

The Protection mandate of the South African Human Rights Commission

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SUMMARY

This article considers case law where the courts have held that the South African Human Rights Commission does not have the power to make a definitive finding that a right has been violated, or issue binding directives to remedy a violation of human rights. It is argued in this article that these decisions cannot be faulted as it was not the intention of the constitutional drafters to create a Commission with binding powers. It is also not a requirement in terms of the international framework for national human rights commissions to have binding power. Furthermore, where foreign jurisdictions have sought to provide binding power to its human rights commissions, it has explicitly awarded such binding power either in the constitutional text or in the enabling legislation. This article argues that the Commission must use its soft power to establish respect for human rights and a culture of human rights, and should not adopt an adversarial approach. The Commission should therefore enter into dialogue with the relevant parties where it concerns the alleged violation of human rights, and the relevant parties would have an obligation to participate in this dialogue in protecting the integrity and effectiveness of the Commission.

1 Introduction

The South African Human Rights Commission (the Commission or SAHRC) is one of the institutions created in Chapter 9 of the Constitution,¹ whose aim is to strengthen constitutional democracy.² The Commission plays a fundamental role in working towards the transformation of South African society.³ Given the oppressive colonial and apartheid periods, the promotion and protection of fundamental human rights contained in the Constitution is of particular importance in

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1 Constitution of the Republic of South Africa, 1996 ("Constitution").

2 Section 181 of the Constitution.

3 Murray "The human rights commissions *et al*: What is the role of South Africa's chapter 9 institutions" 2006 *PELJ* 122–147.

the democratic dispensation.⁴ The role of the Commission in establishing a culture of human rights in South Africa cannot be overstated. The Commission has broad constitutional and legislative powers to achieve its mandates. Through these broad mandates and extensive powers, the SAHRC also provides access to the enforcement of rights for vulnerable and marginalised members of society who would otherwise be unable to seek redress through judicial means.⁵

Following the Constitutional Court decision in *Economic Freedom Fighters v Speaker of the National Assembly*,⁶ where the court held that the Public Protector (another Chapter 9 institution) has the power to order binding remedial action where appropriate, the Commission has argued that it similarly has the power to issue binding directives for the redress of a violation of human rights.⁷ Although it is generally accepted that the Commission does not have the power to issue binding directives,⁸ some argue that it should (or does) have the power to issue binding directives.⁹ In comparing the power of the Public Protector to order binding remedial action and the Commission's power to take steps to redress the violation of human rights, Makwati argues that "it will not be rational to deny the

4 See generally Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 25–34; Makwati "The South African Human Rights Commission" in Fombad CM (ed) *Compendium of documents on national human rights institutions in Eastern and Southern Africa* (2019) 646–648.

5 See National Assembly of South Africa *Report of the ad hoc committee on the report of chapter 9 and associated institutions* (2007) 167.

6 2016 (2) SA 580 (CC) ("EFF" case).

7 See the Commission's submissions in *Solidarity v Minister of Labour* 2020 1 BLLR 79 (LC); *South African Human Rights Commission v Agro Data CC* (1448/2021) 242 ZAMPMBHC 58 (2 March 2022) ("Agro Data MPHCC" case); and *South African Human Rights Commission v Agro Data CC* (39/2023) 2024 ZASCA 121 (15 August 2024) ("Agro Data SCA" case), the latter case supported by Afriforum, the Centre for Applied Legal Studies (Wits University), and Commission for Gender Equality intervening as *amici curiae*. See also South African Human Rights Commission *Media statement: SAHRC takes judgment on its powers to the Constitutional Court* (6 September 2024), where the Commission indicated that it will appeal the decision of the Supreme Court of Appeal in *Agro Data SCA* where the Court held that the Commission does not have the power to issue binding directives.

8 National Assembly of South Africa (2007) t 167–168; Klaaren "SA Human Rights Commission" in Woolman & Bishop (eds) *Constitutional law of South Africa* (2013) 24C–7. Speaking generally in relation to Chapter 9 institutions before *EFF* case; Murray (2006) at 131–132, quoting Reif "Building democratic institutions: The role of the national human rights institutions in good governance and human rights protection" 2000 *Harvard Human Rights Journal* 30 strongly argued that Chapter 9 institutions, including the SAHRC only exercises cooperative control, which is "facilitative and proactive", and opposed to coercive control which is "reactive" and "imposed by unilateral decision".

9 See Makwati (2019) 674–675. See also Govender and Swanepoel "The powers of the office of the Public Protector and the South African Human Rights Commission: A critical analysis of *SABC v DA and EFF v Speaker of the National Assembly* 2016 3 SA 580 (CC)" 2020 *PELJ* 1–32, who are of the view that in certain circumstances, recommendations of the Commission may be binding on the parties.

SAHRC recommendations binding effect while granting the same to another institutions with an overlapping mandate.”¹⁰

Recently, several cases have clarified the Commission’s ability to determine whether a right protected in the Constitution has been violated and whether a directive or a recommendation to remedy a violation of a right is binding on the parties. These cases include the High Court decisions in *Solidarity v Minister of Labour*,¹¹ *Mpumalanga Growth Agency v South African Human Rights Commission*,¹² *Afriforum v South African Human Rights Commission*,¹³ and the High Court and Supreme Court of Appeal’s decisions in *Agro Data*.¹⁴

Afriforum and *Mpumalanga Growth Agency* specifically considered whether the Commission’s finding that a right has been violated is a definitive decision, which would be susceptible to review in terms of the Promotion of Administrative Justice Act.¹⁵ While these decisions dealt with the reviewability of the Commission’s finding in relation to an alleged human rights violation, it does have a bearing on the question that was dealt with in *Solidarity* and *Agro Data* concerning the steps the Commission may take after it has made a finding concerning the alleged violation of human rights in terms of its protection mandate. Ultimately, these cases confirm that the Commission does not have the power to make definitive findings as to whether a right has been violated, and consequently, it also does not have the power to issue binding directives or recommendations. This pronouncement by the courts that the power of the Commission is limited to making recommendations that are not binding is diametrically opposed to the decisions of both the Supreme Court of Appeal¹⁶ and the Constitutional Court¹⁷ in relation to the remedial action of the Public Protector.

However, it is submitted that the courts’ interpretation regarding the Commission’s power cannot be faulted. This article demonstrates that the judiciary’s finding – that the Commission lacks the power to order binding remedial action for human rights violations – aligns with the original concept of the Commission within the South African constitutional framework and is supported by the international framework for national human rights institutions. Furthermore, human rights commissions in foreign jurisdictions also do not generally have the power to make binding decisions, leading some jurisdictions to introduce innovative ways to strengthen the work of their human rights commissions.¹⁸ This article consequently considers the value of the

10 Makwati (2019) 674–675.

11 *Solidarity*.

12 2023 ZAMPMBHC 39 (“*Mpumalanga Growth Agency*” case).

13 2023 6 SA 188 (GJ) (“*Afriforum*” case).

14 *Agro Data MPHC; Agro Data SCA*.

15 3 of 2000 (“PAJA”).

16 *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* 2016 2 SA 522 (SCA).

17 *EFF* case.

18 See the discussion below at 4 Discussion.

Commission in strengthening constitutional democracy and transforming South African society through using its constitutional and legislative powers. It is argued that the Commission's strength lies in the fact that it does not have binding orders, but that it is to engage the relevant parties regarding respect for human rights and establishing a culture of human rights.

This article first sets out the power of the Commission before it turns to a very brief discussion of the case law that dealt with the power of the Commission to make a definitive finding as to whether a right has been violated and the power of the Commission to make a binding order for the alleged violation of rights. Thereafter, it considers, in combination, the original idea of the Commission as conceptualised and understood during the negotiation of the Constitution, as well as the international framework regarding national human rights institutions. It then considers the implication that the finding of the respective courts that the Commission does not have the power to make binding orders has on the reporting of the Commission where it investigates the violation of human rights; how it engages the relevant parties involved in such an investigation; and ultimately how it can still contribute to achieving its ultimate purpose of strengthening constitutional democracy in assisting in the transformation of the South African society.

2 The powers of the South African Human Rights Commission

2 1 Constitutional powers and competencies

Section 184(1) of the Constitution stipulates three main mandates of the Commission in strengthening constitutional democracy. The Commission must "promote respect for human rights and a culture of human rights".¹⁹ It must "promote the protection, development and attainment of human rights";²⁰ and it must "monitor and assess the observance of human rights".²¹ The Commission recognises these three

19 S 184(1)(a) the Constitution.

20 S 184(1)(b) the Constitution.

21 S 184(1)(c) the Constitution. Although not as clear as the mandate in s 184(1), s 184(3) of the Constitution requires the Commission to collect information from relevant state organs on a range of socio-economic and environmental rights. The Constitution is not clear what the purpose of the information collection may be, but it is argued that it enables the Commission with the necessary powers to effectively monitor the level of compliance with human rights in South Africa. See the discussion in Liebenberg and Slade "Applying a human rights lens to poverty and economic inequality: The experience of the South African Human Rights Commission" 2023 *Federal Law Review* 303–306.

distinct yet interrelated mandates and links its strategies to these three mandates.²² In its revised strategic plan 2020-2025,²³ the Commission describes its mandates as follows: “[p]romotion – Enhancing human rights advocacy, visibility and awareness programmes”; “[p]rotection – Increasingly using redress mechanisms to minimise human rights violations”; and “[m]onitoring – Comprehensive human rights monitoring and impact evaluation”.²⁴ Under each of these mandates, the Commission lists specific strategies. Under its protection mandate, it lists the institution of strategic impact litigation, the proactive conducting of investigative inquiries and hearings, and the use of alternative dispute resolution and mediation as mechanisms to protect human rights and reduce human rights violations.²⁵ From a cursory consideration of the description of the various activities of the Commission in its strategic plan, it is clear that the Commission uses these strategies to promote the protection of human rights.²⁶

As mentioned, the Commission is tasked with assisting the transformation of South African society in establishing a culture of human rights. In doing so, it has been granted three main mandates: To enable the Commission to realise its promotion, protection, and monitoring mandates, the Commission has been granted a wide range of constitutional and legislative powers. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights, to take steps to ensure redress where human rights have been violated, to conduct research, and to educate. Section 184(3) of the Constitution requires the Commission to gather information from organs of state on measures it has taken to realise a range of rights protected in the Constitution.²⁷ The legislative powers of the Commission are mainly contained in the South African Human Rights Commission Act.²⁸

2 2 Legislative powers and competencies

Section 13 of the SAHRC Act explicitly assigns the Commission additional obligations to fulfil its constitutional mandate. For instance, section

22 See for instance South African Human Rights Commission *Revised strategic plan 2020–2025* (2022) 10–11. Under its promotion mandate it seeks to enhance ‘human rights advocacy, visibility and awareness programmes. Under its protection mandate, it seeks to increase ‘redress mechanisms to minimise human rights violations’ Under its monitoring mandate, it seeks to ‘comprehensive human rights monitoring and impact evaluation.’

23 SAHRC *Strategic Plan*.

24 SAHRC *Strategic Plan* 10–11.

25 SAHRC *Strategic Plan* 10.

26 See SAHRC *Strategic Plan 2020-2025* 15–20 for information on relevant court rulings where the Commission is either a party to the proceeding or were requested to monitor compliance with the court order.

27 See Liebenberg and Slade (2023).

28 40 of 2013 (“SAHRC Act”). The Commission also has legislative mandates in terms of the Promotion of Access to Information Act 2 of 2000 (PAJA); and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). For more information, see SAHRC *Strategic Plan* at 6–8.

13(1)(a) of the Act obliges the Commission to make recommendations to organs of state in all spheres of government to adopt measures to promote human rights and to further ensure the observance of rights. Section 13(1)(b) of the Act, in turn, obligates the Commission to review government policies that deal with human rights, and it is competent to make recommendations concerning these policies.²⁹ The Commission is also obliged to consider whether there is proper implementation of, and compliance with, any international or regional international convention, charter or treaty that concerns the promotion and protection of human rights.³⁰

In terms of section 13(3) of the SAHRC Act, the Commission can investigate any alleged violation of a human right either after a complaint has been lodged or on its own initiative. The ability of the Commission to investigate an alleged violation of a human right of its own volition is a powerful mechanism that enables the Commission to actively ensure the promotion and protection of human rights as required in terms of the Constitution.³¹ The investigatory powers of the Commission are regulated in terms of section 15 of the Act. The Commission can request any information or any article or item from any person if relevant to an investigation. It can also question any person under oath or affirmation.³² The Commission is also competent to enter and search any premises if relevant to the investigation. Attachment of certain items is also possible in terms of section 15 if certain conditions are met.³³ The Commission makes extensive use of these powers to determine whether an alleged violation of a human right may be substantiated.

If, upon conclusion of the investigation, the Commission is of the opinion that there is substance to the complaint investigated, the Commission is granted the legislative powers to assist the complainant in obtaining redress for the alleged violation. It may, in this regard, also provide financial assistance to enable the complainant to seek redress in court. Alternatively, the Commission can institute proceedings in court on behalf of a person or in its own name.³⁴ To promote the protection of human rights, the Commission can also make recommendations that can be considered advisable for the realisation of rights.³⁵

29 S 13(1)(b)(v) SAHRC Act.

30 S 13(1)(b)(vi) SAHRC Act.

31 The power to institute own-motion investigations into the alleged violation of human rights is not a power that is shared universally by all national human rights institutions, although it appears that the vast majority has the power to institute own-motion investigations. See Reif *Ombuds institutions, good governance and the international human rights system* (2020) 29.

32 A person will only be competent and compelled if the Director of Public Prosecutions has issued an order to that effect.

33 Ss 15(3) & (5) SAHRC Act.

34 See for instance *South African Human Rights Commission and 40 Others v Minister of Home Affairs: Naledi Pandor* 2014 BCLR 1352 (GJ).

35 See also s 13(1)(a) SAHRC Act.

Where the Commission has investigated a matter, section 18(3) permits the Commission to make known, in writing, any finding or recommendation in relation to that finding “to any person, the head of the organisation or institution, or the executive authority of any national or provincial department”.³⁶ Importantly, where such a finding or recommendation has been made known to any of the persons listed in section 18(3), section 18(4) obliges such person to respond, in writing, as to steps it intends to take to give effect to any finding or recommendation if so required. The written response must be submitted within 60 days after having become aware of such a finding or recommendation. This provision seeks to place an obligation on the person concerned to have proper regard to the findings and recommendations of the Commission, and to engage it on matters relating to any potential violation and/or realisation of rights. Although it seems to be open to the person to indicate that it will not take any steps as was indicated by the Commission or that it disagrees with a finding of the Commission, it is clear that the Commission’s findings and recommendations cannot simply be ignored, but that there must be engagement with the Commission as to the protection and realisation of human rights.³⁷

However, as mentioned, the Commission has routinely taken the view that where it has investigated a complaint of a violation of human rights and found that complaint to be substantiated, it has the power to order steps as redress for the violation that is binding on the parties.³⁸ The steps that the Commission can take will flow from a finding that a right has been violated. Section 18(4) speaks to both a finding and a recommendation of the Commission that must be engaged with. In this regard, the case law speaking to whether a finding is definitive and therefore reviewable, and the question of the binding nature of recommendations as steps to ensure redress flowing from a finding that a right has been violated, provides clarity on a question that has up until now not yet been fully considered.

In the section below, case law is discussed, where the courts considered whether a finding of the Commission can be considered a

36 Just referred to further below as “person”.

37 See *Agro Data SCA* case at para 67 and the discussion below. It should be noted that although the Commission can make its findings known to “any person” in section 18(3), which may include private parties, the obligation created in section 18(4) to respond to the findings excludes “any person” and is limited to the head of an organisation or institution, or the executive authority in the national and provincial sphere. Findings by the Commission that are made known to private parties seemingly do not place an express obligation on the private party to respond in terms of section 18(4) of the Act.

38 See for instance South African Human Rights Commission *Final report of the Gauteng provincial enquiry into the Alexandra township total shutdown* (2021) 75 (“SAHRC *Alexandra Township Report*”): “The Commission’s directives herein are binding on the Respondents. Should any of the parties be aggrieved by the finding and directives of the Commission as contained herein, such a party is entitled to challenge same in court through a process of judicial review.”

definitive finding and therefore reviewable, followed by case law where the court considered whether the Commission has the binding power to order redress where it has found that a right has been violated.

3 Case law

3.1 Case law dealing with the question as to the reviewability of the findings of the Commission

3.1.1 Afriforum v South African Human Rights Commission

In the *Afriforum* case, the issue concerned the Commission's finding in relation to alleged hate speech on the part of Julius Malema and other members of the Economic Freedom Fighters. Upon receipt of several complaints, the Commission – pursuant to section 13(3)(a) of the SAHRC Act – investigated certain statements made by Julius Malema and another member of the Economic Freedom Fighters and whether these statements violated section 10 of PEPUDA. After a thorough analysis of the applicable constitutional and legislative provisions pertaining to the prohibition of hate speech and relevant case law, the Commission found that the statements made by Julius Malema and another member of the Economic Freedom Fighters did not amount to hate speech and therefore did not violate section 10 of PEPUDA.³⁹

Aggrieved by this outcome, AfriForum and the FW de Klerk Foundation sought to set aside the finding of the Commission that the statements made by the parties did not amount to hate speech. Initially, there seemed to have been some uncertainty and backtracking with regard to the pathway to review the finding of the Commission. This was undoubtedly based on the fact that the Commission was of the opinion that when it had concluded that Malema's statements did not amount to hate speech, it made a decision, which would be reviewable in terms of PAJA. This is clear from the manner in which it set out the findings in its report and the manner in which it indicated the findings that any aggrieved party could review these findings.⁴⁰ The Commission also initially maintained this position in court.

However, when probed by the court as to why the finding of the Commission is considered a "decision" and therefore reviewable in terms of PAJA, the Commission changed its position.⁴¹ The Commission subsequently stated that its finding is not a decision and, therefore, not

39 South African Human Rights Commission *Findings of the South African Human Rights Commission regarding certain statements made by Mr Julius Malema and another member of the Economic Freedom Fighters* (2019).

40 As above.

41 In the words of the court para 10: "a volte face by the SAHRC occurred."

reviewable in terms of PAJA. The claimants, on the other hand, maintained that the finding is reviewable in terms of PAJA.⁴²

The court, however, was not convinced that the Commission's findings were a decision susceptible to review in terms of PAJA. The court had regard to the role of the Commission (to strengthen constitutional democracy) and the powers of the Commission (as contained in the SAHRC Act) in reaching its decision. The court had particular regard to the authorising provision that led to the finding that is sought to be reviewed. The complaint reached the Commission by way of section 13(3) of the SAHRC Act. Section 13(3) of the Act empowers the Commission to investigate an alleged violation of human rights upon receipt of a complaint. If, after an investigation, the Commission is of the opinion that there is substance to the complaint, it must assist (as far as it is able to do so) the claimant in obtaining redress for the alleged violation. This may also include providing financial assistance to the complainant so that the complainant can obtain redress. Alternatively, the Commission may institute proceedings in its own name. As indicated above, the Act provides sufficiently wide investigatory powers to the Commission to enable it to do a thorough investigation in order to provide a credible opinion. In this regard, the court held that a finding of the Commission that a right has or has not been violated is not a decision, but merely an opinion that would inform the way forward.⁴³ If the Commission forms the opinion that a right has indeed been violated, then section 13(3) provides the Commission with several possibilities in ensuring that appropriate redress may be obtained for the violation. To be clear, if the Commission, after an investigation into an alleged violation of a right, forms the opinion that there is substance in the complaint, it would have to follow the prescripts in section 13(3) to ensure redress, which may involve instituting proceedings in its own name in court.⁴⁴ This reasoning seems to indicate that the Commission does not have *carte blanche* to order any type of redress.

Section 13(3) is relatively clear as regards the power of the Commission upon receipt of a claim that a right, either as protected in the Constitution or expanded on in legislation, has been violated. The Commission can assist the claimant in seeking redress in a court or an appropriate tribunal or launch proceedings in its own name in a court or appropriate tribunal. However, given the way the Commission has up

42 The court (*Afriforum* case) noted that Julius Malema suggested that the proper pathway to review the finding of the Commission is through the principle of legality, but added that “[h]appily, that question need not be decided”. The question about the proper pathway to review findings and decision of the Chapter 9 institutions, requires further research.

43 This was confirmed by the SCA in *Agro Data* SCA para 50.

44 This approach has also been adopted by the Commission. See for instance *South African Human Rights Commission v Qwelane* 2018 2 SA 149 (GJ), where the Commission instituted proceedings in court after it formed the opinion that the respondent contravened the prohibition against hate speech.

until now applied this provision, the clarity the court provided in relation to the powers of the Commission in terms of section 13(3) is to be welcomed and would require the Commission to adapt the manner in which it reports on its investigations in terms of this section.

3 1 2 *Mpumalanga Growth Agency v South African Human Rights Commission*

In *Mpumalanga Growth Agency v South African Human Rights Commission*,⁴⁵ the Commission investigated a complaint by Mr Tembo that the Mpumalanga Growth Agency orchestrated his removal from the property on which he resided. The Commission investigated the complaint as empowered in sections 13 and 15 of the SAHRC Act. The Commission found that although the Agency did not orchestrate the eviction of Mr Tembo, the Agency offered the property to Ms Msiza, which set in motion a chain of events that led to the eviction of Mr Tembo from the property. In this regard, the Commission found that the Agency failed to respect and protect Mr Tembo's right not to be evicted without a court order. The recommendations of the Commission were quite far-reaching. Amongst others, it ordered the Agency to provide Mr Tembo with alternative accommodation similar to those he occupied, and if it does not have alternative accommodation, it must start eviction proceedings against Ms Msiza. However, the directives issued by the Commission were couched in obligatory language.⁴⁶

The Agency sought to have the findings and directives issued set aside in terms of section 6 of PAJA. Section 6 allows for reviewing an administrative action as defined in section 1 of the Act. The court considered whether the findings and directives of the Commission satisfy the requirements for administrative action in section 1 of PAJA. The court found that the Commission is an organ of state, which exercises power in terms of the Constitution and legislation. In this particular instance, the Commission exercised its powers pursuant to section 13 of the SAHRC Act. However, to fully satisfy the requirement for administrative action, the findings and directives of the Commission must also "adversely affect the rights of any person and which has a direct, external legal effect".⁴⁷ The findings and directives of the Commission are, according to the court, *prima facie* findings that a right was violated. Relying on the *Afriforum*⁴⁸ decision, the court held that a finding of the Commission that a right has been violated is not a definitive finding that a right has indeed been violated. To be clear, the finding that the Agency violated Mr Tembo's housing right is not a definitive finding of such a violation; whether such a violation is indeed established is ultimately for a court to decide. As such, the court confirmed that a finding of the Commission that a right has been violated is an opinion of the Commission, which

45 *Mpumalanga Growth Agency*.

46 *Mpumalanga Growth Agency* paras 12–13.

47 S 1 PAJA.

48 *Afriforum*.

may be relevant when either the complainant or the Commission itself seeks to vindicate an alleged breach in court.

Therefore, the Commission's finding is not a definitive finding, and it does not adversely affect the rights of the Agency as it does not have an external legal effect, meaning that it is not reviewable in terms of PAJA.⁴⁹ Since the finding is not definite, it can be concluded that any directives to address a finding of violation of rights cannot be binding or enforceable.

The cases discussed below consider the question of whether the directives of the Commission to remedy a violation of human rights following an investigation by the Commission are binding.

3 2 Case law dealing with the question of whether the directives of the Commission are binding

3 2 1 Solidarity v Minister of Labour

The *Solidarity* case⁵⁰ was the first decision that touched upon the nature of the findings and recommendations of the Commission. The Commission released an Equality Report⁵¹ in which it sought to consider to what extent radical socio-economic transformation can lead to substantive socio-economic equality. In its report, the Commission made several findings regarding policy, practices, and laws that perpetuate systemic inequality. Based on these findings, the Commission made several recommendations aimed at addressing gross economic inequality. In its Equality Report, the Commission, amongst others, found that the Employment Equity Act's⁵² definition of "designated groups" conflicts with the Constitution and South Africa's international obligations. As such, the Commission recommended changes to the Employment Equity Act. *Solidarity* argued that the findings and recommendations of the Commission's Equality Report are binding and that effect must be given to the recommendations unless it is set aside on review. The Commission, however, clearly differentiated between its different mandates, being promotion, protection, and monitoring. In this case, the Commission was clear to point out that the Equality Report is a research report, which sought to monitor government's compliance with national and international laws. As such, the Commission indicated that

49 The question about the reviewability of the finding in terms of the principle of legality, remains undecided. See also the discussion above in relation to the *Afriforum* case.

50 *Solidarity* case.

51 South African Human Rights Commission *Equality Report* 2017/2018 (2018).

52 55 of 1998.

its recommendations in the Equality Report are advisory in nature and not binding.⁵³

However, the Commission clearly indicated that if it made recommendations pursuant to its protection mandate as steps to secure redress for the alleged violation of human rights, such recommendations would be binding. In this regard, the Commission indicated that it would be important to have regard to the mandate in terms of which it investigates and reports on matters. According to the Commission, it would only be in the limited circumstance where it investigates the violation of human rights and seeks to order redress, where it has found that a right has indeed been violated, that such steps for redress would be binding.

The high court accepted the contention of the Commission that the Equality Report is a research report that sought to advise government on appropriate steps that could be taken for the progressive realisation of rights and that its recommendations are advisory in nature. As this decision dealt with the Equality Report, which was considered by the court to be a research report where the Commission did not seek to issue binding recommendations, the questions as to the binding nature of directives of the Commission made pursuant to its protection mandate were left unanswered.

3 2 2 *Agro Data*

The high court decision in *Agro Data* MPHC⁵⁴ followed some years after *Solidarity*. It was the first decision that considered the binding nature of the Commission's directives to secure redress for the violation of human rights in terms of section 184(2)(b) of the Constitution.⁵⁵ Following an investigation into the alleged violation of the complainant's right not to be denied access to water, which is protected by section 27(1)(b) of the Constitution and section 6(2)(e) of the Extension of Security of Tenure Act,⁵⁶ the Commission made several recommendations as redress for the violation. The Commission argued that these recommendations flow from its protection mandate and, similar to the binding remedial powers of the Public Protector, are binding on the parties. The high court,

53 Regardless of the advisory nature of the findings and recommendations contained in the *Equality Report*, where the Commission brings these finding and recommendations to the attention of the relevant office bearer, the office bearer would be under a duty to respond to the findings and recommendations as per s 18(4) of the SAHRC Act. This is to ensure engagement between the Commission and, in this case, the executive (and perhaps the legislative) branches of government in ensuring that a culture of human rights is realised.

54 62 of 1997. See also the *Agro Data* MPHC case.

55 For a more comprehensive discussion of the high court decision, see Slade "Clarifying the power of the South African Human Rights Commission to take steps to redress the violation of human rights: A discussion of *South African Human Rights Commission v Agro Data* CC [2022] ZAMPMBHC 58" 2023 *Obiter* 459–470.

56 62 of 1997.

however, found that the Commission does not have the power to make binding recommendations in terms of its protection mandate. Considering the constitutional status, position, and constitutional and legislative powers of the Commission, the court found that the Commission cannot exercise coercive control, only cooperative control.⁵⁷ In this regard, the High Court found that the Commission cannot make binding recommendations, but would have to apply its legislative powers, such as instituting proceedings in a competent court, to ensure redress for human rights violations.

On appeal, the Supreme Court of Appeal confirmed the order of the High Court that the Commission does not have the power to issue binding directives.⁵⁸ The Supreme Court of Appeal pointed to the differences between the constitutional powers of the Public Protector (who the Constitutional Court found has binding remedial powers) and the Commission. According to the Supreme Court of Appeal, the constitutional powers of the Commission in section 184(2)(b) do not provide the Commission with the power to issue remedial orders; it only authorises the Commission to take appropriate steps to secure redress. This is distinguishable from the constitutional power of the Public Protector in section 182(1)(c), which authorises the Public Protector to “directly take appropriate remedial action.”⁵⁹ Furthermore, section 13(3) of the Act, which was discussed above, does not “clothe the SAHRC with adjudicative powers.”⁶⁰ According to the court, if the legislature intended the SAHRC to have binding remedial powers, it would have provided for such powers in legislation.⁶¹

According to the Supreme Court of Appeal, the proper role of the Commission is that of persuader. Through the thorough investigation enabled by its extensive investigatory powers, the Commission is to persuade rather than coerce those implicated in providing relief where it may be required.⁶² To this end, the Commission must point to an alleged violation of human rights and advise on the appropriate remedy, which will require the Commission to engage with the relevant parties.⁶³ This engagement points to the dialogical role that the Commission play in establishing a culture of human rights. The success of the Commission and the human rights project, however, depends on whether the implicated parties, like state departments, seriously engage with the Commission as it is obliged to do in terms of the Constitution.

57 *Agro Data* MPHRC at para 39, with reference to Reif (2000) at 30.

58 *Agro Data* SCA case.

59 *Agro Data* SCA para 44.

60 *Agro Data* SCA para 58.

61 See also the discussion below.

62 See *Agro Data* SCA para 51.

63 *Agro Data* SCA para 53.

4 Discussion

The cases discussed above show that the Commission does not have the power, either in terms of the Constitution or legislation, to make definite findings as to a violation of a right. Consequently, it does not have the power to issue binding directives to remedy such a violation. Where it concerns the Commission's power to order redress for the violation of a human right, it is limited to those steps as contained in the South African Human Rights Commission's Act. These would include instituting proceedings in its own name or assisting the complainant in instituting proceedings in a court.

The position of the courts is that the Commission does not have the power to make definitive findings or binding orders in keeping with the manner in which the Commission was originally conceptualised. In its 1999 document entitled, a Bill of Rights for South Africa, the African National Congress noted that a human rights commission should be created to "promote general observance of the Bill of Rights and in particular to help enforce the right to non-discrimination."⁶⁴ Although the document is silent on whether the Commission would have binding power, it is relatively clear from the document that the Commission is to have the power to monitor the observance of human rights, advise government on the realisation of human rights, mediate and have the power to approach a competent court to seek redress for the violation of human rights. If the Commission were intended to have binding powers, it would not have been necessary to provide the Commission with the power to approach a competent court to seek redress for the violation of human rights. The Interim Constitution of the Republic of South Africa, 1993 referred specifically to the SAHRC assisting a complainant or another person affected by a violation of rights to secure redress. This formulation has been carried over in the Human Rights Act and supports the idea that it was never intended that the Commission be granted power to issue binding recommendations.⁶⁵ Instead, the role of the Commission is to assist a complainant in securing redress.

During the drafting of the Constitution, there was agreement amongst the political parties that the Commission should have the "power to settle complaints through mediation, negotiation and conciliation, and that it can refer matters to court. There was also agreement that the Commission should not have adjudicative powers."⁶⁶ This point was

64 African National Congress *A bill of rights for a new South Africa* (1993) <https://www.anc1912.org.za/policy-documents-1993-a-bill-of-rights-for-a-new-south-africa/> (accessed 01-09-2024).

65 See also the heads of argument of Afriforum (amicus curiae in *Agro Data SCA* case) 7. (copy on file with author).

66 Constitutional Assembly Subtheme Committee 3, Theme Committee 6 *Final report human rights commission* 26 (May 1995) para 7.7 https://www.nationalarchives.gov.za/sites/default/files/ITEM_CA-0163-0001-_-003.pdf (last accessed 01-09-2024). In the draft report Constitutional Assembly Subtheme Committee 3; Theme Committee 6 *Report of submission: Human*

reiterated by the National Assembly's ad hoc committee reviewing Chapter 9 institutions, where it was noted that the Commission "does not have the authority, like a court, to make binding judgments."⁶⁷ Although state organs would accept the findings of the Commission and sometimes give effect to its recommendations, it is generally accepted that the recommendations are not binding. Academic commentators also support this position.⁶⁸ Murray, for instance, argues that institutions like the Commission do "not have the power to enforce accountability, but can demand an account of what the state and other actors have done."⁶⁹ The Commission, therefore, serves as an institution that can uncover human rights abuses through the use of its powerful investigatory powers that would require a positive response from the state.⁷⁰ This is in keeping with the engagement that must take place between the state and the Commission on the realisation and protection of human rights, which the Supreme Court of Appeal also confirmed in *Agro Data SCA*.⁷¹

The position of the judiciary that the South African Human Rights Commission does not have the power to make binding orders also finds support in how national human rights institutions are understood at the international level⁷² and in how domestic jurisdictions have empowered its respective national human rights institutions. The South African Human Rights Commission is a national human rights institution that enjoys accreditation by the Global Alliance of National Human Rights Institutions (GANHRI) in terms of the Paris Principles.⁷³

The Paris Principles, regarded as soft law, were adopted by the United Nations General Assembly in 1993 and set out minimum standards that a national human rights institution must meet in order to be considered credible. GANHRI reviews and accredits national human rights institutions based on criteria set out in the Paris Principles. Currently, the

rights commission (27 April 1995) para 4342 <https://www.justice.gov.za/legislation/constitution/history/REPORTS/Tc63-2703A.PDF> (last accessed 01-09-2024), there was agreement that "the Commission should not have judgemental powers and should therefore not have the powers of a court." In para 4 3 4 3 it was noted that "[i]f the Commission is unable to reach settlement it may, refer the dispute to a Court of Law or refer it to another separate tribunal or bring proceedings in its own name."

67 National Assembly of South Africa (2007) 167.

68 See Klaaren (2013) 24C–7.

69 Murray (2006) 131.

70 See Murray (2006) 131–133.

71 *Agro Data SCA* case.

72 In Office of the United Nations High Commissioner for Human Rights, *National human rights institutions: History, principles, roles and responsibilities* (2010) 16 it is stated that: "Many [national human rights commissions] have the authority to make recommendations only, following investigation (the more typical model)."

73 Principles Relating to the Status of National Institutions General Assembly Resolution 48/134 of 20 December 1993 ("Paris Principles"). The Paris Principles were produced during a UN International Workshop on National Institutions for the Promotion and Protection of Human Rights in 1991.

South African Human Rights Commission enjoys “A status” accreditation, which means that it fully complies with the Paris Principles. Takata sums up the purpose of the Paris Principles as follows:

They [the Paris Principles] provide the basic competence, responsibilities, composition, and methods of operation for NHRIs. They stipulate that NHRIs shall be vested with competence to promote and protect human rights and be given as broad a mandate as possible, clearly set forth in a constitutional or legislative text. The Paris Principles further provide that NHRIs must be independent of government, and their composition must ensure a pluralist representation of the social forces of society. NHRIs’ responsibilities must include, among others, the following: advising the government, parliament, and other competent bodies on human rights issues, promoting the effective implementation of human rights treaties, and contributing to the activities of international human rights bodies.⁷⁴

The Paris Principles speak to the competencies and power a national human rights institution should have in order to be effective. It does not, however, prescribe the force that any such competencies must have. Where the national human rights institution has investigated a complaint, the Paris Principles recognises that national human rights institutions may make binding decisions, but only in so far as the law of the particular jurisdiction has granted that power.⁷⁵ It is, therefore, not a requirement that national human rights institutions be given the power to make binding decisions. This is in keeping with the idea that the Paris Principles “were based on an advisory human rights commission model.”⁷⁶ This much is clear in the emphasis the Principles and GANHRI place on the promotion capabilities of national human rights institutions, as opposed to its protection capabilities.⁷⁷ As a result, having enforcement power is not a defining characteristic of a national human rights commission. In fact, national human rights institutions have a unique role to play, a role that is separate from, for instance, the judiciary.

Some national human rights commissions have been granted the power in terms of legislation to make binding orders, while others have not. For instance, the Canadian Commission on Human Rights, established in terms of the Canadian Human Rights Act⁷⁸ (which mainly prohibits unfair discrimination in federal government and federal private

74 Takata “How are the Paris Principles on NHRIs interpreted? Towards a clear, transparent, and consistent interpretative framework” 2022 *Nordic Journal of Human Rights* 2.

75 The Paris Principles do not require national human rights institutions to have the power to hear and consider complaints. However, where national human rights institutions have such competency, a number of principles apply. Principle (a) reads as follow: “Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions, or where necessary, on the basis of confidentiality.”

76 Reif (2020) 156.

77 Reif (2020) 157.

78 The Canadian Human Rights Commission is established in s 26(1) of the Canadian Human Rights Act R.S.C 1985, c. H-6.

businesses and does not provide protection for socio-economic rights as such), does not have the power to make binding orders. Instead, the Human Rights Act established a Human Rights Tribunal⁷⁹ to which the Commission may refer complaints if it considers it appropriate.⁸⁰ The Human Rights Tribunal does have the legislative power to make binding orders. It can, for instance, “make an order for compensation, restoration of lost rights”⁸¹ and an order that seeks to prevent a violation of the Human Rights Act.⁸² This confirms a particular understanding of a national human rights commission, a commission that does not have binding power, which may necessitate the creation of a specialised administrative tribunal that would be able to make binding orders as far as the legislation permits. In the Canadian example, the remedial orders that the Tribunal can make appear to be limited to those prescribed in the legislation.

Where a national human rights institution has been given binding powers, such powers are expressly contained in the Constitution or enabling legislation. For instance, section 53(1) of the Constitution of the Republic of Uganda, 1995 declares the Commission of Human Rights to have the power of a court where it summons a person to appear before it or where it questions any person, requires information, or where it seeks to hold persons in contempt of its orders. Although this power is contained in the Constitution and not in the enabling legislation, this position regarding the power of the Commission, where it investigates the alleged violation of human rights is similar to the powers of the South African Human Rights Commission. However, section 53(2) of the Ugandan Constitution empowers the Commission, upon finding that a right has been violated, the power to order compensation to be paid for the violation or “any other legal remedy or redress.”⁸³ Many of the complaints dealt with by the Ugandan Human Rights Commission Tribunal resulted in the award of compensation as redress for human rights violations flowing from assault, torture and murder at the hands of the police or other state agents,⁸⁴ or failure to pay child maintenance.⁸⁵ The Commission Tribunal has exercised the Commission’s broad powers

79 Established in terms s 48 of the Canadian Human Rights Act.

80 Canadian Human Rights Act Review Panel *Report of the Canadian human rights act review panel* (2000) chap 4 <https://publications.gc.ca/collections/Collection/J2-168-2000E.pdf> (last accessed 01-09-2024).

81 As above.

82 S 52(2) Canadian Human Rights Act. At present, the Canadian Human Rights Tribunal only hears cases that are submitted to it by the Human Rights Commission. The Review Panel (2000) (at chap 9) however, recommended that the legislation be amended to allow complainants to approach the Tribunal directly.

83 S 53(2)(c) Canadian Human Rights Act.

84 *Eriya Muhindo v Attorney General* Complaint No UHR/FPT/012/2010; *Wambi Akram Henry v Attorney General* Complaint No UHRC/JJ/44/2008; *Musisi Jimmy v Attorney General* Complaint NO UHRC/71/2007; *Mwasa Steven v Attorney General* Complaint NO UHRC 44/2006.

85 *Shamim Jaffer v Byaruhanga Isaac* Complaint NO UHRC/43/2004.

to seek redress by ordering the relevant authorities to discipline those responsible for human rights violations.⁸⁶

Although the power of the Ugandan Human Rights Commission to order compensation is expressly provided for in the Constitution, and although the power to order any other remedy for redress is similarly provided in the Constitution, implementation by the state is a challenge that has been identified.⁸⁷ The Ugandan example, however, does show that where a national human rights commission has the power to make binding orders, such as an order of compensation as redress for a violation, it is expressly granted that power in terms of the Constitution or enabling legislation.

Considering the way in which the South African Human Rights Commission was conceptualised, the international framework to which the Commission subscribes and the way that national human rights institutions are understood at the global level, it is clear that a national human rights commission like the SAHRC would only have the power to order binding directives if binding force is provided for those directives in terms of the Constitution or in legislation. The judgment of the High Court and the Supreme Court of Appeal in the *Agro Data SCA* case is, therefore, correct.

The inability of the South African Human Rights Commission to make definitive findings on the violation of human rights and binding recommendations to remedy those violations should not, however, be regarded as a weakness, but its greatest strength.⁸⁸ The South African Human Rights Commission has an extremely broad mandate and strong constitutional and legislative powers to establish a culture of human rights.⁸⁹ It has wide investigatory powers into the potential violation of human rights. The Commission can continue to establish a culture of human rights through the thorough investigation of human rights

86 Wambi Akram Henry.

87 See Mubangizi "A comparative discussion of the South African and Ugandan Human Rights Commissions" (2015) XLVIII *CILSA* 135. See generally this article for a discussion on the Ugandan Human Rights Commission.

88 Speaking in relation ombudspersons (the Commission can be considered a type of ombudsperson – (see Reif (2020) chap 2), Oosting "The ombudsman and his environment: A global view" in Reif (ed) *The international ombudsman anthology: Selected writings from the International Ombudsman Institute* (1999) 10 does not regard the lack of power to make binding decisions as inherently a negative aspect, but provides the identity to the institution as mediator between public administration and the public. Owen "The ombudsman: Essential elements and common challenges" in Reif (1999) 53 similarly argues that the "inability to force change represents the central strength of the office and not its weakness."

89 See Liebenberg and Slade (2023) on the broad mandate of the Commission, specifically the s 184(3) mandate, which requires various organs of state to provide yearly information to the Commission on measures they undertook to realise a several of the rights listed in the Bill of Rights in the Constitution.

complaints and by entering into dialogue with the relevant parties to ensure that human rights violations are appropriately addressed and remedied. In *Agro Data SCA*, the Supreme Court of Appeal hinted at this dialogical role.⁹⁰ The Court recognised the obligation expressly placed on organs of state in terms of section 181(3) of the Constitution to ensure the dignity and effectiveness of the Commission. There are, however, several examples where the Commission has made recommendations to state departments, where the relevant state department simply did not respond to the Commission's report and recommendation.⁹¹ The Court therefore emphasised the obligation on state departments to communicate with the Commission if dissatisfied with the Commission's findings and recommendations. Failing to communicate with the Commission in these cases undermines its investigation into potential human rights violations and its role in establishing a culture of human rights. This negatively affects the Commission's dignity. If state departments disregard the Commission responsible for establishing a culture of human rights, the value of human rights, which is as central to South Africa's constitutional democracy, is undermined. Furthermore, ignoring the Commission also affects its effectiveness. In cases where the state department does not engage with the Commission after a report containing recommendations has been submitted, the Commission may, at times, need to do follow-up investigations or monitoring⁹² and further reporting, or in limited cases, incur litigation costs. This impedes the effectiveness of the Commission as instead of resolving a matter, a matter is repeatedly engaged with, with potential human rights violations not being addressed. It is, therefore, important that organs of state, especially state departments, to enter into dialogue with the Commission

90 *Agro Data SCA* at para 67.

91 See the non-responsiveness of the City of Johannesburg and the Gauteng Provincial government following the investigation into the Alexandra Township Total Shutdown. Following unrest in the township of Alexandra, the Commission released a report, SAHRC *Alexandra Township Report*. The Commission had to conduct a follow-up visit to see whether matters improved in Alexandra, and reported as follow: "neither the City nor the provincial government responded to the [Commission's] report ... though they were given 60 days in which to do so": Mafata "Nothing has changed in Alexandra, says Human Rights Commission" (GroundUp, 15 February 2022) <https://www.groundup.org.za/article/sa-human-rights-commission-says-nothing-has-changed-alexandra/> (last accessed 21-08-2024). See further Slade (2023) 462.

92 See, for instance, the South African Human Rights Commission *Annual Report 2020* (31 March 2020) 30 <https://www.sahrc.org.za/home/21/files/Annual%20Report%202019%20-%202020.pdf> (last accessed 01-09-2024), where the Commission notes its activities regarding the monitoring of the implementation of its recommendations. Tellingly, the Commission notes that a few stakeholders provided their responses to the Commission's recommendations. See also the South African Human Rights Commission *Annual Report 2022* (31 March 2022) <https://www.sahrc.org.za/home/21/files/SAHRC%20Annual%20Report%202021-22%20F.pdf> (last accessed 01-09-2024) on monitoring the Department of Health Care's responsiveness to its findings and recommendations.

when the Commission has made findings and recommendations that seek to address potential violations of human rights.

5 Conclusion

The Constitution provides the Commission with three core mandates: “promote respect for human rights and a culture of human rights”; “promote the protection, development and attainment of human rights;” and “monitor and assess the observance of human rights in the Republic.”⁹³ From the cases discussed above, it is clear that the Commission does not have the power to finally determine whether a violation of a right has occurred, and subsequently, it does now have the power to protect human rights by instituting directives to redress the violation of such right. It can, however, *promote* the protection of human rights through a variety of means. It can institute strategic impact litigation that could address systemic violations of human rights. It can institute litigation in individual cases to obtain redress for human rights violations or assist, financially or otherwise, a complainant in instituting proceedings in court. Instituting litigation for the vindication of an alleged violation of human rights goes a long way in promoting the protection of human rights. The Commission can also make use of alternative dispute resolution and mediation as a mechanism to resolve a dispute “emanating from or constituting a violation of or threat to any human right.”⁹⁴

The power of the Commission to promote the protection of human rights through the powers given to the SAHRC Act and by making non-binding recommendations to organs of state and other parties that can be considered advisable for the protection of human rights is the traditional strength of human rights institutions. The Commission serves as a bridge between civil society and the state⁹⁵ and should be able to assist the most marginalised in society. It is, therefore, pointedly different to other institutions like the courts, and the need to have different institutions with different powers to ensure that a democratic society based on human rights is established, is necessary. This will be undermined if the Commission takes an adversarial stance, which it would have to do if it were to have binding powers. Instead, the Commission should rely on its soft power and cooperative control and “rely on persuasion and publicity as means to the realisation of ... [its] recommendations.”⁹⁶ As such, the dialogical approach described above, which stems from the cooperative control the Commission exercises, is

93 S 184(1) the Constitution.

94 S 14 SAHRC Act.

95 United Nations High Commissioner for Human Rights (2010).

96 Reif “The promotion of international human rights law by the office of the Ombudsman” in Reif (1999) 271. Murray (2006) 128 also refers in this regard to the intermediary role that the Human Rights Commission plays.

essential as it is “noncoercive, facilitative and proactive where actors negotiate to try to change behaviour to achieve the desired result.”⁹⁷

⁹⁷ Reif (2020) 26.