

Court rules on the limit of the Human Rights Commission's powers

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"It needs to be understood that the SAHRC is not a punisher of human rights violations, it is an educator, transformer and empowerer," says Judge.



Illustration: Lisa Nelson / GroundUp

A court has declined to grant a “blanket order” that all directives issued by the South African Human Rights Commission (SAHRC) are automatically binding.

Acting Judge Denise Greyling-Coetzer, sitting in the Mbombela High Court, has [ruled](#) that the SAHRC must approach a court and obtain relief from a judge for its directives to be legally enforceable.

The SAHRC sought the declaratory order after a company, Agro Data CC, apparently ignored directives it made concerning a local community’s access to a borehole.

The commission received complaints from people occupying the De Doorn Hock Farm that the owner had introduced restrictions on their use of the borehole and was threatening to impound their cattle.

Following an investigation, the commission deemed this to be a violation of the occupiers' human rights. Further it found that Agro-Data had also violated the occupiers' right not to be denied or deprived of access to water, as contemplated in the Extension of Security of Tenure Act (ESTA).

Agro-Data was directed to restore the supply of borehole waters to the occupiers within seven days and to begin negotiations, in good faith, to resolve the issue of water management at the farm to ensure an equitable share of this "scarce resource".

According to the SAHRC, Agro-Data ignored these directives.

In its application to the court, the SAHRC wanted orders declaring that its directives, issued in terms of the Constitution, are binding and that any refusal to comply with them were automatically unlawful and unconstitutional.

Lawyers for the SAHRC said this was necessary "to obtain clarity for the future to the extent that directives cannot be ignored". This would strengthen democracy, they argued.

The commission also sought further orders directly relating to the borehole issue.

Agro-Data denied that its refusal to comply with the directives was unlawful. It said the SAHRC did not have judicial power to issue orders that should be automatically adhered to where it concerned private individuals.

On the merits of the matter, Agro-Data said some of the occupiers were illegal and demanded unlimited access to the borehole water, free of charge. They had access to water from the river and the municipality, and that the borehole did not have unlimited water supply.

Turning to the purpose and powers of the SAHRC, the judge said, "although it has investigatory powers ... it does not govern. It cannot penalise unconstitutional behaviour."

Citing from an academic study, the judge said the SAHRC had "co-operative control", using advice and persuasion to obtain the desired result and changed behaviour.

Unlike the Public Protector, it was not empowered to take remedial action.

"As the SAHRC has no penal power in respect of human rights violations or unconstitutional behaviour, it would have to take further steps such as approaching a court of law to secure appropriate redress for a person whose human rights have been violated."

The judge said she did not agree that without the "binding" declarator, the SAHRC would have no effective capacity to strengthen constitutional democracy because it had powers to litigate on human rights in its own name on behalf of a complainant.

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On the merits of the case, the judge said the SAHRC had disregarded certain applicable legislation. For example, ESTA did not oblige a landowner to provide water, even more so without charge. It had also ignored that water provision was a municipal function and that not all occupiers were legal in terms of ESTA.

The judge said on identifying that the re-supply of water was "appropriate redress", the SAHRC ought to have approached

the court to obtain appropriate relief.

She ruled that the directive ordering Afri-Data to restore borehole water supply had “no legal effect”.

However, the other directives regarding ongoing engagement to reach an amicable resolution regarding water management on the farm, fell within the powers of the SAHRC.

She refused to grant the broader, declaratory order but ordered that Agri-Data engage with the occupiers in good faith, with facilitation from the SAHRC, on the future management of water supply on the farm.

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