

RAE:OPINION:

O P I N I O N

EX PARTE : THE END CONSCRIPTION CAMPAIGN (ECC)

IN RE: THE COMMISSION'S ACT 8 OF 1947

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1. Consultant is the End Conscription Campaign ('ECC'). In terms of its constitution the object of the ECC is to 'organize around the demand for an end to conscription into the South African Defence Force and to oppose militarization'. Consultant may be described as an organization devoted to the pursuit of certain political objectives as it considers the pursuit of its object as being to 'contribute to the struggle against apartheid and help build a just peace in our land'.

 2. Consultant and its members have been the subject of harassment and repression on the part of the State and others since its formation. Members have been detained and/or restricted, smear campaigns of an ongoing nature have been conducted against consultant and most recently its financial affairs were the subject of an investigation into alleged offences in terms of the Fund Raising Act 107 of 1978.

3. Consultant believes that there is a possibility of a commission of inquiry, similar to the Schlebusch Commission of Inquiry, being appointed to inquire into its functioning and of anti-apartheid organisations. For this reason I have been instructed to examine the Commission's Act with special reference to the powers of commissions to subpoena witnesses.

The Provisions of the Act

4. The object of the Act is to provide for the conferring of powers on commissions of inquiry appointed by the State President to investigate matters of public concern.
5. The State President has the power to appoint commissions of inquiry to investigate matters of 'public concern'. In so doing he may in terms of section 1 (1):

- '(a) Declare the provisions of this act or any other law to be applicable with reference to such commission, subject to such modifications and exceptions as he may specify in such proclamation;
- and
- (b) make regulations with reference to such commission:

- (i) conferring additional powers on the commission;
- (ii) providing for the manner of holding or the procedure to be followed at the investigation or for the preservation of secrecy;
- (iii) which he may deem necessary or expedient to prevent the commission or a member of the commission from being insulted, disparaged or belittled or to prevent the proceedings or findings of the commission from being prejudiced, influenced or anticipated;
- (iv) providing generally for all matters which he considers it necessary or expedient to prescribe for the purposes of the investigation',

6. Criminal sanction is provided for the breach of any regulations made under section 1(1)(b). If a person contravenes a regulation contemplated by section 1(1)(b)(i), (ii) or (iv) that person may be sentenced to a fine not exceeding R200,00 or imprisonment for a period not exceeding six months. If a regulation contemplated by section 1(1)(b)(iii) is contravened the person responsible may be sentenced to a fine not exceeding R1 000,00 or imprisonment for a period not exceeding one year.

7. An offence is also created for any person who 'wilfully interrupts the proceedings of a commission or who wilfully hinders or obstructs a commission in the performance of its functions'. The penalty for such a contravention is a fine not exceeding R100,00 or imprisonment for a period not exceeding six months or both the fine and imprisonment.

8. Commissions of inquiry are given certain powers in respect of witnesses:

8.1 commissions of enquiry have the powers of a provincial division of the Supreme Court of South Africa to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects;

8.2 a summons for the attendance of a witness or the production of any book, document or object must be signed and issued by the secretary of the commission in the form prescribed by the chairman of the commission. It is served in the same manner as the summons for the attendance of a witness at a criminal trial in a superior court;

8.3 the chairman of a commission or an official of the commission to whom such power has been delegated may administer an oath or affirmation in respect of witnesses;

8.4 the law relating to privilege applies to witnesses giving evidence before a commission or to persons who have been summoned to produce a book or document for the commission;

9. The Act creates offences for recalcitrant witnesses. Any person summoned to attend and give evidence or to produce any book, document or object before the commission commits an offence if he or she:
- 9.1 fails to attend at the time and place specified in the summons or
 - 9.2 to remain in attendance until the conclusion of the inquiry or until that person has been excused by the chairman or
 - 9.3 having attended refuses to be sworn or to make affirmation as a witness or
 - 9.4 having been sworn or having made affirmation fails to answer fully and satisfactorily any question lawfully put to him or her or
 - 9.5 fails to produce any book, document or object in his or her possession or custody or under his or her control which he or she has been summoned to produce.
10. The Act provides a defence. The witness can escape conviction if he or she has 'sufficient cause' for such refusal. The onus of proving sufficient cause rests upon

the witness. Upon conviction such a person is liable to a fine not exceeding R100,00 or to imprisonment for a period not exceeding six months or to both the fine and imprisonment.

11. In addition, any person who, after having been sworn or having made affirmation, gives false evidence before a commission, knowing such evidence to be false or not knowing or believing it to be true shall be guilty of an offence. On conviction such a person will be liable to a fine not exceeding R200,00 or to imprisonment for a period not exceeding 12 months or to both the fine and imprisonment.

12. The Act provides that all evidence and addresses heard by a commission shall be heard in public but it further provides that the chairman may in his discretion 'exclude from the place where such evidence is to be given or such address is to be delivered any class of persons or all persons whose presence at the hearing of such evidence or address is, in his opinion not necessary or desirable'.

The Form of a Potential Commission

13. It is a possibility that a commission appointed to inquire into the activities of consultant may take a form similar to that of the Schlebusch Commission appointed in 1972 to investigate the affairs of the National Union of South

African Students, the South African Institute of Race Relations, the Christian Institute and the University Christian Movement. Its terms of reference were to inquire into and report on:

- (a) the objects, organization and financing of the four organizations in question and any related groups;
- (b) the activities of these organizations and groups and 'the direct or indirect results or possible results of these activities';
- (c) the activities of persons connected with these organizations or groups and the 'direct or indirect or possible results of those activities'; and
- (d) any related matter which in the view of the commission called for inquiry.

14. The regulations promulgated for the commission barred the public from hearings, made provision for concealing the identities of witnesses, restricted the right of witnesses to legal representation and made it an offence to disclose information related to the proceedings.

15. The workings of the commission have been described as follows:

'In practice, therefore, the commission received evidence in secret from the Security Police, the Bureau for State Security (BOSS), and other undisclosed sources. Later, persons connected with the organizations under scrutiny were summoned to submit to interrogation before the commission under threat of criminal penalty. Although witnesses were allowed to be accompanied by counsel, the role of counsel was limited to protecting his client from answering incriminating questions. Witnesses were questioned at length about their activities in the organizations in question, their private beliefs and associations and, in some instances, their private lives and lifestyles'. (John Dugard, Human Rights and the South African Legal Order, Princeton University Press, Princeton, New Jersey: 1978, 170-1).

16. If a commission similar to the Schlebusch Commission is constituted to inquire into the activities of consultant it is clear from the above that consultant will be unable to derive any political or other advantages from the commission. It is worth noting that as a result of the procedure adopted by the Schlebusch Commission, the Christian Institute took a decision not to participate in the proceedings at all. This resulted in the conviction of its chairperson, Dr Beyers Naude, and other members.

Challenges to a Commission's Operation

17. The regulations pertaining to a commission of inquiry are subordinate legislation and therefore may be attacked inter alia on the grounds of their unreasonableness. This will no doubt be difficult to do successfully because the purpose of the Commission's Act 8 of 1947, is to amplify, clarify and even to extend the State President's power

when exercising his prerogative' (S v Cleminshaw 1974 (3) SA 883 (T)).

18. In order to validly appoint a commission the State President must believe that the subject matter of the investigation is one of public concern. A court is competent to decide on whether the subject matter is of public concern: the test is an objective one (Garment Workers Union v Schoeman NO and Others 1949 (2) SA 455 (A), 463).
19. This being so, it can be inferred that the hearing of evidence should, unless compelling grounds exist, be heard publicly. This inference is strengthened by the provisions of s4 of the Act. At the same time it must be pointed out that the chairman of the commission has, in terms of this section, a wide subjective discretion to exclude any class of persons or any persons from hearings if he is of the opinion that their presence is not necessary or desirable.
20. Consequently, it might be possible to set aside regulations which provide for secrecy or the decision of the chairman to exclude the public. This, however, will be dependent on the circumstances and/or the terms of the regulations.
21. Should the proceedings of a commission be held publicly

consultant will have to decide on whether the public platform provided by the commission is worth making use of. It should be remembered however, that at the same time State functionaries will avail themselves of that public platform as well. In considering this issue it is worth remembering that the commission will no doubt proceed with or without the co-operation or participation of consultant.

Defences

22. There are only two possible defences available to a person summoned to appear before a commission or to produce documents, books or objects. These are first, the claiming of privilege and secondly, having sufficient cause to refuse to give evidence, answer questions or produce the required documents, books or objects.

Privilege

23. On the face of it the only privilege that members of consultant could claim would be to refuse to answer questions which may incriminate them in the commission of an offence. That privilege is limited is made clear by Hiemstra AJP in S v Naude 1977 (1) SA 46 (T), 50 A - B:

'Niemand hoof by homself to inkrimineer nie behalwe wanneer hy uit eie vrye keuse as 'n beskuldigde die getuiebanc betree het, of 'n vrywaring kan kry as hy eerlik getuig. Die voorreg teen selfbeskuldiging bestaan bowendien ook net teen bepaalde inkriminerende vrae en beteken nie dat iemand heeltemal kan weier om in die getuiebanc te gaan nie.'

24. This limited right to refuse to answer specific questions could be nullified if the commission was granted powers to indemnify witnesses from prosecution.
25. The legal representatives of consultant could, if summoned to give evidence or to produce any book, document or object, claim an attorney/client privilege.

Sufficient Cause

26. The defence that a witness has sufficient cause to refuse to testify or to produce any document, book or object is similarly limited. In S v Naude (supra, 49C) Hiemstra AJP dealt with the term as follows:

'Die neiging van sodanige gesag as wat daar is, kom daarop neer dat lojaliteit teenoor andere, of besware wat berus op politieke of godsdienstige oortuiginge, nie ingesluit is onder voldoende rede of verskoning nie'.



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