THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 39/2023

In the matter between:

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	**APPELLANT**
and	
AGRO DATA CC	**FIRST RESPONDENT**
F G BOSHOFF	**SECOND RESPONDENT**
and	
AFRIFORUM NPC	**FIRST AMICUS CURIAE**
CENTRE FOR APPLIED LEGAL STUDIES	**SECOND AMICUS CURIAE**
THE COMMISSION FOR GENDER EQUALITY	**THIRD AMICUS CURIAE**

Neutral citation: *South African Human Rights Commission v Agro Data CC & Another* (*Afriforum, Centre for Applied Legal Studies and Commission for Gender Equality intervening as Amici Curiae*) (39/2023) [2024] ZASCA 121 (15 August 2024)

Coram: MOCUMIE, MBATHA, MOTHLE and MABINDLA-BOQWANA JJA and TOLMAY AJA

Heard: 12 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 15 August 2024.

Summary: Constitutional law – s 184(2)*(b)* of the Constitution – powers of the South African Human Rights Commission (the SAHRC) – whether s 184(2)*(b)* of the Constitution, read with s 13(3) of the South African Human Rights Commission Act 40 of 2013 empower the SAHRC to issue binding directives – whether the respondents ought to have complied with the directive of the SAHRC to restore the access to water for occupiers of their property – the SAHRC's powers distinguishable from those of the Public Protector.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Greyling-Coetzer AJ, sitting as a court of first instance):

The appeal is dismissed with no order as to costs.

JUDGMENT

Mbatha JA (Mocumie, Mothle and Mabindla-Boqwana JJA and Tolmay AJA concurring):

Introduction

[1] The forebears of our Constitution found it in their wisdom to introduce institutions to strengthen our constitutional democracy. These institutions are listed in Chapter 9 of the Constitution (Chapter 9 institutions). The appellant, the South African Human Rights Commission (the SAHRC) is one of them. Each of these Chapter 9 institutions have been given functions and powers to achieve that constitutional object. In sharp focus in this appeal are the powers of the SAHRC, whether it can issue binding directives to those it finds to have violated human rights. The human right said to have been violated in this case, is access to water'.

[2] 'Water is life's matter and matrix mother and medium. There is no life without water'.[1] There is no better fitting description than this. The United Nations (the UN) recognises access to water and sanitation as human rights fundamental to everyone's health, dignity and prosperity.[2] It recognises that marginalised groups are often overlooked and, sometimes face discrimination as

[1] *Albert Szent-Gyorgyi, M.D* (1937 Nobel Prize for Medicine, 1893-1986).
[2] United Nation: Human Rights to Water and Sanitation accessed at https://www.unwater.org/water-facts/human-rights-water-and-sanitation.

they try to access the water and sanitation services they need. This, inevitably, has the consequent adverse impact on women, children, and previously disadvantaged people.

[3] Access to safe drinking water and sanitation are internationally recognised human rights, derived from the right to an adequate standard of living under Article 11(1) of the International Covenant on Economics, Social and Cultural Rights.[3] On 28 July 2010, the UN General Assembly adopted a historical resolution recognising 'the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights'.[4] In 2015 it recognised that both the right to safe drinking water and the right to sanitation are closely related but distinct human rights.[5]

[4] The right to water and sanitation is a fundamental basic human right provided in the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (the Constitution). Section 27(1)*(b)* of the Constitution provides that everyone has the right to have access to sufficient food and water. It is thus axiomatic that no one has a right to deprive any person of such a fundamental right. While not at the heart of this appeal for determination, it is important to express my view that any deprivation of clean water to people is appalling, dehumanising and impacts on their rights to dignity and life. Before I deal with the issues on appeal, I briefly set out the background.

Background facts

[5] On or about 29 May 2018, the SAHRC, received a complaint from Mr William Trinity Mosotho (Mr Mosotho), lodged on behalf of his elderly father,

[3] Adopted on 16 December 1966 by the General Assembly resolution 2200A(XX1). Entry into force: 3 January 1976, in accordance with article 27.
[4] Article 11(1) of the International Covenant on Economics, Social and Cultural Rights A/RES/64/292.
[5] *Op cit* fn 2.

Mr Tubatsi Mosotho (Mr Mosotho Snr), and other occupiers of the farm. The complaint was that, in 2016, the second respondent, Mr Francois Gerhardus Boshoff (Mr Boshoff) unilaterally introduced restrictions to the occupiers' use of water on the farm, which consequently deprived them of access to the borehole water on the farm.

[6] The SAHRC's preliminary investigation of the complaint disclosed a *prima facie* violation of the occupiers' right to property enshrined in s 25(6) of the Constitution. Henceforth, it commenced an investigation in terms of ss 184(1) and 184(2)*(a)* and *(b)* of the Constitution, read with s 13(3) of the South African Human Rights Commission Act 40 of 2013 (the SAHRC Act). At the completion of the investigation, it compiled a report where it found that Agro Data CC and Mr Boshoff (the respondents) violated the occupiers' rights to access to water, as contemplated by s 6(2)*(e)* of the Extension of Security of Tenure Act 62 of 1997 (the ESTA) and s 27(1)*(b)* of the Constitution. It also concluded that the right to dignity of the occupiers (s 10 of the Constitution) was infringed and needed to be protected.

[7] On 13 July 2018, the SAHRC forwarded a letter to the respondents' attorneys of record, detailing the complaint against them. The main complaint was that Mr Boshoff deprived the occupiers of their only source of water, the borehole. To substantiate this complaint, they alleged that he had drastically rationed their water supply and demanded a payment for it contrary to the practice under the former owner who granted them access to the water free of charge. And that he also demanded that they use the river water which was not fit for human consumption.

[8] On 30 July 2018, the respondents' attorneys responded denying the allegations and set out numerous counter-allegations against the occupiers. On 10

August 2018 and 25 September 2018 respectively, the SAHRC visited the farm for consultations and to conduct an inspection *in loco*. Eight months later on 29 March 2019 the SAHRC afforded the parties an opportunity to comment on its preliminary investigative reports. The respondent did not respond and made no comments on the reports. On 20 September 2019, about six months later, the final investigative report, which contained the SAHRC's directives was served on all the parties.

[9] The SAHRC's findings were listed as follows:

(a) that the respondents violated the occupiers' right to dignity in terms of s 10 of the Constitution;

(b) that Mr Boshoff unilaterally made restrictions and conditions on the occupiers' existing right to a life-sustaining resource;

(c) that Mr Boshoff exercised absolute power over the occupiers, treated them as an inconvenience, and stripped them of their dignity; and

(d) that deprivation of a right to access water to the occupiers, amounted to a violation of s 6(2)*(e)* of ESTA read with s 27(1)*(b)* of the Constitution.

[10] In line with its findings, the SAHRC, issued the following directives:

'12.1.1 That the First and/or Second Respondents [to] restore the supply of borehole water to the Occupiers within 7 days of the report.

12.1.2 That, within 30 days of the report, the parties commence engagement in good faith on the management of water on 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.'

[11] On 15 October 2019, the SAHRC upon visiting the farm, discovered that the directives had not been complied with in any respect. When it enquired from the respondents, their response confirmed non-compliance with the directives. The SAHRC also confirmed that the occupiers had not been given access to the borehole water. Mr Boshoff insisted that the occupiers could not access the borehole water without paying the amount he set for the purchase thereof. He also countered with various claims against the occupiers which he alleged the SAHRC did not even consider in the whole equation. On 23 September 2020, the SAHRC paid another visit to the farm to ascertain if there had been any attempt to comply with the directives. It came to its attention that the borehole water had not been restored to the occupiers to access the water, and none of the other directives had been complied with. The SAHRC was informed that the Municipality had installed a water tank. The occupiers alleged that this intervention was not sufficient to meet their needs, and those of their livestock, as it was not regularly replenished.

[12] The respondents' disregard of its directives prompted the SAHRC to launch an application to the Mpumalanga Division of the High Court, Mbombela (the high court), where it sought the following relief:

'1. It is declared that the South African Human Rights Commission's directives issued in terms of section 184(2)*(b)* of the Constitution are binding.
2. It is declared that the First and/or Second Respondents' refusal and/or failure to comply with the Applicant's Directives in respect of the complaint under file reference number MP/1819/0179 is unlawful and constitutionally invalid.
3. That the First and/or Second Respondents must restore the supply of borehole water to the Occupiers of Portion 3 of the farm Doorhoek, 143 JT, Thaba Chweu ("Farm") at no cost to the Occupiers within 7 days of the judgment of this Court.

4. That, within 30 days of the judgment of this Court, the First and/or Second Respondents commence engagement with the Occupiers in good faith on the future management of water supply on the Farm.
5. That, within 14 days of the judgment of this Court, the First and/or Second Respondents supply to the Occupiers all relevant information to enable them to engage meaningfully in relation to the issue of water management on the Farm, which information shall include all the scientific reports at the disposal of the First and/or Second Respondents relating to the levels of the underground water on the Farm, as well as the costs incurred by the First and/or Second Respondents in the supply of water to the Occupiers.
6. That the First and/or Second Respondents pay the Applicant's costs.
7. That the Court grant the Applicant further and/or alternative relief.'

[13] The application served before Acting Judge Greyling-Coetzer, who dismissed the application for declaratory relief. She, however, ordered the respondents to make all relevant information available to the occupiers for the purpose of meaningful engagement in relation to the issue of water management, which information shall include all the scientific reports available and at the disposal of the respondents relating to the levels of the underground water on the farm, as well as the costs incurred by the respondents in supplying water to the occupiers. She further ordered the SAHRC to facilitate and/or mediate the aforementioned engagement. No order for costs was made. Disappointed with the outcome of the application for declaratory relief, the SAHRC sought leave to appeal to this Court from the high court, which was granted.

[14] At this stage, I must point out that Afriforum NPC, a non-profit civil rights organisation, was admitted as the first *amicus curiae.* The Centre for Applied Legal Studies (CALS), an organisation promoting human rights in South Africa, was admitted as the second *amicus curiae*. The Commission for Gender Equality was admitted as the third *amicus curiae*. All three *amici* made written and oral submissions before this Court. The respondents did not file any papers nor were they represented at the hearing of the appeal.

Issues before this Court

[15] The issue central to the appeal is whether the SAHRC may issue binding directives in terms of s 184(2)*(b)* of the Constitution read with s 13(3) of the SAHRC Act. Differently stated, can a respondent against whom the directives are issued by the SAHRC simply ignore them, without resorting to a court of law to review the SAHRC's decision.

The legal framework

[16] The SAHRC is one of the six Chapter 9 institutions, which were established by the Constitution to strengthen constitutional democracy in the Republic of South Africa. In terms of s 181(2) of the Constitution, '[t]hese institutions are independent, and subject only to the Constitution and the law. They must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'. Sections 181(3), (4) and (5) provide as follows:

'(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.'

[17] The functions and powers of the SAHRC are set out in s 184 of the Constitution, which provides as follows:

'(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;

(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.'

[18] The South African Human Rights Commission Act 40 of 2013 (the SAHRC Act) provides for the composition, powers, functions and functioning of the SAHRC. It accords additional powers and functions to those conferred by the Constitution. The repealed Human Rights Commission Act 54 of 1994 (the Human Rights Commission Act), made provision for the powers and functions sourced from the Interim Constitution and for matters connected therewith.

[19] Section 2 of the SAHRC Act sets out the objects of the SAHRC as follows:

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

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

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

In addition, the powers of the SAHRC are set out in s 13 of the SAHRC Act. The powers in s 13 are in addition to any other powers and functions conferred on, or assigned to it by ss 184(1), (2) and (3) of the Constitution, the SAHRC Act itself, or any other law, in order for the SAHRC to achieve its objectives.

[20] Section 13 sets out the competency of the SAHRC as follows:

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

(a) the Commission is competent and is obliged to–

(i) make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human

rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights;

(ii) undertake such studies for reporting on or relating to human rights as it considers advisable in the performance of its functions or to further the objects of the Commission; and

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

(b) the Commission–

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

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

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

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

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

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

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

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

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

(b) If the Commission is of the opinion that any proposed legislation might be contrary to Chapter 2 of the Constitution or to norms of international human rights law which form part of

South African law or to other relevant norms of international law, it must immediately report that fact to the relevant legislature.

(3) the Commission is *competent*—

(a) to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights, and if, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it must, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum; and

(b) to bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons.

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

The high court proceedings

[21] Before the high court, the SAHRC sought a blanket declaratory order, to the effect that it issued binding directives in terms of s 184(2)*(b)* of the Constitution. In addition, it had sought that the respondents' refusal and/or failure to comply with the directives be declared unlawful and unconstitutional. The SAHRC for this contention relied on its constitutional powers to take appropriate steps to redress the violation of human rights in terms of s 184(2)*(b)* of the Constitution. In that regard, it submitted that the respondents had a legal duty to comply with the directives and co-operate with the SAHRC in its efforts to redress human rights violations. It submitted that all this stemmed from the binding nature of the directives.

[22] In its answering affidavit, the respondents countered the SAHRC's assertions by stating that 'they did not object' that the SAHRC's directives were binding, as envisaged by s 184, but denied that failure to comply with them was

unlawful and unconstitutional. They also submitted that, although the SAHRC may take steps to secure redress where rights had been violated, it was not clothed with judicial power to issue directives that are automatically binding.

[23] Broadly, the high court found that the SAHRC had failed to make out a case for a general declaratory order on the directives issued in terms of s 184(2)*(b)*. It found that the SAHRC's powers were distinguishable from those of the Public Protector (the PP), another Chapter 9 institution. It further held that the SAHRC ought to have assisted the occupiers by approaching the courts for relief, which may have included a spoliation order, declaration of rights or interlocutory relief. In addition, it found that the further directives issued by the SAHRC, in terms of s 184(2) of the Constitution could not be ignored without any consequences, because the section makes provision for engagement and exchange of information as steps towards securing appropriate redress.

[24] On the powers and functions of the SAHRC, the high court held that, although the Chapter 9 institutions share common functions in monitoring government functions and promoting social justice, they were distinct from each other as they were different institutions. It acknowledged that the SAHRC had investigatory powers and certain administrative powers but held that it did not 'govern' like the three arms of government. Its monitoring role is different from the courts of law as it is not empowered to declare government actions to be unconstitutional or illegal, nor can it order the executive to act in a certain way. It held further that, although the SAHRC had a lot in common with the office of the PP, they are not identical as there is a constitutional hierarchy, discernible from the fact that the office of the PP is the first on the list of the Chapter 9 institutions. It reasoned that this suggests an elevated status of the office of the PP. In addition, it found that the elevated status of the PP's office is also discernible from the appointment and removal of the PP, which requires a two

third's majority of the National Assembly. Last, it held that the Constitution and the Public Protector Act 23 of 1994 (the PP Act), specifically give the PP remedial powers, unlike the SAHRC under the SAHRC Act. As a result, the SAHRC is not empowered to take 'remedial action' but is empowered 'to take steps to secure appropriate redress' only.

South African Human Rights Commission's submissions

[25] Before this Court, the SAHRC argued that no legitimately exercised power can be ignored without consequences. It advanced the argument, that for the SAHRC to effectively fulfil its obligations in terms of s 181 of the Constitution, its 'directives' must be binding and cannot be ignored. If they were held not to be binding, the rights envisaged in the Constitution, such as the right to access water, like in this case, would be meaningless. It submitted that the deliberate failure to comply with the directives of the SAHRC, amounted to self-help, which is unlawful and unconstitutional. Furthermore, the resources of the SAHRC and the number of complaints it receives, would not make it possible for the SAHRC to approach a court of law in respect of each and every complaint that it dealt with. It further submitted that a holding that the 'directives' are not binding, would be tantamount to leaving the multitudes of poor people that it serves with no redress. Last, it submitted that in terms of ESTA, no new farm owner can unilaterally cut off water supply to the occupiers who previously had an agreement to access such supply with the previous owner.

[26] In asserting that its directives are binding, the SAHRC specifically relies on s 184(2)*(b)* of the Constitution, which provides that the SAHRC 'has the powers, as regulated by national legislation, necessary to perform its functions, *including the power to take steps to secure appropriate redress where human rights have been violated*'. I must point out that it was accepted by all the parties that the SAHRC had completed the investigation and made two reports, (the

preliminary and final reports), on its observance of abuse of basic human rights. This led to the issuing of directives by the SAHRC, which were not complied with by the respondents. The SAHRC contended that its submissions are to ensure that the legitimacy of the SAHRC as a Chapter 9 institution is maintained. By so doing, it would be able to rightfully exercise its powers over the people who are affected by its decisions.

[27] The SAHRC further submitted that the powers of the SAHRC embodied in s 13(3) of the SAHRC Act, ought to be read through the prism of the Constitution. In support of this contention, it relied on the Constitutional Court judgment of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (*Economic Freedom Fighters*),[6] which rejected the argument that the powers of the PP must be primarily from the PP Act and that the remedial powers of the PP were not binding. The SAHRC emphasised that the SAHRC Act is also not the only source of the powers of the SAHRC. It must therefore follow that the SAHRC Act must be read with the powers conferred by s 184(2)*(b)* of the Constitution.

[28] The SAHRC further advocated for the view that the wording of s 184(2)*(b)*: 'to take steps to secure appropriate redress where human rights have been violated' was to be read with s 181 of the Constitution. It submitted that the wording of s 181 provides the context and purpose of the power in s 184(2)*(b)*. Its argument was that s 181 provides that the SAHRC is independent, subject only to the Constitution and the law. And that it must act impartially and without fear, favour or prejudice in the exercise of its powers and functions. These attributes, so it was contended, apply to all the Chapter 9 institutions as confirmed in

[6] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (Economic Freedom Fighters) para 68.

Economic Freedom Fighters.[7] In that regard, if the Chapter 9 institutions' role is to strengthen democracy, their findings cannot be ignored at a whim.

[29] Furthermore, the SAHRC pointed out that in *Economic Freedom Fighters* the Constitutional Court stated that:

'No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a license to self-help". Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal.'[8]

Similarly, so it advanced, its directives cannot be ignored merely because the respondent disagrees with them or is unable to fulfil them. That being the case, those that it found against had to approach a court of law to seek redress.

[30] According to the SAHRC, the high court's interpretation of the phrase 'appropriate redress' in s 184(2)*(b)* of the Constitution and its finding that it was only the PP that had direct powers to take remedial action, had the effect of reducing the safeguards enshrined in the Constitution. And such a finding impacted adversely on its powers.

[31] Finally, the SAHRC submitted that the high court misdirected itself when it found that there is a constitutional hierarchy in the ranking of the Chapter 9 institutions. In addition, it argued that the high court misdirected itself by finding that the functions of the SAHRC should be overseen by the courts, as this does not appear from the Constitution. It asserted that such an interpretation limits the powers of the SAHRC provided for expressly in the Constitution. Same goes with the high court's finding as regards the powers of the SAHRC to litigate, accorded in ss 184(2)*(b)* and 13(3) of the SAHRC Act.

[7] Ibid para 49.
[8] Ibid para 74.

The Centre for Applied Legal Studies' submissions

[32] CALS largely supported the argument advanced by the SAHRC. Its main contention, in support of the SAHRC's appeal, was that the interpretation of s 184(2)*(b)* given by the high court fundamentally affected the mandate of the SAHRC as a Chapter 9 institution. Section 184(2)*(b)* should be interpreted to accord with international law, that is, in terms of s 233 read with s 39(1)*(a)* of the Constitution. International law guidelines, afford human rights institutions like the SAHRC the broadest possible mandate. Their powers are to be interpreted in a manner that promotes the fundamental right to access remedies, whilst still remaining true to the text. In addition, CALS submitted that s 184(2)*(b)* is capable of a textual interpretation that affords the SAHRC the power to make binding decisions.

[33] In support of its argument CALS submitted that in the process of the interpretation of the SAHRC's powers, the courts should adopt a reasonable interpretation, which is consistent with international law as found by the Constitutional Court in *Law Society of South Africa and Others v President of the Republic of South Africa and Others*.[9] Relying on *S v Okah*,[10] CALS submitted that even if an interpretation was textually reasonable, it still had to be in accordance with international law. CALS also referred to *Sonke Gender Justice NPC v President of the Republic of South Africa and Others*,[11] where the Constitutional Court emphasised the importance of considering international law when interpreting the Bill of Rights, particularly its interpretative value in the context of the independence of oversight bodies such as the Judicial Inspectorate for Correctional Services.

[9] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) para 5.
[10] *S v Okah* [2018] ZACC 3; 2018 (4) BCLR 456 (CC); 2018 (1) SACR 492 (CC) para 38.
[11] *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* [2020] ZACC 26; 2021 (3) BCLR 269 (CC) para 70.

[34] It criticised the textual approach to interpretation adopted by the high court in interpreting s 13(3) of the SAHRC Act as flawed. In addition, it contended that the judgment of *Afriforum v South African Human Rights Commission and Others* (*Afriforum*),[12] that Afriforum relied upon in the present matter, did not consider the provisions of s 184(2)*(b)* of the Constitution. In that regard, so it was submitted, had the high court considered the international approach to the powers of institutions such as the SAHRC, when interpreting s 184(2)*(b)*, it would have come to a different conclusion. Counsel for CALS submitted that the wording in s 184(2)(*b*) 'to take steps to secure appropriate redress' must be given meaning which is in line with Article 2 of the Principles relating to the Status of National Institutions (The Paris Principles).

[35] Article 2 of the Paris Principles provides that '[National Human Rights Institutions] shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence'. CALS sought to draw parallels with the *Economic Freedom Fighters* judgment, to substantiate its argument that the powers of the SAHRC are binding and therefore reviewable, as envisaged in terms of s 33 of the Constitution.

The Commission for Gender Equality's submissions

[36] The Commission for Gender Equality's submissions were essentially that the high court erred in its finding that there was a hierarchy among the Chapter 9 institutions.

Afriforum's submissions

[12] *Afriforum v South African Human Rights Commission and Others* [2023] ZAGPJHC 807; 2023 (6) SA 188 (GJ).

[37] Afriforum has a different view to the SAHRC and the *amici* that support the appeal. It submitted that the SAHRC does not have the power to issue binding remedial directives. Neither the Constitution, nor the SAHRC Act accord it the power to do so. It argued that the SAHRC may merely 'take steps to secure appropriate redress'. This clause in s 184(2)(*b*) makes the SAHRC's powers distinguishable from those of the PP. In addition, Afriforum submitted that the SAHRC does not require the power to issue binding remedial directives in order to effectively discharge its constitutional mandate. This position is consistent with most human rights institutions internationally, which is that of a watchdog.

[38] Afriforum further contended that the PP is empowered by the Constitution and the PP Act to 'take appropriate remedial action.' It accepted all the findings by the high court, save the one that relates to the ranking of the Chapter 9 institutions in the Constitution. Last, Afriforum urged this Court to consider the settled principles of interpretation set out in the jurisprudence of our courts in interpreting s 184(2) of the Constitution read with s 13(3) of the SAHRC Act.[13]

Evaluation

[39] I will first deal with the interpretation of the provisions of s 184(2)*(b)* read with s 13(3) of the SAHRC Act, which is the essence of the submissions argued before us. In interpreting the provisions of s 184(2)*(b*), the SAHRC's chief mandate must be considered, which is the promotion of the Bill of Rights, enshrined in Chapter 2 of the Constitution. It is crucial to consider the significant role of the SAHRC when interpreting the provisions of s 184(2)(*b*) of the Constitution read with s 13(3) of the SAHRC Act.

[13] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

[40] In addition, I have to consider whether the SAHRC is endowed with the same powers as its sister institution, the PP, which is assigned remedial powers by the Constitution. On that score, I also recognise that the SAHRC's powers are sourced from the Constitution, that is, to investigate and report on the observance of human rights. Another relevant factor for consideration is what was stated by the Constitutional Court in *Fose v Minister of Safety and Security* where it stated that:

'. . . an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.'[14]

[41] Last, I need to determine if the high court's interpretation was correct in finding that the constitutional powers of the SAHRC were only limited to taking steps to secure appropriate redress. And, whether the SAHRC is only empowered to provide cooperative control to facilitate engagement, using advice and persuasion to achieve its ends.

[42] The principles of interpretation find application in this matter. These principles were settled in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*Endumeni*).[15] *Endumeni* reiterated that the process of interpretation is a unitary and objective exercise that pays due regard to the text, context, and purpose of the document or instrument being interpreted.[16] Equally trite, is the general principle of statutory interpretation that the words used in a statute should be understood in their normal grammatical sense, unless this would lead to an absurdity. The Constitutional Court, in *Cool Ideas 1186 CC v Hubbard and Another*,[17] added to the general principles: First, that statutes should be

[14] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.
[15] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*).
[16] *Endumeni* para 18.
[17] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

interpreted purposively. Second, the relevant statutory provision must be properly contextualised. Last, that all statutes must be construed consistently with the Constitution.

[43] In interpreting the provisions of s 184, the aforementioned principles of interpretation find application. The provisions of s 184(2)*(a)* empower the SAHRC to investigate and report on the observance of human rights. This means that it is endowed, not only with the role of a watchdog, but also has the power to conduct research and education about human rights. The question which then arises is whether s 184(2)*(b)*, read holistically, accords it the powers similar to those of the PP.

[44] In considering the language of s 184(2)*(b)*, I find that the provision is expressed in clear and direct language. The use of the words 'to take steps to secure' give an unambiguous direction to the SAHRC to secure assistance for the aggrieved person or persons. To obtain a legal remedy means that one must seek recourse through appropriate judicial channels. The language used in s 184(2)*(b)* is exclusive to the SAHRC only. It is different from the wording used in the Constitution in relation to the powers of the PP, which directs the PP 'to take appropriate remedial action'. The remedial powers of the PP are clearly and directly outlined in the Constitution. The PP is expressly empowered to directly take appropriate remedial action.[18] Conversely, the wording of s 184 (2)*(b)* only directs the SAHRC to take measures to secure redress. No reason has been advanced by the SAHRC, CALS or the Commission for Gender Equality why the drafters of the Constitution and the SAHRC Act did not use the exact wording or words similar to those used for the PP's remedial powers for the SAHRC.

[18] Section 182(1)*(c)* of the Constitution.

[45] The ineluctable conclusion must be that the drafters of the Constitution intended that the SAHRC would investigate and, if it is of the opinion that there is substance in any complaint made to it, take steps to secure redress. Section 184(2)*(b)* grants the SAHRC with additional authority to engage in litigation or pursue other suitable options. These powers are complimentary to its powers to investigate a complaint *mero motu* or at the instance of a complainant.

[46] Notably, s 116(3) of the Interim Constitution was expressed in nearly identical language as s 184(2)*(b)* of the final Constitution. It provided that 'in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, secure redress'. It went further by creating a condition that 'where necessary 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'. The section clearly delineated the Commission's obligation and stipulated the condition under which it was obligated to provide financial assistance. It can also not be implied that it conferred any remedial powers to the SAHRC. Though couched in a different form, the essence of the powers of the SAHRC, as expressed in the wording thereof, did not change in the final Constitution. The heading to s 116(3) of the Interim Constitution explicitly set out the competence of the SAHRC as 'to investigate any alleged violation of any person adversely affected thereby to secure redress'.

[47] I now consider the interpretation of the provisions of s 13(3) of the SAHRC Act. First, s 13(3)*(a)* provides the SAHRC with the powers to investigate claims of human rights abuses on its own initiative or upon receipt of a complaint. Second, in the event that it finds substance in any complaint it may proceed to 'assist the complainant and other persons adversely affected thereby, to secure redress. . .'. Third, '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. . .'. These powers are further extended by s 14 which provides that the SAHRC can also resolve disputes through mediation, conciliation or negotiation.

[48] Section 13(3)*(a)* requires the SAHRC to first conduct an investigation and, after due investigation, to form an opinion that there is substance in any complaint made to it. Thereafter, it must, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress. This process requires a *prima facie* finding by the SAHRC, after the investigation has been concluded. The SAHRC is subsequently granted the authority to provide assistance to the affected persons. It could be through mediation, negotiation or litigation, by approaching a court of law or an appropriate tribunal. It will then be upon the court of law or tribunal to make a binding finding on the evidence presented by the SAHRC or the affected person to it. That is the only reasonable and logical interpretation that can be accorded to the provisions of the section.

[49] The word 'assist' as used in the section, can be interpreted to mean that the SAHRC acts in a supportive or enabling role in assisting the adversely affected persons to seek redress. It does not itself make a violation order or exonerate a person from an allegation of a violation of human rights. Once it has established that there is substance to a violation complaint, it may assist the complainant to seek redress or bring the proceedings to a court in its own right. The SAHRC's expertise in human rights and powers of investigation accorded to it by the SAHRC Act are effective in identifying and crystallising the issues upon which it may approach the court or the relevant tribunal. Section 13(3) also gives the SAHRC powers to engage with the parties through mediation or negotiation. This is reinforced by the wording of s 13(3)*(a)* which states, '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…'. This indicates that the necessary financial support will be organised and made available as required. The SAHRC has to exercise a discretion in determining which matters to take to court, either in its name or in the name of the affected person or persons.

[50] The language used in s 13(3)*(a)* and *(b)* does not intimate that the drafters of the legislation intended that the SAHRC issue binding directives. It would be incongruous for the SAHRC to possess authority to implement a remedial action 'on the substance of a complaint' as it is not a finding per se or a decision on whether or not a violation of human rights has occurred, but an opinion. At the same time, I must emphasise that the SAHRC is not precluded from making recommendations following what it has established.

[51] I find that it would be more appropriate to interpret the powers granted to the Commission in terms of s 13 in a conjunctive rather than a disjunctive manner. The provisions of s 13(3) should be read harmoniously with all the provisions of the SAHRC Act and the Constitution, including s 14 the SAHRC Act. Section 14 of the SAHRC Act which provides that the SAHRC may, by mediation, conciliation or negotiation endeavour to resolve any dispute or to rectify any act or omission, emanating from or constituting a violation of or threat to any human right, strongly suggests that the SAHRC has persuasive rather than coercive powers.

[52] Contextually, I draw comparison of the provisions of s 13(3) of the SAHRC Act, with those of s 116(3) of the Interim Constitution. I point out that s 116(3) of the Interim Constitution had a similar provision, though couched differently, which provided that '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'. Though the content of this provision was not similarly retained in s 184 of the Constitution, it was retained in s 13(3) to preserve the status *quo*, albeit different wording was used.

[53] Afriforum correctly pointed out that the repealed Human Rights Commission Act also made no provision for the SAHRC 'to secure redress' in the sense of directly providing redress. In fact, s 15(1) of the Human Rights Commission Act simply empowered the SAHRC, pursuant to an investigation, 'to make known to any person any finding, point of view or recommendation in respect of a matter investigated by it'. This confirmed that the SAHRC's role was only limited to giving advice or making a recommendation. However, I draw attention to the provisions of s 13(3)*(b)* of the SAHRC Act, which extended the powers of the SAHRC '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'.

[54] I acknowledge that the Chapter 9 institutions are anchors of our constitutional democracy and that they are independent and must exercise their powers and perform their functions without fear, favour or prejudice. No person or organ of state may interfere with the exercise of their functions. The SAHRC is regulated by the Constitution and the SAHRC Act. The SAHRC was established in terms of s 184(1)*(a)* of the Constitution, with the mandate to promote, protect and monitor the realisation of human rights. In terms of s 184(1)*(b)*, the SAHRC is obliged to promote the development and attainment of human rights. Section 184(1)*(c)* mandates the SAHRC to monitor and assess the observance of human rights in South Africa. Notwithstanding its mandate, its powers can only be sourced from the Constitution and the empowering legislation.

[55] Though the Chapter 9 institutions established in terms of s 181(1) share a common objective, the strengthening of constitutional democracy in the Republic of South Africa can happen in various ways. The PP's mandate, as confirmed by the Constitutional Court in *Economic Freedom Fighters*, described the office of the PP as follows:

'The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs, and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance.'[19]

The Constitutional Court went on further and stated that:

'[The Public Protector's powers] are indeed very wide powers that leave no lever of government power above scrutiny, coincidental embarrassment' and censure. This is a necessary service because state resources belong to the public, as does state power. The repositories of these resources and power are to use them on behalf and for the benefit of the public. When this is suspected or known not to be so, then the public deserves protection and that protection has been constitutionally entrusted to the Public Protector. This finds support in what this court said in the *Certification* case:

"[M]embers of the public aggrieved by the conduct of government officials should be able to lodge complaints with the Public Protector, who will investigate them and take appropriate remedial action".'[20]

[56] The aforementioned sentiments expressed by the Constitutional Court, in *Economic Freedom Fighters* judgment, resonate with the mandate in s 181 to Chapter 9 institutions to strengthen constitutional democracy. *Economic*

[19] *Economic Freedom Fighters* fn 6 para 52.
[20] *Economic Freedom Fighters* fn 6 para 53.

Freedom Fighters highlights the source and extent of the overarching powers granted to the PP by the Constitution. Conversely, the language of s 184 of the Constitution and s 13 of the SAHRC Act, does not give remedial powers to the SAHRC. It can only 'take steps to secure redress' any violation of human rights. Instructively, the wording of s 184(2)(*b*) does not say that the SAHRC must provide appropriate redress, it states that it has to 'take steps to secure' appropriate redress.

[57] In reply to the arguments presented before us, counsel for the SAHRC submitted that the SAHRC is a quasi-judicial body. For this proposition, it relied on s 15 of the SAHRC Act, which regulates its processes from the commencement of the investigation in terms of s 13(3). Section 15 empowers the SAHRC to administer oaths or affirmations and question individuals under oath during investigations. Furthermore, it provides that any person appearing before it should be competent and compellable to answer all the questions connected with the matter under investigation and the production of documents or articles in his or her possession.

[58] Section 15 provides the SAHRC with investigatory powers for purposes of exercising the s 13 powers. Section 15(3) of the SAHRC Act further accords protection to a witness who may incriminate himself or herself, by making such evidence inadmissible in subsequent criminal proceedings. Section 15(4) accords persons appearing before the SAHRC the right to be assisted by a legal representative and the *audi alteram partem* rule applies when it conducts its investigations. In order to carry out its investigations, s 16 grants the SAHRC the power to enter and search premises, as well as attach and remove articles. These powers do not confer to the SAHRC the status of a quasi-judicial body. They were merely enacted to facilitate the taking of evidence. The powers of the SAHRC are similar to those of a commission of enquiry, which also does not

have binding powers. In that regard I find that s 13(3) does not clothe the SAHRC with adjudicative powers. Had it been the intention of the drafters of the SAHRC Act to imbue it with adjudicative powers, it would have done so through a provision in the legislation.

[59] I am fully aware of the resource limitations that the SAHRC faces. The lack of financial resources does not constitute a valid justifiable reason to clothe it with binding remedial powers. This is not the end of the road for the SAHRC as it can approach law enforcement organs, such as the South African Police Services (SAPS), the Equality Court, and other organs of state for assistance. If the state organs fail to render assistance, the SAHRC can approach the courts of law for assistance. This right is acquired from the provision of s 181(3) of the Constitution which provides that other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

[60] We were referred to *Afriforum* where the court correctly held that the SAHRC does not have the power to make binding decisions on the basis of the provisions of s 13(3) of the SAHRC Act. It further held that s 13(3) only empowers the SAHRC, pursuant to an investigation, to form an 'opinion that there is substance in any complaint' and not to make any definitive finding in that regard.[21] And that, if the SAHRC needs to enforce its directives, it has to approach a court of law, competent tribunal, or proceed with mediation or negotiations. The criticism of *Afriforum* by CALS that it did not deal with the interpretation of s 184(2)*(b)* is misplaced because the high court interpreted the provisions of s 13(3) of the SAHRC Act which gives effect to the provisions of s 184 of the Constitution.

[21] *Afriforum* fn 13 paras 16-20.

[61] The SAHRC in support of its argument also relied on this Court's decision in *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* where it was held that '[o]ur constitutional compact demands that remedial action taken by [Chapter 9 Institutions] should not be ignored…'.[22] First, I point out that, that was said in the context of the powers of the PP. In that judgment this Court did not specifically deal with the powers of the SAHRC. Last, the powers in s 13 of the SAHRC Act directly originate from ss 184(1), (2) and (3) of the Constitution.

[62] The SAHRC has a responsibility to raise awareness about human rights through education and research. It has an extensive reach in terms of monitoring the observance of human rights by organs of state and private persons. It serves as a guardian and protector of our democracy. The primary objective is to establish a society that acknowledges and upholds human rights.

[63] The SAHRC's recommendations need to be accorded respect as an institution created to strengthen our constitutional democracy. This is aptly emphasised in s 18(4) of the SAHRC Act as follows:

'If the Commission makes any finding or recommendation in respect of a matter investigated by it known to the head of the organisation or institution or the executive authority of any national or provincial department concerned, the head of the organisation or institution or the executive authority of any national or provincial department concerned must within 60 days after becoming aware of such finding or recommendation respond in writing to the Commission, indicating whether his or her organisation, institution or department intends taking any steps to give effect to such finding or recommendation, if any such steps are required.'

This means that the SAHRC should not be rendered the proverbial toothless dog. Its recommendations should be given serious consideration and be implemented.

[22] *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) para 53.

[64] Having considered the provisions of the Constitution and the SAHRC Act, I cannot find a valid basis to hold that the SAHRC is empowered to issue binding directives. On the facts of this matter, the SAHRC was at liberty to assist the occupiers to or directly approach a court of law, or an appropriate tribunal or resolve the dispute through negotiation and mediation.

[65] *Economic Freedom Fighters*, relied upon by the SAHRC, has to be considered against the backdrop that it specifically addressed the powers of the PP. I would like to underscore that albeit with specific reference to the PP, the Constitutional Court in *Economic Freedom Fighters*, described the purpose of Chapter 9 institutions as follows:

'Like other chapter Nine institutions, the office of the Public Protector was created to "strengthen constitutional democracy in the Republic". To achieve this crucial objective, it is required to be independent and subject only to the Constitution and the law. It is demanded of it, as is the case with other sister institutions, to be impartial and to exercise the powers and functions vested in it without fear, favour or prejudice. I hasten to say that this would not ordinarily be required of an institution whose powers or decisions are by constitutional design always supposed to be ineffectual. Whether it is impartial or not would be irrelevant if the implementation of the decisions it takes is at the mercy of those against whom they are made. It is also doubtful whether the fairly handsome budget, offices and staff all over the country and the time and energy expended on investigations, findings and remedial actions taken, would ever make any sense if the Public Protector's powers, or decisions were meant to be inconsequential. The constitutional safeguards in section 181 would also be meaningless if institutions purportedly established to strengthen our constitutional democracy lacked even the remotest possibility to do so.'[23]

[66] The SAHRC serves as a means to access justice, as well as to promote and protect human rights. In this regard it can also be regarded as an invaluable constitutional gift to our nation.[24] The SAHRC serves as a facilitator in aiding the aggrieved parties rather than an enforcer of the decision. This reasoning is

[23] *Economic Freedom Fighters* fn 6 para 49.
[24] *Economic Freedom Fighters* fn 6 para 52.

underpinned by the wording of s 18(3) of the SAHRC Act which empowers the SAHRC 'to make known to any person, the head of the organisation or institution, or the executive authority of any national or provincial department, any findings, point of view or recommendation in respect of a matter investigated by it. It is interesting to note that the wording in s 18(3) of the SAHRC is identical to that used in s 15(4) of the SAHRC Act.

[67] The aforesaid reasoning is further supported by the wording of s 18(4) of the SAHRC Act. This provision indicates that the party who has been made 'aware of the finding', should indicate whether it intends to take any steps to give effect to the finding or recommendation by the SAHRC. In the event that the party elects not to give effect to the recommendation, it has to give notice to the SAHRC. This gives the SAHRC the opportunity to act in terms of s184(2)*(b)* 'to take steps to secure appropriate redress', where human rights have been violated. The drafters of the provisions of 18(4) of the SAHRC Act, in my view, did not provide that the party against whom the finding is made, with the option to elect whether his or her organisation or institution intends to implement the finding or recommendation, as submitted by Afriforum. My interpretation of the provision is that, if the organisation is dissatisfied with the result, it should communicate its concerns to the SAHRC.

[68] The reasoning by the high court that the hierarchy of the Chapter 9 institutions differentiates their powers cannot be sustained, as the various Chapter 9 institutions have different powers and functions. The Auditor-General is also appointed in more or less the same way as the PP. All these institutions support democracy, irrespective of how they are appointed or removed from office. The ultimate consideration is the power awarded to each Chapter 9 institution. The fact that the PP is listed first in Chapter 9 institutions of the Constitution is of no significance. It does not elevate the PP above the rest of the

institutions. The high court incorrectly attached undue significance to the listing of the Chapter 9 institutions.

[69] I have also considered CALS' submissions that this Court should interpret s 184(2)*(b)* in a manner that is reasonably consistent with international law as provided in s 233 of the Constitution.[25] Section 233 requires the courts, when interpreting any legislation to prefer any reasonable interpretation that aligns with international law. In *S v Makwanyane and Another*, on the constitutional injunction requiring the application of international law, Mokgoro J stated that:

'[The Constitution] seems to acknowledge the paucity of home-grown judicial precedent upholding human rights, which is not surprising considering the repressive nature of the past legal order. It requires courts to proceed to public international law and foreign case law for guidance in constitutional interpretation, thereby promoting the ideal and intentionally accepted values in the cultivation of a human rights jurisprudence for South Africa.'[26]

[70] I find that the interpretation which I accord to s 184(2)*(b)* of the Constitution and s 13(3) of the SAHRC Act, attaches a reasonable meaning to the text, which is also in line with international norms and standards. I therefore find the argument advanced by CALS not sustainable.

[71] CALS correctly submitted that internationally, there are no treaties or conventions which explicitly advocate for the establishment of national human rights institutions with binding powers. Their terms are in the form of soft law, which carries persuasive value as interpretative tools to the interpretation of s 184(2)*(b)*. This includes amongst other things, the Paris Principles, which constitute soft law. The Paris Principles in Article 2 require that such institutions be given as broad a mandate as possible, clearly set forth in constitutional or

[25] Section 233 of the Constitution provides: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

[26] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 304.

legislative texts that specify the institutions' composition and sphere of competence. In this case, the text of s 184(2)*(b)* and s 13 expressly specify the sphere of competence of the SAHRC. I cannot infer any implied conferral of binding powers in the Constitution and the SAHRC Act. As broad as they are, they do not give remedial powers to the SAHRC.

[72] I do not find the additional textual interpretation provided by CALS to be helpful. It relied on the judgment in *Jawara v The Gambia*,[27] on the interpretation of s 184(2)*(b)*, which would align with Articles 7 and 26 of the African Charter on Human and People's Rights.[28] Those articles are supportive of human rights institutions in providing effective remedies through investigations, where human rights have been violated. Sometimes they issue binding directives that require the complainants to redress human rights violation.

Conclusion

[73] In conclusion, although Chapter 9 institutions were established to bolster our constitutional democracy, it does not necessarily imply that they all possess binding remedial powers. They fulfil distinct mandates and have effective ways of fulfilling their purpose, as provided by the Constitution. Accordingly, I find that the SAHRC has no powers to make binding directives. It must therefore follow that the high court's order must be confirmed.

[74] In the result, the following order is made:

Order

The appeal is dismissed with no order as to costs.

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[27] *Sir Dawda K Jawara v The Gambia* (2000) (communication 147/95 and 149/96) AHRLR 107 (ACHPR 2000).
[28] Adopted 1 June 1981. Date of Entry 21 October 1986.

Y T MBATHA
JUDGE OF APPEAL

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