

# Dispute Resolution

ALERT | 23 August 2024



## In this issue

### SOUTH AFRICA

One of South Africa's watchdogs' power to issue directives: The subject of litigation



For more insight into our expertise and services



**DISPUTE RESOLUTION  
ALERT**

## One of South Africa's watchdogs' power to issue directives: The subject of litigation

In *South African Human Rights Commission v Agro Data CC & Another (Afriforum, Centre for Applied Legal Studies and Commission for Gender Equality intervening as Amici Curiae)* [2024] ZASCA 121, the Supreme Court of Appeal (SCA) had to consider whether the South African Human Rights Commission (SAHRC) could issue directives to remedy the violation of human rights in terms of its statutory functions and whether those directives would be binding in nature.

The judgment stems from a complaint by occupiers on a farm in Mpumalanga, who approached the SAHRC, on the basis that their right to access water in terms of section 27(1)(b) of the Constitution 1996 and section 6(2)(e) of the Extension of Security of Tenure Act 62 of 1997, had been violated by the respondents, who failed to supply borehole water to the occupiers. After issuing directives to the respondents and non-adherence to those directives, the SAHRC approached the Mpumalanga Division of the High Court, Mbombela (the High Court) for intervention.

The High Court held that the SAHRC had failed to make out a case for a general declaratory order on the directives issued in terms of section 184(2)(b) of the Constitution, which empowers the SAHRC to "to take steps to secure appropriate redress where human rights have been violated". It further held that the SAHRC's powers were distinguishable from those of the Public Protector, another watchdog. The powers of the Public Protector are envisaged in section 182 of the Constitution.

Dissatisfied with the High Court's finding, the SAHRC approached the SCA.

The SAHRC was established with the express purpose of strengthening constitutional democracy. The functions of the SAHRC are envisaged in section 184 of the Constitution. Further powers and functions are provided for in section 13 of the South African Human Rights Commission Act 40 of 2013 (SAHRC Act). The SAHRC is at liberty to make recommendations in respect of investigations or complaints of human rights violations to secure appropriate redress. However, it is not granted the power to make directives.

**DISPUTE RESOLUTION  
ALERT**

# One of South Africa's watchdogs' power to issue directives: The subject of litigation

CONTINUED

**SCA's finding**

The SCA undertook a statutory interpretation exercise to determine what the extent of the SAHRC's powers are under section 184 of the Constitution, read together with section 13 of the SAHRC Act. It held that the language used in these sections does not indicate that the drafters of the legislation intended that the SAHRC could issue binding directives. It further held that the powers granted to the SAHRC in terms of section 13 of the SAHRC Act should be interpreted in a conjunctive rather than a disjunctive manner. The SCA then held that it could not find a valid basis to hold that the SAHRC is empowered to issue binding directives.

This judgment creates some concern in respect of the implementation of the SAHRC's powers going forward and may render the SAHRC a toothless watchdog with a loud bark but no bite. Even though the SAHRC's use of its constitutional and statutory powers goes a long way in promoting, monitoring and protecting human rights in South Africa, and great strides have been made in this regard, there remains some discomfort in the fact that directives issued by the SAHRC are not binding in nature. The SAHRC indicated that it would appeal the judgment and approach the Constitutional Court for clarification.

**Tanya Calitz and Marelise van der Westhuizen**

## OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:



### Rishaban Moodley

Practice Head & Director:  
Dispute Resolution  
Sector Head:  
Gambling & Regulatory Compliance  
T +27 (0)11 562 1666  
E rishaban.moodley@cdhlegal.com



### Tim Fletcher

Chairperson  
Director: Dispute Resolution  
T +27 (0)11 562 1061  
E tim.fletcher@cdhlegal.com

### Imraan Abdullah

Director:  
Dispute Resolution  
T +27 (0)11 562 1177  
E imraan.abdullah@cdhlegal.com

### Timothy Baker

Director:  
Dispute Resolution  
T +27 (0)21 481 6308  
E timothy.baker@cdhlegal.com

### Eugene Bester

Director:  
Dispute Resolution  
T +27 (0)11 562 1173  
E eugene.bester@cdhlegal.com

### Neha Dhana

Director:  
Dispute Resolution  
T +27 (0)11 562 1267  
E neha.dhana@cdhlegal.com

### Denise Durand

Director:  
Dispute Resolution  
T +27 (0)11 562 1835  
E denise.durand@cdhlegal.com

### Claudette Dutilleux

Director:  
Dispute Resolution  
T +27 (0)11 562 1073  
E claudette.dutilleux@cdhlegal.com

### Jackwell Feris

Sector Head:  
Industrials, Manufacturing & Trade  
Director: Dispute Resolution  
T +27 (0)11 562 1825  
E jackwell.feris@cdhlegal.com

### Nastascha Harduth

Sector Head: Corporate Debt,  
Turnaround & Restructuring  
Director: Dispute Resolution  
T +27 (0)11 562 1453  
E n.harduth@cdhlegal.com

### Anja Hofmeyr

Director:  
Dispute Resolution  
T +27 (0)11 562 1129  
E anja.hofmeyr@cdhlegal.com

### Tendai Jangara

Director:  
Dispute Resolution  
T +27 (0)11 562 1136  
E tendai.jangara@cdhlegal.com

### Corné Lewis

Director:  
Dispute Resolution  
T +27 (0)11 562 1042  
E corne.lewis@cdhlegal.com

### Nomlayo Mabhena-Mlilo

Director:  
Dispute Resolution  
T +27 (0)11 562 1743  
E nomlayo.mabhena@cdhlegal.com

### Sentebale Makara

Director:  
Dispute Resolution  
T +27 (0)11 562 1181  
E sentebale.makara@cdhlegal.com

### Vincent Manko

Director:  
Dispute Resolution  
T +27 (0)11 562 1660  
E vincent.manko@cdhlegal.com

### Khaya Mantengu

Director:  
Dispute Resolution  
T +27 (0)11 562 1312  
E khaya.mantengu@cdhlegal.com

### Richard Marcus

Director:  
Dispute Resolution  
T +27 (0)21 481 6396  
E richard.marcus@cdhlegal.com

### Burton Meyer

Director:  
Dispute Resolution  
T +27 (0)11 562 1056  
E burton.meyer@cdhlegal.com

### Desmond Odhiambo

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E desmond.odhiambo@cdhlegal.com

### Lucinde Rhodie

Director:  
Dispute Resolution  
T +27 (0)21 405 6080  
E lucinde.rhodie@cdhlegal.com

### Clive Rumsey

Sector Head: Construction & Engineering  
Director: Dispute Resolution  
T +27 (0)11 562 1924  
E clive.rumsey@cdhlegal.com

### Belinda Scriba

Director:  
Dispute Resolution  
T +27 (0)21 405 6139  
E belinda.scriba@cdhlegal.com

### Tim Smit

Sector Head:  
Consumer Goods, Services & Retail  
Director: Dispute Resolution  
T +27 (0)11 562 1085  
E tim.smit@cdhlegal.com

### Marelise van der Westhuizen

Director:  
Dispute Resolution  
T +27 (0)11 562 1208  
E marelise.vanderwesthuizen@cdhlegal.com

### Joe Whittle

Director:  
Dispute Resolution  
T +27 (0)11 562 1138  
E joe.whittle@cdhlegal.com

### Roy Barendse

Executive Consultant:  
Dispute Resolution  
T +27 (0)21 405 6177  
E roy.barendse@cdhlegal.com

**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

**PLEASE NOTE**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E [cdhstellenbosch@cdhlegal.com](mailto:cdhstellenbosch@cdhlegal.com)

©2024 13819/AUG

