

***Afriforum v South African Human Rights Commission and Others; Frederik Willem De Klerk NO AND Others v South African Human Rights Commission and Others***

Case no: 14370/2019

31328/2019

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**SUMMARY**

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**Review applications** – What constitutes a reviewable decision – Promotion of Administrative Justice Act 3 of 2000 (PAJA) – Difference between decision and opinion – Powers of South African Human Rights Commission (SAHRC) as per the South African Human Rights Commission Act 40 of 2013 (SAHRCA) – SAHRCA empowering SAHRC to investigate and give opinions – Opinions not constituting decisions in terms of PAJA.

**Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)** – Section 10 – Prohibition of hate speech – Contravention thereof – SAHRC finding on contravention ultra vires.

The complainants brought review applications pursuant to a finding made by the South African Human Rights Commission (SAHRC) declaring utterances made by Mr Malema at a 2016 gathering, not constituting a contravention of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA), and therefore not classified as hate speech.

The complainants contended 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. They also submitted that the decision to exonerate Mr Malema was grievously unreasonable in relation to the common cause facts. The SAHRC resisted the review as groundless and the EFF and Mr Malema agreed.

The court started first by determining the status of the “decision” made by the SAHRC. Upon proper interpretation of section 13(3) of the SAHRCA and what powers the statute grants the Commission, the court found that the Commission may conduct investigations on its own accord or when prompted to do so through a complaint being lodged with it. Thereafter, it forms an opinion whether there is substance to an alleged violation of human rights. The SAHRC therefore establishes whether there is a prima facie case to be met by the alleged violator and if there is, it may cause proceedings to be brought before a competent forum (in this matter, the Equality Court). The opinion is relevant only to whether there is substance to an allegation which could justifiably be the subject of court proceedings. The court therefore found that the SAHRC was not empowered to make definitive decisions that would be subject to review.

Held: any ‘decision’ about hate speech which the SAHRC is lawfully capable of taking is indeed not a ‘decision’ of the type that is reviewable.

The court also remarked that the regulations under the SAHRCA may be the source of the erroneous stance initially taken by the SAHRC (that PAJA applied to its decision) because of how they are drafted, and the terminology used. The use of words like “determination”, “conclusion of a complaint” and “findings” could be suggestive of powers the commission does not actually have.

Held: 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.

With regards to costs, the court held that the SAHRC invited the review proceedings when it decided to broadcast the so-called 'findings' exonerating Mr Malema, a decision they were not empowered to make. For that reason, the Commission should bear the complainants' costs and the EFF to bear its own costs as they joined at their own instance to safeguard their own interests.