 13 September 2016, the Constitutional Court did not confirm the order of constitutional invalidity but rather ordered the reading-in, and severance of, certain words in section 65J(2)(a) and (b) of the MCA to cure the constitutional defect. In essence, after 13 September 2016 no emoluments attachment order may be issued unless a court has authorised the issuing of such emoluments attachment order after satisfying itself that it is just and equitable and that the amount is appropriate.

Following ***University of Stellenbosch***, Parliament introduced the Courts of Law Amendment Bill on 11 May 2016 to address the abuse of emoluments attachment orders. On 31 July 2017, the President signed and assented to the Courts of Law Amendment Act 7 of 2017 (CLA). The CLA came into effect on 2 August 2018. The CLA is envisaged to bring about change in the landscape of EAOs to ensure more protection for judgment debtors by including safeguards in the debt collection process.

2. Thobejane

The case of ***Nedbank Limited v Thobejane and related matters*** 2019 (1) SA 594 (GP) (***Thobejane***) dealt with the practice by the banks to institute legal proceedings against defaulting home owners in the High Court

when magistrates' courts closer to debtors' homes also has jurisdiction to hear these matters. In this particular matter, some of the debtors' homes were situated hundreds of kilometres away in Limpopo and the North West. None of the debtors defended the actions against them, and the banks proceeded to apply for default judgments.

The central question for determination by the High Court in ***Thobejane*** was whether an obligation exists on financial institutions to consider the cost implications and principles relating to access to justice of financially distressed debtors when deciding on whether to institute legal proceedings in the lower or superior courts.

The SAHRC intervened as a friend of the court and argued that the right of access to justice dictates that financial institutions are obliged to take into cognisance the cost implications and access to justice of financially distressed people in choosing a forum where a matter should be heard. Thus, the SAHRC was of the view that inasmuch as it might be legally permissible for the high courts to hear matters that also fall within the jurisdiction of the magistrates' courts, the high courts should not always entertain matters falling within the jurisdiction of the magistrates' courts.

The view of the SAHRC was that creditors should not circumvent the need for inexpensive justice by refusing to approach an appropriate magistrates' court for their relief on the basis that such courts are allegedly ineffective. Thus, according to the SAHRC, the practice among financial institutions of resorting to a high court when a magistrates' court has jurisdiction constitutes a violation of the rights of distressed debtors, in particular their access to justice which, in the context of this matter, is a procedural right that can be used to safeguard other rights in the Bill of Rights, in particular the right to have access to adequate housing, under section 26 of the Constitution, and the right to property, under section 25.

The full bench of the Gauteng Division of the High Court in Pretoria agreed with the submissions of the SAHRC, and accordingly ordered that, with effect from 2 February 2019, civil actions and applications, where the monetary value claimed is within the jurisdiction of the magistrates' courts, be instituted in the magistrates' courts having jurisdiction, unless the High Court has granted leave to hear the matter in the High Court. The Court further held that the High Court has the power to transfer a matter to another court, if it is in the interests of justice to do so.

Recently, the High Court in Makhanda, Eastern Cape, ruled that in view of the fact that the National Credit Act 34 of 2005 (NCA) sought to 'balance the inequities arising from unequal bargaining power between large credit providers and credit applicants' and 'level the playing field between the relatively indigent and unsophisticated consumer and a moneyed and well-advised credit provider', access to justice would be better served if civil cases in the Eastern Cape arising from the NCA were instituted in the magistrate's court (***Nedbank Limited v Gqirana N.O and Another and other related matters***).

The ruling by the High Court in the Eastern Cape fortifies the SAHRC's reasoning that, in the light of the fact that South Africa is a resource-scarce country beset by deep-seated poverty, social economic inequalities and prohibitive costs of legal representation, access to justice is better served when courts are made accessible to the majority of the members of society.

The financial institutions involved in ***Thobejane*** have since appealed the judgment of the Gauteng High Court at the Supreme Court of Appeal. The SAHRC has been granted leave to intervene as a friend of the Court to advance arguments that, although litigants (in this case financial institutions) have a right to recover debts through the judicial system, the ***modus operandi*** of using courts that are situated hundreds of kilometres away from debtors' homes has adverse consequences for distressed debtors that deny their right of access to justice.

2. NCR

In ***National Credit Regulator v Standard Bank of South Africa Limited*** 2019 (5) SA 512 (GJ)(***NCR***) the SAHRC furthered the discourse on access to justice for consumers by making an ***amicus*** brief in the Gauteng Local Division of the High Court in Johannesburg, in which it argued that the common law principles of the right of set-off to satisfy debts that are owed by consumers is not applicable to credit agreements concluded in terms of the provisions of the National Credit Act 34 of 2005 (NCA).

The SAHRC submitted to the High Court that the application of the common law principle of set-off to credit agreements has a detrimental effect as it takes away the income that indigent debtors rely upon for subsistence, without their consent or without affording them the protection offered by the NCA. It was the contention of the SAHRC that this type of action removes the ability of debtors to plan their finances effectively for the future and/or to pay for basic necessities they require for survival.

The High Court found that credit providers are not entitled to rely on the common law principle of set-off to satisfy debts that are owed by consumers in terms of credit agreements that are subject to the provisions of the NCA. The SAHRC sees the ruling by the High Court as in line with the objects of the NCA, which are to advance the socio-economic welfare of South Africans. The judgment also shows how the SAHRC is pursuing its objective of protecting the rights of the marginalised through strategic litigation in the public interest.

Conclusion

The right of access to justice is indispensable to the full enjoyment of human rights in that it is a vehicle through which other human rights may be protected, promoted and enforced in the justice system. Ensuring access to justice is one of the critical component of a state's obligation under international human rights law. Unfortunately, due to the barriers mentioned earlier, many in South Africa, particularly the vulnerable and marginalised, have difficulty in exercising their constitutional right to have access to justice.

The problem has to be addressed in order to carry out the 2030 agenda of sustainable development, the goals of which are to eradicate poverty in all its forms, tackle inequality and promote shared prosperity. NHRIs are part of the mechanisms established to further access to justice. As an NHRI, the SAHRC plays a pivotal role in ensuring the realisation of the right of access to justice. In that regard, the SAHRC has sought to do so by using litigation as a tool to further access to justice for the marginalised and vulnerable in the society.

Advocate Mohamed Shafie Ameermia is a Commissioner, and Peacemore Mhodi a Research Advisor, at the SAHRC.

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