

CASE NOTE



Involving South Africa's Human Rights Commission in environmental protection: *South African Human Rights Commission v Msunduzi Local Municipality*

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ABSTRACT

Section 24 of the Constitution of the Republic of South Africa, 1996, provides that everyone has a right to an environment that is not harmful to their health or well-being. However, the protection of the environment faces challenges, such as the failure of municipalities to provide safe and sufficient drinking water, regularly collect waste and effectively deal with the spillage of sewage into water courses, amongst others. The imminent collapse of local government, which impacts all social, environmental and economic aspects of sustainability, intensifies these failures. Several mechanisms help ensure that municipalities fulfil their constitutional and legislative obligations – including those related to the protection of substantive and procedural environmental rights enshrined in the Constitution. Among these are civil protests and judicially ordered provincial interventions into failing municipalities. However, little attention has been paid to the role of Chapter 9 institutions in ensuring that local government respects, protects, promotes and fulfils its environmental rights obligations. Drawing on a mix of literature and the recently decided *South African Human Rights Commission v Msunduzi Local Municipality* case, this contribution advances the argument that the South African Human Rights Commission has vast potential to help protect and fulfil s 24 of the Constitution and also that litigation seems inevitable in propelling specific action. The authors also consider the interpretation of the constitutional environmental right and the use of structural interdicts in the case of breaches.

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The 28 July 2022 United Nations General Assembly's decision to recognise the right to a clean, healthy and sustainable environment spotlighted the relevance of environmental rights in addressing the global environmental crisis.¹ Prior to this decision, many a researcher and court of law studied and deliberated on the legal

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¹ See United Nations Human Rights Council *The Human Right to a Clean, Healthy and Sustainable Environment* (8 October 2021).

function of environmental rights at multiple levels.² The advent of democracy in South Africa saw the adoption of a profound constitutional right that promises the protection of the environment in which people work and live, as well as the natural resources that support them.³ Section 24 of the Constitution of the Republic of South Africa, 1996, forms part of the Bill of Rights and stipulates that everyone has the right to an environment that is not harmful to their health or well-being.⁴ It also obligates the state to protect the environment for present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation.⁵

Despite the constitutional right to a healthy environment, South Africa faces an environmental crisis due to the state's failure to protect the environment as a result of complexities arising from the concurrency of environmental governance powers in the national, provincial and local spheres of government, human capacity challenges, corruption, and wasteful and fruitless expenditure.⁶ These problems are intensified at the local level, in which many medium-sized and smaller municipalities are collapsing across the country, compromising their ability to deliver basic services sustainably.⁷ The consequences for residents and the environment are severe and have been traversed in several court decisions.⁸ For residents, the dire state of municipalities manifests in erratic water provision, unpredictable patterns of waste removal, water-logged and dilapidated roads, municipal infrastructure failures, mismanagement of stormwater drainage, and poor condition of wastewater treatment facilities and other critical technical services that municipalities provide.⁹ As a

² See, for instance, DR Boyd *The Environmental Rights Revolution: a Global Study of Constitutions, Human Rights, and the Environment* (2011); JR May & E Daly *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (2019); E Daly 'Constitutional protection for environmental rights: The benefits of environmental process' (2012) 17 *International Journal of Peace Studies* 71; R Mwanza 'The relationship between the principle of sustainable development and the human right to a clean and healthy environment in Kenya's legal context: An appraisal' (2020) 22 *Environmental Law Review* 184; CB Soyapi 'The courts and the constitutional right to a clean and healthy environment in Uganda' (2019) 28 *Review of European Comparative & International Environmental Law* 152.

³ The impact of this right on the subsequent development of environmental law and governance in South Africa has been extensively explored over the years. See, for example, L Feris 'Constitutional environmental rights: An under-utilised resource' (2008) 24 *South African Journal on Human Rights* 29; AA du Plessis 'South Africa's constitutional environmental right (generously) interpreted: What is in it for poverty?' (2011) 27 *South African Journal on Human Rights* 279; M Kidd 'Environmental rights' (1996) 7 *South African Human Rights Yearbook* 102; J Glazewski 'Environmental justice and the new South African democratic legal order' (1999) *Acta Juridica* 1; ON Fuo 'The transformative potential of the constitutional environmental right overlooked in *Grootboom*' (2013) 34 *Obiter* 77; and LJ Kotzé 'The judiciary, the environmental right and the quest for sustainability in South Africa: A critical reflection' (2007) 16 *Review of European Community & International Environmental Law* 298.

⁴ Section 24(a) of the Constitution.

⁵ Section 24(b)(i) of the Constitution.

⁶ These challenges have been noted by the courts in various cases, including *Unemployed Peoples Movement v Eastern Cape Premier* 2020 3 SA 562 (ECG). See J Wright, F Dube & A du Plessis 'Judicial enforcement of mandatory provincial interventions in municipalities in South Africa' (2022) 55 *Verfassung und Recht in Übersee/World Comparative Law* 105 for a discussion.

⁷ *Electoral Commission of South Africa v Minister of Cooperative Governance and Traditional Affairs* 2022 5 BCLR 571 (CC) para 195.

⁸ See *Unemployed Peoples Movement* (note 6 above); *Coetzee v Premier, Mpumalanga Province* Case No: 2799/2017 (unreported), *Featherbrooke Homeowners Association NPC v Mogale City Local Municipality* 11292/2020; *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipality* [2020] ZANWHC 95; *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipalities* [2020] ZANWHC 9.

⁹ *Ibid.*

result of these failures, the pollution of land, air, rivers and other water courses ensues, affecting humans and ecosystems.¹⁰

Sections 24(a) and (b)(i) of the Constitution seek to prevent pollution that threatens human health and well-being. In light of incursions on the constitutional environmental right, several formal and informal mechanisms have developed as a result of attempts to ensure that municipalities fulfil their constitutional and legislative obligations. Among these are civil protests, judicially ordered provincial interventions into failing municipalities,¹¹ and activist environmental litigation against the government.¹² However, little attention has been paid to the role of the public institutions supporting constitutional democracy, also known as Chapter 9 institutions,¹³ in ensuring that municipalities fulfil their environmental obligations espoused in the Constitution and enabling legislation.¹⁴

In this contribution, we consider the role of the South African Human Rights Commission (SAHRC), one of the six Chapter 9 institutions, in ensuring respect for, and protection, promotion and fulfilment of the constitutional environmental right. In *South African Human Rights Commission v Msunduzi Local Municipality*,¹⁵ the SAHRC successfully applied for declaratory relief and a structural interdict against the Msunduzi Local Municipality in KwaZulu-Natal to fulfil its duty of care and to remediate the environment following its failure to operate a municipal waste disposal site in line with environmental legislation and applicable norms and prescripts. We begin the analysis with the *Msunduzi* case, after which we comment on the interpretation of s 24 of the Constitution. We proceed to evaluate the use of the structural interdict as a remedy in environmental cases. We end the discussion with a contextual exposition of the significance and powers of the SAHRC and the impact of the *Msunduzi* case on the role of the Commission in remedying breaches of the constitutional environmental right.

1. The South African Human Rights Commission as protector, enforcer and promoter of section 24: *Msunduzi*

1.1 The facts

This case emanated from an investigation carried out by the SAHRC into the failure of the Msunduzi Local Municipality to operate the New England Road landfill

¹⁰ See, for example, SAHRC 'Final report of the Gauteng provincial inquiry into the sewage problem of the Vaal River' (17 February 2021).

¹¹ For an exposition of judicially ordered provincial interventions into failing municipalities, see in general L Chamberlain & T Masiangoako 'Third time lucky? Provincial intervention in the Makana Local Municipality' (2021) 138 *South African Law Journal* 423. For a discussion on civil protest action in local government, see M Stoffels & A du Plessis 'Piloting a legal perspective on community protests and the pursuit of safe(r) cities in South Africa' (2019) 34 *Southern African Public Law* 1.

¹² The recently decided *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* [2022] 1 All SA 796 (ECG) is a good case in point.

¹³ Section 181(1) of the Constitution establishes six Chapter 9 institutions: the SAHRC, the Public Protector, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Auditor-General, and the Electoral Commission.

¹⁴ For critical analyses of the role of local government in the fulfilment of the constitutional environmental right in the South African context, see AA du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008); AA du Plessis 'Local environmental governance' and the role of local government in realising Section 24 of the South African Constitution' (2010) 21 *Stellenbosch Law Review* 265; O Fuo 'Role of courts in interpreting local government's environmental powers in South Africa' (2015) *Commonwealth Journal of Local Governance* 17.

¹⁵ *South African Human Rights Commission v Msunduzi Local Municipality* 2021 3 All SA 939 (KZP).

site¹⁶ in line with s 24 of the Constitution and national legislation governing the environment. The people of Pietermaritzburg were desperate for ways to hold the municipality accountable for its mismanagement of the site.¹⁷ An audit report found the following on the state of the landfill site's management:¹⁸

- a. inadequate assessment and classification of waste, illustrated by the disposal of 'hazardous chemical containers, paint containers and paint products, whole tyres and motor oil containers';¹⁹
- b. failure to regulate access to the landfill site, resulting in the presence and permanent residence of people at the landfill site, as seen by the presence of beds and sleeping areas at the site;
- c. failure to record entry and exit from the landfill site;
- d. servicing and maintenance of vehicles at the site, resulting in oil seeping into the soil and storm water washing off the oil into the Msunduzi River;
- e. failure to prevent leachate from the site from seeping into the environment;
- f. excessive storage of water at the landfill site, resulting in flies and odour; and
- g. failure to prevent informal recovery of waste and recycling at the landfill site.

These issues pointed to the failure of the Msunduzi Local Municipality to manage the landfill in accordance with the minimum standards stipulated in the management permit.²⁰ The report revealed that the municipality failed to implement an effective system for the management of the leachate system and that it was not undertaking necessary repair and maintenance work at the landfill site. These problems resulted in 'a series of fires that occurred at the landfill site and with no significant corrective action by the municipality'.²¹ The municipality also failed to heed the outcomes of the monitoring and supervisory engagements with the national government.²²

Despite several media reports²³ and outcries from the community, the municipality failed to remediate the problematic landfill site, which eventually resulted in

¹⁶ The site is located on Lot 1853 of the Farm Darvil No 15036 in New England Road, Pietermaritzburg in KwaZulu-Natal.

¹⁷ *Msunduzi* (note 15 above) para 14.

¹⁸ *Ibid* para 14.

¹⁹ *Ibid* para 34.

²⁰ The permit to operate the landfill site was issued in terms of the Environmental Conservation Act 73 of 1989, s 20. These minimum standards for the operation of the landfill site were annexed to the SAHRC's founding papers in *Msunduzi* (Annexure JBS2) – see para 23 fn 7 of the judgment. Section 20 of the Environmental Conservation Act was repealed by s 81 of the National Environmental Management: Waste Act 59 of 2008, although this did not affect the validity of the permit issued for the operation of the landfill site. Notwithstanding, the Msunduzi Local Municipality successfully applied for a replacement permit, which was issued in the variation licence for all of its activities pertaining to the management and protection of water sources from pollution – see *Msunduzi* (*ibid*) paras 29–30.

²¹ *Msunduzi* (*ibid*) paras 42, 46, 47, 49.

²² The national government conducted meetings, site inspections and engagements with the Msunduzi Local Municipality hoping to secure compliance with applicable environmental legislation to no avail. The Court said that these national engagements were undertaken in terms of the constitutional provision regulating co-operative governance and also in terms of legislation for the monitoring, supervision and oversight of municipalities by the national government (*ibid* para 42), resulting in the latter issuing a notice of non-compliance in terms of NEMA (para 43).

²³ See, for example, P Harper 'Dumpsite fire that smoked out Pietermaritzburg is finally out' (1 August 2020) *Mail & Guardian*; L Bhengu 'Lawsuit threats as Msunduzi landfill fire leaves city under cloud of smoke' (8 October 2019) *Sowetan Live*.

intervention by the SAHRC.²⁴ The numerous reports of the deplorable conditions at the landfill site triggered the SAHRC to initiate an investigation into the operation of the site. It was clear that the mismanagement of the landfill site was in breach of several statutes that protect natural resources, such as water and soil, and that it infringed on the protection of the environment in s 24 of the Constitution. When the SAHRC initiated the investigation and later turned to Court, it was driven by its constitutional mandate to 'promote the protection, development and attainment of human rights' and to 'monitor and assess the observance of human rights'.²⁵ The Commission obtained its legal standing from s 38 of the Constitution²⁶ and s 32 of the National Environmental Management Act (NEMA),²⁷ the latter providing that where environmental legislation has been violated or is about to be breached, anyone can approach the courts for relief.²⁸

1.2 Issues for consideration

The main issue for consideration by the Court was simple: whether the Msunduzi Local Municipality was in breach of its obligations to promote and protect the environmental right in s 24 of the Constitution by failing on its duty of care to manage the landfill site in accordance with the water management licence and compliance notices issued by provincial and national governments.²⁹ In addition, the Court had to determine whether the municipality had violated the National Environmental Management: Waste Act,³⁰ NEMA,³¹ the National Water Act (NWA)³² and some international law obligations.³³ While the constitutional environmental right and international law instruments cited served to create the rights-based canvas for deciding this case, the issues for consideration were grounded in national environmental legislation.

²⁴ *Msunduzi* (note 15 above) para 14.

²⁵ *Ibid* para 15.

²⁶ Section 38 of the Constitution defines anyone who can approach the courts for relief concerning infringements of the Bill of Rights as a person or persons acting:

- (a). in their own interests
- (b). on behalf of another person who cannot act in their own name
- (c). as a member of, or in the interest of, a group or class of persons
- (d). in the interest of its members (in the case of an association.)

²⁷ National Environmental Management Act 107 of 1998 (NEMA).

²⁸ Section 32 of NEMA, titled 'Legal standing to enforce environmental laws', provides an extended replica of s 38 of the Constitution by regulating who may litigate in environmental rights matters.

²⁹ *Msunduzi* (note 15 above) para 69.

³⁰ National Environmental Management: Waste Act, s 20(b), failure to operate a waste management site without a waste management licence; and s 28(1)-(3), duty of care and obligation to remediate environmental damage.

³¹ NEMA, s 31(L)(4), failure to comply with a notice in terms of this Act.

³² National Water Act 36 of 1998, s 19(1), failure to prevent and remediate water pollution.

³³ According to the Court (*Msunduzi* (note 15 above) para 81), the municipality's international obligations arose from the 1981 *African Charter on Human and Peoples' Rights* (to which South Africa is a State party), specifically art 16 (right to enjoy the best attainable state of physical and mental health), art 24 (right to a generally satisfactory environment favourable to development), and art 16(2) (duty of a state to take all necessary steps to protect human health); the 1989 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, in particular art 4(2)(c), duty to undertake all appropriate measures to prevent pollution to hazardous waste and all pollution that arises from the management of such waste so as to mitigate impact on the environment and human health; and the 1966 *International Covenant on Economic, Social and Cultural Right*, art 12, the right to enjoy the standard of physical and mental health.

1.3 The Court's reasoning

The Court traversed the material facts concerning the mismanagement of the site and considered the relevant environmental legislation and international law instruments. It reasoned that given the laws governing the management of waste, it was clear that waste management is a regulated activity and that, as such, municipalities have a statutory obligation to manage landfill sites in a manner that does not cause environmental harm.³⁴ This is meant to protect the environment and safeguard human health and well-being.³⁵ The Court further reasoned that despite its obligation under the replacement permit, the variation permit and various obligations imposed by environmental legislation, including the Waste Act, the Msunduzi Local Municipality had failed to manage the landfill site properly.³⁶ It emphasised that the municipality had failed to discharge its obligations under NEMA and had failed to comply with the government's compliance notices.³⁷ As such, the municipality breached its statutory duty of care and its obligation to remediate environmental damage. These duties are embedded in s 28 of NEMA, which says:

Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

The duty of care and the accompanying obligation to remediate polluting activities and their effects extend to all persons who own or operate on the land in which the activities occur, including municipalities. The duty of care and responsibility to remediate also find support in the environmental management principles in s 2 of NEMA, which, *inter alia*, provides for environmental justice and prevention, mitigation, and remediation of environmental damage.³⁸ Since the Msunduzi Local Municipality was operating the landfill site in terms of a permit (environmental authorisation), it owed the community this duty of care.³⁹ However, the municipality failed to act expeditiously, despite engagements and administrative-type interventions by the provincial and national authorities and, eventually, the SAHRC.⁴⁰ As such, the Court reasoned that the municipality had failed to be exemplary in managing its landfill site.⁴¹ According to the Court, this amplified the vulnerability of the citizens of Pietermaritzburg,⁴² particularly given that when fires broke out at the landfill site,

³⁴ *Msunduzi* (note 15 above) para 85.

³⁵ *Ibid* para 85.

³⁶ *Ibid* paras 86, 88.

³⁷ *Ibid* para 89.

³⁸ Section 2(1) and (4)(i)-(viii) of NEMA.

³⁹ *Msunduzi* (note 15 above) paras 88, 89(c).

⁴⁰ The municipality failed to act quickly in several instances, such when a series of fires broke out at the landfill site (*ibid* para 42). It only responded to a compliance notice after more than a month – see paras 44–45. Even after the response, fires continued to break out at the landfill site – see para 47.

⁴¹ *Ibid* para 95. The Court quoted various precedent setting judgments on the duty of organs of state to be exemplary in their compliance with constitutional obligations. These included *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 10 BCLR 968 (CC); *Lesapo v North West Agricultural Bank* 1999 12 BCLR 1420 (CC); and *MEC for Health, Eastern Cape v Kirland* 2014 3 SA 481 (CC).

⁴² *Msunduzi* (note 15 above) para 96.

the pollution emanating from the smoke was so intense that it engulfed a large area, resulting in the closure of schools and the shut-down of the N3 route. It also posed a serious risk to the health of the people living in the area.⁴³

In its reasoning, the Court did not rely on s 4 of the Local Government: Municipal Systems Act.⁴⁴ Instead, it focused on s 24 of the Constitution. It held that NEMA is the statute envisaged by s 24 that mandates the state to take appropriate measures (including the enactment of legislation to protect the environment ‘for the benefit of present and future generations’).⁴⁵ The Court observed that the statutory environmental law framework established under the Constitution has a set of comprehensive measures that are meant to protect the environment.⁴⁶ It held that for these measures to be meaningful, enforcement authorities are empowered to issue compliance notices that must be urgently attended to by the person to whom they are issued. The Court said that the Msunduzi Local Municipality did not heed these notices timely, thereby breaching its licence conditions, environmental legislation, and the Constitution.⁴⁷

However, there is something to be said about the Court’s rudimentary engagement with s 24 of the Constitution. In our analysis, the Court merely brushed over the environmental rights impact of the situation in Msunduzi, despite established conceptual linkages between local governance and the constitutional environmental right.⁴⁸ In our view, the Court’s mere impact-seeking mention of s 24 does not really add much judicial value. In fact, NEMA, the Water Act and the Waste Act, read with the Systems Act, would have seen this case through, as the Court had enough statutory violations to work with to arrive at its findings. However, the case was brought by the SAHRC, the country’s human rights watchdog, making it strange for the Court not to mention and address the constitutional environmental right under the circumstances.

Judicial recognition of the application of environmental rights where an organ of the state fails to secure an environment that is not detrimental to health or well-being should be celebrated. However, such recognition is futile if it does not enhance respect for the protection, promotion and fulfilment of constitutional environmental rights. In our view, the Court in *Msunduzi* had an ideal opportunity to elaborate on the nexus between the worrying state of local government service delivery and governance in large parts of South Africa,⁴⁹ on the one hand, and the kind of environment that the Constitution envisages for the people, on the other hand. It would have been desirable for the Court to critically engage with ss 7(2),⁵⁰ 24 and 152(1)⁵¹

⁴³ Ibid para 88.

⁴⁴ Local Government: Municipal Systems Act 32 of 2000. The section provides that councillors have a duty to see to it that community members live in a safe and healthy environment and to contribute to the progressive realisation of, *inter alia*, the constitutional environmental and water rights.

⁴⁵ Constitution, s 24.

⁴⁶ *Msunduzi* (note 15 above) para 89.

⁴⁷ Ibid para 89.

⁴⁸ See, for example, Du Plessis (note 14 above) and O Fuo & L Feris ‘Environmental rights protected in the Constitution’ in AA du Plessis (ed) *Environmental Law and Local Government in South Africa* (2021).

⁴⁹ See the discussion in Wright et al (note 6 above).

⁵⁰ This article provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

⁵¹ This provision states that one of the objects of local government is to promote a safe and healthy environment.

of the Constitution. Section 24 of the Constitution is the enabling legal basis for NEMA and the ensuing comprehensive list of environmental legislation.⁵² It is also one of the constitutional environmental rights that remains in need of judicial interpretation for future decision-making and rights litigation.⁵³

1.4 Findings

After considering the facts and the applicable legal framework, the Court made the following factual and legal findings:

- a. The Msunduzi Local Municipality was in breach of the revised compliance notice issued to it by the national government.⁵⁴
- b. The Msunduzi Local Municipality breached the variation waste management licence issued to it for the operation of the landfill site.⁵⁵
- c. The Msunduzi Local Municipality breached its obligations in international law.⁵⁶
- d. The Msunduzi Local Municipality breached the following provisions in South African law:⁵⁷
 - a. Section 24 of the Constitution;
 - b. Section 20(b) of the Waste Act;
 - c. Section 31L(4) of NEMA;
 - d. Section 28(1) and (3) of NEMA; and
 - e. Section 19(1) of the National Water Act.

These findings suggest that the Msunduzi Local Municipality had mismanaged its landfill site in violation of the constitutional environmental right, environmental legislation, and compliance notices from monitoring bodies. As alluded to above, the Court made its findings on s 24 of the Constitution without establishing any material links between the substance of the environmental right (s 24(a) and (b)) and the dire state of the New England Road Landfill Site.

1.5 Structural interdict

Section 172(1)(a) and (b) of the Constitution stipulates that a court must declare any conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. The court may make any order that is just and equitable. Section 38 of the Constitution provides that a court may grant appropriate relief, including a declaration of rights. In the present matter, the Court issued a structural interdict⁵⁸ to

⁵² *Msunduzi* (note 15 above) para 89.

⁵³ Many of the interpretational concerns raised in A du Plessis 'Adding flames to the fuel: Why further constitutional adjudication is required for South Africa's constitutional right to catch alight' (2008) 15 *South African Journal of Environmental Law and Policy* 57 have not yet been addressed by the Constitutional Court or any other of South Africa's courts.

⁵⁴ *Msunduzi* (note 15 above) para 1 of the order.

⁵⁵ *Ibid* para 2 of the order.

⁵⁶ *Ibid* para 3.6 of the order.

⁵⁷ *Ibid* para 3 of the order.

⁵⁸ Structural interdicts require the violator to rectify the breach of a constitutional right under the supervision of the court. The structural interdict typically consists of five elements. I Currie & J de Waal *The Bill of Rights Handbook*

remediate the mismanagement of the landfill site.⁵⁹ It ordered the Msunduzi Local Municipality to ‘discharge its duty of care and remediation of the environment’⁶⁰ as required by s 28(1) of NEMA and to file a report on its progress within six months. It further ordered the municipality to develop a comprehensive and detailed action plan to address its non-compliance with the revised compliance notice and the variation waste management licence.⁶¹ To ensure that its order would be effective, the Court also ordered the municipality to ensure that the Action Plan would ‘set measurable, periodic deadlines for progress’⁶² and give all parties to the case opportunities to comment before submitting the plan to the Court. The plan had to be approved by the respondents. The Court further ordered the municipality to file monthly progress reports with it on the implementation of the plan subject to the right of the other parties to comment on the monthly progress reports within 30 days of their filing. The Court reserved its right to make further directions *mero motu* or after submissions from the other parties at any time during the implementation of the Action Plan. It said that such directions would require the registrar of the High Court to enrol the matter on a date specified and in consultation with the judge president for consideration and determination. The Court did not issue an order on costs.

However, the *Msunduzi* Court’s structural interdict was silent on the application of the constitutional environmental right. Structural interdicts are appropriate remedies when a right in the Bill of Rights has been infringed, and it becomes necessary for the courts to administer the execution of a remedy.⁶³ In an ideal world, one of the benefits is that the structural interdict requires the government agency concerned to regularly report to the Court on the steps taken as set out in the structural interdict to comply with certain provisions of the Constitution.⁶⁴ While this contribution’s focus is not on the merit and worth of the structural interdict as a judicial remedy, it is essential to mention that despite some of the significant benefits in local government cases,⁶⁵ there may be some concerns about structural interdicts as a feasible remedy in environmental cases that may prove technical due to scientific and other complexities. Among other things, the concerns speak to the institutional support necessary to protect and judicially enforce constitutional

6 edn (2013) 217–219. See also N Swanepoel ‘Die aanwending van die gestruktureerde interdik in die Suid-Afrikaanse konstitusionele regsbedeling: ‘n Eiesoortige beregtingsproses – regte’ (2015) 12 *Litnet Akademies* 374, 378. The Constitutional Court first acknowledged structural interdicts as a valid and applicable remedy in 1998 in *Pretoria City Council v Walker* 1998 2 SA 363 (CC), in which it was held that litigants seeking either a declaratory or mandatory order to vindicate a constitutional right could also obtain a court order that the sphere of government in question take appropriate steps as soon as possible to eliminate the violation of rights and to report back to the court in question. P Swanepoel *The Potential and Role of Structural Interdicts to Constitute Effective Relief for Socio-Economic Rights Cases* (2017) 88–135 analyses a number of historic socio-economic rights cases in which the courts resorted to the structural interdict as a form of relief.

⁵⁹ *Msunduzi* (note 15 above) para 4 of the order.

⁶⁰ *Ibid* para 10 of the order.

⁶¹ *Ibid* para 4 of the order.

⁶² *Ibid* para 4 of the order.

⁶³ See the extensive discussion of the suitability of structural (supervisory) interdicts in matters involving local government in A du Plessis ‘The judiciary’s role in shaping urban space in South Africa as per the sustainable development goals’ (2018) 24 *South African Journal of Environmental Law and Policy* 5, 31–37.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

environmental rights in real terms, considering its basis in environmental management science.⁶⁶

2. The South African Human Rights Commission's constitutional significance and powers

The 1993 United Nations Principles Relating to the Status of National Institutions (the Paris Principles)⁶⁷ stipulate that national institutions responsible for protecting human rights should, *inter alia*, draw the attention of their governments to 'situations in any part of the country where human rights are violated and making proposals for initiatives to put an end to such situations'⁶⁸ and, where necessary, express opinions on the positions and reactions of the governments. The Paris Principles emphasise the important role of such institutions in protecting the integrity of the global human rights architecture.

The SAHRC⁶⁹ was established as a Chapter 9 institution to advance South Africa's constitutional democracy, which is defined as 'a government of the people by the people and for the people through the instrumentality of the Constitution'.⁷⁰ Rassie Malherbe and Dirk Brand observe that an important feature of the post-apartheid Constitution is its provision for 'various independent institutions to support and promote the new democratic order'.⁷¹ Among other reasons, the SAHRC was established to ensure that the executive at the national, provincial and levels 'does not abuse state financial resources, respects human rights and [...] does not act in an improper or prejudicial manner against citizens'.⁷² Its specific functions are set out in s 184 of the Constitution, which stipulates that the SAHRC 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 rights in the Republic.

As such, the SAHRC has an accountability mandate which requires it to operate independently of the political processes of government. Hence, it only reports to Parliament, to which it is accountable.⁷³ To ensure that it fulfils its functions, s 184(2) of the Constitution provides that the SAHRC has the powers to conduct investigations and report⁷⁴ on the observance of human rights, take active steps to

⁶⁶ For other concerns, see P Swanepoel (note 58 above) 137–147.

⁶⁷ Specifically the principles relating to the status of national institutions.

⁶⁸ Article 3(iv) of the section on competence and responsibilities.

⁶⁹ For more on the SAHRC, see: <<https://www.sahrc.org.za>>.

⁷⁰ *United Democratic Movement v Speaker of the National Assembly* 2017 8 BCLR 1061 (CC) para 1.

⁷¹ R Malherbe & D Barnard *Sub-National Constitutional Law in South Africa* (2017) 40.

⁷² F Dube 'Enhancing democratic accountability through constitutionalism in South Africa' (2019) PhD diss, North-West University 142.

⁷³ See the Constitution, s 181(5), which provides that Chapter 9 institutions report to the National Assembly annually. Reporting to the National Assembly does not mean that these institutions are subservient to the legislature – see Dube (*ibid*) 143.

⁷⁴ Since its inception, the SAHRC has published a number of investigative reports concerning the right to water, farming evictions, and tolerance and diversity, among others. See <<https://www.sahrc.org.za/index.php/sahrc-publications/findings>> for a list of these findings.

ensure that human rights violations are remediated expeditiously, conduct research on human rights violations, and to educate people on human rights. These powers are evidently broad and open-ended, although there was some uncertainty on whether the remedial actions of the SAHRC are binding. This issue was recently clarified in *SAHRC v Agro Data CC*,⁷⁵ in which the High Court held that the Commission cannot make binding remedial action because it ‘is not the “punisher” of human rights violations. It is the educator, transformer and empower [...] What the SAHRC is empowered to do is to take steps to secure appropriate redress. It cannot be the source of the redress’.⁷⁶ The Court’s pronouncement confirms the SAHRC’s status as a human rights guardian angel. However, the Court’s approach contrasts with *Economic Freedom Fighters v Speaker of the National Assembly*, in which the Court had the following to say regarding the powers of the Public Protector, another Chapter 9 institution:

If compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect. And if it were, by design, never to have a binding effect, then it is incomprehensible just how the Public Protector could ever be effective in what she does and be able to contribute to the strengthening of our constitutional democracy. The purpose of the office of the Public Protector is therefore to help uproot prejudice, impropriety, abuse of power and corruption in State affairs, all spheres of government and State-controlled institutions. The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant.⁷⁷

The Court elevated the Public Protector to an ‘actor’ responsible for more than a passive reflection on and caution against injustice, maladministration and threats to constitutional democracy.⁷⁸ Given that both the Public Protector and the SAHRC are established by the same constitutional provision, that is, s 181 of the Constitution, and since their independence, protection from interference and accountability are governed by the same section, one might have been persuaded to conclude that the findings and remedial action of the SAHRC should also be binding unless set aside by the courts. However, this is not the case, as the powers of the two institutions differ to the extent that the Public Protector can ‘take appropriate remedial actions [...] while the SAHRC should take] steps to secure appropriate redress’.⁷⁹

Notwithstanding its recent attempt to persuade the courts that its remedial action is binding,⁸⁰ the SAHRC does not appear to have been interpreting its powers to mean the issuance of binding remedial action. To date, it has taken a cautious approach that entails investigating and reporting on alleged human rights violations, engaging perpetrators and victims of human rights violations (such as municipalities

⁷⁵ *South African Human Rights Commission v Agro Data CC* [2022] ZAMPMBHC.

⁷⁶ *Ibid* paras 60–61. See also OC Okafor ‘The South African Human Rights Commission: A holistic assessment’ in T Maluwa (ed) *Law, Politics and Rights* (2014) 162–164.

⁷⁷ *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC) para 56.

⁷⁸ This corresponds with the view of Malherbe & Barnard (note 71 above) 40, who state with regards to Chapter 9 institutions that: ‘Although all these institutions have a specific role to play to support and promote constitutional democracy, the crucial role that the Auditor-General and the Public Protector play in strengthening good governance and constitutional democracy is emphasized’.

⁷⁹ *Agro Data* (note 75 above) para 59.

⁸⁰ See, for instance, *Agro Data* (*ibid*) para 58.

and their residents), and approaching the courts to secure redress for such violations.⁸¹ Over the years, the guardian angel spread its wings by way of investigations into and reports on persisting inequalities, implicit and explicit human rights violations and the ongoing struggle to balance different rights.⁸² However, it could not fly as such in that it could not do much more to ensure the urgent redress that transpired to be required in virtually all instances.⁸³

3. Concluding perspectives

We conclude that s 24 of the Constitution is so important that it should be the business of everyone in South Africa, including every organ of state, local government and the SAHRC, to ensure that its vision is fulfilled. In all instances, the value of a court judgment, such as *Msunduzi*, lies in whether it secures relief for affected persons. Our evaluation of the *Msunduzi* case shows that it is a meaningful judgment that finally succeeded in highlighting and addressing the ongoing battle for improving the state of the New England Road landfill site in Pietermaritzburg. The well-developed framework of environmental legislation in South Africa, which emanates from the constitutional environmental right, provided the SAHRC with ample legal ammunition for a strong case against the wrongful conduct of the Msunduzi Local Municipality.

However, the case raised a couple of interesting academic questions. For example, why did the national framework of local government legislation and its sections on environmental sustainability and municipal service delivery feature not feature in the judgment? Why did the Court shy away from drawing clear links between the wording and protection of s 24 of the Constitution and the poor state of local environmental governance in Msunduzi, of which the New England Road landfill site appears to have been just one manifestation at the time? Why did the Court issue a resource-intensive structural (supervisory) interdict and not another legal remedy? While these are interesting questions, they were not guiding our analysis of this case, as we were interested in the Court's analysis of the role of the SAHRC in protecting, promoting and fulfilling the constitutional environmental right. In determining this, it is necessary to consider the fact that:

To a large extent the Bill of Rights was transplanted overnight onto a society most definitely longing for, but not really prepared for it. Various institutions and mechanisms have therefore been created to further the development of a human rights culture [...] a Human Rights Commission was established to promote respect for human rights and the development of a culture of human rights. The Commission also

⁸¹ Some of the leading cases are *South African Human Rights Commission v City of Cape Town* [2020] ZAWCHC 84 (interdicting the City of Cape Town from carrying out brutal evictions of vulnerable people in winter at the height of the Covid-19 pandemic); *Qwelane v South African Human Rights Commission* 2021 6 SA 579 (CC) (interdicting hurtful speech); *South African Human Rights Commission v Khumalo* [2019] 1 All SA 254 (GJ) (interdicting hate speech). Also see ss 13 and 15 of the South African Human Rights Commission Act 40 of 2013 for more details on the SAHRC's powers and functions related to its investigations and collection of information.

⁸² See some of the SAHRC's hearing reports <<https://www.sahrc.org.za/index.php/sahrc-publications/hearing-reports>>.

⁸³ See the outcome of the hearing reports (ibid).

promotes the protection of human rights and monitors and assesses the observance of human rights.⁸⁴

It would seem that without litigation, there is not much that the SAHRC can do to stop violations of human rights, including environmental rights, in an era marked by a global environmental crisis and in a country battling with collapsing municipal service delivery. While it would have been desirable for the SAHRC to play a more active role in protecting the environment and securing its cleanliness and safety without having to first run to the courts, this is not the case. This is attributable to the constitutional framing of the functions of the SAHRC, as provided in s 182(2)(b) of the Constitution, which stipulates that the SAHRC has the power to, *inter alia*, 'take steps to secure appropriate redress where human rights have been violated'. As interpreted by the Court in *Agro Data*, this entails that the SAHRC is not the source of such redress but a mere vehicle for securing it.⁸⁵ Since its directions are not binding, the SAHRC has to rely on litigation to obtain binding directions against persons and organs of state who violate human rights.

At first glance, the non-binding nature of the SAHRC's findings reduces it to a mere human rights litigator, as it does not have 'teeth to bite' violators of human rights. However, the SAHRC is competent and obligated to make recommendations to organs of state for the promotion of human rights within the framework of the Constitution and the law,⁸⁶ undertake studies on human rights,⁸⁷ and request information from any organ of state on legislative and executive measures adopted relating to human rights.⁸⁸ This is supported by the fact that its 'findings and recommendations are not usually ignored – at least not in large measures'.⁸⁹ Given the dearth of detailed constitutional engagement with the meaning, scope and application of s 24, the SAHRC's contribution may very well lie in its mandate to conduct human rights research to help inform future litigation.

Although the Constitution and the SAHRC Act do not give the SAHRC powers to punish perpetrators of human rights violations, it can use its expertise and other resources to empower communities affected by human rights violations to obtain redress in the courts. Such empowerment can occur through assisting affected persons with access to legal counsel to litigate on their own behalf. Where such persons cannot litigate in their own names due to access to justice issues such as costly litigation, the SAHRC can use its constitutional standing under s 38 of the Constitution to litigate on behalf of the affected persons.⁹⁰ This has its own benefits, such as making affected persons feel involved in obtaining redress for themselves. However, it has the unintended consequence of depriving the SAHRC of the opportunity to play a bigger

⁸⁴ Malherbe & Barnard (note 71 above) 136.

⁸⁵ For a discussion of the defined jurisdiction of the Commission, see Okafor (note 76 above) 162–163.

⁸⁶ Section 13(1)(a)(i) of the SAHRC Act.

⁸⁷ Section 13(1)(a)(ii) of the SAHRC Act.

⁸⁸ Section 13(1)(a)(iii) of the SAHRC Act.

⁸⁹ Okafor (note 76 above) 164. See, also, *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC) para 56.

⁹⁰ Also see s 13(1)(a) and (b) of the SAHRC Act in terms of which the Commission may investigate any alleged violation of human rights and after a diligent investigation it may bring the matter to a competent court or tribunal in its own name or on behalf of a person or group of persons.

role in protecting human rights as an institution without the need for judicial involvement and adversarial court action.

Like some of its counterparts, South Africa does not have an environmental ombudsman as an accountability mechanism for violations of environmental rights.⁹¹ Hence, it is beneficial for the SAHRC to attempt to resolve any disputes, including disputes of an environmental nature, by taking non-litigation remedial action. The SAHRC may, for instance, resolve any dispute⁹² or attempt to rectify any act or omission that violates or threatens any human right by mediation, conciliation, or negotiation.⁹³ The benefits of this could be wide-ranging. Two of the starkest benefits that come to mind relate to the cost and time-intensive nature of adversarial litigation and the co-benefit of using the findings of SAHRC inquiries for addressing environmental rights infringements and to explore and promote the meaning and scope of application of s 24.⁹⁴

While we focus in this contribution on the role of the SAHRC, it also seems imminent that an extensive study is undertaken on the *collective role* of all of the Chapter 9 institutions in upholding the constitutional environmental right.⁹⁵ Such a study may also dwell on the Paris Principles' call in its sections on 'Competence and responsibilities' and 'Methods of operation' for 'the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles' and for 'the development of relations with the non-governmental organisations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialised areas'.⁹⁶ The somewhat limited powers of the SAHRC shift the spotlight to the important work to be done by the country's other Chapter 9 institutions, including the Public Protector and the Auditor-General. At the same time, it raises the question of what the SAHRC *is able to do* within the scope of its legal jurisdiction, considering the need for environmental rights education and research.

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⁹¹ Examples include the Australian Territory, New Zealand and Hungary. See further, M Shindo 'Environmental Ombudsman: Its role in the system of accountability mechanisms for administrative environmental decision making' in C Voigt (ed) *International Judicial Practice on the Environment: Questions of Legitimacy* (2019) 391.

⁹² Section 14(a) of the SAHRC Act.

⁹³ Section 14(b) of the SAHRC Act.

⁹⁴ While in this contribution we critique the court in the *Msunduzi* case for not having elaborated more on the meaning and implications of the constitutional environmental right, it should be noted that the mandate and scope of powers of the SAHRC allows (even mandates) it to do significant work in this regard.

⁹⁵ Section 27(1)(b) of the Constitution.

⁹⁶ Articles 3(g) (competence section) and (g) (methods section).

Disclosure statement

No conflict of interest was declared by the authors.

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