

Pro Bono & Human Rights



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South Africa

- In the South African context Chapter 9 institutions are indispensable



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The distinct role of Chapter 9 institutions, as independent watchdogs, is indispensable in attaining the Constitution's transformative ideals and vision. This fact was made abundantly clear by the Constitutional Court recently in its judgment in the matter of *South African Human Rights Commission v Agro Data CC and Another* [2026] ZACC 16, where it was called upon to pronounce on the nature and scope of the powers of the South African Human Rights Commission (SAHRC) under section 184 of the Constitution read with section 13(3) of the South African Human Rights Commission Act 40 of 2013 (SAHRC Act).

Given the significance of their constitutional mandate and functions, these institutions and the work they perform should always occupy a position of significance in our collective conscious. Far from being a peripheral issue, the question of the legal status of the SAHRC's directives has national significance for at least three reasons: it is material to the nature and ambit of the SAHRC's institutional powers; it impacts the rights of complainants who depend on the SAHRC's assistance in asserting and vindicating their constitutional rights; and it is material to the legal position of parties subject to the SAHRC's compliance processes.

This important judgment, which originated from a legal challenge that began in the Mpumalanga Division, Mbombela (High Court) in 2022 where the SAHRC sought an order declaring its directives automatically binding, raised three significant legal issues directly at the heart of the powers conferred on the SAHRC by the Constitution.



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The factual matrix

The matter arose from a complaint lodged with the SAHRC in 2018 by occupiers of Doornhoek farm in Mpumalanga. The occupiers alleged that the respondents, Agro Data CC and its sole member, Mr Boshoff, had restricted their access to (borehole) water. The SAHRC conducted an investigation and found that the occupiers' rights to access to water and dignity had been violated. It issued directives requiring that their access to water be restored, that the parties engage with each other and that the respondents disclose relevant information to the occupiers to allow for meaningful engagement between the parties. The respondents failed to comply, prompting the SAHRC to approach the High Court to seek an order that its directives issued in terms of section 184 of the Constitution were binding and that the specific directives it had issued in this case were binding. 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.

In opposing the application, the respondents denied that the SAHRC has the power to issue binding directives to which private individuals have to automatically adhere.

On 2 March 2022, the High Court handed down judgment and held that the SAHRC exercises co-operative control, which is facilitative and proactive, rather than coercive. It also held that the SAHRC could not be equated with the Public

Protector, holding that the constitutional and statutory powers of the two institutions are distinguishable – with the latter enjoying a higher status in the hierarchy of Chapter 9 institutions. It dismissed the declaratory relief sought that the SAHRC's powers are generally binding.

The SAHRC appealed to the Supreme Court of Appeal (SCA) 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.

In its judgment, the SCA agreed with the High Court that section 184 of the Constitution read with section 13(3) of the SAHRC Act empowers the SAHRC to assist affected persons to secure redress, and that 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 itself. It concluded that the SAHRC's powers are persuasive rather than coercive and that the SAHRC lacks authority to make binding decisions under section 13 of the SAHRC Act. However, it rejected the High Court's finding that Chapter 9 institutions' different roles and powers implied a vertical hierarchy between them.



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At the Constitutional Court

The SAHRC appealed the SCA's finding that it lacks authority to make binding directives to the Constitutional Court. In its appeal it relied on the Constitutional Court's judgment in *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11 (where it was held that remedial action taken by the Public Protector may, at times, have binding effect) to argue that decisions taken under constitutional authority must be complied with unless set aside by a court. The SAHRC contended that the Constitution and the SAHRC Act could be broadly interpreted to mean that its directives were binding. It submitted that the matter raises three important constitutional issues: 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.

The appeal to the Constitutional Court was unopposed. Three amici curiae were admitted – the Centre for Applied Legal Studies (CALS), AfriForum NPC and ProBono.Org. CALS supported the SAHRC and argued for a broad interpretation of its powers, aligned with international law and which promoted effective access to remedies. ProBono.Org submitted that the SAHRC's decisions have legal effect but accepted that enforcement requires court proceedings. AfriForum opposed both positions, submitting that the SAHRC has no binding powers at all.

In a unanimous decision, the Constitutional Court found that the wording of section 184 and the SAHRC Act, read in context and in light of its purpose and legislative history, did not support an interpretation that the SAHRC has the power to issue binding directives – finding that the powers of the SAHRC were distinguished from those of the Public Protector. It held that the latter is empowered to “take remedial action” which may, at times, be binding, but that the SAHRC is limited to “taking steps to secure appropriate redress”. However, and of great significance, the Constitutional Court stressed that its determination that the fact that the SAHRC's powers are non-binding does and should not diminish the constitutional importance of the SAHRC or render its work ineffectual. Rather, it remains an important institution that promotes human rights through investigation, advocacy and facilitating access to justice.

Concluding remarks

Chapter 9 institutions are crucial to South Africa's constitutional democracy. Their mandate is pivotal for the sustained implementation of the rule of law and South Africa's commitment to its constitutional vision. Accordingly, it is in the interest of all citizens that these institutions remain functional and effective. It is therefore an important and welcome step that the apex court stressed that the non-binding nature of the SAHRC's directives does not undermine its constitutional role.

Jacque Cassette and Gift Nkosinathi Xaba



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