CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 264/24

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Applicant
and	
AGRO DATA CC	First Respondent
FRANCOIS GERHARDUS BOSHOFF	Second Respondent
and	
CENTRE FOR APPLIED LEGAL STUDIES	First Amicus Curiae
AFRIFORUM NPC	Second Amicus Curiae
PROBONO.ORG	Third Amicus Curiae

Neutral citation:	*South African Human Rights Commission v Agro Data CC and Another* [2026] ZACC 16
Coram:	Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Nicholls AJ, Rogers J, Savage AJ, Theron J and Tshiqi J
Judgment:	Nicholls AJ (unanimous)
Heard on:	25 November 2025
Decided on:	22 April 2026

Summary: South African Human Rights Commission Act 40 of 2013 — Chapter 9 institution — section 184(2)(b) of the Constitution — South African Human Rights Commission

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ORDER

On appeal from the Supreme Court of Appeal:

1. Leave to appeal is granted.
2. The appeal is dismissed.

JUDGMENT

NICHOLLS AJ (Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Rogers J, Savage AJ, Theron J and Tshiqi J concurring):

Introduction

[1] The Constitution's transformative vision is unattainable without the support of institutions specifically established to entrench constitutionalism and ensure the effective functioning of our democratic order. Six such institutions are conceptualised in Chapter 9 of the Constitution,[1] each bearing a distinct and indispensable role in upholding and advancing the constitutional project. In the words of the Constitution: "[t]hese institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions

[1] As set out in section 181(1) of the Constitution, which establishes the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission.

without fear, favour or prejudice."[2] Other organs of state are obliged to assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness, and "no person or organ of state may interfere with the functioning of these institutions".[3]

[2] The establishment of the Chapter 9 institutions was a deliberate choice made by South Africa's constitutional drafters to restore trust in the state and rebuild public institutions. These institutions were created as part of a new constitutional architecture to operate as intermediaries between the state and the public, recognising that the traditional branches of government had often been inaccessible or had operated as sources of oppression during apartheid.[4]

[3] This case is concerned with the powers conferred on one of the Chapter 9 institutions, the applicant in this case, the South African Human Rights Commission (SAHRC). Specifically, this Court is asked to determine the legal effect of the recommendations or directives[5] of the SAHRC following its investigation into a complaint of a violation of human rights. The question is whether it has the power to issue binding and legally enforceable directives under section 184(2)(b) of the Constitution, which provides that the SAHRC has the power to "take steps to secure appropriate redress where human rights have been violated".

[4] The first respondent is Agro Data CC, a close corporation which owns Portion 3 of the farm Doornhoek in the Mpumalanga Province (Doornhoek farm). The second respondent is Mr Francois Gerhardus Boshoff, who is the sole member of Agro Data CC. Neither respondent opposed the application in this Court. The Centre

[2] Section 181(2) of the Constitution.

[3] Section 181(3) and (4) of the Constitution.

[4] Konstant "The Performance of Chapter 9 Institutions" in *Assessing the Performance of South Africa's Constitution* (International Institute for Democracy and Electoral Assistance, 2016) at 3.

[5] There was some disagreement on whether the SAHRC was empowered to issue directives or recommendations. At the hearing, the SAHRC conceded that it can only issue recommendations. However, because the SAHRC had argued before the courts *a quo* that it was empowered to issue directives, this is the terminology used in this judgment.

for Applied Legal Studies (CALS), AfriForum NPC (AfriForum) and ProBono.org were admitted as amici curiae (friends of the court). They made written and oral submissions.

Background facts

[5] In June 2015, Agro Data CC purchased the Doornhoek farm. Around May 2016, it informed the occupiers who resided on the farm that they were no longer permitted to access water from the farm's borehole. In May 2018, the SAHRC received a complaint from Mr William Mosotho on behalf of his elderly father and other occupiers, some (but not all) of whom qualified as occupiers as defined in section 1 of the Extension of Security of Tenure Act[6] (ESTA). They alleged that, in 2016, Mr Boshoff unilaterally restricted their access to borehole water on the farm. After an investigation, the SAHRC found that the previous farm owner had allowed the occupiers access to borehole water for their personal use. They had also been permitted to use water from a nearby stream for farming purposes.

[6] The SAHRC released a report finding, among others, that the respondents had violated the occupiers' right of access to water as contemplated by section 6(2)(e) of ESTA and section 27(1)(b) of the Constitution, and had violated their right to dignity under section 10 of the Constitution. The SAHRC directed—

> "[t]hat the first and/or second respondents restore the supply of borehole water to the occupiers within 7 days of this report.
>
> 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.
>
> 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

[6] 62 of 1997.

water on the farm, as well as the costs incurred by the second respondent in the supply of water to the occupiers.

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."

[7] Upon visiting the Doornhoek farm in 2019 and again in 2020, the SAHRC found that the respondents had not complied with its directives.

Litigation history

High Court

[8] The SAHRC brought an application in the High Court of South Africa, Mpumalanga Division, Mbombela (High Court), where it sought, among others, a declaratory order that its directives issued under section 184(2)(b) of the Constitution are binding and that the specific directives it had issued in this case were binding. It argued that its powers to issue binding directives derived from section 184(2)(b) of the Constitution and section 13(3) of the South African Human Rights Commission Act[7] (SAHRC Act).

[9] Section 184 of the Constitution provides:

"(1) The South African Human Rights Commission 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 human rights in the Republic.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power—

(a) to investigate and to report on the observance of human rights;

[7] 40 of 2013.

(b) to take steps to secure appropriate redress where human rights have been violated;

(c) to carry out research; and

(d) to educate.

(3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission 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.

(4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation."

[10] Section 13(3) of the SAHRC Act provides:

"(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."

[11] The SAHRC contended that by ignoring its directives, the respondents had undermined the rule of law and interfered with its functioning, in violation of

section 181(4) of the Constitution.[8] The SAHRC relied on *EFF I*,[9] where this Court held that the Public Protector's directives might, at times, have a binding effect to allow for the effective address of complaints.[10]

[12] The respondents opposed the SAHRC's application. They denied that the SAHRC has the power to issue orders to which private individuals had to automatically adhere. The respondents argued that they could not supply free borehole water to the occupiers of the Doornhoek farm, who numbered over 100, and some of whom were unlawful occupiers who had alternative access to water from the river and the municipality.

[13] On 2 March 2022, the High Court handed down its judgment.[11] It held that the SAHRC exercises cooperative control, which is facilitative and proactive, rather than coercive control, which is unilaterally or forcefully imposed. The High Court held that the SAHRC could not be equated with the Public Protector and therefore *EFF I* was not applicable. It reasoned that the Constitution creates a hierarchy between Chapter 9 institutions, with the Public Protector enjoying a higher status on the basis that there are heightened appointment and removal requirements for the Public Protector, and because the Public Protector is mentioned first in section 181(1) of the Constitution. In addition, the High Court held that the constitutional and statutory powers of the institutions are distinguishable. The Public Protector is empowered to "take appropriate remedial action" under section 182(1)(c) of the Constitution, while the SAHRC may "take steps to secure appropriate redress" under section 184(2)(b) of the Constitution.

[14] However, the High Court stated that this did not mean that the SAHRC's powers were automatically non-binding or capable of being ignored, but rather that their

[8] Section 181(4) provides that no person may interfere with the functioning of Chapter 9 institutions.

[9] *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC).

[10] Id at paras 69-71 and 73.

[11] *South African Human Rights Commission v Agro Data CC* [2022] ZAMPMBHC 58 (High Court judgment).

binding effect depended on whether a directive was aimed toward securing appropriate redress. This was to be determined by interpreting each directive, taking into account the issues being investigated, the findings made and the steps taken. Accordingly, the High Court held that the SAHRC was not entitled to a blanket declaration that all its directives were binding.

[15] In respect of the specific directives in this case, the High Court held that the first directive (to restore the water supply) exceeded the SAHRC's powers and was therefore not binding. The SAHRC had overlooked that the Constitution makes the provision of water a municipal function, and ESTA does not put a positive obligation upon the land owner to provide water, especially without charge. Moreover, not all those residing on the Doornhoek farm qualified as occupiers as defined in ESTA.

[16] As to the remaining two directives (facilitating engagement between the parties and providing relevant information), the High Court held that these were legitimate directives under section 184(2) of the Constitution, since engagement and exchange of information are steps towards securing appropriate redress. The High Court thus dismissed the prayer for a declarator that the SAHRC's directives were generally binding, but granted the declaratory relief pertaining to the directives concerning engagement and the provision of relevant information.

Supreme Court of Appeal

[17] The SAHRC appealed to the Supreme Court of Appeal against the High Court's dismissal of the declaratory relief that its directives were generally binding. It argued that if its directives were ignored, it would be unable to effectively fulfil its constitutional obligations. Resource constraints made it impossible to litigate every complaint, and vulnerable complainants would have no redress if the SAHRC's directives were not binding. The SAHRC criticised the High Court's interpretation of "appropriate redress" and its finding that there is a constitutional hierarchy amongst Chapter 9 institutions, with only the Public Protector having the power to take direct remedial action.

[18] The respondents did not participate in the proceedings before the Supreme Court of Appeal. CALS, the Commission for Gender Equality (CGE) and AfriForum were admitted as amici curiae.

[19] Both CALS and CGE supported the SAHRC's position. CALS contended that the High Court had erred in adopting a purely textual approach to interpretation, and that section 184(2)(b) of the Constitution should be interpreted in line with international law as required by section 233 of the Constitution, which included the Principles Relating to the Status of National Institutions[12] (Paris Principles). CGE's arguments focused on how the High Court had erred in finding that there was a hierarchy among Chapter 9 institutions. AfriForum took a different stance. It submitted that unlike the Public Protector, the SAHRC does not have the constitutional or statutory power to issue binding remedial directives and does not require such power to fulfil its constitutional mandate.

[20] In its judgment,[13] the Supreme Court of Appeal held that section 184(2)(b) of the Constitution read with section 13(3) of the SAHRC Act is expressed in clear and direct language, requiring the SAHRC to assist affected persons through appropriate judicial channels or to pursue other suitable options. The Supreme Court of Appeal held that section 13(3) of the SAHRC Act empowers the SAHRC to assist affected persons to secure redress, and it falls on a court or tribunal to make a binding finding based on the evidence before it. It found that the word "assist" in section 13 of the SAHRC Act was indicative of the SAHRC's function to act in a supportive or enabling role, rather than to issue binding directives.

[12] Principles Relating to the Status of National Institutions, annexed to National Institutions for the Promotion and Protection of Human Rights GA Res 48/134 UN Doc A/RES/48/134 (1993).

[13] *South African Human Rights Commission v Agro Data CC* [2024] ZASCA 121; [2024] 4 All SA 66 (SCA); 2024 (6) SA 443 (SCA) (Supreme Court of Appeal judgment).

[21] After considering section 14 of the SAHRC Act, which provides that the SAHRC may rely on mediation, conciliation or negotiation, the Supreme Court of Appeal concluded that the powers of the SAHRC were persuasive rather than coercive. Further, it held that the investigative powers contemplated in sections 15 and 16 of the SAHRC Act do not confer quasi-judicial status on the SAHRC but facilitate the taking of evidence. The Supreme Court of Appeal agreed with the High Court's judgment in *AfriForum*[14] that the SAHRC lacks authority to make binding decisions under section 13(3) of the SAHRC Act.

[22] The Supreme Court of Appeal disagreed with the High Court's finding on the hierarchy of Chapter 9 institutions and held that while all Chapter 9 institutions aim to strengthen constitutional democracy, they do so in different ways, and not all possess binding remedial powers. The different constitutional role and powers of the Public Protector, as described in *EFF I*, were distinguished from those of the SAHRC. The latter may only "take steps to secure appropriate redress" as opposed to direct remedial action. It pointed out that the statement in *SABC*,[15] that Chapter 9 institutions' remedial powers cannot be ignored, referred specifically to the Public Protector. For these reasons, the Supreme Court of Appeal found that the different roles and powers of Chapter 9 institutions do not imply a vertical hierarchy between them.

[23] The Supreme Court of Appeal held that its interpretation was consistent with international norms and standards, noting that there were no binding treaties or conventions explicitly requiring National Human Rights Institutions (NHRIs) to have binding powers. The Supreme Court of Appeal thus dismissed the appeal with no order as to costs.

[14] *AfriForum v South African Human Rights Commission* 2023 (6) SA 188 (GJ).

[15] *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA).

In this Court

SAHRC's submissions

[24] The SAHRC submits that this matter engages this Court's constitutional jurisdiction and raises three constitutional questions: whether its directives may be disregarded by persons against whom they are directed; what recourse it has when its directives are ignored; and whether the SAHRC must in every case approach the courts to give its findings binding effect. This matter also, it is submitted, engages this Court's general jurisdiction, since it impacts on victims of rights violations who depend on the SAHRC for protection, as well as those who are currently subject to compliance processes and face uncertainty as to the status and consequences of such compliance processes.

[25] On the merits, the SAHRC contends that the Supreme Court of Appeal failed to interpret the SAHRC Act and section 184 of the Constitution purposively and contextually. The SAHRC argues that the correct interpretation would yield the result that its directives cannot be ignored without consequence.

[26] The SAHRC argues that the Supreme Court of Appeal departed from binding precedent such as *EFF I*, which held that the rule of law demands that decisions made by those with legal authority must be obeyed unless set aside by a Court. It submits that the finding that the SAHRC's directives are non-binding is inconsistent with the principle of legality and undermines the rule of law.

[27] While the Paris Principles do not mandate binding powers for NHRIs, the SAHRC argues that they support an expectation of cooperation with NHRIs' findings, and that interpreting section 184(2)(b) narrowly would render the SAHRC ineffective and would potentially be inconsistent with South Africa's international obligations. As such, the SAHRC submits that directives issued in the course of its investigations have legal force, unless and until set aside by a competent court.

CALS' submissions

[28] CALS advances two main propositions: first, that section 184(2)(b) must be given the broadest possible scope in order to align with international law; and second, that section 184(2)(b) should be interpreted with a focus on access to remedies.

[29] CALS argues that section 233 of the Constitution mandates courts to favour interpretations consistent with international law. It submits that the African Charter on Human and Peoples' Rights[16] (African Charter) requires states to establish national institutions to promote and protect rights embodied by the African Charter. The Paris Principles advocate for NHRIs to have as broad a mandate as possible. CALS recognises that the African Charter does not specify the powers of these institutions, and that no treaty or convention imposes a positive obligation on states to establish NHRIs with binding powers. Because the principles espoused by the African Charter support a broad reading of section 184(2)(b), CALS submits that the Constitution and the SAHRC Act can be interpreted so that the SAHRC has the power to make binding decisions.

[30] On the right of access to remedies, CALS argues that this is a fundamental constitutional and internationally-recognised right, and that international instruments affirm that remedies need not be court-based. On this basis, it contends that interpreting section 184(2)(b) as conferring on the SAHRC the power to make binding directives affords the SAHRC the broadest mandate possible and fulfils South Africa's international obligations to promote the right to access remedies.

ProBono.org's submissions

[31] ProBono.org submits that the real question is not whether the SAHRC can issue binding directives, but rather the legal effect and enforceability of its decisions under its investigative and complaints functions.

[16] African Charter on Human and Peoples' Rights, 27 June 1981.

[32] ProBono.org asserts that the SAHRC's decisions have legal effect, which it substantiates by relying on different iterations of Regulations regulating the SAHRC's Complaints Handling Procedure.[17] In its written submissions, it relied heavily on the 2007 iteration, which provided in regulation 6.14 that the SAHRC's findings are "final and binding on the parties and the SAHRC". At the hearing, counsel conceded that the 2007 Regulations were impliedly repealed by the Regulations issued in 2012[18] and 2017,[19] but persisted with the submission that they remained "interpretively relevant".

[33] ProBono.org equates the SAHRC with other independent and impartial fora for resolving disputes under section 34 of the Constitution, such as the Commission for Conciliation, Mediation and Arbitration (CCMA). If a forum's decisions or remedies have no legal effect, it is argued, complainants are denied effective relief in that forum and their section 34 rights are undermined.

[34] ProBono.org acknowledges that the decisions of the SAHRC, like the CCMA and other arbitration bodies, require judicial enforcement in the face of non-compliance. Thus, enforcement of the SAHRC's decisions after a complaint will ultimately have to proceed to litigation if there is no compliance. It also submits that the SAHRC's decisions may be subject to judicial review, and consequently, individuals affected by the SAHRC's decisions may challenge them in court.

AfriForum's submissions

[35] AfriForum submits that the SAHRC neither has the power to issue binding directives nor indeed the authority to issue directives at all, as it is only empowered to issue recommendations. It argues that the SAHRC's interpretation disregards the text,

[17] South African Human Rights Commission Determination of the Procedure Contemplated in Section 9(6) of the South African Human Rights Commission Act No. 54 of 1994, GN 817 *GG* 30022, 6 July 2007 (2007 Regulations) and Repeal of Complaints Handling Procedures, 2012 and Notice of Publication of Complaints Handling Procedures of the South African Human Rights Commission, GN 1483 *GG* 41362, 29 December 2017 (2017 Regulations).

[18] Complaints Handling Procedures: Determination of the Procedure Contemplated in Section 9(6) of the Human Rights Commission Act 54 of 1994, GN 55 *GG* 34963, 27 January 2012 (2012 Regulations).

[19] 2017 Regulations above n 17.

context and purpose of the relevant provisions and incorrectly equates its powers with those of the Public Protector. It contends that the proper interpretation is that the SAHRC's findings and recommendations lack coercive force.

[36] AfriForum rejects the SAHRC's argument that a lack of binding powers would render it ineffectual or symbolic, and maintains that the SAHRC remains a powerful and influential body through its use of "soft power", which is not coercive but persuasive.

Analysis

Jurisdiction and leave to appeal

[37] The matter plainly engages this Court's constitutional jurisdiction. The dispute requires an interpretation of section 184(2)(b) of the Constitution and the determination of the functions and powers conferred upon Chapter 9 institutions. These are important constitutional questions.

[38] The matter also engages this Court's general jurisdiction, as the question of the legal status of the SAHRC's directives has national significance for the SAHRC's institutional powers, the rights of complainants who depend on the SAHRC's assistance, and the legal position of parties currently subject to the SAHRC's directives.

[39] This Court has not yet had the opportunity to address questions on the scope of the SAHRC's powers, yet this issue has significant implications. It is in the interests of justice that leave to appeal be granted.

Interpretation of the SAHRC's powers

[40] It is by now trite that interpretation is a unitary exercise involving the simultaneous consideration of text, context and purpose.[20] This Court has stated that the text is often the starting point in the interpretative exercise, but that due regard must be given to the context.[21] I find it apposite at this juncture to trace the legislative history of the SAHRC's powers. This Court has confirmed that the legislative history is a vital interpretative aid where the background evidence is clear, not in dispute and relevant to the matter at hand.[22] In *Makwanyane*,[23] Chaskalson P held:

> "[B]ackground material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it."[24]

[41] Similarly, in *Bato Star*,[25] this Court, citing *Jaga*,[26] explained:

> "Certainly, no less important than the oft-repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of

[20] *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2019] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR 749 (CC) at paras 29-32 and *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 52.

[21] *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

[22] *Mutsila v Municipal Gratuity Fund* [2025] ZACC 17; 2025 (10) BCLR 1139 (CC); 2026 (1) SA 1 (CC) at para 29.

[23] *S v Makwanyane* [1995] ZACC 3; 1995 (2) SACR 1; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[24] Id at para 17.

[25] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[26] *Jaga v Dönges, N.O.; Bhana v Dönges, N.O.* 1950 (4) SA 653 (A).

more importance is the matter of the statute, its apparent scope and purpose, *and, within limits, its background*."[27] (Emphasis added.)

[42] The SAHRC has its genesis in sections 115 to 118 of the interim Constitution. Section 115 of the interim Constitution established a Human Rights Commission (now called the SAHRC), and section 116 set out its various powers and functions.[28] Of central importance was section 116(3), which vested the SAHRC with investigative powers and explained what the SAHRC was empowered to do after an investigation:

"The [SAHRC] shall be competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of fundamental rights, and if, after due investigation, the [SAHRC] is of the opinion that there is substance in any complaint made to it, it shall, in so far as it is able to do so, assist the complainant and other persons adversely

[27] *Bato Star* above n 25 at para 89.

[28] These powers and functions were set out as follows:

"(1) The [SAHRC] shall, in addition to any powers and functions assigned to it by law, be competent and be obliged to—

(a) promote the observance of, respect for and the protection of fundamental rights;

(b) develop an awareness of fundamental rights among all people of the Republic;

(c) 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 fundamental rights within the framework of the law and this Constitution, as well as appropriate measures for the further observance of such rights;

(d) undertake such studies for report on or relating to fundamental rights as it considers advisable in the performance of its functions; and

(e) request any organ of state to supply it with information on any legislative or executive measures adopted by it relating to fundamental rights.

(2) If the [SAHRC] is of the opinion that any proposed legislation might be contrary to Chapter 3 or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it shall immediately report that fact to the relevant legislature.

(3) The [SAHRC] shall be competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of fundamental rights, and if, after due investigation, the [SAHRC] is of the opinion that there is substance in any complaint made to it, it shall, 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."

> 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."

[43] Section 116(1) contemplated that further powers and functions could be conferred on the SAHRC by legislation. The primary legislation, the Human Rights Commission Act[29] (HRC Act), was signed into law in November 1994, with some of its provisions commencing in September 1995 and others in May 1996. Section 7 of the HRC Act fleshed out the powers, duties and functions of the SAHRC,[30] giving legislative substance to the mandate envisaged under the interim Constitution.

[44] As the SAHRC was becoming operational, the Constitutional Assembly was simultaneously engaged in drafting the final Constitution. To facilitate this process, various theme committees were established.[31] Theme Committee 6 dealt with

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[29] 54 of 1994.

[30] Section 7 provided:

> "(1) In addition to any other powers, duties and functions conferred on or assigned to it by section 116 of the Constitution, this Act or any other law, the [SAHRC]—
>
> (a) shall develop and conduct information programmes to foster public understanding of this Act, Chapter 3 of the Constitution and the role and activities of the [SAHRC];
>
> (b) shall maintain close liaison with institutions, bodies or authorities similar to the [SAHRC] 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;
>
> (c) may consider such recommendations, suggestions and requests concerning fundamental rights as it may receive from any source;
>
> (d) shall carry out or cause to be carried out such studies concerning fundamental rights as may be referred to it by the President and the [SAHRC] shall include in a report referred to in section 118 of the Constitution a report setting out the results of each study together with such recommendations in relation thereto as it considers appropriate;
>
> (e) may 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.
>
> (2) All organs of state shall afford the [SAHRC] such assistance as may be reasonably required for the effective exercising of its powers and performance of its duties and functions."

[31] Constitutional Assembly *Annual Report May 1994-May 1995*.

specialised structures of government and, to manage the breadth of its work, established four sub-committees. Sub-committee 3 dealt with transformation and monitoring and focused on, amongst others, the SAHRC. Its final report on the SAHRC, dated 29 May 1995, recorded:

> "There is agreement that the [SAHRC] should have the kind of powers and functions stipulated in section 116(1), (2) and (3) of the interim constitution, and that these sections should serve as a guide to the powers and functions that are written into the final constitutional text. . . . It is also agreed that the final text should sketch broad powers only and provide a broad mandate to the [SAHRC] to protect, promote, respect and fulfil human rights. . . . This constitutional mandate could be fleshed out by legislation."[32]

[45] The Sub-Theme Committee identified a suite of agreed powers that would define the SAHRC's mandate: a general obligation to promote the observance and protection of, and respect for, human rights; a promotional, educational and awareness-raising function; a monitoring function; an advisory or lobbying function; a research function; an investigative function; and a function to assist parties to redress wrongs.[33]

[46] In respect of the last function, the CA Final Report noted:

> "There is agreement on the power to settle complaints through mediation, negotiation and conciliation, and that it could refer matters to court. *There is also agreement that the [SAHRC] should not have adjudicative powers*."[34] (Emphasis added.)

[47] The CA Final Report also mooted the idea of a tribunal arm with enforcement powers:

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[32] Constitutional Assembly Subtheme Committee 3; Theme Committee 6 *Final Report: Human Rights Commission* (May 1995) (CA Final Report) at para 7.

[33] Id at paras 7.1-7.7.

[34] Id at para 7.7.

> "Most submissions were against the idea of a separate tribunal to enforce human rights claims. However, the ANC and Nadel felt that it may be necessary over time but should not be constitutionalised. The NP was also against this. The DP suggested that an enabling clause should be inserted into the constitution to provide for an enforcement function. LHR supported the idea of a tribunal."[35]

[48] The eventual outcome was the final Constitution's establishment of the SAHRC in section 181(1)(b) and setting out its functions in section 184.[36]

[49] In July 2007, an ad hoc parliamentary committee reviewed the work of Chapter 9 institutions and produced a report,[37] which found that the HRC Act was outdated and required reform to align with the final Constitution.[38] The outcome of the reform process was the SAHRC Act, which remains the operative statutory framework. Section 13 sets out the SAHRC's powers and functions in detail, expanding upon those conferred in terms of section 184.[39] Of particular importance is section 13(3), which substantially mirrors section 116(3) of the interim Constitution.

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[35] Id at para 13.8.1.

[36] See full text at [9].

[37] Parliament of the Republic of South Africa *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions: A Report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa* (July 2007).

[38] Id at 171.

[39] Section 13, headed "Powers and functions of [SAHRC]", reads in full:

> "(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 [SAHRC] 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 [SAHRC]; 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 [SAHRC]—

(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 [SAHRC];

(ii) must as far as is practicable maintain close liaison with institutions, bodies or authorities with similar objectives to the [SAHRC] 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 [SAHRC];

(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 [SAHRC];

(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 [SAHRC]; 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 [SAHRC] 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 [SAHRC] 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 [SAHRC] 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 [SAHRC] 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 [SAHRC] 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 [SAHRC] such assistance as may be reasonably required for the effective exercising of its powers and performance of its functions."

Text, context and purpose

[50] Having set out the historical evolution of provisions governing the SAHRC, including insight into the mandate intended for the SAHRC, I return to the text and its purpose. The purpose and general mandate of the SAHRC is set out in section 181 of the Constitution as "strengthen[ing] constitutional democracy" and further, to—

> "(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 human rights in the Republic."[40]

[51] While all Chapter 9 institutions have a shared objective of checking government power and contributing to the Constitution's transformative project,[41] the SAHRC has a distinctly broad mandate covering all human rights,[42] rather than being confined to a particular subject, defined category of conduct or limited cluster of rights. The wide scope of the SAHRC's mandate is also demonstrable in its jurisdictional reach: unlike other Chapter 9 institutions such as the Public Protector and the Auditor-General of South Africa (AGSA), the SAHRC's jurisdiction reaches into both public and private domains.

[52] The SAHRC was created for the purpose of giving life to a culture of human rights through monitoring, education, research, investigation and assistance in securing redress. Section 184(1) frames the SAHRC's mandate in promotional, educational and monitoring terms. These functions are suggestive of a body designed to facilitate,

[40] Section 184(1) of the Constitution.

[41] Murray "Human Rights Commission et al: What is the Role of South Africa's Chapter 9 Institutions?" (2006) 9 *PER/PELJ* 122 at 125.

[42] The SAHRC Act defines "human rights" in section 1 as "the human rights contained in Chapter 2 of the Constitution".

engage and influence rather than control and compel. In this way, the SAHRC exerts cooperative control rather than coercive control.[43]

[53] Section 184(2)(b) empowers the SAHRC to "take steps to secure appropriate redress where human rights have been violated". A "step" is defined as a "stage in a process" and "an action in a series of actions taken for a particular purpose",[44] while to "secure" means to obtain something.[45] "Taking steps to secure" is distinguishable from "taking" remedial action,[46] "making" an order[47] or "granting"[48] relief, all of which suggest a remedy which flows directly from a dispute-resolving body itself. The Supreme Court of Appeal was thus correct in finding that it is significant that section 184(2)(b) of the Constitution does not say that the SAHRC must "provide" appropriate redress.[49] The ordinary meaning of the phrase "take steps to secure" makes plain that the SAHRC is not empowered to provide a remedy itself, but to perform actions which support or enable the obtaining of redress which is to be dispensed elsewhere.

[54] The SAHRC Act mirrors the constitutional design. Section 13(3)(a) permits the SAHRC, upon finding substance in a complaint, to "assist the complainant and other persons adversely affected thereby, to secure redress". It authorises the SAHRC to arrange or fund litigation, or to direct complainants to appropriate forums. This assumes that binding redress is to be found elsewhere, and does not lie in the hands of the

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[43] Reif "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 *Harvard Human Rights Journal* 1 at 30. Reif describes cooperative control as "facilitative and proactive, using advice and persuasion, wherein the actors confer and dialogue to try to obtain the desired result and change behaviour" while coercive control is conceived as "reactive [where] control is imposed by unilateral decision."

[44] See Cambridge Dictionary definition of the noun "step", available at https://dictionary.cambridge.org/dictionary/english/step.

[45] See Cambridge Dictionary definition of the verb "secure" as being "to get something, sometimes with great difficulty", available at https://dictionary.cambridge.org/dictionary/english/secure.

[46] Section 182(1)(c) of the Constitution states that the Public Protector can "take" remedial action.

[47] Section 172(1)(b) of the Constitution states that a court may "make" any just and equitable order. Section 165(5) confirms that such orders are binding.

[48] Section 38 of the Constitution states that a court may "grant" appropriate relief.

[49] Supreme Court of Appeal judgment above n 13 at para 56.

SAHRC. If the SAHRC had the power to impose binding remedial outcomes, the statutory provisions on litigation assistance, referrals and facilitation of redress would be superfluous. The legislative history set out above demonstrates that the drafters deliberately adopted language in section 13(3) that was previously employed in the interim Constitution, suggesting an intended continuity of a facilitative, and not adjudicative, model.

[55] Section 13 distinguishes between the SAHRC's engagement with state institutions, where it is both empowered and required to act, and its dealings with private actors, where it is empowered but not compelled to intervene. Section 13(3) reinforces this by directing that the SAHRC is *competent* to investigate a complaint or any alleged violation of human rights and, after finding merit in it, the SAHRC must assist affected persons to obtain redress to the extent it is able, including by facilitating access to court or directing them to an appropriate forum.

[56] The powers to mediate, conciliate and negotiate in section 14 of the SAHRC Act do not alter this conclusion. These powers are inherently non-coercive and are a means through which the SAHRC may assist parties to resolve disputes voluntarily. They do not entail the imposition of obligations, and the inclusion of these non-coercive tools supports the view that the SAHRC lacks binding remedial authority. If the SAHRC had the power to compel compliance, it would not need to resort to mediation, conciliation or negotiation.

[57] The SAHRC contends that the breadth of its investigative powers in terms of sections 15 and 16 of the SAHRC Act is incompatible with the position that it has a merely advisory role. While it is true that the SAHRC has broad investigative powers, this does not transform it into an institution empowered to impose binding obligations. The powers to investigate, summon information, compel explanations, enter premises and subpoena witnesses are necessary to discharge the SAHRC's mandate. But these investigative powers do not detract from the fact that it is essentially a non-coercive body. Furthermore, the repeated use of the term "may" in sections 14 and 15

underscores that the SAHRC's powers are largely discretionary and advisory rather than coercive.

[58] As stated above, ProBono.org relied extensively on the 2007 Regulations[50] which provided in article 6.14 that the SAHRC's findings are "final and binding on the parties and the SAHRC". The 2007 Regulations were issued under the now-repealed HRC Act and were impliedly repealed by the 2012 Regulations[51] and 2017 Regulations[52] (counsel for ProBono.org conceded as much at the hearing). There is no indication in the papers of any savings clause or transitional provision that would preserve the application of the 2007 Regulations.

[59] Even leaving aside this fundamental difficulty, the argument falters at a deeper level. As this Court made clear in *Afribusiness*,[53] delegated legislation cannot depart from the scheme adopted by the Legislature.[54] Regulations cannot alter the Legislature's chosen design or confer powers that the Constitution or legislation does not authorise.[55] Here, the empowering provisions in section 184(2)(b) of the Constitution and section 13(3) of the SAHRC Act do not authorise the SAHRC to impose binding obligations. Under *Afribusiness*, any regulation purporting to bestow binding remedial powers on the SAHRC would impermissibly exceed the statutory mandate and would be *ultra vires* (beyond the powers of the regulation-maker).

[60] What is required is a clear foothold in the enabling provisions authorising the SAHRC to take binding action, and none is present in the Constitution or the SAHRC Act. The absence of language conferring coercive authority, coupled with the

[50] Above n 17.

[51] Above n 18.

[52] Above n 17.

[53] *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC).

[54] Id at para 103.

[55] Subordinate legislation cannot create powers that are inconsistent with those granted by the parent legislation. In this case, section 184(4) of the Constitution contemplates that legislation may prescribe additional powers and functions for the SAHRC. However, the legislation in question, the SAHRC Act, does not allow for binding directive powers, placing an obstacle in the way of conferral of binding powers by regulation.

presence of provisions which presuppose that an approach to other fora is required, supports the Supreme Court of Appeal's conclusion that the SAHRC is not a body capable of issuing binding directives.

[61] If the legislature had intended to grant binding authority to the SAHRC, one would expect clear textual signals such as the creation of consequences for non-compliance. The SAHRC Act is silent on what follows if a party fails to comply, reinforcing the view that the SAHRC's authority is supervisory and persuasive rather than coercive. This is distinguishable from the powers bestowed on other Chapter 9 institutions, such as the AGSA. The AGSA did not initially have the power to take binding action under the Public Audit Act.[56] When Parliament determined that it was necessary to enhance the AGSA's effectiveness, it expressly amended section 5 and created enforcement mechanisms through the incorporation of sections 5A and 5B into the Public Audit Act. These sections explicitly provide for the AGSA to take remedial action and specify consequences upon a failure to comply. This confirms that where Parliament intends a Chapter 9 institution to exercise coercive remedial powers, it does so expressly.

[62] Section 39 of the Constitution does not change the outcome. Section 39(2) of the Constitution requires every Court, when interpreting legislation, to promote the spirit, objects and purport of the Bill of Rights. This injunction does not allow courts to expand statutory powers beyond what the text can bear. Section 39(2) cannot be invoked to expand and imbue powers upon a body that the Constitution and statute have deliberately withheld.

[63] The interpretation that the SAHRC's role is cooperative and facilitative best promotes constitutional rights. Insofar as it is argued that section 34 rights will be undermined if the SAHRC's determinations and redress actions do not have legal effect,

[56] 25 of 2004. Prior to amendment by Act 5 of 2018, the Public Audit Act bestowed upon the AGSA powers, amongst others, to audit and report on accounts, financial statements and financial management of various spheres of government and other institutions; provide audit-related services to an auditee; provide advice and support to a legislature; and carry out investigations or special audits of certain institutions.

that submission rests on a mistaken premise: the SAHRC is not and was never intended to be a section 34 forum. Institutions such as the CCMA fall within this category because they are expressly established by legislation to resolve defined disputes and to grant binding relief. The SAHRC is not a tribunal designed for the resolution of disputes between parties. Its processes are inquisitorial and cooperative rather than adjudicative. Section 34 is best promoted by ensuring that the SAHRC can assist vulnerable complainants in accessing courts, tribunals or fora designed to resolve disputes, while also ensuring that coercive power is vested in bodies specifically intended to exercise such power. Promoting the objects of the Bill of Rights does not require elevating the SAHRC's directives to binding status, but instead requires ensuring that the SAHRC remains an effective and independent institution within the limits of its constitutionally conferred mandate.

[64] Finding that the SAHRC does not have binding powers does not limit the right of access to effective redress for human rights violations. The Constitution and legislation governing Chapter 9 institutions envisage a system in which effective redress is achieved through a combination of complementary institutions. Part of the SAHRC's mandate is to catalyse access to binding remedies through appropriate fora. Accessing redress is thus secured by enabling the SAHRC to perform its facilitative role.

[65] Section 233 of the Constitution requires courts, when interpreting legislation, to prefer a reasonable interpretation that is consistent with international law. CALS argues that international norms and standards such as the Paris Principles support interpreting section 184(2)(b) to allow for binding decisions that are not judicial in nature.

[66] The Paris Principles, adopted by the United Nations General Assembly in 1993, set out the essential qualities that NHRIs must possess to be considered credible, such as independence, pluralism and having broad mandates. Nowhere do the Paris Principles prescribe that NHRIs must have binding remedial powers, nor do they

suggest that NHRIs' findings must carry the force of law.[57] Instead, the Paris Principles describe institutions that monitor, investigate, advise, report and engage with government and the public. The fact that some states have chosen to grant binding authority to their NHRIs is a matter of domestic choice and not international obligation. The absence of binding powers does not mean that an NHRI does not comply with the Paris Principles.[58] The Global Alliance of National Human Rights Institutions (GANHRI) accredits NHRIs based on their compliance with the Paris Principles. As at 4 December 2025, the SAHRC enjoys "A-status" and is regarded as fully compliant with the Paris Principles.[59]

[67] A comparative analysis reveals that, like the SAHRC, there are other "A-status" NHRIs which do not possess binding enforcement powers, such as the Ghanaian Commission on Human Rights and Administrative Justice,[60] the Mauritian National Human Rights Commission[61] and the Malawi Human Rights Commission.[62]

[68] This approach is entirely consistent with the Paris Principles, which describe NHRIs as institutions that should have as broad a mandate as possible, but qualify this by requiring that such a mandate be clearly set out in a constitutional or legislative text. In other words, the breadth of an NHRI's powers is not open-ended, but expressly confined to whatever authority the domestic constitution or legislation provides.

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[57] The Paris Principles do consider that NHRIs may resolve complaints through "binding decisions" but only "within the limits prescribed by law". It does not, however, require domestic laws to bestow NHRIs with the power to make binding decisions.

[58] Slade "The Protection Mandate of the South African Human Rights Commission" (2025) *De Jure Law Journal* 54 at 69.

[59] Office of the United Nations High Commissioner for Human Rights and Global Alliance of National Human Rights Institutions "Chart of the Status of National Institutions: Accreditation status as of 4 December 2025", available at https://ganhri.org/wp-content/uploads/2025/12/Accreditation-Status-Chart_Dec2025.pdf.

[60] Sections 7 and 18 of the Commission on Human Rights and Administrative Justice Act 456 of 1993.

[61] Section 4 of the Protection of Human Rights Act 19 of 1998.

[62] Sections 129 and 130 of the Constitution of the Republic of Malawi Act 20 of 1994, read with section 22 of the Human Rights Commission Act (Chapter 3:08, Laws of Malawi).

[69] There are instances where human rights bodies can take binding enforcement action, but they do so because domestic law expressly says so, not because of any binding international norm. For example, the Uganda Human Rights Commission has the constitutional power to make orders upon satisfaction that there has been an infringement of a human right or freedom, which can be appealed to the High Court.[63] In Canada, a hybrid system exists where the Canadian Human Rights Commission receives and screens complaints and may refer cases to the Canadian Human Rights Tribunal (Tribunal), which may, after finding that a complaint is substantiated, order parties to take certain action and may approach the Federal Court to make such orders enforceable. The Tribunal's authority flows from the Canadian Human Rights Act, which clearly gives it such power.[64]

[70] In the United Kingdom, the Equality and Human Rights Commission (EHRC) has strong enforcement powers under the Equality Act 2006,[65] which includes the authority to issue "unlawful act notices" under section 21[66] where breaches are identified, and to enter into legally binding agreements under section 23 as an alternative to an unlawful act notice.[67] The EHRC also has the power to apply to a court or sheriff, as the case may be, for an injunction or interdict restraining a person from committing an unlawful act, or to make an order where a section 23 agreement has not

[63] Section 53(2) of the Constitution of the Republic of Uganda, 1995 provides that:

> "The Commission may, if satisfied that there has been an infringement of a human right or freedom, order—
>
> (a) the release of a detained or restricted person;
>
> (b) payment of compensation; or
>
> (c) any other legal remedy or redress."

[64] Sections 49, 50, 53 and 57 of the Canadian Human Rights Act, RSC 1985, c H-6.

[65] Sections 20 to 32 of the Equality Act 2006 (c. 3).

[66] Such notice may require the person to whom the notice is given to prepare an action plan for the purpose of avoiding repetition or continuation of an unlawful act and recommend action to be taken by the person for that purpose. An unlawful act notice may be appealed to an appropriate court or tribunal under section 21(5), and section 22 provides that the EHRC may apply to court for an order compelling the person to give a draft plan.

[67] Under such agreement, a person undertakes not to commit an unlawful act of a specified kind, and to take, or refrain from taking, other specified action (which may include the preparation of a plan for the purpose of avoiding an unlawful act).

been, or will not be, complied with. This makes plain that the EHRC does not itself exercise judicial power.

[71] This discussion illustrates that where binding remedial consequences attach to the work of a human rights body, it is only because the legislature has expressly conferred such powers in clear statutory language.

[72] From the above, it is clear that the Supreme Court of Appeal's interpretative exercise cannot be faulted. Read holistically, the text, context (including legislative history) and purpose of the provisions, read with sections 39(2) and 233 of the Constitution, do not yield the result that the SAHRC is empowered to issue binding directives following an investigation into a complaint of human rights violations.

Comparison with EFF I

[73] It is necessary to address *EFF I* and the pronouncements of this Court on the nature of the Public Protector's powers, upon which the SAHRC places much reliance. The SAHRC argues that *EFF I* is authority for the proposition that a decision that is constitutionally-grounded may not be ignored unless set aside by a court of law, and that the rule of law demands that there must be adherence to decisions made by those who have the legal authority to take such decisions.

[74] This Court, in *EFF I*, held:

> "No decision grounded in the Constitution or law may be disregarded without recourse to a court of law. . . . No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon."[68]

[75] On this basis, the SAHRC submits that its own directives, issued pursuant to section 184(2)(b) of the Constitution, enjoy the same legal status and are binding until

[68] *EFF I* above n 9 at para 74.

set aside. It also submits that its powers to "take steps to secure appropriate redress" are akin to the remedial action of the Public Protector.

[76] The SAHRC misconceives both the rationale in *EFF I* and the nature of the powers at issue in that case. *EFF I* is not a general proposition that all exercises of constitutional power by Chapter 9 institutions are binding unless set aside. Rather, this Court conducted a detailed interpretative exercise, and concluded that the phrase "take remedial action" conferred upon the Public Protector a unique competence capable of, at times, producing enforceable legal obligations (binding remedial action).

[77] Chapter 9 institutions are not identical. Each is entrusted with powers tailored to its specific mandate, and their powers must be interpreted within the logic of its own constitutional design. The SAHRC's constitutional mandate is markedly different from that of the Public Protector.

[78] The Public Protector's constitutional functions are set out in section 182, which differs structurally from section 184. Unlike the SAHRC, whose constitutional mandate includes a duties clause linked to its oversight role, the Public Protector is assigned three expressly enumerated functions.[69] The most significant for present purposes is the authority in section 182(1)(c) to "take appropriate remedial action." This textual formulation has no direct equivalent in the constitutional provisions governing the other Chapter 9 institutions.

[79] Although both bodies possess investigative and reporting powers, the SAHRC is empowered to "take steps to secure appropriate redress" while the Public Protector must "take appropriate remedial action". Although "appropriate redress" and "appropriate remedial action" might, as the SAHRC argues, be analogous, the operative difference between sections 182(1)(c) and 184(2)(b) is the words "take steps to secure". This connotes facilitation and assistance to access a remedy, rather than the unilateral power

[69] Klaaren "South African Human Rights Commission" in Woolman and Bishop (eds) *Constitutional Law of South Africa* Service 5 (2013) at ch24C-p16.

to impose a remedy. The Supreme Court of Appeal was therefore correct in its finding that these words do not permit the SAHRC to directly provide relief.

[80] *EFF I* provides that powers derived in law may not be ignored. However, this simply means that the power that the law grants to the SAHRC is the power, upon forming an opinion that there is substance in any complaint of a human rights violation, to take steps as delineated in sections 13 and 14 of the SAHRC Act:

(a) to mediate, conciliate or negotiate;

(b) to approach a competent court itself;

(c) to arrange for or provide financial assistance to enable proceedings to be taken to a competent court; and/or

(d) to direct a complainant to an appropriate forum.

[81] The SAHRC can do no more than that which the Constitution and the law permit. And the law, including the founding value of the rule of law, does not automatically convert recommendations of the SAHRC into binding directives. The SAHRC and ProBono.org argue that even if the enabling provisions do not expressly authorise binding remedial action, the SAHRC's directives nevertheless have legal effect and cannot be ignored. However, the fact that an act of a public functionary has legal effect does not necessarily mean it is binding. As *EFF I* tells us,[70] the precise effect of a legal act is a question of interpretation of the act itself and the enabling provisions in question. Thus, a decision may exist in law and may inform and influence subsequent exercises of public power, but it does not follow *per se* (in itself) that such a decision imposes enforceable obligations. The SAHRC's directives may have legal status but they do not create any binding and enforceable legal rights or duties. Without a clear legislative or constitutional foundation, any attempt to treat the SAHRC's directives as binding would run contrary to the principle that public power must be sourced in law and cannot be expanded by implication or institutional design.

[70] *EFF I* above n 9 at para 71.

[82] In their papers, the SAHRC initially asserted that all of their directives, following an investigation into human rights violations, were binding as a matter of interpretation. Yet at the hearing, they contended that they have the power to issue recommendations, and only *some* should be binding, depending on their content or context. When pressed to articulate a coherent principle identifying which directives were binding, and on what legal basis, counsel for the SAHRC was unable to offer a conclusive or satisfactory answer. That inability is unsurprising, because the constitutional and statutory texts provide no foundation from which to derive binding effect, selectively or by implication.

Conclusion

[83] This Court has answered the question of whether the SAHRC may issue binding directives under section 184(2)(b) of the Constitution in the negative. This means that after the SAHRC has concluded an investigation into a complaint, it may issue recommendations as to appropriate redress. However, should the respondent decline to act in accordance with the recommendation, the SAHRC cannot merely approach a court to compel compliance with its recommendations. The recommendation does not, in and of itself, impose a legally enforceable obligation. The SAHRC, or the complainant supported by the SAHRC, would be required to litigate the matter on the underlying facts and to establish an entitlement to the relief on the merits. In that process, the SAHRC's investigation and report will ordinarily have yielded the evidentiary foundation necessary to advance such a case.

[84] It must be stressed that recognising the absence of binding remedial powers does not diminish the constitutional importance of the SAHRC or render its work ineffectual. The SAHRC is far from toothless. Its influence lies in the deployment of the powers conferred upon it by the Constitution and the SAHRC Act, including the exercise of extensive investigative authority, the support of litigation, the shaping of the conduct of state officials, the informing of public debate and the exertion of normative pressure on organs of state and private actors alike. Properly understood, the SAHRC's strength lies precisely in its capacity to act in ways that courts cannot. Even without binding

remedial competence, it remains a potent and indispensable guardian of human rights within our constitutional scheme.

Order

[85] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.

For the Applicant:	B D Lekokotla, L Phasha and N Mahlangu instructed by Sibeko Incorporated Attorneys
For the First Amicus Curiae:	J Bhima and S Mkhize instructed by Centre for Applied Legal Studies
For the Second Amicus Curiae:	M J Engelbrecht SC and A Molver instructed by the Hurter Spies Incorporated
For the Third Amicus Curiae:	J Brickhill and M Salukazana instructed by Bowman Gilfillan Incorporated