



SOUTH AFRICAN HUMAN RIGHTS COMMISSION REPORT

FILE REF NO: MP/1819/0179

In the matter between:

WILLIAM TRINITY MOSOTHO AND OTHERS

COMPLAINANT

And

AGRO DATA

FIRST RESPONDENT

MR F.G. BOSHOFF

SECOND RESPONDENT

INVESTIGATIVE REPORT

1. PARTIES

- 1.1. The Complainant in this matter is Mr William Trinity Mosotho, an adult male, who lodged the complaint on behalf of Mr Tubatsi Phepheng Piccanin Mosotho, his father, and the other occupiers (collectively referred to as "**the Occupiers**") of Doornhoek Farm ("**the Farm**").
- 1.2. The First Respondent in this matter is Agro Data CC, the owner of the Farm as of 24 November 2015.
- 1.3. The Second Respondent in this matter is Mr F.G. Boshoff, the sole member of the First Respondent. Although the Farm belonged to the First Respondent, as would be apparent below, the Second Respondent appears to have been the main actor in the events leading to this complaint.

2. MANDATE

- 2.1. The South African Human Rights Commission ("**the Commission**") is an institution established in terms of section 181 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**").
- 2.2. The Commission is specifically required to:
 - 2.2.1. Promote respect for human rights;
 - 2.2.2. Promote the protection, development and attainment of human rights; and
 - 2.2.3. Monitor and assess the observance of human rights in the Republic.
- 2.3. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.
- 2.4. The South African Human Rights Commission Act, 40 of 2013 ("**the SAHRC Act**"), provides the enabling framework for the powers of the Commission.
- 2.5. Section 15(6) of the SAHRC Act determines the procedure to be followed in conducting an investigation regarding an alleged violation of or threat to a fundamental right.

3. BACKGROUND

- 3.1. In the complaint received on 29 May 2018, the following was alleged by the Complainant:
 - 3.1.1. His father has been living on the Farm since 1965 as a farm labourer. He continued to work on the Farm until 1995, when the previous Farm owner left the Farm. He has, therefore, not worked on the Farm since 1995, but has continued to live on the Farm with his family, surviving on subsistence farming of livestock. In all the years he has been on the Farm, his cattle and other livestock could freely graze anywhere on the Farm, alongside the cattle or livestock of the owners of the Farm from time to time.
 - 3.1.2. Shortly after the Farm was transferred to the First Respondent, the Second Respondent issued notices to all the Occupiers, in terms of which he

advised of the withdrawal of all and any permission to keep, graze and drive any livestock on the Farm. The notices went on to state that all livestock belonging to the Occupiers must be removed on or before 31 March 2016, failing which, the livestock may be impounded in accordance with the applicable laws and ordinances.

- 3.1.3. Despite the Occupiers keeping their livestock beyond 31 March 2016, no steps were taken by the Second Respondent to have the livestock impounded, until 26 May 2018, when the Occupiers learnt that the Second Respondent was planning to impound their cattle.
 - 3.1.4. In addition to the above, also in 2016, the Second Respondent dug a furrow at the stream the Occupiers were using as their source of water for personal consumption and for their livestock, diverting the water away from the Occupiers. They have, therefore, been deprived of access to water by the Second Respondent, and have to rely on intermittent water supply from the Local Municipality, which is unreliable.
- 3.2. From the above, it is apparent that the initial complaint related to lack of access to water and the threatened impounding of the Occupiers' livestock by the First and/or Second Respondents.
 - 3.3. The Commission's preliminary assessment of the initial complaint was that the complaint disclosed a *prima facie* violation of the Occupiers' right to property as enshrined in section 25(6) of the Constitution.
 - 3.4. Subsequent to the initial complaint, however, the Complainant and the Occupiers raised additional issues or grievances, which include, but not limited to access to electricity, access to additional grazing land, access to additional land for cultivation purposes, damage to the graves of the Occupiers' relatives by the First and/or Second Respondent's cattle, accessibility of roads, and recovery of the full purchase price from the Second Respondent's father for a bull he sold in the market on behalf of one of the Occupiers.

4. MEDIATION ATTEMPT

- 4.1. An attempt was made by the Commission to mediate the dispute between the parties, with the view to assisting the parties to find an amicable resolution to their dispute.
- 4.2. The parties were, however, not able to agree on the terms for an amicable resolution of their dispute. As a result of the failed mediation attempt, the Commission determined that an investigation in terms of its CHP was appropriate.

5. INVESTIGATIVE METHODOLOGY

- 5.1. This complaint was investigated by the staff of the Commission through interviews and correspondence with the Complainant and the Occupiers, as well as correspondence with the Second Respondent, through his legal representative.
- 5.2. Site inspections were also conducted on the Farm.

6. RESPONSE FROM THE RESPONDENTS AND FURTHER REPLY FROM THE COMPLAINANT AND OCCUPIERS

- 6.1. An allegation letter setting out the initial complaint was sent to the Second Respondent's attorneys on 13 July 2018. The Second Respondent's response to the allegations was received on 30 July 2018
 - 6.1.1. With regards to the issue of water, the Second Respondent averred the following, amongst others:
 - a) In May 2016, the water levels of the borehole supplying the Farm were very low as a result of the very dry season, necessitating that the borehole pump and pipes be replaced.
 - b) The Complainant's father was consequently advised that he could no longer receive water from the borehole and must rely on the Municipality and the River for his water supply.
 - c) Following the installation of the new pump and pipes, the Complainant's father was advised that if he wished to continue

receiving water from the borehole, he would need to pay R300.00 (three hundred rand) for every 1000 liters of water supplied. The Complainant's father and "Christina"¹, however, insisted that the borehole water should be provided to them free of charge, at his expense.

6.1.2. With regards to the threatened impoundment of the Occupiers' livestock, the Second Respondent averred the following, amongst others:

- a) In and around June 2016, the wife to the Complainant's father and another Occupier (Ms Liesbet), chased his cattle out of one of their camps and chased their own cattle into the grazing camp designated for the Respondents' cattle. He is of the view that the Occupiers' conduct amounts to farming him off his land and that his property rights are not being respected by the Occupiers. It is for this reason that the notices referred to above (for the removal of the Occupiers' livestock from the Farm) were issued to the Occupiers in November 2016.
- b) On 30 January 2017, two bulls belonging to the Complainant's father broke some of the fences of the Farm and he requested that he (the Complainant's father) keep his cattle in his grazing camp, in response to which "Liesbet" threatened to kill him.
- c) On 27 November 2017, he once again requested the Complainant's father to stop chasing his cattle in the grazing camp designated for his cattle but the Complainant's father once again refused to do so and attempted to hit him instead.
- d) On 8 March 2018, one of the employees of the Farm was chasing a bull belonging to one of the Occupiers out of the grazing camp designated for his (Second Respondent) cattle but was shouted at by some of the Occupiers and threatened with violence.
- e) On 6 May 2018, the Complainant's father chased his cattle into the Farm's planted land, damaging the land. Further incidents took place

¹ Christina is one of the long term occupiers on the Farm.

on the 8th and the 9th of May 2018, resulting in him sustaining damages to the land in the amount of R100 000 (one hundred thousand rand).

6.1.3. In addition to his responses above, the Second Respondent *inter alia* made the following counter allegations against the Occupiers:

- a) That the Occupiers have, on a number of occasions, made threats to his life and property, when he requested the Occupiers to stop encroaching on his grazing land;
- b) That the Occupiers have made unauthorized use of his grazing land, resulting in damages being sustained to the grazing land;
- c) That the Occupiers have had visitors on the Farm without his consent or adhering to any conditions normally applicable to visitors entering the land belonging to another;
- d) That other than the Complainant's father and "Christina" who were living on the Farm when he took over the Farm, the Occupiers do not have legal title to be on the Farm;
- e) That the Complainant's father and "Christina" have allowed unauthorized Occupiers not entitled to stay on the Farm to reside on the Farm and to erect structures on the land;
- f) That the Complainant's father and "Christina" have arranged funerals on the Farm without consulting him and also extended the cemetery on the Farm without authorization;
- g) That the Occupiers have disrupted the normal farming activities on the Farm by erecting fences for different camps and for planting fields on the Farm.

6.1.4. The Second Respondent also indicated that he reported the intimidation and violence to the South Africa Police Services for investigation and handling to no avail. He is therefore requesting the Commission to intervene in his criminal complaints, to ensure that they are attended to.

6.2. In reply to the response from the Second Respondent, however, the Occupiers denied all the allegations levelled against them and instead averred that it is the Second Respondent that has made life difficult for them, as they had a peaceful and undisturbed existence on the Farm, before the First and/or Second Respondents took over the Farm. In relation to the issue of water, they further averred that they do not want to use the water from the river, as the employees of the Second Respondent defecate on the river. Accordingly, they are of the view that the water from the river is not fit for human consumption, which is denied by the Second Respondent. In any event, they asserted that as they previously received water from the borehole, it is that water supply they want restored, not the supply of water from the river. They denied that the water levels in the borehole were low at any point, which necessitated the disruption of their water supply from the borehole.

7. INSPECTION IN LOCO

7.1. The Commission visited the Farm on 10 August 2018 and 25 September 2018 respectively.

7.2. On the first visit to the Farm:

7.2.1. The Commission observed a number of homesteads on the Farm, where the Occupiers are said to be residing. The Commission noted that the homesteads had relatively big yards, where small scale gardening for subsistence purposes could be carried out.

7.2.2. The Commission also observed a furrow that had been dug along the Farm's main road, which diverted water from the river to a manmade pond at the bottom of the Farm. The Second Respondent indicated that the water collected in that pond is used for farming activities.

7.2.3. Moreover, the Commission also observed plots of fenced land, which were identified as grazing land plots. The one plot appeared to be overgrazed with very little grass remaining on it compared to other plots. The Complainant indicated that the overgrazed plot was allocated to them by the Second Respondent for purposes of grazing their cattle. The Complainant and his father, however, lamented the inadequacy of the plot

for grazing purposes, given the number of cattle grazing on that plot. The Second Respondent, on the other hand, indicated that he had to buy seed for the grazing grass to grow on his plots, and that the Complainant's father sought to benefit from that grazing land, without making a commensurate investment.

8. ANALYSIS OF THE FACTS

8.1. AGREED FACTS

8.1.1. From the above, the following salient facts appear to be not in dispute:

- a) That the Complainant's father and "Christina" were residing on the Farm when the Farm was taken over by the First and/or Second Respondent.
- b) That the Occupiers received a supply of water from the Farm's borehole before May 2016, without charge.

8.2. DISPUTED FACTS

8.2.1. The following salient facts appear to be in dispute between the parties:

- a) The reasons for discontinuation of the supply of water from the Farm's borehole.
- b) The quality of the water from the river for human consumption.
- c) The other Occupiers' title to reside on the Farm.
- d) The allegations of improper conduct levelled by the Second Respondent against the Occupiers.

9. LIMITATION OF ISSUES AND ISSUES FOR DETERMINATION

9.1. Having considered the additional issues and/or complaints raised by the Occupiers, as well as the additional counter allegations and complaints from the Second Respondent, the Commission is of the view that most of these additional issues and/or complaints could be dealt with more effectively by other organisations or institutions and has therefore, in accordance with article 8.1(9) of the CHP, determined that those issues should be indirectly referred to the relevant organisations or institutions for further handling. In this regard:

9.1.1. The Commission is of the view that the Department of Rural Development and Land Reform is best placed to deal with the complaints relating to access to additional land for cultivation and grazing purposes. This is because, having conducted site inspections at the Farm, it is apparent that the Farm cannot accommodate the growing demands of the Occupiers for additional land, whilst also accommodating the Respondent's commercial farming activities. Accordingly, the Occupiers are hereby advised to approach the Department of Rural Development and Land Reform for assistance with securing additional land to meet their growing demands for land. The Department of Rural Development and Land Reform is also best placed to deal with the complaint relating to roads, as this aspect of the complaint does not implicate a specific right and can, therefore, not be dealt with by the Commission.

9.1.2. The Commission is also of the view that the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities ("**CRL**") is best placed to assist the Occupiers with their complaint relating to damaged graves. Accordingly, the Occupiers are hereby advised to approach the CRL for assistance in relation to this aspect of their complaint.

9.1.3. The Commission is further of the view that the Small Claims Court is best placed to deal with the complaint relating to the recovery of the full purchase price for the bull the Second Respondent's father sold in the market on behalf of one of the Occupiers. The Occupier concerned is therefore advised to institute proceedings in the Small Claims Court in relation to this aspect of the complaint. To succeed with her claim,

however, the Occupier would need to prove how much was received for the bull from the Second's Respondent's father and how much ought to have been paid to them by the Second Respondent's father. The difference between the two figures is the amount that could be claimed for in the proceedings before the Small Claims Court.

- 9.1.4. The Commission is also of the view that Eskom is best placed to deal with the complaint relating to access to electricity in the first instance. The Occupiers concerned are therefore advised to approach Eskom for assistance with electricity connections and/or reconnections. Only if the Occupiers are unable to receive the assistance sought for, can they approach the Commission or any other organisation, including Legal Aid South Africa or the Department of Rural Development and Land Reform for assistance.
- 9.1.5. Finally, the Commission is of the view that a Court of law and the police are best placed to deal with the Second Respondent's complaints of intimidation and damage to property against the Occupiers. In this regard, the Second Respondent may approach an appropriate court for relief in the form of an interdict or an eviction application if just and equitable grounds for such applications are established. Moreover, the Second Respondent may report his dissatisfaction with the local SAPS to the SAPS station commander and escalate such complaint to the provincial commissioner for appropriate relief if needed.

- 9.2. With regards to the issue of threatened impoundment of the Occupiers' cattle, the Commission finds it unnecessary to make a finding on this issue, as almost a year since the threats were allegedly made, no livestock belonging to the Occupiers has been impounded by the Second Respondent. In any event, the Commission cannot impede the Second Respondent's lawful exercise of the right to impound trespassing cattle or other livestock, provided it is done in accordance with the law. In this regard, it suffices to direct the parties to the provisions of section 7 of the Extension of Security of Tenure Act no 62 of 1997 ("**ESTA**") relating to impoundment:

"(1) The owner or person in charge of land may have a trespassing animal usually or actually in the care of an occupier impounded and removed to a pound in accordance with the provisions of any applicable law, if the owner or person in charge has given

the occupier at least 72 hours' notice to remove the animal from the place where it is trespassing and the occupier has failed to do so: Provided that the owner or the person in charge may take reasonable steps to prevent the animal from causing damage during those 72 hours."

- 9.3. In view of the above, the only issue that remains for determination by the Commission is the issue relating to access to water.
- 9.4. In relation to the issue of access to water, in the initial complaint, the Complainant averred that the Second Respondent dug a furrow, diverting the water from the river away from the Occupiers. During the investigation of this matter, however, the Occupiers denied that they were sourcing their water from the river before the arrival of the Second Respondent on the Farm. Instead, the Occupiers asserted that they did not want water from the river as it is not fit for human consumption and demanded to have their water supply from the borehole restored.
- 9.5. Whilst the contradictory versions of the Complainant and the Occupiers, would, ordinarily be decisive, it is noteworthy in the present case that, although he has relatives on the Farm, the Complainant does not currently live on the Farm and has not lived there for many years. On the other hand, the Occupiers do live on the Farm, and would, naturally, have a more informed perspective on the matter. In any event, in his reply of 26 July 2018, the Second Respondent conceded that in May 2016, shortly after the transfer to the Farm to the First Respondent, he advised the Complainant's father that "they" (the Occupiers) can no longer receive water from the borehole and must rely on water from the Municipality and the river. The Second Respondent's own version, therefore, lends support to the version of the Occupiers that before May 2016, the Occupiers' main source of water was the borehole, and not the river as initially asserted by the Complainant. In the circumstances therefore, for the purposes of this investigation, it is this borehole water supply disruption that must be investigated, with the view to determining whether the Second Respondent violated the rights of the Occupiers' to water.
- 9.6. It is also worth noting that this is not a case where the farm owner has refused to supply water to the Occupiers *in toto*. In his reply to the allegations levelled against him, the Second Respondent avers that he offered to supply the borehole water to the Occupiers at a charge of R300 (three hundred rand) for every 1000 liters supplied.

- 9.7. Accordingly, the specific issue to be determined by the Commission is whether the refusal by the Second Respondent to supply water to the Occupiers without charge violated the Occupiers' rights to water.

10. LEGAL ANALYSIS

- 10.1. In terms of section 25(6) of the Constitution, the Legislature was required to enact legislation that will either provide security of tenure or provide comparable redress for persons or communities whose tenure was legally insecure as a result of past racially discriminatory laws. It is against this injunction that ESTA was enacted.
- 10.2. In the case of *Daniels v Scribante and Another 2017 ZACC 13 (Daniels)*, after outlining the history of land dispossessions by the white minority in South Africa, the court underscored the fact that in redressing the mischiefs of the past, ESTA not only seeks to provide occupiers with security of tenure, but also seeks to afford occupiers "the dignity that eluded most of them throughout the colonial and apartheid regimes".² The court went on to find, therefore, that ESTA should be interpreted in a manner that gives effect to this purpose.
- 10.3. Insofar as the rights of occupiers and owners are concerned, section 5 of ESTA provides the following:
- "5. Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier, an owner and a person in charge shall have the right to –*
- (a) human dignity;*
 - (b) freedom and security of the person;*
 - (c) privacy;*
 - (d) freedom of religion, belief and opinion and of expression;*
 - (e) freedom of association; and*

² *Daniels*, Para 23

(f) *freedom of movement,*

with due regard to the objects of the Constitution and this Act.” (own emphasis)

10.4. Sections 6 further outlines the rights of occupiers. The rights of occupiers which are relevant to this investigation are as follows:

*“6(1) Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as **had** been agreed upon with the owner or person in charge, whether expressly or tacitly.*

(2) Without prejudice to the generality of the provisions of section 5 and subsection 1 and balanced with the rights of the owner or person in charge, an occupier shall have the right ... (e) not to be denied or deprived of access to water...”
(own emphasis)

10.5. In the case of ***Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 28***, the court underscored the importance of water to human existence. Simply put, the court found that “[w]ater is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die.”³

10.6. It is therefore not surprising that the right of access to water is one of the rights specifically mentioned in section 6 of ESTA.

10.7. As indicated above, the specific issue to be determined by the Commission is whether the refusal by the Second Respondent to supply water to the Occupiers without charge violated the Occupiers’ rights not to be denied or deprived of access to water in terms of section 6(2)(e) of ESTA.

10.8. The language of section 6(2) of ESTA calls for the reading of section (6)(2) together with sections 5 and 6(1) of ESTA. Whilst section 5 underscores the human dignity of both occupiers and owners, section 6 (1) provides that occupiers do not only have a right to reside and use occupied land, but that they also have a right to services that had been agreed to with the owner of the farm, whether expressly or tacitly.

³ Mazibuko, Para 1

- 10.9. We have already established above that the Occupiers in the present case were receiving water from the Farm's borehole before May 2016. It would also appear from the facts before the Commission that the Occupiers accessed and utilised the water from the borehole in an open manner, which suggests that before May 2016, the Occupiers had an established right or permission (whether expressly or tacitly) to access and use the water from the borehole by the previous Farm owner and by the First and/or Second Respondents before May 2016.
- 10.10. From the facts before the Commission, it would also appear that, before May 2016, the borehole water was supplied to the Occupiers without charge. The Second Respondent's version that he only informed the Complainant's father of the charge of R300 for every 1000 litres of water supplied after the borehole was fixed lends support to this conclusion.
- 10.11. In light of the above, the Commission finds that the supply of borehole water to the Occupiers without charge was a service that had been agreed upon (expressly or tacitly) with the previous Farm owner and the Second Respondent before May 2016 within the contemplation of section 6(1) of ESTA.
- 10.12. Notwithstanding the long established agreement or arrangement relating to the provision of water to the Occupiers, the Second Respondent sought to unilaterally alter this arrangement by first informing the Occupiers that they will no longer be receiving water from the borehole and by later informing the Occupiers (after replacing the borehole pump and pipes) that they can only receive water from the borehole if they paid a charge of R300 for every 1000 litres of water supplied.
- 10.13. Whilst the Commission is not unmindful of the cost pressures associated with the operation and servicing of a borehole, the First and Second Respondents went about addressing these pressures through the imposition of a unilateral condition. Rather than treat the Occupiers as important stakeholders and partners in addressing the common challenge of access to a scarce resource like water, the Second Respondent treated the Occupiers as nothing more than an inconvenience and entities without agency, stripping them of their human dignity. In this regard, without consulting or engaging with the Occupiers, the Second Respondent determined on his own that the borehole water levels were low. On his own, he decided that a new pump and pipes needed to be fixed. Again, on his own, he decided what the charge will be for the borehole water, without taking the Occupiers into his confidence and

explaining how he arrived at the charge of R300 (three hundred rand) for every 1000 litres of borehole water supplied. This conduct undoubtedly contributed to the hardening of relations between the parties, as on the Second Respondent's own version, the relations between the parties begin to unravel in June 2016, after the decision of the Second Respondent in May 2016.

- 10.14. In the Commission's view, an appropriate course of action would have been to engage the Occupiers at the earliest possible opportunity on the issue of water supply on the Farm, at the very least at the time the Second Respondent became dissatisfied with the existing arrangement. In the event of the parties failing to reach an amicable resolution of the matter, the Second Respondent could have approached a court of law for appropriate relief.
- 10.15. In the circumstances, the Commission is of the view that the First and/or Second Respondent violated the Occupiers' right not to be denied or deprived of access to water as contemplated in section 6(2)(e) of ESTA.
- 10.16. The Commission has not considered whether access to water may be obtained from the river as this option is not a tenable one given the precarious nature of the option and the fact that an earlier more suitable arrangement is the point of dispute.

11. PRELIMINARY FINDINGS

- 11.1. In light of the above, the Commission makes the following findings:
 - 11.1.1. The First and/or Second Respondent violated the Occupiers' right not to be denied or deprived of access to water as contemplated in section 6(2)(e) of ESTA.
 - 11.1.2. It is not necessary to make a finding on the issue of the threatened impoundment of the Occupiers' livestock as almost a year since the threats were allegedly made, as no livestock belonging to the Occupiers has been impounded by the Second Respondent. In any event, the Commission cannot impede the Second Respondent's exercise of the right to impound trespassing cattle or other livestock, provided it is done in accordance with the law.

- 11.1.3. The remaining issues to be referred to other organisations and institutions for further handling as indicated in paragraph 9.1 of this report.


12. DIRECTIVES

- 12.1. In the light of the findings set out in paragraph 11 above, the Commission makes the following directives:
 - 12.1.1. That the First and/or Second Respondents restore the supply of borehole water to the Occupiers within 7 days of this report.
 - 12.1.2. That, within 30 days of this report, the parties commence engagements in good faith on the management of water at the Farm, with the view to ensuring an equitable sharing of this scarce resource.
 - 12.1.3. The Second Respondent to supply the Occupiers with all the relevant information within 14 days of this report, to enable them to engage meaningfully in relation to the issue of water management on the Farm. Such information should include all the scientific reports at the disposal of the Second Respondent relating to the levels of the underground water on the Farm, as well as the costs incurred by the Second Respondent in the supply of water to the Occupiers.
 - 12.1.4. That in the event that the parties are not able to reach an amicable resolution on the issue of water management on the Farm, each party may approach a court of law for appropriate relief.

13. OPPORTUNITY TO COMMENT ON THE PRELIMINARY INVESTIGATIVE REPORT

- 13.1. The parties were afforded an opportunity to comment on the preliminary investigative report issued on 29 March 2019. No comments were received from the parties, despite being provided with an extended period within which to comment.
- 13.2. In view thereof, the findings and directives made in the preliminary report remain unchanged in this report.

SIGNED AT Johannesburg ON THE 9th DAY OF September 2019.



Commissioner M S Ameerma

South African Human Rights Commission