



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

02/03/2022
DATE


SIGNATURE

CASE NUMBER: 1448/2021

In the matter between:

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Applicant

and

AGRO DATA CC

First Respondent

BOSHOFF, FG

Second Respondent

JUDGMENT

GREYLING-COETZER AJ

INTRODUCTION

- [1] During May 2018 the applicant (hereinafter referred to as “the SAHRC”) received a complaint lodged by William Trinity Mosotho on behalf of his father, Mr Tubatsi Phepheng Piccinini Mosotho and other occupiers of De Doorn Hoek Farm. The complaint contained several allegations against the first- and second respondents’, *inter alia* that they in 2016 unilaterally introduced restrictions to occupiers’ use of borehole water and threatened to impound the occupiers’ cattle.
- [2] The SAHRC considered the complaint and concluded that the restriction of use of the borehole water disclosed a *prima facie* violation of the occupiers’ human rights.
- [3] Acting in terms of Sections 184(1) and 184(2)(a) – (b) of the Constitution, read with Section 13(3) of the South African Human Rights Commission Act 40 of 2013 (“the SAHRC Act”), the SAHRC commenced investigating said complaint. This investigation process resulted in an investigative report being compiled. In terms of this report, it was found that the respondents violated the occupiers’ right not to be denied or deprived of access to water, as contemplated in Section 6(2)(e) of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) and Section 27(1)(b) of the Constitution. It was further found that the respondents infringed on the occupiers’ inherent right to dignity and the right to have their dignity respected and protected.
- [4] The SAHRC in its report made the following directives:-
- “12.1.1 *That the first and/or second respondents restore the supply of borehole water to the occupiers within seven days of this report.*
- 12.1.2 *That, within thirty days of this report, the parties commence engagements in good faith on the management of water at the farm, with the view to ensuring an equitable share of this scarce resource.*

12.1.3 *The second respondent to supply with all the relevant information within fourteen days of this report, to enable them to engage meaningfully in relation to the issue of water management of the farm. Such information should include all the scientific reports at the disposal of the second respondent relating to the levels of the underground water on the farm, as well as the costs incurred by the second respondent in the supply of water to the occupiers.*

12.1.4 *That in the event that the parties are not able to reach an amicable resolution on the issue of water management on the farm, each party may approach a court of law for appropriate relief.”*

[5] The respondents’ inaction, by not heeding and implementing said directives, motivated the current application.

[6] It is important to briefly outline the relief sought by the SAHRC. In the first place the SAHRC seeks two declaratory orders namely that:

6.1 a general declaratory order be granted to the extent that the SAHRC’s directives issued in terms of Section 184(2)(b) of the Constitution are binding; and

6.2 the respondents’ refusal and/or failure to comply with the directives be declared unlawful and constitutionally invalid.

[7] The SAHRC further seek that:

7.1 the respondents be ordered to restore the supply of the borehole water to the occupiers of Portion 3 of the farm Doornhoek, 143 JT, Thaba Chweu at no cost to the occupiers within 7 (seven) days of the judgment;

7.2 the respondents within 30 (thirty) days of the judgment commence engagement with the occupiers in good faith on the future management of the water supply on the farm; and

7.3 the respondents within 14 (fourteen) days of the judgment supply to the occupiers all relevant information to enable them to engage meaningfully in relation to the issue of water management on the farm, which information shall include all the scientific reports at the disposal of the first and/or second respondents relating to the levels of the underground water on the farm, as well as the costs incurred by the first and/or second respondents in supply of water to the occupiers.

[8] It was submitted by Counsel on behalf of the SAHRC that the relief of a general declarator is sought to obtain clarity for the future to the extent that directives by the SAHRC can't be ignored. It was submitted that if a party against whom a directive is made does not agree with it or does not intend or is not willing to comply with it, they needs to approach the court to review and set it aside.

THE APPLICANT'S CASE

[9] The SAHRC contends that the directives made form part of its protective mandate and its constitutional power to take steps to secure appropriate redress in terms of Section 184(2)(b) of the Constitution where human rights have been violated. In the heads of argument it was put differently in that the directives were issued *"in terms of its powers to "secure redress" and or "necessary relief" in terms of section 13(3) of" the SAHRC Act.*

[10] Further, that the directives are appropriate and practical, and would provide the occupiers with effective redress as it addresses the immediate need to restore the occupiers' substantive right to access of potable water for their survival; that it proposes an engagement with the attempt to restore a relationship of good faith between farm owner and occupier, the exchange of information to enable equal knowledge, thereby empowering and restoring dignity of the occupiers. According to the SAHRC the directives also retain all parties' rights to approach a court for redress should their efforts fail, and it demand no more from the respondents than what they are capable of doing.

- [11] It is submitted that the respondents have a constitutional and legal duty to comply with the directives, and to cooperate with the SAHRC's efforts to seek redress for the rights violation. The source of aforesaid duty was not expressly dealt with. It was further argued that the respondents by ignoring the directives undermined the Rule of Law as this constitutes interfering with the SAHRC's effectiveness and exercise of its constitutional mandate.
- [12] It was further submitted that appropriate redress presupposes a binding nature of said power, and absent the power to take binding "*appropriate redress*", the SAHRC would have no effective capacity to strengthen constitutional democracy, as no party against whom a directive has been given would comply with an optional remedy.
- [13] The SAHRC essentially placed exclusive reliance on the matter of **Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others**¹ ("Nkandla judgment").
- [14] In the Nkandla judgment the Apex Court *inter alia* held that:
- 14.1 sections 181 and 182 of the Constitution gave reliable pointers to the legal status and effect of the Public Protector's remedial power;
 - 14.2 the obligation (in s 181(3)) of other organs of state to assist and protect her so as to ensure her dignity and effectiveness, was relevant to the enforcement of her remedial power — she would arguably lack dignity and be ineffective if her directives could be ignored;
 - 14.3 a remedial power that was so inconsequential that those against whom it was exercised could ignore or second-guess it, was irreconcilable with the need for an independent, impartial and dignified Public Protector;

¹ 2016 (3) SA 580 (CC) ("Nkandla judgment")

14.4 while it might sometimes be a mere recommendation, it would often have to be binding to effectively address the complaint;

14.5 when remedial action was binding, compliance was obligatory and could not be ignored without legal consequences.

THE RESPONDENTS' CASE

[15] In essence, the respondents' case is that the occupiers of whom some are illegal, demand unlimited borehole water, which cannot be supplied free of charge, and that the borehole water can be supplied to the occupiers at a rate of R300.00 per 5 000 litres. According to the respondents the occupiers refuse to engage in discussions with regards to the management of the water. The occupiers still have access to the water from the river (the appropriateness of which is placed in dispute by the occupiers) and municipality (which is said by the occupiers to be irregular) for their personal- and animal use.

[16] The respondents seek that the SAHRC assists in engaging the occupiers in order to establish a constructive water management system, which also includes the right of access to water for the farm owner itself and the management of the water, taking care of a scarce commodity. The occupiers demand for water from the borehole is there for unreasonable and unsustainable.

[17] It appears to be common cause, alternatively not seriously disputed, that the occupiers, or at the very least the complainant's father, enjoyed access to borehole water free of charge prior to May 2016 and from the former farm owner.

[18] As remarked by the SAHRC this is thus not a situation of complete refusal to supply water, but the issue appears to be that there is according to the respondents no obligation on them to provide the water nor to provide same free of charge. It was submitted that even if it was the respondents obligation they cannot supply borehole water to all of the occupiers, currently exceeding

100 occupiers, some of whom are illegal occupiers, as the water supply is not unlimited.

[19] In the answering affidavit the respondents states that they “*do not object*” that the SAHRC’s directives are binding in terms of Section 184 of the Constitution, but deny that their failure or refusal to comply with the said directives is unlawful and unconstitutional. In terms of Rule 6 of the Uniform rules of court a respondents needs to either admit, deny, confess and avoid an allegation. Should that not be done the court can regard the allegation to be admitted. In this respect the respondents’ affidavit falls short. However, considering the important issues raised and the far reaching effect of the relief sought it would not be just to approach this matter on a technical basis. Whether the directives issue in terms of Section 184 of the Constitution is generally binding, still requires closer consideration.

[20] It is argued that although the SAHRC may take steps to secure redress where rights have been violated, it does not enshrine it with judicial power to issue orders that must automatically be adhered to where it concerns private individuals.

[21] The respondents further contend that the occupiers have no established personal right in respect of the borehole water, and no rights or obligations have been formally ceded or assigned to them in this respect. It is submitted that the duty to provide water is a constitutional duty befalling the government of the Republic of South Africa. It is contended that the SAHRC knowing that the second respondent is an individual, can impossibly not fulfil a constitutional state obligation.

[22] It is undisputed that there are currently illegal occupants on the farm, which aspect according to the respondents has been brushed off by the SAHRC as unimportant. The respondents contend that this is most important, considering that it is directly linked to whom the water stands to be provided, as well as the volume required.

[23] The respondents argue that the it is burdensome and unreasonable of the SAHRC to expects the respondents to provide scientific reports without even considering who would be obliged to pay for same to be prepared.

ACCESS TO WATER

[24] Without dealing with a person's right to access to water comprehensively it is necessary to outline some aspects in order to better understand and inform the considerations of the directives by the SAHRC.

[25] Our Constitution affords each person in South Africa certain justiciable social economic rights, such as the right to have access to sufficient food and water in terms of Section 27 of the Constitution. However this right is limited by Section 27(2), which requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

[26] The Water Services Act 108 of 1997 ("WSA") gives expression to Section 27(1)(b) of the Constitution.² The WSA expressly codifies the circumstances in which land owners will be responsible for providing water to people living on privately owned land. The WSA further introduced the notion of water services intermediaries, which is someone who has a contract with someone else, which contains an obligation to provide the other person to the contract with water services, and where this obligation is incidental to the main object of the contract.

[27] Water supply is a municipal function in terms of Schedule 4 Part B of the Constitution. Private landowners have no direct statutory obligation to provide water services unless contracted to do so as a water service provider,

² The WSA was promulgated to give content to the Minister's executive authority contemplated in Section 155(7) of the Constitution. Section 155(7) gives the National Government, subject to Section 44 of the Constitution, legislative and executive authority to ensure effective performance by municipalities of their functions in respect of matters listed in Schedule 4 and 5 of the Constitution. Schedule 4 Part B of the Constitution lists water and sanitation services.

although a landowner may acquire an obligation as a water service intermediary in terms of a contract.

[28] It appears that the occupiers or at the very least the complainants father is a occupier as defined in section 1 of The Extension of Security of Tenure Act 62 of 1997 (“ESTA”). In terms of section 6 of ESTA an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.

[29] ESTA further provides in subsection 2 that:

“Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right-

(a)

(e) not to be denied or deprived of access to water; and

(f) not to be denied or deprived of access to educational or health services.”

[30] ESTA does not place a positive obligation upon the land owner to provide water, even more so without charge.

[31] **In Mshengu v Umsunduzi Local Municipality**³ the court held that regardless of land ownership a municipality still has the primary obligations to provide people with access to sufficient water. Further that ESTA provides that a landowner cannot reasonably refuse a municipality access to his or her land in order to install infrastructure that would facilitate access to water. A land owner merely has a secondary obligation in terms of Section 8 and 27 of the

³ 2019 (4) All SA 469 (KZP)

Constitution not to refuse access to the water services authority/municipality for the purpose to install infrastructure.⁴

- [32] Human rights obligations have a bearing on private actors. In terms of Section 8(2) of the Constitution, which provides that the Bill of Rights binds a natural or a juristic person if and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. However, the language of this provision does not impose an absolute obligation on private actors such as land owners. It indicates that when determining whether Section 8(2) is applicable, one must establish whether the Section applies to a particular case and if it does apply, the extent to which it applies. Therefore, a court must take into account the nature of the right and the nature of any duty imposed by the right.⁵

PURPOSE AND POWERS OF SAHRC

- [33] In order to appreciate the role of the SAHRC and more so when they issue directives the purpose and powers of the SAHRC should be understood.
- [34] The six institutions established under Chapter 9 have some common functions such as checking government and promoting social justice but are distinct and purposeful. The SAHRC as a Chapter 9 institution was created to “*strengthen constitutional democracy in the Republic*”.⁶
- [35] In the language of the Constitution, “*checking and monitoring government*” contributes to holding government accountable. The Chapter 9 institutions’ functions to promote social justice also means contributing to the transformation of South Africa into a society in which social justice prevails.
- [36] The SAHRC, as in the case of the other Chapter 9 institutions, is expected to be independent and impartial. The SAHRC is too a differing degree from other

⁴ para 63

⁵ “*Corporate Law on the Constitution: Towards binding Human Rights Responsibilities for Corporations*” (2008) 125 SALJ 754

⁶ Section 181(1) of the Constitution

Chapter 9 institutions, “*intermediary institution providing a link between people on the one hand and the executive and parliament on the other*”.⁷

- [37] It is important to be mindful that the SAHRC stands outside of government and is not a branch of government. It is further not a legislative, judicial or an executive organ, and therefore does not exercise power in the same way as the executive, legislature or parliament do. Although it has investigatory power and it may be interpreted to have certain administrative powers, it does not govern.⁸
- [38] The mandate of the SAHRC is intended to supplement the traditional methods of securing accountability from government, but this checking role is different from that which one branch of government exercises over another in a system of separation of power with checks and balances. This is so, as the SAHRC is does not have governmental powers, and unlike courts, it cannot conclusively declare government actions to be unconstitutional or illegal, nor can it order the executive to act in a certain way, and it cannot penalise unconstitutional behaviour.
- [39] I find the type of control the SAHRC has over government and the public to be accurately described by *Reif* in the Harvard Human rights Journal. She describes this type of control as “*cooperative control*”.⁹ She explains that cooperative control is facilitative and proactive, it uses advice and persuasion, wherein the act is conferred and dialogue to try to obtain the desired result and change behaviour. This is contrary to coercive control, which is reactive and control imposed by unilateral or forced decision.
- [40] The SAHRC clearly has one of the broadest mandates of all the Chapter 9 institutions. That is focussed (without being limited) by the requirement to monitor social and economic rights.¹⁰

⁷ Murray 2006 PELJ 26

⁸ Resident of the RSA v Hugo 1997 (4) SA 1 (CC)

⁹ Reif 2000 Harvard Human Rights Journal 28

¹⁰ Murray PER 2006 (9) 2

[41] From Sections 181¹¹ and 184¹² of the Constitution it is clear that the SAHRC is most central in monitoring government's commitment to human rights, but also in transforming of South Africa into a society in which social justice prevails.

[42] In addition to the constitutional powers set out in section 184, it has statutory powers. Section 13 of the South African Human Rights Commission Act 40 of 2013 sets out the powers and functions of the SAHRC.¹³ In this respect it provides as follows:-

“(1) ...

¹¹ Section 181 of the Constitution provides

- “(1) The following state institutions strengthen constitutional democracy in the Republic: (b) the South African Human Rights Commission ...
- (2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- (3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness of these institutions.
- (4) No person or organ of state may interfere with the function of these institutions.
- (5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least a year.”

¹² Section 184 of the Constitution provides:-

- “(1) The South African Human Rights Commission must
- (a) promote respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in public.
- (2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power
- (a) to investigate and to report on the observance of human rights;
- (b) to take steps to secure appropriate redress where human rights have been violated;**
- (c) to carry out research; and
- (d) to educate.
- (3) Each year, the Human Rights Commission must require relevant organs of state to provide the commission with information on the measures that they have taken towards the realisation of the rights in the Bill Rights concerning housing, health care, food, water, social security, education and the environment.
- (4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.”

¹³ In addition, Section 14 sets out the mediation, consolidation and negotiation powers of the SAHRC, and Section 15 sets out the investigative powers of the SAHRC and elaborates on the powers which the SAHRC enjoys in respect of investigations pursuant to Section 13(3).

- (a) *The Commission is competent and is obliged to*
 - (i) *make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights;*
 - (ii) *undertake such studies for reporting ...*
- (3) *The Commission is competent*
 - (a) *to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights, and if, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it must, in so far as it is able to do so, **assist the complainant and other persons adversely affected thereby, to secure redress**, and where it is necessary for that purpose, to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum; and*
 - (b) *to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or group or class of persons.*
- (4) *All organs of state must afford the Commission such assistance as may reasonably require for the effective exercising of its power and performance of its functions."*

[43] The wording in both section 184 of the constitution and section 13(3) of the SAHRC act lends credence to the type of control to be exercised by the SAHRC as cooperative control.

[44] Most relevant in the present matter is that the Constitution provides that "*the South African Human Rights Commission has the power ... to take steps to secure appropriate redress where human rights have been violated.*" Whereas Section 13(3) of the SAHRC Act provides that "*it must, in so far as it is able to*

do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose, to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum.”

- [45] As the SAHRC relied heavily on that found in the Nkandla judgment and in considering the argument by the SAHRC, it is necessary to study and compare the powers bestowed upon the Public Protector by the Constitution and that bestowed upon the SAHRC.
- [46] Although the Office of the Public Protector and the SAHRC have a lot in common, they are not identical. From the ranking of the Chapter 9 institutions, it appears that there is a constitutional hierarchy. The Office of the Public Protector being the first institution suggests an elevated status. This is not only so when regard is had to Section 193(5) of the Constitution, but also when the Constitution’s specific function and powers are compared. Credence is lend hereto by the heightened majority for the appointment and removal of the Public Protector.¹⁴
- [47] The Public Protector has the direct power to take remedial action, whereas the SAHRC is constitutional empowered to take steps to secure appropriate redress. It does not empower the actual taking or issuing of remedial action or ordering of redress. The wording is purposefully different.
- [48] This does however not mean that because the SAHRC’s powers are different to that of the Public protector they are automatically not binding or able to be ignored. The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view held.¹⁵ As further held in Nkandla “*Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or*

¹⁴ Govender and Swanepoel 2020 PELJ 23

¹⁵ **Nkandla** at par [75]

else approach courts of law to set them aside so we may validly escape their binding force.”

[49] This translates therein that where the SAHRC exercise a power it is sanctioned to exercise in terms of the law (Constitution and SAHCR Act) those against who such power is exercised is obliged to obey same.

[50] Further, although the government in terms of Section 181(3) of the Constitution is obliged to assist and to protect Chapter 9 institutions and to ensure their independence, impartiality, dignity and effectiveness, the court was not directed to a similar obligation imposed by the Constitution directly on a private person. That being so, a private person may not interfere with the functioning of such institutions, but this does not place an obligation of enforcement of the directives of the SAHRC on such a private person. In the work of ***Constitutional Law of South Africa***¹⁶ it was held that “(a) *decision made in resolving a complaint is not understood to be binding on the parties to the dispute, although some State organs have treated the Commission’s decisions as binding.*”

[51] As dealt with above, unlike the Public Protector, the SAHRC is not empowered to “take remedial action”. It can and must take steps to secure appropriate redress in the event of a violation of human rights. The SAHRC must investigate, consider and establish what would constitute appropriate redress for the violation. And then take or assist to take steps to secure same. The language of both the Constitution and SAHRC Act lends credence thereto that the SAHRC is to “*take steps to secure appropriate redress*”, “*assist...to secure appropriate redress*”.

[52] As the SAHRC has no penal power in respect of human rights violations or unconstitutional behaviour it would have to take a further step such as

¹⁶ Woolman, Roux, Klaaren, Stein and Chaskalson (Eds) *Constitutional Law of South Africa* (2nd Edition) Chapter 24F 24/8

approaching a court of law to secure appropriate redress for a person whose human rights have been violated.

[53] In terms of the interim Constitution, the Public Protector was not empowered to take remedial action. Its powers were in essence advisory in nature. Although this is not exactly the same as the powers enjoyed by the SAHRC under the Constitution, it bears similarity in that the SAHRC is not empowered to take remedial action but to take steps to secure appropriate redress and assist a complainant to secure remedial redress, as well as where necessary arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief.

[54] Every complaint requires a practical or effective step that is in line with its individualities and merit to move towards securing appropriate redress. The nature of the issue under investigation, the finding made and the particular kind of steps taken would determine the legal effect it has on a person or institution it is addressed to.¹⁷

[55] Therefor as long as the directives of the SAHRC are directives aimed at moving towards secure appropriate redress, they may very well be binding. However, where the directives are in fact the appropriate redress, such directives do not find their origin from the Constitution and can't be considered binding. Whether the directive issued by the SAHRC are issued in terms of its constitutionally allocated power would be a matter of interpretation aided by context, nature and language.

THE DIRECTIVES ISSUED AGAINST THE RESPONDENTS

[56] In the matter at hand, the court is requested to grant an order in general terms that the SAHRC's directives issued in terms of Section 184(2)(b) of the Constitution are binding. The SAHRC has in the papers before court failed to make out a case for such a general order. Whether such relief will ever be competent is questionable when regard is had to the principles set out in

¹⁷ Nkandla at par [70]

Nkandla and for the reason that the nature of the issue under investigation, the finding made and the particular kind of steps taken would determine the legal effect it has on a person or institution it is addressed to.¹⁸

[57] During argument I was requested to consider the specific directives issues in this matter, should I not be in agreement with the general declarator sought. I will proceed to do so.

[58] It is submitted that the SAHRC standing and function are precisely the same as the ones described by the Chief Justice in the **Nkandla** judgment, and in respect of the Public Protector. The SAHRC contends that as its directives are sourced from the Constitution itself, it cannot be ignored, again placing reliance on the **Nkandla** matter. It was submitted in paragraph 78 of the SAHRC's heads of argument that absent the power to take binding and "appropriate redress", the SAHRC will have no effective capacity to strengthen constitutional democracy, because no party against whom a directive has been issued, would comply with an optional remedy.

[59] In my view the findings in **Nkandla** cannot blindly find application to directives issued by the SAHRC, for the reasons set out above and *inter alia* as the two chapter 9 institutions constitutional and statutory powers differ. There is an undeniable difference between "take appropriate remedial action" and taking steps to secure appropriate address.

[60] I don't agree with the submission on behalf of the SAHRC that without its directives being found to be binding, it will have no effective capacity to strengthen constitutional democracy. Its powers authorise it to employ cooperative control over government as well as the public, and its specific litigation powers empower it to litigate on human rights in its own name on behalf of a complainant. This in itself strengthens constitutional democracy. It need to be understood that the SAHRC is not the "punisher" of human rights violations. It is the educator, transformer and empowerer.

¹⁸ **Nkandla** at par [70]

- [61] In light of that stated above it is clear that the SAHRC cannot take binding appropriate redress or any redress at all. What the SAHRC is empowered to do is take steps to secure appropriate redress. It cannot be the source of the redress.
- [62] It was further contended that the SAHRC is not a legal aid office or law clinic, and does not have the capacity to attend court upon every complaint received or on every single non-compliance experienced. Similarly, I cannot agree with the submission. As much as it is not the legal aid or a law clinic, by the very nature of the powers afforded to it, the SAHRC is to act as a litigant or as set out in Section 13 of the South African Human Rights Commission Act 40 of 2013, "*it must, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress and where it is necessary for that purpose, to do so it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief. Further advise, direct and refer complainants to appropriate forums.*"
- [63] The first directive 12.1.1 as per paragraph [4] above is based on the finding by the SAHRC that the supply of borehole water to the occupiers, without charge, was a service that had been agreed upon (expressly or tacitly) with the previous farm owner and the second respondent prior to May 2016 within the contemplation of Section 6(1) of ESTA. However, from a consideration of the report and the legal analysis contained therein, it seems it various applicable pieces of legislation has been disregarded. In illustration, ESTA does not put a positive obligation upon the land owner to provide water, even more so without charge. ESTA for example does not oblige a land owner to provide schooling or healthcare, so how can it place a positive obligation on a land owner to provide water.
- [64] It was ignored that the Constitution allocates water provision as a municipal function. Nor does it appear the report gave any consideration to the provisions of the WSA, and Section 27(2) of the constitution. The investigation seems to ignore the fact that not all the occupiers on the farm are occupiers

as contemplated in ESTA. The directive is suggestive of a finding on the remedy of spoliation.

[65] This directive does not flow from the constitutional and statutory powers enjoyed by the SAHRC. It does not constitute a step to secure appropriate redress, but in fact appears to order the remedy which the occupiers would be entitled to seek from a court, i.e., to be supplied by the respondents with borehole water free of charge. On identifying that the re-supply of water to the occupiers was appropriate redress the SAHRC ought to have assisted the occupiers and taken steps to secure same through for example approaching a court for a spoliation order, declaration of rights or interdictory relief.

[66] The remaining two directives 12.1.2 and 12.1.3 quoted in paragraph [4] herein above are indeed in my view directives issued in terms of Section 184(2) of the Constitution, and therefore cannot be ignored without consequence. Engagement and exchange of information are steps towards securing appropriate redress.

[67] It was contended by the respondents that the SAHRC expects the respondents to provide scientific reports without even considering who would be obliged to pay for such reports to be prepared. This contention is not correct when regard is had to the content of the directive and the words used therein. The directive under 12.1.3 specifically states that "*the second respondent is to supply relevant information which should include all the scientific reports at the disposal of the second respondent*". This clearly means available scientific reports. If same is not available there can be no obligation to give it.

[68] It is necessary to mention that the occupants and the respondents appear to have a shared animosity towards one another. This would require mediation or facilitation in order to secure appropriate redress in respect of the human rights violation found to exist by the SAHRC. This is so as both parties complain of various acts and happenings between them from frustrations to death threats, which cannot be unattended and ignored to ensure harmonious future co-habitation of the farm.

COSTS

[69] Having regard to the subject matter, relevant circumstance and relief granted herein below, I am of the view that no cost order would be justified in favour of any of the parties.

CONCLUSION

[70] In conclusion, no case has been made out for a blanket order that all directives issued by the SAHRC are binding.

[71] Directive 12.1.1 issued by the SAHRC in this matter has no legal effect, nor is it binding for want of it coming into being through the exercise of a statutory and constitutional power of the SAHRC.

[72] The two further directives under 12.1.2 and 12.1.3 are directives constituting steps to secure appropriate redress and are actionable, and can therefore not be ignored without consequence.

ORDER

1. The declaratory relief is dismissed.
2. The first- and second respondents, through the facilitation of the SAHRC, are ordered to engage with the occupiers in good faith on the future management of water supply on the farm.
3. The first- and second respondents are ordered to make all relevant information available to the occupiers for the purpose of meaningful engagement in relation to the issue of water management, which information shall include all the scientific reports available and at the disposal of the first- and second respondents relating to the levels of the

underground water on the farm, as well as the costs incurred by the first- and second respondents in supplying water to the occupiers.

4. The SAHRC to facilitate and/or mediate aforementioned engagement.
5. No order as to costs.


GREYLING-COETZER AJ

HEARING DATE:	16 NOVEMBER 2021
JUDGMENT RESERVED:	07 DECEMBER 2021
FURTHER SUBMISSIONS:	10 DECEMBER 2021
DATE OF JUDGMENT:	02 MARCH 2022

Appearances: For the Applicant – Adv Marongo instructed by SAHRC
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