**IN THE SUPREME COURT OF APPEAL**
**SOUTH AFRICA**

**SCA Case No: 039/29**
**High Court Case No:1448/2021**

**In the matter between:**

**SOUTH AFRICAN HUMAN RIGHTS COMMISSION** Appellant

and

**AGRO DATA CC** First Respondent

**BOSHOFF F.G.** Second Respondent

**AFRIFORUM** *First Amicus Curiae*

**CENTRE FOR APPLIED LEGAL STUDIES** *Second Amicus Curiae*

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# CENTRE FOR APPLIED LEGAL STUDIES' HEADS OF ARGUMENT (AS AMICUS CURIAE)

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# Introduction

1. The core issue in this appeal is the interpretation of the appellant's powers under the Constitution. That task comes down to the interpretation of one seemingly simple sentence – "*to take steps to secure appropriate redress where human rights have been violated"*.[1] But this simple sentence is a pandora's box of existential crisis for the appellant, the South African Human Rights Commission (SAHRC). For without knowing what steps it may take to secure appropriate redress, a key institution within our democracy will not know who it is.

2. *A quo*, the SAHRC sought a declaratory order stating that directives issued by it in terms of section 184(2)(b) of the Constitution were binding.[2] The court *a quo* declined to grant the SAHRC's declaratory order.

3. On appeal, the SAHRC persists in its relief and provides a domestic interpretation of section 184(2)(b) and relies on the Constitutional Court's judgment in *EFF* wherein the remedial powers of the Public Protector were found to be binding.[3]

4. The Centre for Applied Legal Studies (CALS) was admitted as *amicus curiae* in these proceedings. CALS' admission was premised on its submissions that this Court must reasonably interpret the sentence in question in a manner that is

[1] Section 184(2)(b) of the Constitution of the RSA, 1996

[2] This was not the only relief that the SAHRC sought, but it is the only relief relevant on appeal.

[3] *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC) *(EFF)*.

consistent with international law.[4] Our submissions focus solely on section 184(2)(b).[5]

5. Neither the SAHRC, nor any other intervening party, raise the question of how international law influences the interpretation of section 184(2)(b). CALS is aware that Afriforum has been admitted as *amicus curiae* in this appeal, but we have not had the privilege of reading their written submissions. From the heads of argument filed by the SAHRC, we surmise that while Afriforum do refer to the Paris Principles, its submissions appear materially different to the argument we develop below. To our knowledge, the respondents have not filed heads of argument in this appeal as at the date that these submissions are filed.

6. We seek to advance two main propositions. First, section 184(2)(b) must be afforded the broadest mandate as possible so as to be in line with international law. Second, and flowing from our first proposition, section 184(2)(b) must be interpreted through the lens of accessing remedies.

7. In these submissions, we advance these two propositions through three themes:

    7.1. First, section 233 of the Constitution, the status of international law and its role in the interpretation of the SAHRC's powers.

    7.2. Secondly, the SAHRC as a pathway to ensuring access to remedies.

    7.3. Thirdly, whether section 184(2)(b) means that the SAHRC is (sometimes) competent to make binding decisions.

[4] Section 233 of the Constitution.

[5] *EFF* par 57. The SAHRC sources its powers directly from the Constitution.

## Interpreting section 184 through the lens of section 233 of the Constitution

8. Section 233 of the Constitution requires courts to prefer a reasonable interpretation that is consistent with international law. This interpretation should prevail over any other interpretation that is inconsistent with the international law.

9. In the *SADC Tribunal* case,[6] the Constitutional Court emphasized that *international law enjoys well deserved prominence in the architecture of our constitutional order*".[7] It is insufficient to interpret any domestic legislation in a manner that is only reasonable and textually appropriate; courts must also interpret legislation to accord with international law.[8] This means that even if an interpretation were textually reasonable, it would be incorrect if the interpretation is not also in line with international law.[9]

10. In *Sonke,*[10] the Constitutional Court explained the interpretative value of international law in the context of the independence of oversight bodies such as the Judicial Inspectorate for Correctional Services.[11] The Court emphasised the importance of considering international law when interpreting the Bill of

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[6] A Coutsoudis and M Du Plessis "*We Are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law"* Constitutional Court Review 2020 Volume 10, 155–195.

[7] *Law Society of South Africa & Others v President of the Republic of South Africa &* Others [2018] ZACC 51 2019 (3) SA 30 (CC) (*SADC Tribunal* case*)*.

[8] *Ibid* at par 4.

[9] *S v Okah 2018 (1) SACR 492 (CC)* at 509B-C par 38.

[10] *Sonke Gender Justice NPC v President of the RSA* 2021 (3) BCLR 269 (CC)

[11] *Sonke* at par 57.

Rights.[12] Further, the Court held that international law also offers valuable interpretative guidance outside of the Bill of Rights. It held that section 233 of the Constitution required it, when interpretating the relevant provisions of the Correctional Services Act, to prefer an interpretation that aligns with international law.

11. Importantly, in *Sonke*, when discussing the Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa,[13] the Court said that *"although the Robben Island Guidelines are non-binding, like other soft law they offer a useful tool for interpreting the obligations found in related binding instruments. For example, they lend additional detail to Article 5 of the African Charter on Human and Peoples' Rights, a binding instrument that prohibits torture and cruel, inhuman or degrading treatment."*[14]

12. It is the purely textual approach of the learned judge *a quo's* interpretation that did not consider the prevailing international norms when interpreting section 184(2)(b).[15] Similarly, the recent judgment from the Gauteng Division in *Afriforum v SAHRC*, penned by Sutherland DJP,[16] failed to consider the

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[12] Section 39(1)(b) of the Constitution.

[13] African Commission on Human and Peoples' Rights Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa, 23 October 2002.

[14] *Sonke* at par 65.

[15] The court *a quo's* judgment can be found in the Record at pages 96 – 116.

[16] *Afriforum v South African Human Rights Commission and Others (14370/2019; 31328/2019) [2023] ZAGPJHC 807 (14 July 2023).* It is important to note, however, that the court in *Afriforum* decided the case within the context of the SAHRC's mandate under section 10 of PEPUDA, Act 4 of 2000, and made the following order:

*(1) It is declared that:*

> *(i) The South African Human Rights Commission (SAHRC) is not empowered by the Constitution or by the South African Human Rights Commission Act 40 of 2013 (SAHRCA) to make definitive decisions about whether or not a contravention of section*

prevailing international norms when interpreting section 13(3) of the SAHRC Act.[17] It must be noted, however, that the court in *Afriforum* did not consider the interpretation of section 184(2)(b). Had the court *a quo,* and the court in *Afriforum,* considered an international law approach to interpreting the powers of the SAHRC under section 184(2)(b), their respective findings may have been different.

*REGIONAL LAW ON THE ESTABLISHMENT OF NHRIS*

13. The African Charter on Human and Peoples' Rights is an international human rights convention that is intended to promote and protect human rights and basic freedoms in the African continent.[18] Article 30 of the African Charter establishes the African Commission on Human and Peoples' Rights. There is a strong relationship between the African Commission and National Human Rights Institutions ("NHRIs"). Article 26 of the African Charter places a duty on states to establish appropriate national institutions entrusted with the promotion and protection of rights embodied by the Charter and provides that:

> "*States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of <u>appropriate national institutions</u>*

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*10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)has or has not occurred.*

*(ii) The opinion which the SAHRC is empowered to form pursuant to section 13(3) of SAHRCA is relevant only to whether the bringing of proceedings in a competent court is appropriate, if at all.*

*(iii) Any act by the SAHRC purporting to constitute a definitive decision on an issue addressed in section 13(3) of SAHRC is ultra vires the SAHRCA.*

*(2) The 'finding' of the SAHRC of 9 March 2019 purporting to exercise a power that the SAHRC does not have was unlawful and is set aside.*

[17] Act 40 of 2013.

[18] The African Charter was acceded to by South Africa on 09 July 1996.

*entrusted with the promotion and protection of the rights and freedom guaranteed by the present Charter*."

14. Article 45(1)(c) in turn provides that:

> *"The functions of the Commission shall be to promote Human and Peoples' Rights and in particular: …*
>
> > *(c) Co-operate with other African and International institutions concerned with promotion and protection of human and peoples' rights".*

15. Article 26 of the African Charter plays a critical role in ensuring that human rights principles are not merely theoretical concepts but are translated into practical realities for the citizens who experience human rights violations. By requiring states to establish appropriate national institutions, this provision underscores the importance of creating mechanisms that ensure that regional human rights standards are effectively incorporated into national legal frameworks, policies, and practices.

16. What those specific mechanisms should be, however, are not expressly stated in the African Charter. Nor would a treaty body dictate the content of mechanisms to states because of state sovereignty. The fact that there are no specific and express obligation for NHRIs to have specific powers, in itself, does not mean that the general principles of the African Charter do not favour a generous interpretation of section 184(2)(b).

*INTERNATIONAL LAW ON THE ESTABLISHMENT OF NHRIs*

17. Like the regional position, internationally there is no treaty or convention that explicitly places a positive obligation on states to establish NHRIs with binding powers. It is worth noting for the Court that where obligations are in fact stated, they are stated in general terms directed at the general promotion of human rights. These terms are in the form of soft law, which carries persuasive value as interpretive tools to the interpretation of section 184(2)(b).

18. The United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[19] places a responsibility on States to put measures in place to ensure that universal human rights are protected and promoted. Article 2 of the Declaration states that:

> "*Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice*.
>
> …
>
> *Each state shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are <u>effectively guaranteed</u>*".

[19] Adopted 09 December 1988 by General Assembly Resolution 53/144.

19. Article 2 of the Declaration emphasised that states must take progressive steps, as may be necessary, to effectively guarantee rights and freedoms under the Declaration.

20. On 20 December 1993, following the adoption of the Vienna Declaration and Programme of Action, the UN General Assembly adopted Resolution 48/134 titled *"National institutions for the promotion and protection of human rights"* that contained principles that would come to be known as the Paris Principles (the Principles).

21. The Principles affirmed the important and constructive role of NHRIs and are seen as the international minimum standards for NHRIs to effectively fulfil their roles within states.

22. Although none of the United Nations human rights treaties or conventions impose a mandatory requirement on member states to establish an NHRI that adheres to the guidelines in the Paris Principles, it is noteworthy that all UN treaty bodies consistently advocate for state parties to both create and enhance NHRIs in alignment with the Paris Principles. This encouragement underscores the significance of NHRIs that operate in accordance with these principles for upholding human rights and strengthening accountability.[20] This, too, is an indicator of what the international community views as an open and democratic society based on human dignity, equality and freedom.[21]

[20] The Office of the High Commissioner for Human Rights regularly updates a compilation of all treaty body concluding observations and recommendations referring to NHRIs (available at: http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx).

[21] Section 39(1)(a) of the Constitution.

23. The Paris Principles constitute soft law that aid in determining what the prevailing international law attitudes are towards NHRIs. When interpreting our domestic law, in this case section 184(2)(b), the Principles provide a guideline for interpretation that will be both consistent with international law and reasonable given the language already present in the section.[22] Where there is a lacuna in the existing body of international law, soft law can play a pivotal role in offering guidance and principles that states can adopt.[23]

*THE PARIS PRINCIPLES*

24. The Paris Principles require NHRIs to have a constitutional or legislative basis, or both.

25. The Paris Principles' Declaration provides as follows:

> "*The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the 'Principles relating to the status of national institutions' and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level".*[24]

26. NHRIs should be autonomous public bodies established at the national level by the State to promote and protect human rights.[25] The SAHRC is an NHRI established in terms of Section 181 of the Constitution. Its mandate is to protect,

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[22] This Court regularly applies guidelines from the UN in appeals concerning refugee law. See for example *Somali Association of South Africa and Others v Refugee Appeal Board and Others* 2022 (3) SA 166 (SCA) at par 92.

[23] *Sonke* at par 70.

[24] Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 at par 36.

[25] Article 1 of the Paris Principles.

promote and monitor the attainment of human rights – rights which are outlined in the Bill of Rights.

27. The Paris Principles provide that NHRIs should be required to both protect and promote human rights.

28. Importantly, the Principles provide that NHRIs are to be given *as broad a mandate as possible, clearly set forth in constitutional or legislative texts that specify the institution's composition and sphere of competence*.[26]

29. The Paris Principles were not initially intended to serve as a global benchmark for NHRIs. However, the current global advocacy for the Paris Principles as authoritative norms for NHRIs contrasts with their initial limited scope and expectations when they were adopted in 1991. This shift in perspective reflects the evolving significance attributed to NHRIs in safeguarding human rights and upholding democratic principles on a broader scale than originally envisioned. This is important because the general goal of international law is to progress the advancement, promotion and protection of human rights at a state level, and accordingly, the concept of an open and democratic society based on human dignity, equality and freedom (at least at an international level) progresses with time.

30. The Paris Principles, however, recognize that certain state laws may imbue NHRIs with express quasi-judicial powers. On the current framing of section 181 and 184 of the Constitution, and section 13 of the SAHRC Act, that does not seem to be the case in South Africa. That, however, only means that the

[26] Article 2 of the Paris Principles.

SAHRC cannot make quasi-judicial decisions. It may, however, still be interpreted to have the power to (sometimes) make binding decisions that are not quasi-judicial in nature.

*SAHRC AS A PATHWAY TO ENSURING ACCESS TO REMEDIES*

31. Section 184(2)(b) envisages taking steps to secure an appropriate redress. This speaks to giving access to a remedy (where human rights *have been* violated.) It is important that the Constitution does not dictate nor define what is appropriate.

32. The right to access remedies is a fundamental international human right and is imperative to the protection, promotion and realisation of fundamental human rights. The Constitutional Court in the *SADC Tribunal* case stated expressly that *"[w]e are about access to justice and access to all appropriate justice-dispensing platforms".*[27]

33. The right to remedy is also entrenched under international law. South Africa is legally bound by the International Covenant on Civil and Political Rights ("the ICCPR") which it has signed and ratified. Article 2(3)(a) of the ICCPR states that:

> *"Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"*

[27] *SADC Tribunal* case at par 77.

34. In addition, South Africa has signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICEARD). Article 6 of the ICEARD mandates that:

> "*States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination*."

35. The Universal Declaration of Human Rights, a non-binding but widely accepted road map for the global protection of human rights, also provides for remedies for victims of human rights violations. Article 8 provides that:

> *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."*

36. As mentioned above, South Africa is a party to the African Charter which establishes, in article 30, the African Commission. The African Commission is tasked by the African Charter to promote human rights in the continent,[28] interpret the rights in the African Charter and provide remedies in applicable circumstances.[29]

37. The African Charter also mandates that victims of rights violations receive remedies.[30] Article 7 of the African Charter specifically provides for the right of

[28] Article 30 African Charter on Human and Peoples' Rights.

[29] Article 45 (1) African Charter on Human and Peoples' Rights

[30] Article 7 African Charter on Human and Peoples' Rights.

recourse "*to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force*".

38. Correspondently, article 26 of the African Charter obliges states to not only guarantee the independence of the courts but to also "*allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the [African] Charter*". The African Charter therefore envisions that in addition to courts, independent organs such as national human rights institutions must be empowered to provide effective and appropriate remedies for the protection and promotion of human rights.

39. The African Commission sets out the three elements necessary for a remedy to meet the standards of the African Charter: availability, effectiveness and sufficiency.[31] The African Commission further highlight that a remedy is considered 'available' if the petitioner can pursue it without impediment, it is deemed 'effective' if it offers a prospect of success, and it is found 'sufficient' if it is capable of redressing the complaint.[32]

40. The African Charter, a binding instrument on South Africa, envisages that states would provide for independent courts and "*allow the establishment and improvement of appropriate national institutions entrusted with the promotion*

[31] *Jawara v The Gambia*, (2000) AHRLR 107 at par 32.

[32] *Ibid.*

*and protection of the rights and freedoms guaranteed by the [African] Charter".* NHRIs, such as the SAHRC, are such institutions.

41. Traditionally, right of access to remedies has been viewed solely through the prism of courts. This may also be tied to the right to access courts under section 34 of the Constitution being interpreted as the sole means of accessing justice. But access to *justice* through the provision of '*effective'* and '*appropriate'* remedies moves beyond only formal court systems. For instance, tribunals and other forums may be empowered to provide equitable relief for human rights violations and abuses. Indeed, section 34 of the Constitution recognises this by making provisions for *"where appropriate, another independent and impartial tribunal or forum."* Such a forum must include the SAHRC, which is both impartial and independent in terms of section 181 of the Constitution.[33]

42. But the right to access remedies must not be mistaken to only mean a right to access courts. By necessity, remedies may vary in their form and the type of appropriate remedy may require the provider of the remedy to be a forum or entity outside of courts. Institutions such as the SAHRC can be such a forum that is empowered to provide remedies to ensure the appropriate resolution of a human right violation. The very purpose of remedies is to ensure those whose rights are infringed have redress. In many instances, such redress appropriately sits with an entity such as the SAHRC.

43. As an example, vesting NHRIs with binding powers to ensure the provision of remedies is evident in other jurisdictions on the African continent. The Ugandan

[33] Section 181(2) of the Constitution read with *EFF* at par 49. *EFF* is cited here to emphasise that the independence of the SAHRC is connected to the consequentiality of its decisions.

Human Rights Commission and the Kenya National Human Rights and Equality Commission all have the powers that enable them to provide effective remedies. Article 53(1) of the Ugandan Constitution provides its human right commission with quasi-judicial powers that enable it to fulfil its investigations.

44. Article 53(2) of the Ugandan Constitution also vests its Human Rights Commission with the power to provide legal redress and remedies through the issuing of binding orders. While the Ugandan Constitution provides wide and discretionary powers to its human rights commission, the South African Constitution provides boundaries and safeguards for the exercising of power by the SAHRC. With regard to remedies, however, section 184 and the SAHRC Act does not (and should not) curtail the ability of the SAHRC to provide appropriate remedies through binding directives, and it should not be interpreted as doing so. Instead, as will be demonstrated below, section 184(2)(b) of the Constitution could reasonably be interpreted as empowering the SAHRC to (sometimes) issue binding decisions within the confinements of what "*appropriate redress*" in each case would require.

45. The Kenya National Human Rights and Equality Commission similarly has a mandate to secure appropriate relief for instances of human rights violations. Like the South African Constitution, article 59(2)(e) of the Kenyan Constitution provides its human rights commission with the power '*to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated*'. Kenya's national human rights institution is an organ envisaged by article 26 of the African Charter to be an institution that can, in addition to courts, provide relief in the

form of remedies that meet the article 7 standards of remedies under the African Charter.

## The SAHRC is competent to make binding decisions

46. This Court's focus should be on what the words "take steps", "to secure" and "appropriate redress" mean, in its broadest possible terms.[34]

47. The scheme of section 184 provides the SAHRC with four general powers:

    47.1. Firstly, the power to investigate and to report on the observance of human rights. This speaks to power that the SAHRC has to investigate human rights violations.

    47.2. Secondly, and central to this appeal, the power to take steps to secure appropriate redress where human rights *have been* violated. This speaks to what the SAHRC may do *once* human rights have been found to have been violated.

    47.3. Thirdly, the power to carry out research, and fourthly, the power to educate. These are self-explanatory.

48. There are two aspects to Section 184(2)(b). The first is the power to take steps to secure redress, in some form. The second is the qualification to the redress that the SAHRC may secure – it must be appropriate. This speaks to giving access to a remedy (where human rights *have been* violated). It is important that the Constitution does not dictate what is appropriate.

[34] In line with Article 2 of the Paris Principles.

49. It is not unimportant that the past tense is used in relation to the power to give access to a remedy – the steps to secure appropriate redress must be taken where human rights *have been* violated. This presupposes that the SAHRC has the power to make a factual finding that human rights *have been* violated. This textual interpretation supports our contention that the power that section 184(2)(b) provides is inherently linked to the right to access a remedy. This premise is in line with the international law position that is elucidated above.

50. On this premise, that steps to secure appropriate redress may only be taken after a factual finding that human rights have been violated, we interpret the text of section 184(2)(b) as follows:

51.1. "to take steps": "*to take*", as a verb, indicates some form of action. "*Steps*", as a noun, means to do something, and is indefinite because the nature of the steps are not constrained within the syntax of the section, so long as the steps are directed at securing appropriate redress.

51.2. "to secure": these words are used as a verb. The ordinary meaning, according to the Oxford Dictionary, is simply to "*obtain*" or "*achieve*" something. The language is generous and the manner in which the SAHRC may secure appropriate redress is not defined.

51.3. "appropriate redress": the word "*appropriate*" is used as an adjective to describe the nature of the redress that the SAHRC may secure. Ordinarily, "*appropriate*" means "*suitable, acceptable or correct for the particular circumstances*" according to the Oxford Dictionary. Within the context, "*appropriate*" means case by case or as each

case demands. Sometimes it may be appropriate to give a binding direction. To "*redress"* something simply means *"to correct something that is unfair or wrong, to remedy",* according to the Oxford Dictionary.

51. The case of *Jawara* provides a lens to which section 184(2)(b) of the Constitution can be interpreted and the provision of remedies by human rights institutions can be understood.[35] Interpreting section 184(2)(b) of the Constitution in line with articles 7 and 26 of the African Charter would favour the position that the SAHRC is an institution that can provide effective remedies through its investigations and, where human rights *have been* violated, sometimes give binding directives that mandate the redressing of human rights violations experienced by complainants. Without binding directives in appropriate circumstances, it may be impossible for the SAHRC to fulfil the African Charter's requirement of providing a remedy that is sufficient and effective.

52. When analysing the powers of the Public Protector to take remedial action, the Constitutional Court in *EFF* defined "*appropriate*" as "*nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case*".[36]

53. While acknowledging that the Public Protector and the SAHRC are different institutions, the power of the Public Protector to *"take remedial action"*[37] is

[35] *Jawara,* cited above, at par 32.

[36] *EFF* par 71(e).

[37] "Remedial" means to remedy or cure.

synonymous with the SAHRC's power to *"take steps to secure appropriate redress".*[38] Within the textual context, *"to take steps"* is synonymous with the word *"action"* in section 182(1)(c). The words *'secure appropriate redress"* is synonymous with *"remedial"* in section 182(1)(c). In other words, both the SAHRC and the Public Protector are provided powers by the Constitution to take some action to *secure an appropriate remedy*.

54. To apply the Constitutional Court's line of reasoning in *EFF*,[39] the interim Constitution only empowered the SAHRC to *"be competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of fundamental rights, and if, after due investigation, the Commission is of the opinion that there is substance in any complaint made to it, it shall, in so far as it is able to do so, assist the complainant and other persons adversely affected thereby, to secure redress, and where it is necessary for that purpose to do so, it may arrange for or provide financial assistance to enable proceedings to be taken to a competent court for the necessary relief or may direct a complainant to an appropriate forum."*[40]

55. Taking steps to secure appropriate redress is much more significant than the formulation of the now repealed section 116(3) of the Interim Constitution. Section 184(2)(b) makes no mention of the SAHRC supporting claimants to approach a competent court. Importantly, whereas section 116(3) of the Interim Constitution was prospective, i.e., talking of alleged violations of fundamental

[38] "Redress" means to remedy.

[39] *EFF* at par 68.

[40] Section 116(3) of the Interim Constitution of the Republic of South Africa, 1994.

rights (a "maybe" situation), section 184(2)(b) is a retrospective power that is premised on a *finding* that human rights *have been violated* (a situation of certainty). The retrospectivity of the language in section 184(2)(b) presupposes that the SAHRC is empowered to remedy the violation.

56. The powers of the SAHRC, as set out in section 116(3) of the Interim Constitution, simply do not accord with the prevailing international law that we have elucidated in these submissions. Whereas, the marked departure from the old section 116(3) to the new section 184(2)(c) demonstrates a recognition of the progress of the international community towards empowering NHRIs to promote *and* protect human rights.

57. Govender & Swanepoel rightly argue that the SAHRC would be unable to fulfil its constitutional mandate of "*appropriate redress*" without binding directives.[41] Access to appropriate remedies for victims of human rights violations goes to the core of realising human rights. Without binding powers, the SAHRC would be unable to secure the appropriate redress for violations of human rights, thereby leaving, often destitute victims, without recourse.

58. Ultimately, the interpretation proposed above fulfils two important requirements:

    54.1. It is attaches reasonable meanings to the text; and

    54.2. The ultimate interpretation is in line with international laws, and international norms and standards.

[41] K Govender & 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' (2020) *PEJ* (23) at p 25.

## Conclusion

59. The question which this Court is faced with in this matter is a significant one for the country, the rule of law, and the identity of the SAHRC.

60. If the goal is to eradicate all injustices of the past and provide substantive redress to all victims of human rights violations and all forms of injustices of the past, surely, the institutions which have been vested with the power of supporting our democracy ought to have sufficient power to protect and provide justice for victims of human rights violations.

61. We submit in conclusion that both our primary propositions are good in law. Firstly, by interpreting section 184(2)(b) in a way that affords the SAHRC the broadest mandate possible so as to be in line with international law, still stays true to the textual meaning of section 184(2)(b). This is an indicator that our interpretation is both reasonable and fulfils the task set by section 233. Secondly, our interpretation of section 184(2)(b) fulfils South Africa's international obligations to promote the right to access remedies.

## Grounds for oral submissions

62. CALS offers the Court submissions on what the prevailing international laws, norms and standards are. These are issues that are not directly addressed by any party in the appeal.

63. CALS further offers a textual and purposive interpretation analysis of section 184(2)(b), which we submit is in line with international laws, norms, and standards. This too is an issue that is not directly addressed by any party in the appeal.

64. Both these propositions offer a nuance to this appeal, which is of tremendous public importance as it goes to the very heart of the nature of the powers of a Chapter 9 institution and ultimately affects the rule of law. We submit that a debate about these propositions will benefit the Court in the adjudication of the appeal. Each proposition must be capable of scrutiny before it can be accepted by the Court, and we will avail ourselves should the Presiding Judge view our oral submissions as necessary.

65. If leave is granted to present oral argument, no more than 30 minutes need be allocated for CALS to present its argument.

**JATHEEN BHIMA**
Counsel for the CALS
28 August 2023