

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case no: 14370/2019
31328/2019

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
<u>2023/07/14</u>	<u><i>Wendie S. Mthembu</i></u>
DATE	SIGNATURE

In the matter between:

AFRIFORUM

First Applicant

and

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

First Respondent

**THE CHAIRPERSON: BONGANI
CHRISTOPHER MAJOLA N.O**

Second Respondent

COMMISSIONER PRISCILLA JANA N.O

Third Respondent

JULIUS MALEMA

Fourth Respondent

ECONOMIC FREEDOM FIGHTERS

Fifth Respondent

And,

In the matter between:

FREDERIK WILLEM DE KLERK N.O

First Applicant

DAVID WHITEFOORDT STEWARD N.O

Second Applicant

HERMAN BAILEY N.O

Third Applicant

BEN COETZEE BESTER N.O

Fourth Applicant

WARREN ALEXANDER MORTEN CLEWLOW N.O

Fifth Applicant

ELIZABETH DE KLERK N.O

Sixth Applicant

THEUNIS ELOFF N.O

Seventh Applicant

DEENADA YALEN KONAR N.O

Eighth Applicant

FORTUNATE MASHEBU MATHEBULA N.O

Ninth Applicant

And

THE SOUTH AFRICAN RIGHTS COMMISSION

First Respondent

**THE CHAIRPERSON: BONGANI
CHRISTOPHER MAJOLA N.O**

Second Respondent

COMMISSIONER PRISCILLA JANA N.O

Third Respondent

JULIUS MALEMA

Fourth Respondent

ECONOMIC FREEDOM FIGHTERS

Fifth Respondent

This judgment has been delivered by uploading it to the court online digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties. The deemed date and time of the delivery is 10H00 on 14 July 2023.

THE ORDER

(1) It is declared that:

- (i) The South African Human Rights Commission (SAHRC) is not empowered by the Constitution or by the South African Human Rights Commission Act 40 of 2013 (SAHRCA) to make definitive decisions about whether or not a contravention of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) has or has not occurred.
- (ii) The opinion which the SAHRC is empowered to form pursuant to section 13(3) of SAHRCA is relevant only to whether the bringing of proceedings in a competent court is appropriate, if at all.
- (iii) Any act by the SAHRC purporting to constitute a definitive decision on an issue addressed in section 13(3) of SAHRCA is ultra vires the SAHRCA.

(2) The 'finding' of the SAHRC of 9 March 2019 purporting to exercise a power that the SAHRC does not have was unlawful and is set aside.

(3) The SAHRC shall, in both applications, bear the costs of the applicants, including the costs of two counsel where so employed.

JUDGMENT

Sutherland DJP:

Introduction

- [1] Before the court are two review applications. The subject matter of the applications is a communication dated 8 March 2019 from the South African Human Rights Commission (SAHRC) to the several complainants who had, in terms of section 13(3) (a) of the South African Human Rights Commission Act 40 of 2013 (SAHRCA) lodged complaints about the speech given by Mr Julius Malema in November 2016 to a gathering outside the Newcastle Magistrates' Court, where he was facing criminal charges for incitement to seize land. Among several complainants were the FW De Klerk Foundation and Afriforum who are the applicants in these proceedings. Except where necessary these two parties shall be referred to collectively as the complainants. Joining the proceedings in the Afriforum case is Mr Malema himself, and his political Party, the Economic Freedom Fighters (EFF) who both, along with the SAHRC, oppose the application. They are not parties in the other application, but that is of no consequence.
- [2] The gravamen of the complaints is that the speech in whole or in part, constituted a contravention of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. (PEPUDA). Section 10 provides:

'Prohibition of hate speech

- (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-

- (a) be hurtful;
 - (b) be harmful or to incite harm;
 - (c) promote or propagate hatred.
- (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21 (2) (n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.'

[3] The complainants had lodged their complaints to the SAHRC that such a contravention occurred pursuant to section 13(3)(a) of the SAHRCA, the provisions of which are addressed hereafter.

[4] The text of the SAHRC's communication to all the complainants was identical and was addressed 'Dear Complainant'. It referred to the complaint that had been lodged and traversed its rationale for exonerating Mr Malema. Then it ended with the following:

'(18) Thus it is the Commission's view that the statement in this context does not amount to hate speech.

(19) In view of the above, your complaint is hereby concluded in terms of clause 11(d)(i) of the gazetted handling procedures of the Commission on the basis that the conduct of Mr Malema did not violate the rights of White People.

(20) The commission will now accordingly close its file on the matter.

(21) Should you not be satisfied with this decision you may challenge the decision through the High Court by way of a judicial review. An application for judicial review must be made within 180 of the date on which you became aware of the decision. A person who seeks judicial review after this period will not be successful unless the court is satisfied that it is in the interests of justice to allow the review.'

[5] It is not obvious on the papers that when this letter was dispatched to the complainants whether it was, at that moment, accompanied by a document that had been earlier composed styled: '*Findings of the SAHRC regarding certain statements made by Mr Malema and another member of the EFF*'. The 'Findings'

document is dated 'March 2019.' The Findings are significant because it was therein that the SAHRC articulated its conclusion and the rationale it relied upon to reach it; the letter simply regurgitated much of the contents and addressed the complaints directly. For practical purposes the two documents must be taken as one and constitutes the 'decision' which is the subject matter of the review.

- [6] Contemporaneously with this communication the SAHRC called a press conference to publicise its decision.
- [7] These events provide the platform for the litigation which has led to this hearing.

What is the status of the 'decision' of the SAHRC of 8 March 2019?

- [8] When the complainants brought review proceedings, as invited so to do, the SAHRC advanced the stance that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) applied to its decision. That was wholly consistent with the letter of 9 March which alluded to the period prescribed by PAJA to bring a review. The SAHRC was thus unequivocally asserting that it had made a 'decision' as defined in section 2 of PAJA.
- [9] The complainants fell in with that premise.¹ Various grounds of review were articulated. In essence these grounds, generically fall into two categories: first,

¹ The EFF and Mr Malema, who joined the proceedings questioned whether PAJA was the correct jurisprudential platform and suggested that a review on the Principle of Legality might be the correct platform. Happily, that question need not be decided.

that the SAHRC failed to apply its mind properly to the legal test for a contravention of section 10 and therefore applied a wrong test, and secondly the decision to exonerate Mr Malema was grievously unreasonable in relation to the common cause facts. The SAHRC resists the review as groundless. The EFF and Mr Malema agree with the SAHRC.

[10] However, during the hearing there was, in response an enquiry by the court as to why it was thought that the decision constituted a decision contemplated by PAJA and was thus reviewable, a *volte face* by the SAHRC occurred. It now contends that the decision is not susceptible to review. Paradoxically the two complainants persisted that it is reviewable.

[11] In my view any 'decision' about hate speech which the SAHRC is lawfully capable of taking is indeed not a 'decision' of the type that is reviewable. This case manifests a bizarre example of confusion and, regrettably, on the part of the SAHRC, ostensibly, a dollop of hubris. This judgment is burdened with explaining how this unhappy affair came about.

The scheme and structure of the SA Human Rights Commission Act

[12] The reason that the SAHRC was invented is because section 181(1)(b) of the Constitution declared that it should exist in order to '...strengthen constitutional democracy ...' The SAHRC is one of what are popularly known as the Chapter 9 institutions. Pursuant thereto, Parliament initially enacted the Human Rights Act 54 of 1994 (The Old HRA) to create the SAHRC. This statute was repealed by the enactment of the South African Human Rights Commission Act 40 of 2013. (SAHRCA) At all material times relevant to this case, only SAHRCA was applicable.

[13] It is necessary to belabour the role and powers of the SAHRC under SAHRCA.

[14] The preamble to SAHRCA provides thus, to describe the origin and mandate of the SAHRC:

'...since the Constitution provides that the South African Human Rights Commission must—

promote respect for human rights and a culture of human rights;
promote the protection, development and attainment of human rights;
monitor and assess the observance of human rights in the Republic; and
annually require relevant organs of state to provide it with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment;

AND SINCE the Constitution provides that the South African Human Rights' Commission—

has the powers, as regulated by national legislation, necessary to perform its functions, including the power to investigate and to report on the observance of human rights; to out research; and to educate; and
has the additional powers and functions prescribed by national legislation.'

[15] Section 2 of SAHRCA thereupon prescribes the objects of the SAHRC:

(a) to promote respect for human rights and a culture of human rights;

(b) to promote the protection, development and attainment of human rights; and

(c) to monitor and assess the observance of human rights in the Republic.

[16] Thereafter, section 13 follows, in which the powers and functions of the SAHRC are stipulated.² The critical portion for the purposes of this case is section 13(3):

13. Powers and functions of Commission.—

(1) In addition to any other powers and functions conferred on or assigned to it by section 184 (1), (2) and (3) of the Constitution, this Act or any other law and in order to achieve its objects—

(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 on or relating to human rights as it considers advisable in the performance of its functions or to further the objects of the Commission; and

(iii) request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to human rights; and

(b) the Commission—

(i) must develop, conduct or manage information programmes and education programmes to foster public understanding and awareness of Chapter 2 of the Constitution, this Act and the role and activities of the Commission;

(ii) must as far as is practicable maintain close liaison with institutions, bodies or authorities with similar objectives to the Commission in order to foster common policies and practices and to promote co-operation in relation to the handling of complaints in cases of overlapping jurisdiction or other appropriate instances;

(iii) must liaise and interact with any organisation which actively promotes respect for human rights and other sectors of civil society to further the objects of the Commission;

(iv) may consider such recommendations, suggestions and requests concerning the promotion of respect for human rights as it may receive from any source;

(v) must review government policies relating to human rights and may make recommendations;

(vi) must monitor the implementation of, and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the Commission;

(vii) must prepare and submit reports to the National Assembly pertaining to any such convention, treaty, covenant or charter relating to the objects of the Commission; and

(viii) must carry out or cause to be carried out such studies concerning human rights as may be referred to it by the President, and the Commission must include in a report referred to in section 18 (1) a report setting out the results of each study together with such recommendations in relation thereto as it considers appropriate.

(2) (a) The Commission may recommend to Parliament or any other legislature the adoption of new legislation which will promote respect for human rights and a culture of human rights.

(b) If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 2 of the Constitution or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it must immediately report that fact to the relevant legislature.

(3) The Commission is competent—

(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 a group or class of persons.

(Emphasis supplied)

[17] The SAHRC is a creature of statute and its powers are circumscribed by the enabling statute. Axiomatically, any act performed by it that does not fall within the compass of the SAHRCA cannot be lawful.³

[18] What does section 13(3) envisage to be the role and function of the SAHRC? The First point of note is that this section empowers the SAHRC to take certain forms of action. The section does compel these actions.

(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 a group or class of persons.

(4) All organs of state must afford the Commission such assistance as may be reasonably required for the effective exercising of its powers and performance of its functions.'

³ This is the basic rule of law: *Pharmaceutical Manufacturers Association of SA and another: In Re Ex parte President of the Republic of SA and others 2000(2) SA 674 (CC)* *Affordable Medicines Trust v Minister of Health 2006 (3) SA 347 (CC)*.

[19] There are two categories of action.

19.1 In the first category, the SAHRC may conduct investigations. This it may do *mero motu* or when prompted to do so when a complaint is made to it. It follows that the purpose of an investigation, as the section explicitly provides, is to form an 'opinion' whether or not there is 'substance' to an '[alleged] violation of human rights'.

19.2 The second category is what the SAHRC may do as a result of the opinion it has formed. If it concludes there is substance to a complaint, the SAHRC has a choice to either assist a complainant or the victims of the alleged violation to bring proceedings in a competent court or bring such proceedings in its own right or on behalf of an affected person or class of affected persons.

[20] It is plain that the SAHRC is not empowered or authorised to decide whether or not a violation of human rights has *indeed* occurred. It follows that it is not within the power or authority of the SAHRC to pronounce that an *alleged* violation is *indeed* a violation and moreover, it is not within the power or authority of the SAHRC to exonerate a person from an allegation of having violated human rights. The SAHRC's opinion is relevant only to whether there is *substance* to an allegation, which justifiably could be the subject matter of court proceedings. To use different and familiar nomenclature, the question the SAHRC asks itself is whether there is a *prima facie* case to be met by the alleged violator. If the SAHRC reaches that conclusion, it may cause proceedings to be brought. In the case of an alleged contravention of section 10 of PEPUDA, the competent court in which to bring such proceedings in the Equality Court.

[21] If the SAHRC decides to investigate, pursuant to a complaint, as it claims to have done in this matter, then its further conduct in that regard is regulated by section 15. Section 15 prescribes an array of procedures and powers which would be necessary in order to conduct, if necessary, a *fact-finding exercise*,

including interrogations. The need for such powers would arise, typically, when, for example, an allegation is met with a denial and a dispute of fact arises. Section 16 takes this further by providing for search and seizure powers. One can imagine this procedure being necessary when making enquiries about, for example, allegations of human trafficking or workplace slavery. It may be useful to note that the investigation process as described in sections 15 and 16 seems to be strictly confined to fact-finding and is distinct from the qualitative process of evaluating the significance of the facts so gathered. Bearing in mind that the SAHRC does not make a definitive decision as to whether a violation has indeed occurred, the SAHRC is not required or permitted to conclude that an allegation of fact has been proven. That is a decision to be made by a court in due course.

[22] The complaints handling regulations under SAHRCA promulgated in 2017 contain provisions which should raise an alarm. Para 3(2) states that the SAHRC has a wide discretion whether to investigate an act – that *per se* is unobjectionable. The regulations then go on to state that an investigation leads to a ‘determination’. This terminology is a dangerous exaggeration of what statute provides, if what is contemplated is a definitive ‘decision’. If a definitive decision is meant, then it is *ultra vires*. In para 11 there is an allusion to the ‘conclusion of a complaint.’ SAHRC may in terms of 11(a), reject a referral or, in 11 (d), ‘find’ there was no violation. (The SAHRC’s Letter of 9 March 2019 referred to para 11(d)) Para 12(5) states the SAHRC must notify the parties of the outcome of an investigation in form of ‘findings’. Again, this terminology is suggestive of a role and powers not conferred by the SAHRCA. If they are interpreted to expand the powers of the SAHRC beyond the provisions of the statute they are *ultra vires*. These regulations may be the source of the erroneous stance that the SAHRC initially took and has now abandoned.

[23] Accordingly, the supposition on the part of the SAHRC when it pronounced that Mr Malema was exonerated from a contravention of section 10 of PEPUDA, led to an act or so - called ‘decision’ which was *ultra vires* and

therefore null ab initio. No such 'decision' was lawfully capable of being made by the SAHRC. To that extent and on that premise the purported 'decision' could not be made.⁴ What the SAHRC did was to purport to exercise a power it did not have. On that ground the 'decision' ought be reviewed and set aside. As alluded to, both complainants stood steadfast on the proposition that the SAHRC was capable of making a reviewable decision on the merits of the complaint that Mr Malema committed hate speech. Nonetheless what turned out to be the critical issue; ie could the SAHRC make such a decision, was fully argued.

[24] The Old HRA of 1994 made provision under the terms of the Interim Constitution for a Human Rights Commission. Section 7 set out its powers. Those provisions were no more extensive than those in the SAHRCA of 2013. Section 10 of the Old HRA provided for reports. It described in section 10 the outcome of its investigations as 'findings' which were to be notified to the complainants and affected persons. There is an appeal panel decision by the SAHRC under the Old HRA reported as *Freedom Front v South African Human Rights Commission and Another 2003 (11) BCLR 1283 (SAHRC)*. The Panel, in that appeal, overturned an initial decision of the SAHRC. On appeal the SAHRC appeal panel declared that the slogan 'Kill the Farmer Kill the Boer' was indeed hate speech forbidden by section 16(2)(c) of the 1996 Constitution. This took place in terms of regulations which provided for

⁴ See: *CUSA v Tao Ying Metal Industries and Others 2009 (2) SA 204 (CC)* at: [67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not, on its own, raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not, on appeal, raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible. [68] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the commissioner's jurisdiction and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings, in fact, did not reach the stage where the question of jurisdiction came into play.

hearings and appeals against 'determinations'. It is not apparent that these regulations could have been consistent with the provisions of the statute insofar as the SAHRC purported to make, itself, definitive decisions about what constituted hate speech. The reported decision seems to do just that. It is the only report of its kind known to me. Perhaps, it might be supposed that the current misstep by the SAHRC is, in part, explained by this historical error and a wrong grasp of its role.

[25] The provisions of PEPUDA add nothing to the scope of the role and powers of the SAHRC. The SAHRC is mentioned in section 28(2) in relation to its reporting duties already provided for in section 15 of SAHRCA. These have no bearing on the controversy.

Did Mr Malema contravene section 10 of PEPUDA?

[26] Whether Mr Malema transgressed section 10 of PEPUDA was of course the gravamen of these review applications. The complainants can get no answer from this court. This court, *qua* High Court has no jurisdiction to 'decide' such a question: the answer is reserved for the Equality Court, and it is to that court the complainants must go to obtain an answer.⁵ The SAHRC may opine that there is no contravention of section 10 of PEPUDA but for the reasons already traversed that opinion has no status whatsoever. The opinion of the SAHRC on such a question ranks with the opinion of any other person eligible to bring a case before the Equality Court.

⁵ There is a curious paradox about the jurisdictional role of the High Court in litigation under PEPUDA. The Equality Court is an ad hoc creature which comes into existence whenever the High Court or the Magistrates Court is convened to 'sit as an Equality Court'. The High court *qua* High Court can review a judgment of the Magistrates Court sitting as an Equality Court but has no original jurisdiction to pronounce on the issues regulated by PEPUDA; that is possible only when the High Court sits *qua* Equality Court'. A review against a decision of the SAHRC *per se* is not within the purview of the review jurisdiction provided in PEPUDA but, rather, is competent under PAJA. However, for the reasons already addressed, the SAHRC cannot make definitive decisions on PEPUDA issues and therefore the question of a review jurisdiction by the High Court in respect of such issues cannot arise. Whether this structural quagmire is really useful might be a question worthwhile for Parliament to give attention.

[27] Therefore, whether the remarks of Mr Malema, inter alia, that the land shall be acquired by Black South Africans one way or another from the Whites who had slaughtered Africans like animals in the process of colonial dispossession, but, at least for the present, he makes no call for the concomitant slaughter of Whites constitutes a contravention of section 10 of PEPUDA must remain uncertain, awaiting an authoritative pronouncement by a court of competent jurisdiction. Whether the notion that these remarks are not unlawful, as is the opinion of the SAHRC, stands up to scrutiny in the light of the equality jurisprudence of the courts must await adjudication.

Costs

[28] The liability for costs in this case is dictated by an unusual set of circumstances. The SAHRC wrongly purported to decide a question it had no power to decide and broadcast so-called 'findings' exonerating Mr Malema. The SAHRC expressly invited a review of those findings. In all of this the SAHRC is wrong. Were it not for that conduct there would have been no review applications at all. Moreover, the purported decision was no lawful decision at all; it was a mere opinion.

[29] These circumstances seem to me to be a proper basis why the SAHRC should bear the complainants' costs.

[30] Mr Malema and the EFF joined, at their own instance, to safeguard their interests and made common cause with the SAHRC albeit that they articulated a distinct intellectual premise for the application of the principles of review and of the provisions of PEPUDA. They should bear their own costs.

[31] For these reasons the order set out above has been made.

A handwritten signature in black ink, reading "Roland Sutherland", is written above a horizontal line.

Roland Sutherland

Deputy Judge President, Gauteng Division,
Johannesburg.

Heard: 8 May 2023

Judgment: 14 July 2023

Appearances:

For Afriforum:

Adv C Woodrow SC

With him Adv M Oppenheimer,

Instructed by Hurter Spies Incorporated

For FW De Klerk Foundation:

Adv MJ Engelbrecht SC,

Instructed by Crafford Attorneys

For South African Human Rights Commission:

Adv K Hardy,

With her, Adv T Tsagae

Instructed by South African Human Rights Commission

For Mr Julius Malema and EFF:

Adv K Premhid,

With him Adv P Vabaza,

Instructed by Ian Levitt Attorneys