IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT:291/2021

SCA Case No: 38/2019 & 47/2019

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Appellant
and	
THE STANDARD BANK OF SOUTH AFRICA LIMITED	1st Respondent
NEDBANK LIMITED	2nd Respondent
FIRSTRAND BANK LIMITED	3rd Respondent
EZRA MAKIKOLE MPONGO	4th Respondent
MYRA GERALDINE WOODITADPERSAD	5th Respondent
RADESH WOODITADPERSAD	6th Respondent
JOYCE HLUPHEKILE NKWINIKA	7th Respondent
KARIN MADIAU SAMANTHA LEMPA	8th Respondent
NEELSIE GOEIEMAN	9th Respondent
ANGELINE ROSE GOEIEMAN	10th Respondent
JULIA MAMPURU THOBEJANE	11th Respondent
AUBREY RAMORABANE SONKO	12th Respondent
ONESIMUS SOLOMON MATOME MALATJI	13th Respondent
MODIEGI PERTUNIA MALATJI	14th Respondent
GRACE M MAHLANGU	15th Respondent
KEY HINRICH LANGBEHN	16th Respondent

APPLICANT'S WRITTEN SUBMISSIONS

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INTRODUCTION

1. This matter concerns the exercise by the High Court of its jurisdiction under the Constitution, in the light of the constitutional right of access to courts. Specifically, it concerns the common law mandatory jurisdiction principle and the impact of the right of access to justice on the common law.

2. The mandatory jurisdiction principle requires that a High Court must consider every matter before it even where it appears that the matter may be conveniently dealt with in the Magistrate's Court and falls within the monetary jurisdiction of the Magistrate's Court. The essence of the principle is that the plaintiff has the choice of forum and may institute proceedings in any court with concurrent jurisdiction. The High Court is obliged to hear any matter that comes before it and is not empowered to decline to hear the matter based on considerations of fairness regarding the position of the defendant.

3. The SCA held that the mandatory jurisdiction principle remains settled law and that considerations relating to section 34 of the Constitution do not have an impact on the mandatory jurisdiction principle.

4. In the applicant is the South African Human Rights Commission ("**the SAHRC**"). It was an *amicus curiae* in the High Court and the Supreme Court of Appeal. It applies for leave to appeal because there is a clear public interest in this Court's hearing an appeal and none of the parties to the proceedings *a quo* seek to pursue an appeal.[1] This is a matter of critical public importance, which will shape the law

[1] *University of Witwatersrand Law Clinic v Minister of Home Affairs* 2008 (1) SA 447 (CC) at para 6; *Freedom of Religion v Minister of Justice* 2020 (1) SA 1 (CC) paras 13 to 20; *Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd* 2006 (6) SA 103 (CC) at para 19 – 22

on jurisdiction and will affect debtors facing default judgment across the country. It is accordingly a matter which merits the attention of this Court notwithstanding the fact that no litigant pursues an appeal.

5. The SAHRC submits that, if applications for default judgment in respect of money amounts falling within the jurisdiction of the Magistrates' Court are instituted in the High Court, there is a material threat that impecunious debtors will be unable to defend their cases. This impairs their constitutional right of access to courts. The High Court has a duty to take measures to mitigate or reduce the impediments to access courts. This duty includes that the High Court may exercise its inherent power in terms of section 173 of the Constitution to decline to hear the matter and transfer it to the Magistrate's Court.

6. We have structured these submissions as follows:

    6.1. First we set out the relevant background to this matter and provide an overview of the SAHRC's submissions;

    6.2. We address the Constitutional and statutory scheme for the jurisdiction of the High Court and its effect on the pre-constitutional common law principle that the High Court must exercise jurisdiction over any case falling within its jurisdiction (the mandatory jurisdiction principle);

    6.3. We discuss the content of constitutional right of access to courts;

    6.4. We consider the accessibility of Magistrates' Courts relative to High Courts;

    6.5. We show how issues of accessibility impact on debtors' ability to defend cases;

6.6. We then address:

6.6.1. the obligation of the judiciary, legislature and executive to respect, promote, protect and fulfil the right of access to courts; and

6.6.2. the judiciary's inherent power to regulate its own proceedings in the interest of justice and the High Court's discretion to decline to hear matters in its jurisdiction;

6.7. Finally, we identify the flaws in the reasoning of the SCA.

RELEVANT BACKGROUND AND OVERVIEW

7. This matter arises from thirteen applications that were set down for hearing in accordance with a practice directive issued by the Judge President of the Gauteng Division on 24 June 2016 ("**the practice directive**").[2] In all thirteen matters, the applicant (a bank) sought default judgment against a debtor for the payment of money owing, as well as an order declaring that the immovable property of the debtor (i.e. his or her home) is specially executable. In each case, the application was brought in the High Court, despite the fact that it fell within the monetary jurisdiction of the Magistrates' Court.

8. The practice directive issued by the Judge President called upon the parties to address the following questions:

8.1. Why the High Court should entertain matters that fall within the jurisdiction of the Magistrates' Court?

[2] Practice Directive issued by the Office of the Judge President of the Gauteng Division of the High Court, Record Vol. 1, pg. 3.

8.2. Is the High Court obliged to entertain matters that fall within the jurisdiction of the Magistrates' Court purely on the basis that the High Court may have concurrent jurisdiction?

8.3. Is the provincial division of a High Court obliged to entertain matters that within the jurisdiction of a local division on the basis that the provincial division has concurrent jurisdiction?

8.4. Is there not an obligation on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular forum is considered?

9. The primary issue for determination was whether a High Court had a discretion (and a duty in certain circumstances) to decline to hear matters over which the High Court shares concurrent jurisdiction with the Magistrates' Court or another division of the High Court. The Full Court of the Gauteng Division, Pretoria found that such a power exists.

9.1. It held that the High Court is not obliged to hear matters that fall within the jurisdiction of the Magistrates' Court, purely on the basis that the High Court may have concurrent jurisdiction over such matters.[3] Rather, such matters should be issued in the Magistrates' Court. If a party is of the view that a matter which falls within the jurisdiction of the Magistrates' Court should more appropriately be heard in the High Court, that party must make the application and justify why the matter should be heard in the High

[3] *Nedbank Limited v Thobejane* 2019 (1) SA 594 (GP) ("*Nedbank v Thobejane*") at para 91. See also High Court judgment, Record Vol. 5, pg. 424, para 91.

Court.[4]

9.2. In addition, the Provincial and Local Divisions of the High Court may *mero motu* transfer a matter to the other court if it is in the interests of justice to do so.[5]

9.3. Finally, it held that there is an obligation on all litigants to consider the question of access to justice when actions or applications are issued and the courts have an obligation to ensure that access to justice is safeguarded, by exercising appropriate jurisdictional oversight.[6]

10. The SCA overturned the judgment of the High Court. [7] Its reasoning is addressed below.

11. The SAHRC aligns itself with the position of the High Court. That position is correct, in light of the following:

11.1. The Constitution does not oblige the High Court to hear all matters falling within its jurisdiction. Nor does any statute oblige the High Court to exercise the jurisdiction it may have over a particular matter. Subject to the fundamental right of access to courts enshrined by section 34 of the

[4] *Nedbank v Thobejane*, para 92. See also High Court judgment, Record Vol. 5, pg. 424, para 92.

[5] *Nedbank v Thobejane*, para 92. See also High Court judgment, Record Vol. 5, pg. 424, para 92.

[6] *Nedbank v Thobejane*, para 92. See also High Court judgment, Record Vol. 5, pg. 424, para 92.

[7] The SCA consolidated the appeal against the Gauteng High Court decision with an appeal against a similar decision from the Eastern Cape High Court under case number 999/2019. The Eastern Cape High Court found that the National Credit Act 34 of 2005 ousted the jurisdiction of the High Court, leaving the Magistrates' Court with exclusive jurisdiction in matters that fall within the ambit of the National Credit Act. The SAHRC does not seek to appeal the decision of the SCA in respect of this aspect of the Eastern Cape High Court decision under case number 999/2019. It was not a party to that matter. The SAHRC's application for leave to appeal is limited to the judgment and order of the SCA insofar as it overturns the decision of the Gauteng High Court under case numbers 38/2019 and 47/2019 and deals with the issues raised therein.

Constitution, the High Court is accordingly entitled to decline to exercise its jurisdiction over matters that are more appropriately heard by other courts.

11.2. Section 34 of the Constitution should be interpreted to require that defendants/respondents be given a meaningful opportunity to present their legal arguments and evidence to the court. Measures must be taken to reduce the economic, social and geographical barriers that prevent a respondent's access to court.

11.3. Like the legislature and executive, the judiciary is bound by the Bill of Rights[8] and bears a constitutional duty to respect, protect, promote and fulfil the rights therein (including the right of access to courts).[9] The High Court is also empowered by section 173 of the Constitution to protect and regulate its own process, and to develop the common law, taking into account the interests of justice.

11.4. Magistrates' Courts are generally more accessible than High Courts to impoverished respondents or defendants (they are closer geographically, less expensive and have designated interpreters).

11.5. The right of access to courts is infringed in cases where there is a real risk that, if the matter is heard in the High Court, the respondent will be unable to defend his or her case due to financial, geographical or other barriers.

11.6. In such cases, the High Court must accordingly decline to hear the matter

[8] Section 8(1) of the Constitution

[9] Section 7(2) of the Constitution

and should transfer it to the Magistrates' Court. This is necessary in order to promote and protect the right of access to courts and is in the interests of justice. It is also necessary to protect judicial independence.

11.7. Given the high prevalence of such cases, the default rule should be that matters that fall within the monetary jurisdiction of the Magistrates' Courts should be heard in such courts unless exceptional circumstances exist. The onus will be on the applicant (the bank or creditor) to show exceptional circumstances that warrant the hearing of the matter in the High Court.

12. In what follows, we expand upon this reasoning.

THE CONSTITUTION AND THE MANDATORY JURISDICTION PRINCIPLE OF THE COMMON LAW

13. The Constitution does not oblige the High Court to hear all matters falling within its jurisdiction. Section 169(1)[10] of the Constitution (which determines the jurisdiction of the High Court) provides that the High Court ***"may"*** (not "must") decide matters falling within that jurisdiction.

14. Nor does any statute oblige the High Court to exercise the jurisdiction it may have over a particular matter. Chapter 6 of the Superior Courts Act 10 of 2013, which deals with the jurisdiction of the High Court, is framed in permissive terms. It contains no provisions that oblige the High Court to exercise the jurisdiction it may have over a particular matter.

[10] Section 169(1): "*The High Court of South Africa may decide – (a) any constitutional matter except a matter that – (i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and (b) any other matter not assigned to another court by an Act of Parliament.*"

15. Subject to the fundamental right of access to courts enshrined by section 34 of the Constitution, the High Court is accordingly entitled to decline to exercise its jurisdiction over matters that are more appropriately heard by other courts.

16. The mandatory jurisdiction principle does not flow from a statutory provision. It is a pre-Constitution common law principle that was first enunciated in the judgment of Schreiner J in *Goldberg v Goldberg*.[11] This is clear from the judgment of *Standard Credit Corporation v Bester*,[12] which has been invoked by the banks. That judgment relies heavily on *Goldberg,* stating that:

> *"From none of these cases can a principle be extracted that the Supreme Court has an inherent jurisdiction to refuse to hear a litigant and to entertain proceedings in a matter within its jurisdiction and properly before the Court.*
>
> *In contrast Goldberg's case is clear authority that no such principle exists:*
>
> > *'On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction.*
>
> *... But apart from such cases and apart from the exercise of the Court's inherent jurisdiction to refuse to entertain proceedings which amount to an abuse of its process (and that, in my opinion' is not the case here) I think that there is no power to refuse to hear a matter which is within the Court's jurisdiction.'*[13]

17. The mandatory jurisdiction principle was never a rigid rule. For example, it was held not to apply to cases involving the jurisdiction of the High Court over minors, where another foreign court may be better suited to hear the matter.[14] More recently, in the *Strang* case,[15] this Court developed a new rule of jurisdiction over foreign defendants but made clear that the High Court has a discretion not to

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[11] 1938 WLD 83.

[12] *Standard Credit Corporation LTD v Bester and Others* 1987 (1) SA 812 (W).

[13] Ibid at 817J - 818D.

[14] *Littauer v Littauer* 1973 (4) SA 290 (W)

[15] *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA) at para 56

exercise such jurisdiction having regard to considerations of appropriateness and convenience.

18. The *Strang* case also illustrates that any pre-constitutional common law "rules" of High Court jurisdiction are now subject to the Constitution, and the Bill of Rights in particular. The *Strang* case involved a tension between the fundamental right to freedom of the person and the pre-constitutional rules relating to arrest to found or to confirm jurisdiction. The present case involves a tension between the fundamental right of access to court and the mandatory jurisdiction principle.

19. The SCA held that the mandatory jurisdiction principle was confirmed in the post-constitutional case of *Agri Wire*.[16] We respectfully submit that the SCA erred in doing so. *Agri Wire* did not concern a case where there was a tension between the mandatory jurisdiction principle and any fundamental rights. So it did not purport to lay down a "rule" that the mandatory jurisdiction principle applies even when it is in tension with a fundamental right protected in the Bill of Rights. Apart from the self-evident unconstitutionality of any such "rule", it would have been manifestly inconsistent with what the SCA had held in the *Strang* case.[17]

20. In addition, the mandatory jurisdiction principle poses a threat to judicial independence.[18] Judicial independence has two separate components. They are:

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[16] SCA judgment, Record Vol. 6, pg. 516, para 31; *Agri Wire (Pty) Ltd v Commissioner, Competition Commission* 2013 (5) SA 484 (SCA)

[17] *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA).

[18] This Court has described judicial independence as *"foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law"* (*De Lange v Smuts NO and others* 1998 (3) SA 785 (CC) (*"De Lange v Smuts"*) para 59). It has also said that judicial independence is an essential component of the separation of powers doctrine (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 123; *Justice Alliance of South Africa v President of the Republic of South Africa*

20.1. Individual independence – that is that the requirement that judicial officers act independently and impartially in dealing with cases that come before them; and

20.2. Institutional independence – that is the requirement that the necessary structures and guarantees exist to protect courts and judicial officers against external interference.[19]

21. This matter implicates the component of institutional independence.

21.1. In the Canadian case of *Valente v The Queen,*[20] the Canadian Supreme Court held that judicial independence requires that judges have control over administrative decisions:

> "*the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function"*[21] and as *"judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function."*[22] (our emphasis)

and others 2011 (5) SA 388 (CC) (*"Justice Alliance"*) para 34) and is implicit in the rule of law, which is the founding premise of the Constitution (*Van Rooyen* para 17 ;See also *Nkabinde and another v Judicial Service Commission and others* 2015 (1) SA 279 (GJ) para 107).

In addition, section 165 of the Constitution entrenches judicial independence. Section 165(2) of the Constitution provides that the courts are *"independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice"*. Section 165(3) says that *"No person or organ of state may interfere with the functions of the courts"* (our emphasis). Section 165(4) requires organs of state, through legislative and other measures, to *"assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts"* (our emphasis).

[19] *Van Rooyen and Others v The State and others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) (*"Van Rooyen"*) para 19.

[20] *Valente v The Queen* [1985] 2 SCR 673 *("Valente v The Queen")*

[21] *Valente v The Queen* at 708*e-f*

[22] *Valente v The Queen* at 712*a-b*

21.2. The Court commented on the nature of such administrative decisions, stating that:

> *"Judicial control over… assignment of judges, sittings of the court, and court lists – as well as the related matters of allocation of court room and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or "collective" independence."*[23]

21.3. *Valente* was cited approvingly by the Constitutional Court in both *De Lange v Smuts*[24] and *Van Rooyen*. In *Van Rooyen*, this Court held that judicial independence extends to higher courts' supervision of the functions lower courts:

> *"higher courts have the ability not only to protect the lower courts against interference with their independence, but also to supervise the manner in which [lower courts] discharge their functions. These are controls that are relevant to the institutional independence of the lower courts."*[25]

21.4. In *Justice Alliance,* this Court held that *"What is vital to judicial independence is that "the Judiciary should enforce the law impartially and that it should function independently of the Legislature and the Executive."*[26] The courts have held that in this context, the word "independence" means (inter alia) "*self-governing*" and "*free*".[27]

22. So, institutional independence operates primarily at the level of the judiciary as a branch of government, and not at the level of individual judges. Institutional

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[23] *Valente v The Queen* at 709*f-h*

[24] *De Lange v Smuts* para 70

[25] *Van Rooyen* para 24

[26] *Justice Alliance* para 36

[27] *Ruyobeza and another v Minister of Home Affairs and others* 2003 (5) SA 51 (C) 59F

independence demands that the judiciary as a branch of government must have control over how best to utilise judicial resources to perform the judicial function.

23. Accordingly, it would be inconsistent with institutional judicial independence to prevent the High Court from managing the rational use of judicial resources by requiring that matters capable of being more appropriately decided at lower court level, are decided by lower courts.

FUNDAMENTAL RIGHT OF ACCESS TO COURTS

i) Section 34 of the Constitution

24. Section 34 of the Constitution enshrines the right of access to courts and states that "*everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*."

25. When commenting on the nature of this right in *Barkhuizen v Napier,*[28] Ngcobo J stated that:

> "*Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court…. Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy."*[29]

26. The High Court rightly held that section 34 does not entitle a person to access a particular court or tribunal. Rather, it requires everyone to have their dispute

[28] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

[29] *Barkhuizen v Napier* at para 31 and 33.

resolved in a fair hearing before "a court" or another independent and impartial tribunal.[30]

ii) Foreign Law

27. A number of foreign jurisdictions have elaborated upon the nature and importance of the right of access to justice.

The United Kingdom

28. In the case of *R (on the application of UNISON) v Lord Chancellor*,[31] the UK Supreme Court of Appeal emphasized that unimpeded access to courts is critical to the rule of law. The Court was asked to determine whether the fees imposed by the Lord Chancellor in respect of proceedings in employment tribunals ("ETs") and the employment appeal tribunal ("EAT") were unlawful because of their effects on access to justice.[32] In the majority judgment, Lord Reed stated:

> "*The constitutional right of access to the courts is inherent in the rule of law… At the heart of the concept of the rule of law is the idea that society is governed by law... Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade*."[33] (emphasis added)

[30] High Court Judgment, Record Vol. 5, pg. 396, para 32.

[31] *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51

[32] Unlike claims in the ordinary courts, claims in ETs could until recently be presented without the payment of any fee.

[33] *Unison* at para 66 and 68.

29. Lord Reed went on to hold that the imposition of fees would be ultra vires if "*there is a real risk that persons will effectively be prevented from having access to justice*."[34] He noted that the court did not require conclusive evidence that persons were being prevented from accessing courts; it was sufficient if a real risk was demonstrated.[35]

30. Lord Reed held that in order to ensure access to justice, the cost of access to courts must be affordable. Individuals should not be required to sacrifice expenditure required to maintain an acceptable standard of living in order to gain access to a court:

> "*Fees must therefore be affordable not in a theoretical sense, but in the sense that they can reasonably be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable.*"[36]

31. Similarly, in the case of *R v Lord Chancellor, Ex p Witham,*[37] Laws LJ invoked the right of access to courts to strike down a statutory order which repealed a power to reduce court fees on grounds of undue financial hardship in exceptional circumstances.

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[34] *Unison* at para 87.

[35] *Unison* at para 91. See also *R (Hillingdon London Borough Council) v Lord Chancellor (Law Society intervening)* [2008] EWHC 2683 (Admin) at paras 60 – 61.

[36] *Unison* at para 93.

[37] *R v Lord Chancellor, Ex p Witham* [1998] QB 575.

Canada

32. The Canadian Courts have commented upon the nature and scope of the right of access to justice in cases which are of relevance to the present matter:

32.1. In *R v Domm*,[38] the Court of Appeal for Ontario held that the rule of law requires that "*the law must provide individuals with meaningful access to independent courts with the power to enforce the law*…" (Emphasis added).

32.2. In *Hryniak v. Mauldin*,[39] the Supreme Court of Canada held that individuals must have effective and accessible means of enforcing their rights. Access to courts must be timely and affordable. The court observed that:

> *"Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened… Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system."*[40] (emphasis added)

32.3. In *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*,[41] the Supreme Court considered the constitutionality of court hearing fees imposed by the Province of British Columbia that denied some people access to the courts. McLachlin CJ held that such

[38] *R. v. Domm*, 1996 CanLII 1331 (ON CA), section 4.

[39] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 ("*Hryniak").*

[40] *Hryniak* at para 1 and 2.

[41] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* 2014 SCC 59. ("*Trial Lawyers Association*")

fees were unconstitutional. She noted that the hearing fees become unconstitutional when they are so high as to subject the litigants to undue hardship, thereby preventing access to courts:

> *"A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum... But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts" (emphasis added).*[42]

iii) International Law

33. The right of access to courts is enshrined in a number of international instruments. These include the following:

African Charter on Human and People's Rights ("African Charter"), 1986

34. Article 7(1) of the African Charter provides:

> "*Every individual shall have the right to have his cause heard.* This comprises:
>
> *a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
>
> *b) The right to be presumed innocent until proved guilty by a competent court or tribunal;*
>
> *c) The right to defence, including the right to be defended by counsel of his choice;*
>
> *d) The right to be tried within a reasonable time by an impartial court or tribunal.*"

[42] *Trial Lawyers Association*, at para 46.

35. In 2003, the African Commission on Human and People's Rights ("**the Commission**") submitted a report highlighting the principles and guidelines to be followed on the right to a fair trial and legal assistance in Africa.[43] The Commission set out "general principles applicable to all legal proceedings". These included the principle that every person has a right of access to all judicial services. The Commission noted that to ensure the respect of this right,

35.1. States shall ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind. In particular, States must take special measures to ensure that rural communities and women have access to judicial services.

35.2. States shall ensure that access to judicial services is not impeded by the distance to the location of judicial institutions; the lack of information about the judicial system; the imposition of unaffordable or excessive court fees; and the lack of assistance to understand the procedures and to complete formalities.[44]

American Convention on Human Rights ("ACHR"), 1969

36. Article 8(1) if the ACHR provides:

> "*Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.*"

[43] ACHPR "*Principles and Guidelines the Right a Fair Trial and Legal Assistance in Africa*" 2003 Accessible online at: http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/

[44] Ibid, section K(a) – (d).

37. In its review of the standards adopted by the Inter-American System of Human Rights ("IASHR") (consisting of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights),[45] the Inter-American Commission underlined the importance of each State's obligation to remove economic obstacles to ensure access to the courts. This constituted one of the four core issues that must be regarded as priorities to ensure the judicial protection of economic, social and cultural rights.[46]

38. As such, it is established that States not only have a negative obligation *not to* obstruct access to those remedies but also *a positive duty* to organize their institutional apparatus so that all individuals can access those remedies. In order to do so, States must remove any regulatory, social, or economic obstacles that prevent or hinder the possibility of access to justice.[47]

39. In this respect, the IASHR has recognized the obligation to remove any obstacles in access to justice that originate from the economic status of persons. Crucially, it has established that procedural costs (whether in judicial or administrative proceedings) and the location of tribunals are factors that may render access to justice impossible and, therefore, result in a violation of the right to a fair trial.[48] In this regard, the following judgments and reports are relevant:

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[45] '*Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights'*. Inter-American Commission on Human Rights, Accessible online at: https://www.cidh.oas.org/countryrep/AccesoDESC07eng/Accesodesci-ii.eng.htm.

[46] Ibid at para 3.

[47] Ibid at para 41.

[48] Ibid at para 66 – 67.

39.1. In its judgment in the *Cantos* case,[49] the Inter-American Court of Human Rights held that any measure that imposes costs or otherwise obstructs an individual's access to the courts (and is not reasonably necessary for the administration of justice) is contrary to Article 8 of the Convention.

39.2. In the *Yean and Bosico* case,[50] the Inter-American Court of Human Rights underscored the need to limit the cost of proceedings in order to prevent the violation of rights.

39.3. In its report entitled "*Access to Justice for Women Victims of Violence in the Americas*",[51] the Commission highlighted an economic obstacle of enormous significance in terms of access to justice: location of tribunals. The Commission noted that—

> "*The judicial presence and state advocacy services available to women victims nationwide is inadequate, which means that victims have to draw on their own economic and logistical resources to file a complaint and then participate in judicial proceedings."*[52]

39.4. In its report, the Commission pinpointed a number of structural problems that create economic obstacles to access to justice. These include (i) the absence of institutions necessary for the administration of justice in rural, poor and marginalized areas;[53] and (ii) the economic cost of judicial

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[49] I/A Court H.R., *Case of Cantos v Argentina.* Judgment of November 28, 2002. Series C No. 97 ("Case of Cantos"). See in particular, paras 51 to 55 of the judgment.

[50] I/A Court H. R., *Case of the Girls Yean and Bosico v Dominican Republic,* Judgment of September 8, 2005. Series C No. 130.

[51] Inter-American Commission on Human Rights, '*Access to Justice for Women Victims of Violence in the Americas*', OEA/Ser.L/V//II, Doc. 68, January 2007. Available online at http://www.cidh.org/women/access07/tocaccess.htm. ("*IACHR Access to Justice Report*").

[52] *IACHR Access to Justice Report*, at para 182.

[53] *IACHR Access to Justice Report*, at para 10.

proceedings.[54] As a consequence, the Commission recommended the following: "*Create adequate and effective judicial bodies and resources in rural, marginalized and economically disadvantaged areas so that all women are guaranteed full access to effective judicial protection against acts of violence."*[55]

European Convention on Human Rights (ECHR), 1953

40. The right to a fair hearing is enshrined in Article 6 of the ECHR.[56] The European Court of Human Rights has interpreted Article 6 as follows:

    40.1. The right of access to courts must be practical and effective.[57] For the right to be effective, an individual must "*have a clear, practical opportunity to challenge an act that is an interference with his rights*".[58] The nature of this right may be impaired, *inter alia*, by the prohibitive cost of the proceeding in view of the individual's financial capacity (such as excessive court fees)[59] or by the existence of procedural bars preventing or limiting the possibilities of applying to a court.

    40.2. The right to a fair hearing also includes the principle of "equality of arms". The requirement of "equality of arms" applies in principle to civil as well as

[54] *IACHR Access to Justice Report*, at para 12.

[55] *IACHR Access to Justice Report*, Specific Recommendations.

[56] Article 6 provides:

> "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.* […]"

[57] *Bellet v. France* ECHR 4 Dec 1995 at para 38.

[58] *Bellet v. France* at para 36.

[59] *Kreuz v. Poland* ECHR 19 June 2001 at para 60-67.

to criminal cases.[60] Equality of arms implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis the other party.

UN General Assembly Resolution: the Declaration of the High-level Meeting on the Rule of Law (2012)

41. The Declaration of the High-level Meeting on the Rule of Law[61] emphasized the right of equal access to justice for all, including members of vulnerable groups, and reaffirmed the commitment of Member States to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all:[62]

    41.1. Paragraph 12 of the Resolution states: "*We reaffirm the principle of good governance and commit to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid*".[63]

    41.2. Paragraph 14 states: "*We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to*

[60] *Feldbrugge v. the Netherlands* ECHR 29 May 1986 at para 44.

[61] Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels UNGA Res 67/1 (30 Nov 2012) adopted without vote, 3rd plenary meeting.

[62] Ibid at para 14 and 15.

[63] Ibid at para 12.

taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid."[64]

iv) The right of access to courts and the exercise of High Court jurisdiction

42. The SAHRC submits that this Court should interpret the right of access to courts in accordance with the principles set out above. In particular:

42.1. The right of access to courts will be infringed (by a measure or set of circumstances) if there is a material threat that persons will effectively be prevented from having access to justice.[65]

42.2. Access to courts must be affordable. Individuals should not be required to sacrifice expenditure required to maintain an acceptable standard of living or endure undue hardship in order to gain access to a court.

42.3. Access to courts must be meaningful. It is not sufficient to have a formal right of access if, in practice, financial and geographical barriers prevent such access. The right entails that parties must have a meaningful opportunity to present arguments and evidence, and to challenge or respond to opposing arguments or evidence.

42.4. Accordingly, if the practical effect of the exercise of a High Court's

[64] Ibid at para 14.

[65] The right places a positive obligation on the State to take steps to remove the regulatory, social, or economic obstacles that prevent or hinder the possibility of access to justice. Such steps include measures to ensure that judicial services are available to persons in remote areas and that access is not impeded by the distance to judicial institutions and measures to minimize the costs of judicial proceedings.

concurrent jurisdiction is that it threatens to limit a defendant's right of access to courts, that Court should decline to exercise its jurisdiction and should direct the plaintiff to reinstitute proceedings in a more accessible court with concurrent jurisdiction.

RELATIVE ACCESSIBILITY OF MAGISTRATES' COURTS

43. The Full Court correctly recognised that the Magistrates' Courts are more accessible than High Courts in a number of respects.[66] These include the following:

43.1. Magistrates' Courts are more accessible due to their number and geographical location. There are 14 High Courts in South Africa, all of which are situated in large urban centres. By contrast, there are 82 Regional Magistrates' Courts[67] and 468 District Magistrates' Courts.[68] The Department of Justice and Correctional Services ("the Department") is in the process of rationalising the territorial jurisdiction of the Magistrates' Courts to ensure that magisterial districts are aligned with municipal districts.[69] This will ensure a Magistrates' Court is geographically accessible to the persons living in each municipality.

43.2. Distressed debtors who default on their loan agreements, and against whom legal proceedings are brought, generally have limited financial means. This is clear from the 13 applications that were before the Full

[66] High Court Judgment, record Vol. 5, pg. 388, para 11.4.

[67] With monetary jurisdiction over claims of R200 000 to R400 000.

[68] With monetary jurisdiction over claims up to R200 000. See Minister of Justice and Correctional Services' Affidavit in the Minister's application to be admitted as an *amicus curiae* ("Minister of Justice Affidavit") at Vol. 3, pg. 274, para 27.2.

[69] Minister of Justice's Founding Affidavit, Record Vol. 3, pg. 275, para 27.4.

Court. The applications were brought by banks that sought default judgment against the debtor, as well as an order declaring each debtor's home specially executable. In most of those applications, the amount in arrears was relatively small yet the debtor had apparently been unable to pay it, despite the threat of losing his or her home. The details of twelve of the applications are the following:

CASE NAME	**TOTAL AMOUNT CLAIMED (excludes interest and insurance premiums)**	**TOTAL ARREARS**
Standard Bank of South Africa Limited v Ezra Makikole Mpongo	R227 436.09	R13 777.84
Standard Bank of South Africa Limited v Joyce Hluphekile Nkwinika (Withdrawn as client discharged debt)	R622 639.10	R117 518.18
Standard Bank of South Africa Limited v Karin Madiau Samantha Lempe	R 218 324.73	R20 782.10
Standard Bank Of South Africa Limited v Radesh and Myra Geraldien Wooditadpersad	R 95 129.64	R 7 772.18
Standard Bank Of South Africa Limited v Neelsie and Angeline Rose Goeieman	R161 430.23	R 9 533.86
ABSA Bank Limited v Anayo Prince and Portia Nomandla Igwilo	R121 906.57	R12 928.63
ABSA Bank Limited v Jagathisan and Thirunadevi Pillay	R125 009.47	R20 200.78
Nedbank Limited v Aubrey Ramorabane Sonko	R255 245.56	R13 586.64

Nedbank Limited v Julia Mampuru Thobejane	R125 700.27	R9 662.82
Firstrand Bank Limited v Grace Mmamtena Mahlangu (Subsequently withdrawn as client discharged debt)	R269 229.41	R16 930.02
Firstrand Bank Limited v Kay Hinrich and Eunice Langbehn (Subsequently withdrawn as client discharged debt)	R207 595.01	R7 271.94
Firstrand Bank Limited v Onesimus Solomon Matome and Modiegi Pertunia Malatji (Subsequently withdrawn as client discharged debt)	R228 565.85	R19 432.33

43.3. In light of the limited financial means of distressed debtors, many will not be able to afford legal representation and will have little option but to represent themselves in legal proceedings. This involves travelling to court to file papers and to appear in person for the hearing. However, most distressed debtors will have a restricted budget for travel and accommodation. If the matter is set down in a distant High Court, the cost of travel to the court and accommodation for the duration of the hearing may be prohibitive. In such circumstances, the debtor would be unable to defend the application or action brought against them. By contrast, if the matter is set down in a Magistrates' Court (which are greater in number and are generally far closer geographically) the cost of travel to file papers

and to appear in court will be significantly lower and accommodation may be unnecessary. In addition, the debtor will not have to take additional leave (paid or unpaid) from work in order to travel to court.[70]

43.4. Even if a debtor is able to afford legal representation to defend against the proceedings initiated by a bank or creditor (or if the debtor incurs further debt to employ a legal representative), the costs will be significantly higher if the matter is set down in the High Court rather than the closest Magistrates' Court. If the debtor engages the services of a local attorney, he or she will be required to pay for a correspondent attorney to file papers and oppose the matter in the High Court. Unless that attorney has rights of appearance in the High Court, the debtor will have to pay for an advocate to appear for him or her. Given the debtor's limited means, the costs of defending a matter in the High Court may be prohibitive.[71]

43.5. There are other barriers faced by debtors who represent themselves in the High Court. The Minister of Justice's affidavit in his *amicus* application before the High Court states that there are no designated interpreters in the High Courts and warns that this may have the effect of denying the respondent/defendant his or her right to a fair hearing.[72] By contrast, there are 450 senior court interpreters, 79 principal court interpreters and 1125 court interpreters designated for assisting the Regional and District Courts across the provinces.[73] By explaining the legal concepts and process to

[70] High Court judgment, Record Vol. 5, pg. 386, para 11.2.

[71] High Court judgment, Record Vol. 5, pg. 387, para 11.3.

[72] Minister of Justice's Founding Affidavit, Record Vol. 3, pg. 279, para 27.13.

[73] Minister of Justice's Founding Affidavit, Record Vol. 3, pg. 274, para 27.3.

the respondent or defendant, the interpreters make the process less intimidating and enable them to defend their case.[74] As a consequence, a respondent or defendant who does not understand the language used in court will be at a significant disadvantage when a matter is set down in the High Court rather than the Magistrates' Court.

44. The SCA held that the factual allegations made by the SAHRC were "broad, sweeping generalisations and not facts" and "speculative extrapolations from moral sensibilities rather than from established fact".[75] The SAHRC strongly disagrees with this conclusion. The evidence outlined above was set out in the Minister of Justice's affidavit[76] and in the papers of the 13 applications before the Court. The remainder of the allegations are self-evident and the Full Court was entitled to take judicial notice thereof.

INFRINGEMENT OF THE DEBTOR'S RIGHT OF ACCESS TO COURTS

45. Given the above barriers to access, there is a real threat that impoverished respondents or defendants will be prevented from defending legal proceedings brought against them in a High Court. In cases where a bank brings an application in the High Court for the payment of money or execution against the debtor's home, a debtor's ability to defend his case (and consequently his right of access to courts) may be violated in the following ways:

    45.1. If the debtor has a legal defence to the relief sought by a creditor, it is

[74] High Court judgment, Record Vol. 5, pgs. 388 & 389, paras 12 – 13.

[75] SCA judgment, Record Vol. 6, pg. 503, para 7. See also Record Vol. 6, pg. 507 & 506, paras 11 – 14.

[76] See Minister's Founding Affidavit, Record Vol. 3, pg. 267

imperative that the debtor be granted a meaningful opportunity to make his or her case and present evidence. If access is impeded by reason of the debtor's financial position or geographical location, the debtor will not be able to do so.

45.2. Even if the debtor does not have a complete defence to the relief sought against her, she should be given the opportunity to put up evidence and set out all of the relevant circumstances. Such evidence may assist the court in tailoring the order to mitigate against hardship that the debtor and her family may suffer. Cases involving writs of execution over immovable property illustrate this proposition:

45.2.1. Rule 43A of the Magistrates' Courts Rules imposes similar conditions. Rule 43A(2) states that, when considering an application for execution against immovable property, a court must establish whether the immovable property is the primary residence of the judgment debtor and "*must consider alternative means by the judgment debtor of satisfying the judgment debt*, *other than execution against his or her primary residence*." The court shall not authorise execution against the judgment debtor's home unless, "*having considered all relevant factors"*, the court is satisfied that execution against such property is warranted.

45.2.2. Much of the above information (regarding the circumstances of the debtor and her family) is exclusively within the knowledge of the debtor. If the debtor is unable to put up evidence, the court will not have the benefit of this information and may come to the

wrong conclusion.

THE HIGH COURT'S DUTY TO PROTECT, PROMOTE AND FULFIL THE RIGHT

46. Section 7(2) of the Constitution requires that the state must "*respect, protect, promote and fulfil the rights in the Bill of Rights*". Section 8(1) of the Constitution makes clear that the Bill of Rights binds not only the executive and the legislature but also the judiciary.[77]

47. For the reasons set out above, if proceedings for the payment of money amounts falling within the jurisdiction of the Magistrates' Court are instituted in the High Court, there is a material threat that impecunious debtors will be unable to defend their cases. This impairs their right of access to courts. The High Court is under a duty to take measures to mitigate or reduce the impediments to access. Therefore, it should decline to exercise its jurisdiction over unopposed matters of this nature unless the plaintiff can satisfy the High Court that:

    47.1. there is no risk that the absent defendant's access to Court was impeded by the institution of proceedings in the High Court, or

    47.2. there are other factors (for example the complexity of the matter) which would justify the institution of proceedings in the High Court rather than the Magistrates' Court.

48. The High Court's order gives effect to the above obligation. It requires that matters that fall within the jurisdiction of the Magistrates' Courts must generally be issued in those courts. However, if either party believes that there are exceptional

[77] Section 8(1): "*The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.*"

circumstances that justify the matter being heard by the High Court (for example, the issues are particularly complex), that party must make application to the High Court, setting out the reasons why it should exercise its discretion to hear the matter.

HIGH COURT'S DISCRETION REGARDING THE EXERCISE OF JURISDICTION

49. The High Court's judgment accepts that a High Court is entitled to decline to exercise its jurisdiction over matters within the concurrent jurisdiction of the Magistrates' Court.

50. Having held that a High Court is entitled to decline to exercise its jurisdiction over matters within the concurrent jurisdiction of the Magistrates' Court, the High Court exercised its powers in terms of section 173 of the Constitution to formulate a rule as to how a High Court should determine whether or not to hear a matter over which it shares concurrent jurisdiction with the Magistrates' Court.

    50.1. Section 173 vests the Constitutional Court, the Supreme Court of Appeal and the High Court with the inherent power to "*to protect and regulate their own process, and to develop the common law, taking into account the interests of justice*."

    50.2. In *Phillips and Others v National Director of Public Prosecutions*,[78] the Constitutional Court held that "*ordinarily the power in s 173 to protect and regulate relates to the process of court and arises when there is a*

[78] *Phillips and Others v National Director of Public Prosecutions* (2006 (1) SA 505 (CC).

legislative lacuna in the process."[79]

50.3. Rule 39(22) empowers a Magistrates' Court to transfer a matter over which it has jurisdiction to the High Court. The rule provides for transfer to take place on consent of both parties. In *Veto v Ibhayi City Council* ,[80] the High Court held that there was a lacuna in the rule and exercised its inherent jurisdiction to provide for transfer where there was no consent, but one party sought transfer.

50.4. Similarly, a lacuna exists in section 27[81] of the Superior Courts Act, which provides for the High Court to transfer matters over which it has concurrent jurisdiction to the Magistrates' Court on application by one of the parties. This section makes no provisions for the High Court to transfer an unopposed matter over which it has jurisdiction, *meru motu*, to the Magistrates' Court. There is no reason in principle why similar logic to that in the *Veto* case cannot be applied to such matters, thereby allowing the High Court to transfer the matters *meru motu* in terms of section 173 of the Constitution if it is in the interests of justice to do so.

[79] Ibid at para 48.

[80] *Veto v Ibhayi City Council* 1990 (4) SA 93 (SE).

[81] Section 27 states that "*If any proceedings have been instituted in a Division or seat of a Division, and it appears to the court that such proceedings: (a) should have been instituted in another Division or at another seat of that Division; or (b) would be more conveniently or more appropriately heard or determined – (i) at another seat of that Division; or (ii) by another Division, that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that Division or seat, as the case may be*."

THE SUPREME COURT OF APPEAL'S JUDGMENT

51. The SCA overturned the High Court's judgment and order. It upheld the mandatory jurisdiction principle. Specifically it held, *inter alia*, that:[82]

    51.1. A High Court must entertain matters within its territorial jurisdiction, which also fall within the jurisdiction of the Magistrates' Court, because it has concurrent jurisdiction with the Magistrates' Court. The High Court is obliged to hear matters such matters.

    51.2. The main seat of a Division of the High Court has a duty to hear the matter brought before it, even where it falls within the jurisdiction of a local seat of the Division; and

    51.3. There is no obligation in law on financial institutions to consider the cost implications and access to justice of financially distressed people when they choose to institute proceedings in a particular court of competent jurisdiction.

52. The SCA reached these conclusions by reasoning as follows:

    52.1. First, the SCA held that the reasoning of the High Court cannot be sustained as it is based on the "*fundamental misconception that a High Court can decline to hear a matter which is within its jurisdiction*".[83] This is contrary to the mandatory jurisdiction principle. The SCA erred in this respect, for the following reasons:

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[82] SCA judgment, Record Vol. 6, pg. 543, para 88.

[83] SCA judgment, Record Vol. 6, pg. 519, para 39.

52.1.1. As is explained above, the mandatory jurisdiction flows from pre-constitutional judgments. These judgments do not reflect the correct legal position after the enactment of the Constitution, where the issues of access to court (particularly for indigent defendants) and judicial independence (with regard to judicial control of courts' caseloads in the interests of the most efficient administration of justice) have become important.

52.1.2. The post-constitutional case of *Agri Wire* did not confirm the application of the mandatory jurisdiction principle. We have dealt with this above.

52.2. Second, the SCA emphasised the role that the plaintiff plays as *dominus litis* and their right, as such, to choose the forum in which he or she wishes to institute proceedings. The High Court had observed that the concept of *dominus litis* is outdated. The SCA dismissed that observation as "*unfortunate and unsubstantiated*".[84] In doing so, the SCA refused to engage with the issue of access to courts, particularly from the perspective of financially distressed and/or unrepresented defendants. We have demonstrated, above, the severe impact that the mandatory jurisdiction principle may have on such litigants. The SCA's approach, which fails to take into account such considerations, is inconsistent with section 34 of the Constitution.

[84] SCA judgment, Record Vol. 6, pg. 512, para 25.

52.3. Third, the SCA held that the existing constitutional framework supports the banks' interpretation of section 169(1) of Constitution i.e. that the section is peremptory and requires that a High Court must decide any matter falling within its jurisdiction (subject to specified exceptions).[85] The SAHRC contends that section 169(1) is permissive i.e. that a High Court may decide matters falling within its jurisdiction.

52.3.1. The SCA held that the SAHRC's interpretation of section 169(1) is untenable. It observed that—

> "*the term 'may decide' is used in all of the sections dealing with the jurisdiction of all of the courts listed in ch 8 of the Constitution. This would mean, for instance, that the Constitutional Court could refuse to hear even those matters over which it has exclusive jurisdiction; the Supreme Court of Appeal could refuse to hear appeals over which it has jurisdiction; and magistrates' courts could refuse to hear matters within their jurisdiction*."

52.3.2. The latter statement is correct. The Constitution empowers the Constitutional Court, Supreme Court of Appeal and Magistrates Courts to decline to hear matters that fall within their jurisdiction. There are a number of reasons why a court may do so. For

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[85] Section 169(1) provides:

'(1) The High Court of South Africa may decide —

(a) any constitutional matter except a matter that —

(i) the Constitutional Court has agreed to hear directly in terms of section 167(6)*(a)*; or

(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and

(b) any other matter not assigned to another court by an Act of Parliament.'

(our emphasis)

example, the SCA may refuse to hear an appeal from a matter arising in the High Court on the basis that the appeal has no prospects of success. Similarly, the Constitutional court may decline to hear an appeal where it is not in the interests of justice to do so, even when that appeal raises an arguable point of public importance or a constitutional issue.

52.3.3. Hence, the SCA's observation is not destructive of the SAHRC's case.

52.4. Fourth, the SCA held that the High Court's finding that a court may refuse to hear matters in order to reduce its workload is wrong.[86] The SCA erred in this respect, for the following reasons:

52.4.1. Judicial resources are scarce. It is fundamentally irrational to require that those resources be deployed in a way that sees most skilled judges spending a large portion of their time trawling through mounds of default judgment applications on credit agreements.

52.4.2. If judicial resources have to be deployed in an irrational fashion, this would be inimical to judicial independence (which requires that judges must have control over the administration of the courts to ensure efficiency).

[86] SCA judgment, Record Vol. 6, pg. 520, para 42.

52.5. Fifth, the SCA held that it is the task of statute law, in this case the Superior Courts Act and Magistrates' Courts Act, to establish to a system that is consistent with the constitutional right of access to justice.[87] This finding is misconceived and ignores fundamental principles of the institutional independence of the judiciary. It is, in the first instance, the constitutional function of the judiciary, not the legislature to decide how best to deploy judicial resources in the interests of promoting the fundamental right of access to justice across the judicial system as a whole.

53. In light of the above, the reasoning of the SCA is fatally flawed.

CONCLUSION

54. For the reasons set out above, the South African Human Rights Commission submits that:

54.1. There is no good reason for the High Court to entertain matters that fall within the jurisdiction of the Magistrates' Court and which involve default judgment applications against a debtor for the payment of money owing. This is particularly the case where the applicant seeks an order declaring that the immovable property of the debtor is specially executable;

54.2. The High Court is not obliged to entertain matters that fall within the jurisdiction of the Magistrates' Court purely on the basis that it has concurrent jurisdiction;

[87] SCA judgment, Record Vol. 6, pg. 524 para 50.

54.3. The High Court correctly held that the default rule should be that the banks must issue applications for default judgment and for declarations that property is specially executable in the Magistrates' Courts, if those applications fall within the monetary jurisdiction limits of the Magistrates' Courts. If a party believes that the matter should be heard in the High Court, that party must make an application setting out the grounds upon which they believe that the exercise of the High Court's jurisdiction is justified.

MATTHEW CHASKALSON SC

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Chambers, Sandton
3 March 2022

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no. CCT 291/21
SCA Case No: 38/2019 & 47/2019

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED	First Respondent
NEDBANK LIMITED	Second Respondent
FIRSTRAND BANK LIMITED	Third Respondent
EZRA MAKIKOLE MPONGO	Fourth Respondent
MYRA GERALDINE WOODITADPERSAD	Fifth Respondent
RADESH WOODITADPERSAD	Sixth Respondent
JOYCE HLUPHEKILE NKWINIKA	Seventh Respondent
KARIN MADIAU SAMANTHA LEMPA	Eighth Respondent
NEELSIE GOEIEMAN	Ninth Respondent
ANGELINE ROSE GOEIEMAN	Tenth Respondent
JULIA MAMPURU THOBEJANE	Eleventh Respondent
AUBREY RAMORABANE SONKO	Twelfth Respondent
ONESIMUS SOLOMON MATOME MALATJI	Thirteenth Respondent
MODIEGI PERTUNIA MALATJI	Fourteenth Respondent
GRACE M MAHLANGU	Fifteenth Respondent
KEY HINRICH LANGBEHN	Sixteenth Respondent

FILING SHEET

Presented for filing:

The Standard Bank of South Africa Limited's heads of argument

Signed at **Sandton** on this **23rd** day of **March 2022**.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 291/2021
SCA Case 38/2019 & 47/2019

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Applicant
and	
THE STANDARD BANK OF SOUTH AFRICA LIMITED	1st Respondent
NEDBANK LIMITED	2nd Respondent
FIRSTRAND BANK LIMITED	3rd Respondent
EZRA MAKIKOLE MPONGO	4th Respondent
MYRA GERALDINE WOODITADPERSAD	5th Respondent
RADESH WOODITADPERSAD	6th Respondent
JOYCE HLUPHEKILE NKWINIKA	7th Respondent
KARIN MADIAU SAMANTHA LEMPA	8th Respondent
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ANGELINE ROSE GOEIEMAN	10th Respondent
JULIA MAMPURU THOBEJANE	11th Respondent
AUBREY RAMORABANE SONKO	12th Respondent
ONESIMUS SOLOMON MATOME MALATJI	13th Respondent
MODIEGI PERTUNIA MALATJI	14th Respondent
GRACE M MAHLANGU	15th Respondent
KEY HINRICH LANGBEHN	16th Respondent

STANDARD BANK'S HEADS OF ARGUMENT

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INTRODUCTION

1 The South African Human Rights Commission (*SAHRC*) seeks to have an order of a full Court of Gauteng High Court, that was overturned by the Supreme Court of Appeal, reinstated. We shall refer to the order, which the SAHRC wishes to have reinstated in this case, as the order of "the Full Court".

2 The case arose in the High Court because a number of banks had instituted foreclosure applications in the High Court for recovery of amounts that fell within the jurisdiction of the Magistrates' Courts.[1] As a result, the Judge President issued a practice directive so that a number of these foreclosure matters could be heard together by a full Court of the High Court.[2]

2.1 The practice directive required extensive steps to be taken to bring the consolidation of the cases to the attention of various state functionaries, including the Minister of Justice, the Minister of Trade and Industry, the South African Reserve Bank, and the SAHRC.[3]

2.2 The practice directive also required the banks to go through a detailed process of notification to the respondent debtors in each of the foreclosure matters. The banks were specifically directed to invite each debtor to make representations to

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1 High Court Judgment, Record Vol 5, page 381 para 1. The case also concerned the practice of banks bringing foreclosure matters in the Pretoria High Court when they could have brought the matter in the Johannesburg High Court (see, further, para 1 of the High Court's judgment). However, the SAHRC does not deal at all with the issue of concurrent jurisdiction between different High Courts in their heads of argument, and so we do not address that issue here.

2 Practice Directive, Record Vol 1, page 3 para 1

3 Practice Directive, Record Vol 1, page 4 para 3.2

the court on the issue whether the High Courts should entertain their matters when they could have been brought within the jurisdiction of the Magistrates' Courts.[4] In order to ensure that the respondent debtors' participation in the case would come at no cost to them, the Judge President also directed that the respondents be informed that the Court had requested the Pretoria Society of Advocates to appoint counsel to act "on behalf of the respondents *amicus curia*".[5]

3 The Full Court found that the practice whereby banks brought foreclosure matters in the High Court instead of in the Magistrates' Court implicated debtors' rights of access to courts. The Full Court therefore granted an order with extraordinary reach.

4 The order was not confined to the foreclosure matters before the High Court; it was not even confined to foreclosure matters. The order was that *any* case brought by *any* litigant that falls within the jurisdiction of the Magistrates' Court had to be brought in the Magistrates' Court unless the High Court had granted leave to hear the matter in the High Court.[6]

5 But then the judgment of the Full Court made obtaining that leave impossible because it also found that the mere practice of bringing a matter in the High Court, in circumstances where it could have been brought in the Magistrates' Court, was an abuse of process.[7] It would therefore never actually be possible for a litigant to obtain the leave of the High Court because the Full Court had already found that exercising a choice to bring a claim

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4 Practice Directive, Record Vol 1 page 6 para 15.1.1

5 Practice Directive, Record Vol 1 page 7 para 15.2

6 High Court Judgment, Record Vol 5 page 425 para 96 – order para (1)

7 High Court Judgment, Record Vol 5 page 418 para 76; see further: Vol 5 page 406 para 52

in the High Court, when it could have been brought in the Magistrates' Court, was an abuse of process.

6 This meant that the doors of the High Court were effectively closed to *any* litigant in *any* matter that could have been brought in the Magistrates' Courts.

7 Pursuant to the Judge President's practice directive, the SAHRC participated in the proceedings before the High Court and before the Supreme Court of Appeal as an *amicus curiae*.

8 It seeks leave to appeal against the order of the Supreme Court of Appeal. This means that if it is successful in this appeal, the order of the Full Court will be reinstated.[8]

9 Despite this being the outcome of the application for leave to appeal before this Court, the SAHRC's application for leave to appeal and its heads of argument are noticeably lacking any argument supporting the actual order that was granted by the Full Court. Instead, they confine themselves to a smaller category of case – cases involving only banks, and they contend that the default rule must be that banks bring their foreclosure matters in the Magistrates' Courts unless they can justify bringing the case in the High Court.[9]

10 This more limited relief is not compatible with upholding the appeal because success in the appeal would simply reinstate the order of the Full Court. The SAHRC offers no

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8 Standard Bank AA in leave to appeal, Record Vol 7 page 621 para 19

9 SAHRC heads of argument para 54.3.

argument for why this Court should grant leave to appeal and then give an order that is *different* to the one actually given by the Full Court.

11 The SAHRC's argument in this Court fails to grapple with the obvious overbreadth and fundamental inconsistency of reasoning that produced the Full Court's order. Instead, the SAHRC's argument advances on one central submission: that if the banks are entitled to choose a High Court, rather than a Magistrates' Court, in which to bring their applications for default judgment against debtors, "there is a material threat that impecunious debtors will be unable to defend their cases".[10]

12 This is a causal conclusion.[11] It says that if something happens (namely, that the banks choose to litigate their claims in the High Courts rather than the Magistrates' Courts), this will produce a real threat that indigent debtors will be unable to defend their claims. The conclusion is therefore based on a direct link between the banks' choice of the High Court, on the one hand, and debtors' inability to defend the claims against them, on the other.

13 However, there is no evidence in the record to support this conclusion. Despite the SAHRC seeking leave to be admitted as an *amicus* in the High Court and promising to put this evidence before the Court,[12] it failed to do so. There was also no evidence at all from a single one of the debtors in these cases to say that if their matters had been brought in the Magistrates' Courts rather than the High Courts, they would have been

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10 SAHRC heads of argument para 5

11 SCA Judgment, Record Vol 6, page 530 para 61

12 SAHRC's amicus curiae application, Record Vol 1 page 31 para 22.1 to 22.3

able to defend the matters.[13] This is despite the fact that, as we set out above, they had the services of the Pretoria Society of Advocates to act for them in the matter.

14 In order to overcome this gaping absence of evidence, the SAHRC has been forced to advance its case by invoking "constitutional principles". The focus of its attack has become the rule of the common law that entitles plaintiffs to choose any court with jurisdiction in which to litigate. The rule of mandatory jurisdiction requires courts to decide the cases that come before them, subject to the caveat that, if the case involves an abuse of process, the court may decline to exercise jurisdiction.

15 The tone of the SAHRC's argument is that the mandatory jurisdiction rule should be approached with scepticism. It is a pre-constitutional relic[14] that should be jettisoned to the scrap heap because it poses a threat to judicial independence.[15]

16 The SAHRC is correct that the fact that the mandatory jurisdiction rule has been around for more than a century does not immunise it from constitutional scrutiny. But this Court has also recognised that the fact that a rule of the common law is of vintage variety, does not mean that it has no place in the post-constitutional scheme. In *Mighty Solutions*, this Court held as follows:[16]

> "*Caution is called for though. It is tempting to regard precedents from the pre democratic era with suspicion. This may be more so when language*

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13 SCA Judgment, Record Vol 6, page 501 para 2; page 502 para 6; page 507 para 11

14 SAHRC's heads of argument para 16

15 SAHRC's heads of argument para 20

16 *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* (CCT211/14) [2015] ZACC 34

is used, which some may regard as archaic and reminiscent of a patriarchal feudal era, as when the Court in Kala Singh said that "it does not lie in the mouth of a lessee to question the title of his landlord". However, the mere fact that common law principles are sourced from pre-constitutional case law is not always relevant. Age is not necessarily a reason to change. Some of the lessons gained from human experience over the ages are timeless and have passed the logical and moral tests of time. The Constitution indeed recognises the existing common law and customary law."[17] (emphasis added)

17 In these heads of argument, we shall show that the SAHRC's case for overturning the mandatory jurisdiction rule fails at three hurdles.

17.1 The *first* hurdle is that the Full Court's order, properly interpreted, is in conflict with the scheme of jurisdictional demarcation under the Constitution.

17.2 The *second* hurdle lies in the facts.

17.2.1 The facts presented to the Full Court show that Standard Bank chooses to litigate in the High Courts in order to advance efficiency, consistency, and cost-savings in the administration of justice.[18] It therefore litigates in the High Courts to promote the right of access to courts, rather than to retard it.

17.2.2 The facts show that Standard Bank only brings foreclosure cases to the High Courts after an extensive period of engagement with a debtor, during which numerous opportunities are offered for the debtor to reduce his or her arrears. Because of this extensive prior

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17 *Mighty Solutions* para 37

18 SCA judgment Record Vol 6, page 503 para 5

process of engagement, when cases do end up in the courts, they are generally undefended. Standard Bank also does not doggedly insist that matters stay in the High Courts. If the bank is approached by a debtor, who is able to show that moving a case to the Magistrates' Court would be appropriate, the bank will consent to such a transfer.

17.2.3 The comparative case law invoked by the SAHRC does not assist it because it serves only to emphasise the detailed type of evidence that is required to be placed before the courts (but was lacking in this case) in order to justify a conclusion that there is a real risk to litigants' rights of access to courts.

17.3 The *third* hurdle lies in the SAHRC's error that the mandatory jurisdiction rule undermines judicial independence. Contrary to the SAHRC's submissions, observance of the mandatory jurisdiction rule is not only consistent with judicial independence, but, in fact, promotes it.

18 These heads of argument are structured to deal with these three hurdles.

FIRST HURDLE: THE JURISDICTIONAL SCHEME

Section 169 of the Constitution

19 The ambit of the courts' jurisdiction is first, and foremost, determined by the Constitution. Section 169 of the Constitution deals with the jurisdiction of the High Courts.

20 The section reads as follows:

> "*(1) The High Court of South Africa may decide—*
>
> *(a) any constitutional matter except a matter that—*
>
> *(i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or*
>
> *(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and*
>
> *(b) any other matter not assigned to another court by an Act of Parliament*."

21 It says that the High Courts may decide some constitutional matters and "any other matter that is not assigned to another court by an Act of Parliament". The section does two things. First, it provides that the High Courts have original jurisdiction over any matter other than those which go directly to the Constitutional Court. Second, it provides

that for all those matters that fall within the High Court's jurisdiction, it is Parliament that may assign a matter away from the High Court.

22 This is an important provision because it means that, in the separation of powers designed by the Constitution, it is Parliament, and not the courts, that is empowered to remove a matter from the jurisdiction of the High Courts. In other words, the Constitution vests the High Courts with jurisdiction over all matters other than those that fall within this Court's exclusive jurisdiction. Then it vests Parliament with the power to take matters away from the jurisdiction of the High Courts through the enactment of national legislation.

23 The Full Court's judgment, which the SAHRC seeks to vindicate before this Court, is in conflict with this section of the Constitution.

24 Paragraph 1 of the order of the Full Court provides as follows:

> "*to promote access to justice as from the 2 February 2019 civil actions and/or applications, where the monetary value claimed is within the jurisdiction of the Magistrates' Courts should be instituted in the Magistrates' Court having the jurisdiction, unless the High Court has granted leave to hear the matter in the High Court*".[19]

25 Although, at first blush, this order appears to leave it open to plaintiffs to bring an application in the High Court for leave to institute matters that fall within the Magistrates' Courts' jurisdiction in the High Court, this is not, in fact, the effect of the order, read with the reasons in the judgment.

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[19] High Court Judgment, Record Vol 5 page 425 para 96 at (1)

26 It is a trite principle of our law that in interpreting a court order, the order must be read together with the judgment and reasons for it.[20]

27 When the Full Court's order is read together with the reasons in its judgment, it is clear that the actual effect of the order is to remove matters from the jurisdiction of the High Court when they can be instituted in the Magistrates' Court. This is because the Full Court found that the mere fact that a claim had been brought in the High Court, when it could have been brought in the Magistrates' Court, was an abuse of process.[21] And it made this finding despite being presented, in great detail, with the justifications that all the banks could marshal to explain why they litigate foreclosure matters in the High Courts.

28 As the Supreme Court of Appeal observed "the essence of the [Full Court's] judgment is that a plaintiff commits an abuse of process by suing out of a court that suits its interests when, supposedly, that choice does not necessarily suit the defendant's interests".[22]

29 In the face of this finding by the Full Court, it will not be open to a subsequent judge to grant leave to a plaintiff to institute a claim in the High Court that could have been brought in the Magistrates' Court, because that judge will be bound, according to the principles of

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20 *Eke v Parsons* 2016 (3) SA 37 (CC) para 29; *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) para 33; *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited* 2019 (1) SA 370 (CC) para 52; *Firestone South Africa (Pty) Ltd v Genticuro* AG 1977 (4) SA 298 (A) at 304D-F; *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) para 10

21 High Court Judgment, Record Vol 5 page 418 para 76; see further Vol 5 page 406 para 52

22 SCA Judgment, Record Vol 6 page 517 para 35; see further Vol 6 page 521 para 44

stare decisis, by the finding of the Full Court that such conduct constitutes an abuse of process.[23]

30 The effect of the Full Court's order is therefore to assign matters, which fall within the jurisdiction of the Magistrates' Courts, to those courts and away from the High Courts. But that reassignment role is given to Parliament under the Constitution. The courts have no power to trench upon Parliament's constitutionally ordained power and conduct a reassignment exercise of their own.

31 The SAHRC's application for leave to appeal, and the appeal itself, face this first insurmountable hurdle. They seek to vindicate an order of the Full Court that breaches section 169 of the Constitution.

The meaning of "may"

32 The SAHRC's argument that the "may" in section 169 should be understood to vest a discretion in the courts to decide not to entertain matters that fall within their jurisdiction[24], does not save the Full Court's order from constitutional inconsistency.

33 There are two reasons for this.

33.1 The first is that the SAHRC is simply wrong about the meaning of "may" in section 169 of the Constitution. As the Supreme Court of Appeal held in its

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[23] *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) para 58; *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 28

[24] SAHRC's heads of argument para 13

judgment, the "may" in section 169 does not vest a discretion in the High Courts because it is required to be read together with the other sections in Chapter 8 of the Constitution. In the context of the Chapter as a whole, the Supreme Court of Appeal found that section 169 delineates the jurisdictional scope of the different courts.[25] It is therefore an empowering provision and not one that vests a discretion in the High Courts to decline to exercise the jurisdiction that they have been assigned by the Constitution.

33.2 The second is that it does not matter. Even if the Supreme Court of Appeal was wrong to reject the SAHRC's argument that section 169 vests a discretion in the High Courts to decline to entertain matters that fall within their jurisdiction, section 169 of the Constitution still leaves it to Parliament to assign a matter away from the High Courts. That is an act that only the legislature can perform under the Constitution.

33.3 So even if the "may" in section 169 means that the High Courts have a discretion not to decide a matter falling within their jurisdiction, that is a discretion to be exercised on a case by case basis. The SAHRC does not suggest otherwise. But the "may" in section 169 certainly does not, and has not ever been suggested to, give the courts a power to assign matters away from the High Courts. For the reasons set out above, that is the actual effect of the Full Court's order. It is therefore in conflict with the power that the Constitution gives only to Parliament to assign matters away from the jurisdiction of the High Courts. The Full Court's order should therefore not be upheld by this Court.

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[25] SCA Judgment, Record Vol 6, para 41 page 520

Bound by its application for leave

34 The SAHRC also cannot avoid this conclusion by claiming that it does not seek an order that assigns all matters within the Magistrates' Courts' jurisdiction to those courts. The SAHRC's application for leave to appeal seeks to reinstate the order of the Full Court.[26]

35 The SAHRC asks for no special exercise of this Court's powers to interfere with that order. It provides no justification for a different order from the one granted by the Full Court. In fact, it appears to recognise this problem for its case, because the SAHRC's heads of argument do not even end with the order it seeks from this Court.

36 Its application for leave to appeal must, at the very least, be evaluated against the order it sought in that application. The order it sought was a reinstatement of the Full Court's order. But that result would, for the reasons we set out above, be in violation of section 169 of the Constitution. Leave to appeal should, therefore, be refused.

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[26] Notice of Application, Record Vol 6, page 547 para 3

SECOND HURDLE: THE FACTS

37 The second hurdle that the SAHRC's case faces is that there simply were no facts to support the order of the Full Court.

38 The SAHRC's argument before this Court depends on the proposition that the banks' practice of litigating in the High Courts violates debtors' rights of access to Courts.[27] But that proposition depends on a factual foundation – that indigent debtors are not defending cases that the banks bring in the High Courts *because* those cases are not being brought in the Magistrates' Courts. But there is no evidence that this is so on the papers.

Standard Bank's facts

39 The actual facts tell a very different story. In its affidavit, Standard Bank has explained, in considerable detail, why it chooses to bring foreclosure matters in the High Court. There are four main reasons:

39.1 Standard Bank brings foreclosure matters in the High Courts because it recognises that they "concern the determination of complex and important constitutional rights".[28] A court dealing with a foreclosure matter is required to consider a number of factors, including "the impact of declaring the property specially executable on judgment debtors who are poor, elderly, vulnerable or

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27 SAHRC's heads of argument para 11.6

28 Standard Bank Supp Affidavit, Record Vol 1, page 62 para 13.3

disabled and at risk of losing their homes".[29] This balancing exercise is required even when the matter is undefended.[30] In Standard Bank's experience, High Court judges are better able to deal with this complex balancing exercise[31] and their judgments create a body of precedent which enhances legal certainty and serves the administration of justice.[32]

39.2 Bringing cases in the High Courts, rather than in the Magistrates' Courts, achieves more efficient and speedier[33] outcomes. This is because "in almost all jurisdictions where proceedings are instituted in the Magistrates' Courts, it takes significantly longer to obtain judgment compared to the time it takes to obtain judgment in the High Court".[34] This is a product of the way in which the Magistrates' Courts organise their rolls.[35] As an example, the difference in speed can be as much as five weeks in the High Court, as compared to four months in the Magistrates' Courts.[36] It is also a product of the inefficiencies of the Magistrates' Courts. In Standard Bank's experience, documents and files often go missing in the Magistrates' Courts.[37] There are also often delays owing to the unavailability of stenographers, recording machines and court rooms.[38]

39.3 The efficiencies of litigating in the High Courts have two effects on costs.

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29 Standard Bank Supp Affidavit, Record Vol 1, page 68 para 17.2

30 Standard Bank Supp Affidavit, Record Vol 1, page 68 para 17.3

31 Standard Bank Supp Affidavit, Record Vol 1, page 68 para 17.6

32 Standard Bank Supp Affidavit, Record Vol 1, page 69 para 17.7

33 Standard Bank Supp Affidavit, Record Vol 1, page 62 para 13.4; and page 78 para 18.2.7 (4)

34 Standard Bank Supp Affidavit, Record Vol 1, page 70 para 18.2.1 (1)

35 Standard Bank Supp Affidavit, Record Vol 1, page 70 para 18.2.1 (2)

36 Standard Bank Supp Affidavit, Record Vol 1, page 71 para 18.2.1 (4)

37 Standard Bank Supp Affidavit, Record Vol 1, page 78 para 18.2.7 (2)

38 Standard Bank Supp Affidavit, Record Vol 1, page 78 para 18.2.7 (3)

39.3.1 The first is the impact on a particular debtors' liability to the bank. Home loan agreements generally provide for the consumer to bear the costs associated with litigation to recover the outstanding debt.[39] This means that when the litigation process takes longer and requires more court attendances, as it does in the Magistrates' Courts, the costs to be borne by the debtor, increase.[40]

39.3.2 The second is that the less efficient the recovery actions of banks are, the more of an impact this will have on the cost of borrowing. Increased costs of recovery "put pressure on the ability of banks to lend". If the costs of borrowing increase, fewer consumers will qualify for home loans. This will have a detrimental effect on the ability of less well-resourced consumers to access home loan financing.[41]

39.4 At a practical level, section 66(4) (read with sections 66(2) and (3)) of the Magistrates' Courts Act provides that, where there is a creditor who has a claim preferent to the judgment creditor, the attached property must be sold within a year from the date of attachment, failing which the attachment lapses.[42] Because of Standard Bank's practice of giving debtors every opportunity to bring their home loan accounts up to date, the bank often extends opportunities to debtors, even after it has secured an attachment order.[43] When this is going to delay matters

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39 Standard Bank Supp Affidavit, Record Vol 1, page 83 para 25

40 Standard Bank Supp Affidavit, Record Vol 1, page 79 para 18.2.9; Standard Bank Supp Affidavit, Record Vol 1, page 71 para 18.2.1 (3)

41 Standard Bank Supp Affidavit, Record Vol 1, page 72 para 18.2.1. (7)

42 Standard Bank Supp Affidavit, Record Vol 1, page 76 para 18.2.6

43 Standard Bank Supp Affidavit, Record Vol 1, page 77 para 18.2.6 (4)

beyond a year, the bank is required to return to the Magistrates' Court to prevent the order from lapsing and incur the costs of obtaining a further order.[44]

40 The facts therefore establish that the very aspects of the right of access to courts that are highlighted by the SAHRC are, in fact, promoted by Standard Bank's practices. Standard Bank proceeds in the High Court because it is quicker, less costly, and more efficient to do so. That is the antithesis of conduct that breaches the right of access to courts.

41 As the Supreme Court of Appeal pointed out, these facts were never rebutted or challenged in the High Court.[45] They, therefore, formed the factual foundation from which the Full Court ought to have analysed the case before it.

42 In its affidavit, Standard Bank also set out the process it follows before a foreclosure case is brought to court. It actively engages with consumers and offers various ways for them to bring their arrears up to date.[46] This process is relevant because it shows that the bank does not rush into litigation. When a case comes before the High Court, it has been preceded by numerous attempts to assist the debtor in meeting his or her contractual commitments. It also explains why, in Standard Bank's experience, most of the matters that do find their way to litigation, are undefended.[47]

43 Finally, Standard Bank explained in its affidavit that it does not insist on proceeding in the High Court in all cases. It keeps an open mind to the requirements of its debtors. If a

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44 Standard Bank Supp Affidavit, Record Vol 1, page 77 para 18.2.6 (4)

45 SCA Judgment Record Vol 6, page 503 para 5

46 Standard Bank Supp Affidavit, Record Vol 1, page 85 para 30, read with the details provided in respect of each debtor at pages 85 to 97 paras 32 to 34.2

47 Standard Bank Supp Affidavit, Record Vol 1, page 83 para 26

debtor intends defending the action and engages with the bank to motivate for the matter to be transferred to a Magistrates' Court, Standard Bank's policy is to consider these requests on a case-by-case basis. And where appropriate, it will agree to such a transfer.[48]

The SAHRC's "facts"

44 The SAHRC seeks to resuscitate its non-existent factual case by contending that the Full Court was able to take judicial notice of certain facts.[49] The SAHRC sets out these alleged "facts" from paragraph 43 of its heads of argument. But the one fact that is not there is the only one that matters – it is *why* the debtors in the thirteen cases consolidated before the Full Court did not defend those cases.

45 The SAHRC says that it is possible to conclude from the factual circumstances relating to those thirteen cases that the debtors have limited financial means.[50] That may be so, but the relevant question is whether there is a real threat that those debtors, even given their limited financial matters, did not defend these cases *because* they were brought in the High Court instead of the Magistrates' Court. There was no evidence that that is so, despite the SAHRC saying this was the type of evidence it would present to the Court[51] and despite the actual debtors being notified about the proceedings and being able to be represented by counsel from the Pretoria Society of Advocates.[52]

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48 Standard Bank Supp Affidavit, Record Vol 1, page 84 para 28.2

49 SAHRC heads of argument para 44

50 SAHRC heads of argument para 43.2

51 SAHRC's amicus curiae application, Record Vol 1 page 31 para 22.1 to 22.3

52 Practice Directive Record Vol 1 page 7 para 15.2

46 There was also no evidence from the Minister of Justice, who participated as an *amicus curiae* in the High Court, that draws a causal link between where a matter is litigated and whether that fact is what is driving debtors not to defend the claims against them. The most that the Minister presented to the Court was that there are more interpreters in the Magistrates Courts.[53] But that fact is not relevant *unless* it is the absence of readily available interpreters in the High Courts that is the reason that debtors do not defend the foreclosure applications brought in the High Court There was simply no such evidence presented. And that is the type of evidence that it is possible to obtain and place before a Court, as we show in the next section.

Comparative case law

47 The need for a proper factual foundation for the SAHRC's case is, in fact, highlighted by the comparative case law on which it relies in its argument. As we shall show below, the comparative case law establishes two things.

47.1 The first is that it shows the type of evidence that is required for a court to draw a conclusion that the right of access to courts is being imperilled.

47.2 The second is that the comparative case law applies to a very particular type of access to courts' challenge. The comparative cases deal, mainly, with the imposition of a fees regime and the effect of that regime on litigants' rights to access justice. However, the question in this case is a different one. The question in this case engages the jurisdictional scope of different courts. That question necessarily requires a comprehensive assessment to be done of the impact of

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53 See SAHRC's heads of argument, para 43.5

moving cases from one court to another because shifting cases around does not, on its own, necessarily mean access to justice will be promoted.

48 We deal with each of these below.

The type of evidence

49 *UNISON*[54] is a decision of the UK Supreme Court. The case dealt with the question whether the imposition of certain fees by the Lord Chancellor in respect of proceedings in employment tribunals and the employment appeal tribunal created a real risk that litigants would be unable to access those tribunals.[55] Extensive evidence was presented to the court to show that the fees regime did, in fact, infringe litigants' rights of access to courts. The court considered the evidence "realistically and as a whole" in reaching the conclusion it did.[56] The evidence comprised the following:

49.1 The tribunal statistics published by the Ministry of Justice under the title Tribunals and Gender Recognition Certificate Statistics Quarterly.[57]

49.2 The Review Report, which was a consultation paper published by the Ministry of Justice in January 2017.[58] The Review Report referred to evidence submitted by

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54 *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51

55 *UNISON* para 87

56 *UNISON* paras 91 and 97

57 *UNISON* para 38

58 *UNISON* para 38

the Council of Employment Judges and by the Presidents of the Employment Tribunals,[59] as well as an impact assessment done previously.[60]

49.3 Research published by the Department for Business, Innovation and Skills.[61]

49.4 Survey evidence based on a survey of a representative sample of claimants. This evidence included figures relating to claimants who were unable to resolve employment disputes through conciliation but who did not go on to issue employment tribunal proceedings. The evidence showed that the most frequently mentioned reason for not submitting an employment tribunal claim was that the fees were "off-putting".[62]

50 In the Canadian case of *Trial Lawyers Association*,[63] the Supreme Court of Canada was confronted with the question whether the hearing fees that had to be paid by persons of modest means, who wished to have access to family court proceedings, were so high that they were effectively denied their right of access to courts.

51 During the trial, the appellants had filed a report by an economist who had used a 'Market Basket Measure' (MBM) developed in 2003 by Human Resources Development Canada to measure poverty. His report showed that, assuming that the test for the indigency exemption was based on an MBM measure of poverty, a significant percentage of the population would not be exempted from hearing fees (because their

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59 *UNISON* para 40

60 *UNISON* paras 43 and 56

61 *UNISON* paras 31, 36 and 41

62 *UNISON* para 45.

63 *Trial Lawyers Association of British Columbia and another v Attorney General of British Columbia* [2014] SCC 59

income was above MBM), but would nonetheless have great difficulty affording the hearing fees for a ten-day trial, such as the one in that case, because the fees would equal or exceed any income in excess of MBM.

52 This evidence led the Court to conclude that the effect of the fees was unconstitutional, because, for many litigants, bringing a claim would require sacrificing reasonable expenses.[64]

53 None of that type of evidence was placed before the Full Court. This dearth of evidence compelled the Supreme Court of Appeal to overturn the High Court's decision. The SCA held as follows:[65]

> "*The Gauteng Court based its conclusions on two sources. First, Tolmay J, in her judgment, cited statistics of the number of cases heard in Pretoria and Johannesburg, as well as the number of judges in the Gauteng Division. The apparent purpose of this 'evidence', which the banks saw for the first time in the judgment, was to support the contention that the High Court 'may soon be unable to provide process access to justice' and that the system is in danger of collapse. Secondly, she set out in some detail allegations made by the South African Human Rights Commission. These were broad, sweeping generalisations, and not facts. She took the view that the mere fact of the banks instituting proceedings in the High Court when they could have proceeded in the Magistrates' Court was an abuse of process*."

54 The SAHRC's case was, and remains before this Court, a case based on conjecture about why debtors were not defending the cases against them.[66] This conjecture must be

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64 *Trial Lawyers Association* paras 52 to 54

65 SCA Judgment Record Vol 6 page 503 para 7

contrasted with the actual evidence placed before the Full Court by the banks. Standard Bank's evidence was that it engages in such thorough pre-litigation engagements with debtors to enable them to bring up their arrears, that the majority of the cases that do eventually end up in the courts are not defended. Its evidence was also that in any case where a debtor properly motivates for a matter to move to a Magistrates' Court, the bank will agree to such a transfer.

55 There was, accordingly, no factual foundation for the Full Court's order. It ought not, therefore, to be reinstated.

The polycentric nature of the question

56 The other fundamental respect in which the facts placed before the Full Court were inadequate was that they failed to grapple with the impact of a new rule that would shift the claims that fall within the Magistrates' Court monetary jurisdiction away from the High Courts and to the Magistrates' Courts.

57 That is a polycentric question because, as soon as cases are moved from one court to another, general administration of justice at the receiving court will be impacted unless there are concomitant additional resource allocations to the receiving court to manage the heavier work load.

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[66] SCA Judgment, Record Vol 6, page 508 para 14

58 This Court has previously recognised the legislature's "particular competence" in addressing polycentric issues".[67]

59 The comparative cases to which the SAHRC has made reference are cases where the impugned rule – such as a fee regime – does not raise polycentric questions of this nature. In the fees cases, if a court finds that the fees infringe the right of access to courts, then the solution is to remove the fees requirement. There is no debate that removing this obstacle will enhance access to courts.

60 But in a case in which the core issue is about shifting cases from one court to another, there is no simple linear relationship between the violation and the proposed solution. If cases are to be shifted to already under-resourced and inefficient courts, then access to justice for *all* the cases in the receiving court will be impacted.

61 Standard Bank's evidence before the High Court is that the administration processes in the Magistrates' Courts are generally inefficient.[68] There are longer delays; documents and files regularly go missing.[69] To burden these courts with a much greater workload, without some concomitant increase in their resources and efficiencies, can simply make access to justice for all those who litigate in the receiving court slower and more costly.

62 This is another reminder of why the legislature, and not the courts, is constitutionally mandated to assign matters away from the High Courts. This Court has previously

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67 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 para 38. See too *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* 2009 (4) SA 222 (CC) para 221

68 Standard Bank Supp Affidavit, Record Vol 1, page 77 para 18.2.7 (1)

69 Standard Bank Supp Affidavit, Record Vol 1, page 78 para 18.2.7 (2) and (3)

recognised that courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary to make these kinds of decisions.[70]

63 In this case, there simply was no evidence on which the Full Court could find that indigent debtors were not defending claims brought in the High Courts *because* they were brought there rather than the Magistrates' Courts. And even if we are incorrect, and there was some factual basis for such a finding, despite the scant information placed before the Court, there was certainly no evidence of the impact on the Magistrates' Courts of shifting every claim that can be litigated in the Magistrates' Courts to them.

64 The order of the Full Court should therefore not be reinstated because the facts required to justify the order that was granted were, and remain, lacking.

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70 *Treatment Action Campaign* para 37

THIRD HURDLE: MANDATORY JURISDICTION RULE

65 At the centre of the SAHRC's case before this Court is the mandatory jurisdiction rule.

66 The mandatory jurisdiction rule has a long pedigree in our law. It was stated as follows by Schreiner J in *Goldberg v Goldberg*:[71]

> "*[A]part from the exercise of the Court's inherent jurisdiction to refuse to entertain proceedings which amount to an abuse of its process…I think that there is no power to refuse to hear a matter which is within the Court's jurisdiction*."

67 Since *Goldberg*, the courts have applied the rule for decades.[72] In *Agri Wire*,[73] the Supreme Court of Appeal held that "our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction."[74] In *Bester*, the High Court held as follows:

> "*From none of these cases can a principle be extracted that the Supreme Court has an inherent jurisdiction to refuse to hear a litigant and to entertain proceedings in a matter within its jurisdiction and properly before the Court.*
>
> *In contrast, Goldberg's case is clear authority that no such principle exists:*

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71 *Goldberg v Goldberg* 1938 WLD 83 at 85

72 See, for example, *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) and the discussion about the application of this rule. We do not traverse the various cases that were discussed by both the High Court and the Supreme Court of Appeal in their judgments in this matter. See High Court judgment Record Vol 5 page 398 paras 35 – 43, SCA judgment Record Vol 6, page 513 paras 26 – 32, for these discussions.

73 *Agri Wire (Pty) Ltd v Commissioner, Competition Commission* 2013 (5) SA 484 (SCA)

74 *Agri Wire* para 19.

'On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction.

... But apart from such cases and apart from the exercise of the Court's inherent jurisdiction to refuse to entertain proceedings which amount to an abuse of its process (and that, in my opinion' is not the case here) I think that there is no power to refuse to hear a matter which is within the Court's jurisdiction."[75]

68 We have set out above the important role that section 169 of the Constitution gives to Parliament to remove matters from the jurisdiction of the High Courts.

69 Section 171 of the Constitution is also an important provision. It says that all courts function in terms of national legislation and their rules and procedures must be provided for in terms of national legislation. This, again, demarcates, the different spheres of responsibility of the legislature, on the one hand, and the courts, on the other, in so far as jurisdiction is concerned. The Constitution provides that the courts function in terms of national legislation. The rules and procedures of the courts must also be provided for in terms of the national legislation.

70 The national legislation governing the High Courts is the Superior Courts Act 10 of 2013 and the legislation governing the Magistrates' Courts is the Magistrates Court Act 32 of 1994.

71 These statutes are therefore specifically envisaged under the Constitution.

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75 *Standard Credit Corporation LTD v Bester and Others* 1987 (1) SA 812 (W) 818.

72 Section 21 of the Superior Courts Act says that the divisions of the High Court have jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance. The jurisdiction of the High Courts is therefore set on the basis of their area of jurisdiction. There is no monetary limit to the jurisdiction of the High Court. Parliament has therefore chosen not to deprive the High Courts of jurisdiction based on the monetary value of the claim.

73 The two statutes delineate the jurisdiction of the divisions of the High Courts as well as the Magistrates' Courts. They also deal with the issue of the concurrent jurisdiction of the courts.

73.1 In the case of the High Courts, Parliament has regulated the circumstances in which a matter may be transferred between High Courts (see section 27 of the Superior Courts Act).

73.2 In the case of the Magistrates' Courts, Parliament has also regulated when matters may be transferred between Magistrates' Courts (see section 35 of the Magistrates Courts Act).

73.3 In so far as the concurrent jurisdiction of the Magistrates and the High Courts is concerned, Uniform Rule 39(22) provides a mechanism for parties in the High Court to move their matter to a Magistrates' Court. The rule provides for parties, by consent, to apply to a judge to have their matter transferred to any Magistrates' Court with jurisdiction.

74 The common law rule of mandatory jurisdiction therefore operates in a system of concurrent jurisdiction between the High Courts and the Magistrates' Courts and it requires a court, which has jurisdiction over a matter brought before it, to exercise that jurisdiction.

75 The SAHRC argues that the mandatory jurisdiction rule poses a threat to judicial independence.[76] This was not an argument it made before the Full Court or the Supreme Court of Appeal.

76 It now claims that "it would be inconsistent with judicial independence to prevent the High Court from managing the rational use of judicial resources by requiring that matters capable of being more appropriately decided at a lower court level, are decided by lower courts."[77] It therefore seeks a development of this common law rule, but it never came to court to seek one, nor did it follow the correct method for common law development.

Common law development

77 This Court has repeatedly cautioned litigants about the need to present a properly pleaded case for common law development. In *Everfresh*, the Court held as follows:

> "*It is so that the test on proper pleading in Prince related to a challenge to the constitutional validity of a provision in a statute. That test however is of equal force where, as in the present case, a party seeks to invoke the Constitution in order to adapt or change an existing precedent or a rule of the common law or of*

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76 SAHRC heads of argument para 20

77 SAHRC heads of argument para 23

customary law in order to promote the spirit, purport and objects of the Bill of Rights. Litigants who seek to invoke provisions of section 39(2) must ordinarily plead their case in the court of first instance in order to warn the other party of the case it will have to meet and the relief sought against it. The other obvious benefit is that the High Court and the Supreme Court of Appeal will be afforded the opportunity to help shape the common law and customary law in line with the normative grid of the Constitution." (footnote omitted)

78 The SAHRC's affidavit supporting its application to be admitted as an *amicus curiae* in the High Court did not even refer to section 39(2) of the Constitution.[78] Its argument also did not engage section 39(2). Its case in the High Court was concerned with the interpretation of the "may" in section 169 of the Constitution and an argument about the courts using their inherent powers to regulate their own processes in order to justify transferring matters to the Magistrates' Courts.

79 This Court has also held that courts must only develop the common law incrementally and on a case-by-case basis,[79] driven by the facts before the Court.[80] The Courts must always be mindful that the major engine for law reform should be the legislature and not the judiciary.[81] Wholesale changes to the common law are more appropriately made by way of legislation.[82]

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78 SAHRC's affidavit supporting its *amicus* application in the High Court, Record Vol 1, pages 25 to 34

79 *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) at para 44

80 *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007 (5) SA 30 (CC) at para 31 and *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 60

81 *Carmichele* at para 36

82 *Mighty Solutions* at para 44

80 One reason for this caution is that in a constitutional democracy, the legislature, and not the courts, is the body democratically elected to govern the country.[83] If the courts usurp this power, it will disturb the separation of powers.[84]

81 Another important reason for this caution is that in polycentric and policy-laden rule-making decisions,[85] there are implications for each broad-based rule that is made, which the court cannot anticipate without the kind of data, evidence and consultation ordinarily available to a legislature or rule-making body. As we set out above, the appropriate facts were simply not before the Full Court in this case.

82 The SAHRC's case for developing the common law rule of mandatory jurisdiction therefore fails to get out of the starting blocks. It was not properly pleaded before the High Court nor properly motivated before any court.

83 In addition, the SAHRC's new argument before this Court, that mandatory jurisdiction rule poses a threat to judicial independence, is also incorrect.

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83 *Du Plessis v de Klerk and Another* 1996 (3) SA 850 (CC) at para 61

84 *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at para 95

85 *International Trade* at para 95

Judicial independence

84 The importance of the independence of the judiciary in our constitutional dispensation cannot be gainsaid. Judicial independence both safeguards the constitutional order and maintains public confidence in the administration of justice.[86]

85 Central to the judiciary's independence is freedom from external pressures. Recently, this Court reaffirmed that judicial independence is an incident of the rule of law. It held that the courts' independence must be impenetrable and resistant to external pressures.[87] This is because the courts "rely solely on the trust and confidence of the people to carry out their constitutionally-mandated function".[88]

86 This Court has repeatedly recognised that freedom from external pressure is an integral part of judicial independence.[89] It was described by Dickson CJ of the Supreme Court of Canada in *Canada v Beauregard*,[90] as follows:

> *"[T]he generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her*

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86 *Van Rooyen v the State* 2002 (5) SA 246 (CC) para 22

87 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18 para 1

88 *Zuma* para 1

89 See, for example, *De Lange v Smuts* para 69; *Van Rooyen* para 19; and *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC) para 68

90 *Canada v Beauregard* [1986] 2 S.C.R 56 at 69

case and makes his or her decision. This continues to be central to the principle of judicial independence."[91]

87 In *Van Rooyen*, Chaskalson CJ noted that independence requires not only that the courts and judicial officers must be independent, but they must also be *perceived* to be so.[92]

88 In *Justice Alliance*, this Court also held that "[t]he truth may be different, but it matters not. What matters is that the judiciary must be seen to be free from external interference."[93] This is essential for public confidence in the administration of justice as well as for the respect that is needed for the effective operation of the Court. The test for the perception of independence is whether the court or judicial officer, "from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence."[94]

89 The SAHRC argues that the mandatory jurisdiction rule is incompatible with judicial independence because it does not leave the courts free to decide what cases to hear and what cases to send elsewhere. However, the concern for judicial independence goes the other way.

90 The case of *Justice Alliance* makes it plain how damaging discretionary decision-making can be to the protection of judicial independence. *Justice Alliance* concerned the constitutionality of section 8(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 (*Remuneration Act*). The section allowed the President to request a Chief Justice, who was about to be discharged from active service, to continue

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91 Our emphasis

92 *Van Rooyen* para 32, referring to *Valene v The Queen* 172

93 *Justice Alliance* para 68

94 *Van Rooyen* para 32

office as the Chief Justice for an additional period, determined by the President, if the Chief Justice acceded to that request.

91 The question was whether that section was incompatible with section 176 of the Constitution, which provides that a Constitutional Court judge holds office for a non-renewable term of 12 years or until he or she reaches the age of 70 years, whichever happens first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.

92 This Court held that section 8(a) was in conflict with section 176 of the Constitution for two reasons. The first was that section 8(a) amounted to an unlawful delegation of a legislative power and the second was that the conferral of a discretion on the executive violates the principle of judicial independence. It is the second reason that is relevant to this case.

93 In *Justice Alliance*, this Court reasoned that legislation that vested a discretion in the head of the executive to ask a Chief Justice to remain in office, despite the period prescribed by the Constitution, may give rise to "a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the executive".[95] This apprehension arose because section 176 of the Constitution vested the power to extend the term of a constitutional court judge in Parliament and not the executive.

94 The parallels to the current case are significant. In this case, section 169 of the Constitution says that it is Parliament that may assign matters to remove them from the jurisdiction of the High Courts. The common law rule of mandatory jurisdiction works within that scheme because it requires courts to decide the cases that fall within their

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95 *Justice Alliance* para 68

jurisdiction. However, now the SAHRC seeks a development of that rule to vest a discretion in the courts to decline to hear cases, and rather send them to another court in circumstances where Parliament has not endorsed that assignment.

95 While it is no doubt so that a court's refusal to entertain a case may have the noblest of motivations – such as the rights of indigent debtors – the point about a discretion is that it will not always and only be applied in one way.[96] On the facts of *Justice Alliance*, when Chief Justice Ngcobo's term was sought to be extended by the President, it was also done with the noblest of intentions – to ensure continuity within the judiciary and to build stability.[97] However, the point about the exercise of a discretion, which impacts judicial independence, is that because the exercise of a discretion is not rule-bound, it invites an apprehension that external pressure is being applied to the judiciary.[98]

96 Imagine a politically charged case – one where the outcome of the judgment is closely watched by the public. Then imagine a court declining to hear the matter and transferring it to another court. In such a situation, the public may legitimately question why the case was moved and may lose confidence in the independence of the judiciary, if judges are perceived to be reluctant to decide the difficult or politically charged cases.

97 The existing rule of mandatory jurisdiction does not permit a court to decline to hear a case that is properly before it, unless it constitutes an abuse of process. Because it requires courts to decide cases, it insulates them from the speculation that will follow from some cases being decided and others being shifted to another court.

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96 *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) para 9

97 *Justice Alliance* para 9

98 *Justice Alliance* para 68

98 In the context of judicial independence, therefore, rules matter because they remove from the equation the concern that external pressures are being brought to bear on the judiciary. If courts are required to decide the cases that come before them within their jurisdiction, then there can be no perception that their decisions about what cases to hear are the product of external pressure.

99 The rule of mandatory jurisdiction is therefore not incompatible with the jurisdictional scheme of the courts. On the contrary, it lives appropriately alongside the power that the Constitution gives to Parliament to pass national legislation demarcating the remit of the different courts' jurisdiction. It has also not been shown, on the facts of this case, to infringe indigent debtors' rights of access to courts.

100 It should not, therefore, be jettisoned for a rule that introduces a discretion that holds the potential to undermine the independence of the judiciary.

LEAVE TO APPEAL

101 This Court will only grant leave to appeal where:[99]

101.1 the matter engages the Court's jurisdiction, either as a constitutional issue or because it concerns an arguable point of law of general public importance that ought to be considered by the Court; and

101.2 it is in the interests of justice for leave to be granted.

102 A finding that there is jurisdiction in this case is not enough to grant the SAHRC leave to appeal. Leave may be refused if it is not in the interests of justice that the Court should hear the appeal.[100]

103 In order to grant leave to appeal, the Court will weigh up and carefully consider the relevant factors.[101] There is no exhaustive list, but the prospects of success on appeal is an important factor.[102]

104 We have devoted the majority of these heads of argument to addressing the SAHRC's arguments on the merits. However, this approach should not be understood to mean that Standard Bank accepts that leave to appeal should be granted in this matter. On the contrary, it is precisely because the SAHRC's prospects of success on the merits are so

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99 Section 167(3)

100 *S v Boesak* 2001 (1) SA 912 (CC) para 12

101 *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* [2005 (4) SA 319 (CC) para 19; and *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (C) para 46

102 *EFF v Gordhan* para 46; *S v Boesak* paras 11-12. See, for example, *Bruce v Fleecytex Johannesburg CC* 1998 (2) SA 1143 (CC) para 6 where the Court held that "if there are reasonable prospects of success that the appeal will succeed, there are compelling reasons for granting the leave."

weak, that we submit that a refusal of leave to appeal would be the appropriate order in this case.

CONCLUSION

105 Under the direction of the Judge President, the Full Court embarked on a laudable objective: to determine whether debtors' rights were being infringed because the banks were choosing to bring foreclosure matters in the High Courts rather than in the Magistrates' Courts.

106 It is difficult not to have some sympathy for the challenges that the judgment of the Full Court shows the Pretoria High Court is facing. It has considerable difficulties in meeting the demands of its roll. The judgment of the Full Court also raises a serious question about whether debtors are not defending actions against them *because* they are litigated in courts further from them.

107 Both of these issues are important concerns. However, they did not justify the new rule that that Full Court developed that requires all plaintiffs, who could litigate in the Magistrates' Court, to bring their claims in the Magistrates' Courts.

108 We have shown that the order of the Full Court is:

108.1 incompatible with section 169 of the Constitution and the role given to Parliament to remove matters from the jurisdiction of the High Courts; and

108.2 fatally flawed because of an absence of the necessary facts to conclude that indigent debtors' rights of access to courts are being infringed or that shifting all the cases that could be litigated in the Magistrates' Courts to those courts is the remedy for any such infringement that may be found.

109 We have also shown that the SAHRC's new argument, that the mandatory jurisdiction rule is incompatible with judicial independence, is wrong. In fact, judicial independence is enhanced by the rule.

110 The overburdened Pretoria High Court roll should be addressed. A proper analysis should be conducted to determine whether more defendants would defend actions against them if the litigation was brought closer to them. If the conclusion of that analysis is that they would, then considerations of resource allocation and skills development will become relevant in order to ensure that shifting all such claims to Magistrates' Court will not retard access to justice for all those who litigate in the Magistrates' Courts. However, those are steps that Parliament must take. It is the proper engine for law reform, not the courts.

111 For the reasons set out above, Standard Bank asks that the SAHRC's application for leave to appeal is dismissed, *alternatively* that the appeal is dismissed.

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23 March 2022

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT291/21

SCA Case No: 38/2019 & 47/2019

In the matter between:

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Applicant

And

THE STANDARD BANK OF SOUTH AFRICA LIMITED	1st Respondent
NEDBANK LIMITED	2nd Respondent
FIRSTRAND BANK LIMITED	3rd Respondent
EZRA MAKIKOLE MPONGO	4th Respondent
MYRA GERALDINE WOODITADPERSAD	5th Respondent
RADESH WOODITADPERSAD	6th Respondent
JOYCE HLUPHEKILE MKWINIKA	7th Respondent
KARIN MADIAU SAMANTHA LEMPA	8th Respondent
NEELSIE GOEIEMAN	9th Respondent
ANGELINE ROSE GOEIEMAN	10th Respondent
JULIA MAMPURU THOBEJANE	11th Respondent
AUBREY RAMORABANE SONKO	12th Respondent
ONESIMUS SOLOMON MATONE MALATJI	13th Respondent
MODIEGIE PERTUNIA MALATJI	14th Respondent
GRACE M MAHLANGU	15th Respondent
KEY HINRICH LANGBEHN	16th Respondent

FILING SHEET

SECOND RESPONDENT'S DOCUMENTS PRESENTED FOR FILING :

1. **Written Submissions**

2. **Practice Note**

3. **Table of Authorities**

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 291/2021

SCA CASE NOs: 38/2019 AND 47/2019

In the matter between:

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Applicant
And	
THE STANDARD BANK OF SOUTH AFRICA LIMITED	1st Respondent
NEDBANK LIMITED	2nd Respondent
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ONESIMUS SOLOMON MATOME MALATJI	13th Respondent
MODIEGI PERTUNIA MALATJI	14th Respondent
GRACE M MAHLANGU	15th Respondent
KEY HINRICH LANGBEHN	16th Respondent

WRITTEN SUBMISSIONS OF THE SECOND RESPONDENT (NEDBANK)

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INTRODUCTION

1 The applicant ("SAHRC") seeks leave to appeal against the judgment and order of the Supreme Court of Appeal handed down on 21 June 2021 (**"**the SCA judgment"),[1] but only to the extent that it upheld an appeal against the order of the Full Court in Gauteng ("the Full Court").[2]

2 The SAHRC was admitted as an *amicus curiae* in the hearing before the Full Court and also appeared before the SCA as an *amicus curiae.*

3 The second respondent ("Nedbank") does not dispute the SAHRC's standing to bring the application for leave to appeal. However, Nedbank opposes the application for leave to appeal and the appeal itself.

4 Our heads of argument are organised as follows:

4.1 We begin by dealing with the application for leave to appeal. We submit that there are several reasons why it would not be in the interests of justice to grant leave to appeal against the order of the Full Court.

4.2 Thereafter we deal with the merits of the appeal. We submit that the SAHRC's criticisms of the SCA judgment are misdirected and that the SCA judgment is correct.

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1 Volume 6 page 497.

2 Volume 5 page 380.

4.3 Finally, we consider what relief should be granted if this Court were to uphold the appeal. In such an event, we submit that paragraph 1 of the order of the Full Court should not be reinstated.

THE APPLICATION FOR LEAVE TO APPEAL SHOULD BE DISMISSED

The SAHRC does not seek leave to appeal in the Eastern Cape matter

5 The SCA judgment dealt with two discrete appeals that had been argued before it on the same occasion. The first was an appeal against a decision of the Full Court in Gauteng under case numbers 38/2019 and 47/2019 ("the Gauteng matter"). The second was an appeal against a decision of the Full Court in the Eastern Cape under case number 999/2019 ("the Eastern Cape matter").

6 The SCA upheld both appeals and substituted the orders in both matters. The substituted order was the same in each case save that the order in the Gauteng matter contains an additional paragraph dealing with concurrent jurisdiction between the main seat and the local seat of a Division of the High Court.

7 The substituted orders became the orders of the Full Court in each matter.[3] In other words, they are not orders of the SCA; they are rather the orders that ought to have been given by the Full Court in each case.[4] It follows that the substituted

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3 *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality* 2012 (9) BCLR 951 (CC) para 7 ("It is usual that in a successful appeal, the appellate court may make the order that the court of first instance should have made. That order then becomes the order of the court of first instance….")

4 *General Accident Versekeringsmaatskappy SA Bpk v Bailey* [1988] 4 All SA 614 (A) at 616 ("In die praktyk kom dit daarop neer dat die Hof van appèl sy uitspraak stel in die plek van dié van die Verhoorhof - hy gee die uitspraak wat die Verhoorhof in die eerste instansie moes gegee het. Vandaar die gebruik om die bevel van die Verhoorhof te vervang met dié van die Hof van appèl …. Dit is nie 'n 'nuwe' vonnis nie, asof 'n Hof van appèl 'n Hof van eerste instansie is (wat nie die geval is nie), maar die gewysigde vonnis van die Verhoorhof, dws die vonnis wat die Verhoorhof moes gegee het.")

orders would apply in Gauteng province and in the Eastern Cape province, respectively.

8 Although the SAHRC had been an *amicus curiae* in the consolidated SCA hearing, it elected not to seek leave to appeal in the Eastern Cape matter. The SAHRC makes this clear in paragraph 22 of its founding affidavit[5] and in prayer 3 of its notice of motion.[6]

9 The SAHRC's election to seek leave to appeal only in the Gauteng matter gives rise to several practical difficulties. The problem is that the substituted order in the Eastern Cape matter is formulated in the same terms as the substituted order in the Gauteng matter.[7] If the appeal of the SAHRC were to succeed, the order of the Full Court in the Gauteng matter may be reinstated or this Court may grant some other order in its place. However, the substituted order in the Eastern Cape matter would be unaffected. It follows that there would then be two orders dealing with the same issues, namely (*i*) the order in the Eastern Cape matter as substituted by the SCA, and (*ii*) the order in the Gauteng matter that would (*ex hypothesi*) have been substituted by this Court.

10 Such an outcome would not be in the interests of justice because there would be different orders operating in different provinces. Even if the reasoning of this Court were to indicate disapproval of the substituted order in the Eastern Cape

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5 Volume 6 p 558.

6 Volume 6 p 547.

7 The only material difference is that the order in the Eastern Cape matter does not deal with overlapping jurisdiction between a main seat and a local seat of the High Court.

matter, this Court would have no jurisdiction to overturn that order since the SAHRC did not seek leave to appeal against it.

The application for leave to appeal is out of time

11 The SCA judgment was handed down on 25 June 2021.[8] The SAHRC was required to apply for leave to appeal to this Court by no later than 16 July 2021. The application was served, unissued, on Nedbank on 17 September 2021 – some two months late.

12 We respectfully submit that the SAHRC has offered no proper explanation for its delay.

13 The SAHRC says that it needed to secure internal approval to seek leave to appeal.[9] It does not explain when such approval was sought or when it was granted. The SAHRC merely says that "the internal processes are lengthy".[10] But in the absence of any explanation of what those internal processes involve, the Court is not in a position to make an assessment of this explanation. In any event, the SAHRC cannot rely on self-created hindrances for failing to comply with the Rules of this Court.

14 The SAHRC says that it wrote to the Legal Resources Centre on 29 June 2021, seeking advice on its standing to bring the application for leave to appeal and to

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8 Founding affidavit: Volume 6 p 558 para 20.

9 Founding affidavit: Volume 6 p 581 para 69.

10 Founding affidavit: Volume 6 p 581 para 70.

find out if the Legal Resources Centre would continue to act.[11] It does not say whether this was done before or after securing the internal approval referred to above. The SAHRC merely says that the Legal Resources Centre had to follow its own internal processes to decide whether it would continue to act for the SAHRC.[12]

15 The founding affidavit says that while the SAHRC was in the process of corresponding with its attorneys, the unrest in the provinces of KwaZulu-Natal and Gauteng started.[13] Once again, no dates are given. It is alleged that "this unrest made it impossible for us and our attorneys to work on this application, as some of our attorneys staff members were severely affected by the unrest."[14] The SAHRC does not say who was working on the application or how they were affected by the unrest. In the absence of any detail, this Court is not a position to assess the alleged impact of the unrest.

16 We therefore submit that the SAHRC has failed to make out a proper case for condonation.

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11 Founding affidavit: Volume 6 p 582 para 71.

12 Founding affidavit: Volume 6 p 582 para 72.

13 Founding affidavit: Volume 6 p 582 para 73.

14 Founding affidavit: Volume 6 p 582 para 74.

Prospects of success on appeal

17 We respectfully submit that the SAHRC does not have reasonable prospects of success on appeal. The reasons for this will be set out in the next section of our heads of argument.

Conclusion

18 For all the reasons set out above, we submit that the application for leave to appeal should be dismissed.

THE APPEAL SHOULD BE DISMISSED

19 In the event that this Court were to grant leave to appeal, we submit that the appeal should be dismissed.

Nedbank's practice in cases of concurrent jurisdiction

20 Nedbank's affidavit before the Full Court explained that its practice is to sue out of the High Court when it seeks to recover a debt that falls within the monetary jurisdiction of the Magistrates' Court in circumstances where:[15]

- immovable property is sought to be declared specially executable;

- a motor vehicle is sought to be recovered; or

- it is a complicated matter that deserves the attention of the High Court.

21 A nuanced set of considerations has led Nedbank to adopt this practice. We summarise some of those considerations below, in order to rebut any suggestion that Nedbank's decision to sue out of the High Court may be branded an abuse of process.

22 Where a debt is secured by a mortgage bond, the immovable property will normally be the residential home of the debtor. Taking away someone's home is

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15 Sorgdrager: volume 2 page 163 para 37.

a drastic step that is deserving of the High Court's scrutiny and oversight.[16] As evidence of the gravity of the step, Uniform Rule 31(5)(b) requires such a matter to be considered by a Judge, unlike other matters in respect of which default judgment may be granted by the Registrar.[17] It involves a delicate balancing of competing rights and interests,[18] and a court may delay execution where there is a real prospect that the debt might yet be paid.[19]

23 When it comes to motor vehicles, the position is as follows:[20]

23.1 A motor vehicle is a depreciating asset. Time is of the essence to recover and sell the vehicle, especially where the vehicle is not insured (which is often the case when a client is in default). This is necessary in order to contain the outstanding balance that a client may be left to settle after the motor vehicle has been sold on auction.

23.2 Because of the movable nature of the asset and the tendency of some debtors to move the asset around, it is of little value to Nedbank to obtain judgment in a Magistrates' Court since the motor vehicle may be located outside the area of jurisdiction of that Court. It is important for Nedbank

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16 Sorgdrager: volume 2 page 171 para 68. This Court has held that "the indignity suffered through the loss of one's home, even on a temporary basis, will always cause irreparable harm" (*Mathale v Linda* 2016 2 SA 461 (CC) para 43).

17 See *Gundwana v Steko Development* CC 2011 3 SA 608 (CC) especially para 49 ("An evaluation of the facts of each case is necessary in order to determine whether a declaration that hypothecated property constituting a person's home is specially executable, may be made. It is the kind of evaluation that must be done by a court of law, not the registrar.")

18 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (1) BCLR 78 (CC) paras 41 to 43.

19 *Standard Bank of SA Ltd v Saunderson* 2006 (9) BCLR 1022 (SCA) para 20.

20 Sorgdrager: volume 2 page 170 para 69.

to obtain a High Court order, since this can be given to the sheriff in whose jurisdiction the motor vehicle happens to be for purposes of execution.

23.3 It is in the interests of all parties that the value of the asset is preserved and that its disposal takes place in a speedy process in order to contain the accumulation of costs which are added to the debt. Nedbank seeks to obtain a High Court judgment so that the order may be executed with expedition.

24 Where a matter falls within the monetary jurisdiction of the Magistrates' Court and Nedbank sues out of the High Court, Nedbank asks for costs on the Magistrates' Court scale.[21] From the perspective of a defendant, the costs are no greater than the costs that he or she would have been ordered to pay if the action had been instituted in the Magistrates' Court.

25 Very few of these matters are opposed, if they go to court at all.[22] In cases where a defendant has no intention of opposing an action, he or she suffers no prejudice by virtue of the fact that the action has been sued out of the High Court rather than the Magistrates' Court.

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21 Sorgdrager: volume 2 page 172 para 72.

22 Sorgdrager: volume 2 page 172 para 74.

26 Distressed debtors who wish to defend proceedings will generally have better prospects of finding *pro bono* legal representation in the High Court because of the location of societies of advocates in the urban hubs.[23]

27 These are some of the considerations that guide Nedbank's decision to use the High Court in circumstances where the Magistrates' Court has concurrent jurisdiction. It represents a conscientious and rational decision on the part of Nedbank, and cannot possibly be described as an abuse of process.

The reasoning of the Full Court

28 The SAHRC seeks to defend the reasoning of the Full Court. We therefore address the main elements of the Full Court's judgment below and submit that the judgment was incorrect in material respects.

29 The judgment of the Full Court grappled with a single overriding question: in circumstances where the High Court and the Magistrates' Court are vested with concurrent jurisdiction, on what principled basis may the High Court decline to hear the matter?

30 In answering this question, the Full Court held – correctly – that section 34 of the Constitution does not guarantee a right of access to a particular court.[24] The Full Court reached this conclusion in relation to the position of plaintiffs, but we submit that the same conclusion must also apply in relation to the position of defendants. The right of access to Court in section 34 of the Constitution cannot mean that a

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23 Sorgdrager: volume 2 page 173 para 77.

24 Full Court judgment: volume 5 page 396 para 32.

plaintiff is not entitled to choose a court of convenience but that a defendant is entitled to choose a court of convenience.

31 This created a logical conundrum for the Full Court: if section 34 of the Constitution does not allow the High Court to decline to hear a matter that falls within its jurisdiction, what principle does allow the High Court to do so? The Full Court sought to answer this question by having regard to three principles (although it did not distinguish clearly between them): "inherent jurisdiction", "access to justice" and "abuse of process". We consider each principle in turn, and show that none of them provides a way out of the logical conundrum that confronted the Full Court.

Inherent jurisdiction

32 The Full Court held that the High Court may exercise its inherent jurisdiction in terms of section 173 of the Constitution to decline to hear a matter that falls within its jurisdiction.[25]

33 We respectfully submit that the Full Court erred. The SCA held in *Oosthuizen*[26] that the High Court's inherent jurisdiction to regulate its own process "does not extend to the assumption of jurisdiction which it does not otherwise have".[27] We submit that a similar principle applies in reverse: the High Court's inherent jurisdiction does not extend to refusing to exercise jurisdiction that it does have.

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25 Full Court judgment: volume 5 page 414 para 69.

26 *Oosthuizen v RAF* 2011 6 SA 31 (SCA).

27 Para 17.

Inherent jurisdiction is a reservoir of residual power that may be used in order to allow a High Court to perform its functions, not to avoid its functions.

34 In short, the High Court may not utilise its inherent jurisdiction in order to decline to hear a matter that falls within the jurisdiction that has been conferred on it by the Constitution and the Superior Courts Act 10 of 2013 ("the Superior Courts Act"). That was the finding of the SCA.[28]

Access to justice

35 The Full Court stated that the issues in this case "have a bearing on the constitutional right of access to court".[29] It said that "the advent of the Constitution has introduced access to justice as a primary consideration", and held that this "calls for a new approach where High Courts are regulating its process with regard to access to justice".[30]

36 The Full Court took the view that "access to justice" involves recourse to section 34 of the Constitution.[31] But this creates an obvious problem because the Full Court had already held that section 34 does not permit a plaintiff to choose a particular court. The problem is this:

36.1 The Full Court held that section 34 of the Constitution "does not entitle a person to access a particular court or tribunal".[32] That is consistent with

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28 SCA judgment: volume 6 page 525 paras 55 to 57.

29 Full Court judgment: volume 5 page 396 para 30.

30 Full Court judgment: volume 5 page 403 para 46.

31 Full Court judgment: volume 5 page 396 para 30.

32 Full Court judgment: volume 5 page 396 para 32.

the jurisprudence of this Court, which has held that "the guarantee in section 34 of the Constitution does not include the choice of procedure or forum in which access to courts is to be exercised."[33]

36.2 However, the Full Court proceeded to contradict itself by stating:

- that "the access to court should also take into consideration the rights of defendants or respondents";[34]

- that "the plaintiff's rights should not dictate the choice of court at the expense of access to justice";[35] and

- that section 34 of the Constitution means that "the position that a plaintiff is dominus litis and can choose any forum that suits him/her is at best outdated".[36]

36.3 If section 34 of the Constitution does not entitle a plaintiff to access a particular court (which is what the Full Court held), then section 34 cannot be relied upon for the conclusion that a defendant has a right to litigate in a court of his or her choice. In other words, section 34 of the Constitution cannot have one meaning for a defendant and a different meaning for a plaintiff.

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33 *Mukaddam v Pioneer Foods (Pty) Ltd and others* 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) para 28, our underlining.

34 Full Court judgment: volume 5 page 401 para 42.

35 Full Court judgment: volume 5 page 401 para 42.

36 Full Court judgment: volume 5 page 419 para 79.

37 In support of "access to justice", the Full Court also referred to section 7(1) and section 8(1) of the Constitution.[37] But this begs the question as to what constitutional right must be "respected", "protected" and "promoted". It could not be the right in section 34 of the Constitution for the reasons given above, and the Full Court did not identify any other rights that might be relevant.

38 In any event, there is no evidence in the record to show that defendants are routinely denied access to justice when a matter is litigated in the High Court rather than in the Magistrates' Court:

38.1 The Full Court stated that "often impecunious defendants or respondents will have to travel in person from distances far away from the Court, to appear and oppose these matters, in other instances being unable to appear in person, due to the prohibitive transport and other costs".[38] However, nothing in the record supports this. There is not a scrap of evidence to show that a defendant who was minded to oppose a matter, had been unable to do so because of the costs of getting to the High Court or the costs of litigating in the High Court as opposed to the Magistrates' Court.

38.2 In its application for leave to be admitted as an *amicus curiae* before the Full Court, the SAHRC had hinted that it may adduce evidence to this effect. It said that it would make "submissions" regarding "the costs that a respondent will face when defending an application in the High Court

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37 Full Court judgment: volume 5 page 412 para 64.

38 Full Court judgment: volume 5 page 381 para 3.

as compared to an application in the Magistrate's Court" and "the impact that additional costs will have on the debtor's financial position".[39] However, no evidence was forthcoming from the SAHRC.

38.3 The Minister also put up no evidence on these matters. The Minister's affidavit merely asserted that "forcing a defendant to settle a dispute that falls within the monetary jurisdiction of the Regional or District Court, in the High Courts, has the effect of denying such a defendant a fair hearing and by extension violates the right guaranteed in terms of section 34".[40] However, the Minister's affidavit offered no substantiation for this conclusion.

38.4 There was accordingly no evidential basis on which the Full Court could conclude that any defendants had been denied access to justice by virtue of the institution of proceedings in the High Court rather than the Magistrates' Court. That was the finding of the SCA.[41]

39 For all of these reasons, we submit that the principle of "access to justice" does not support the conclusions of the Full Court.

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39 Founding affidavit: volume 1 page 31 paras 22.1 and 22.2.

40 Skosana volume 3 page 272 para 20.

41 SCA judgment volume 6 page 531 para 61.

Abuse of process

40 *Bester* held that the High Court has inherent jurisdiction "to prevent an abuse of process",[42] and that an abuse of process occurs when the procedure of the court "is used for a purpose for which it was not intended or designed, to the prejudice or potential prejudice of the other party to the proceedings".[43]

41 In *Beinash v Wixley,*[44] the SCA referred to *Bester*[45] when holding that "an abuse of process takes place where the procedures permitted by the Rules of Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective".[46]

42 We accept that the High Court may decline to hear a matter that falls within its jurisdiction on the basis that its process is being abused. But that can only be the position where the High Court considers the facts of a particular case and concludes that the plaintiff is abusing the process of the Court in that case. In other words, a finding that there has been an abuse of process must necessarily involve a fact-specific enquiry.

43 The Full Court did not engage in such an enquiry. Instead, it held that in all cases it would be an abuse of process for a plaintiff to use the High Court if the Magistrates' Court also has jurisdiction. There was no basis for this finding:

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42 Standard Credit Corporation Ltd v Bester 1987 (1) SA 812 (W) at 819E.

43 At 820B.

44 1997 3 SA 721 (SCA).

45 At 734G.

46 At 734G

43.1 The Full Court held that it was axiomatically an abuse of process for the banks to sue out of the High Court in circumstances where they could have sued out of the Magistrates' Courts.[47] In other words, "it is an abuse of process to allow a matter which can be decided in the Magistrates' Court [or] a Local Division of the High Court to be heard in the Provincial Division simply because it has concurrent jurisdiction".[48] This finding is incorrect. It cannot be said that "the procedures permitted by the Rules of Court to facilitate the pursuit of the truth are [being] used for a purpose extraneous to that objective"[49] merely because a plaintiff has elected to use one court rather than another. This is especially so where the banks have explained why they sue out of the High Court rather than the Magistrates' Court.

43.2 The Full Court held that "it must constitute abuse" to sue out of the High Court "if impecunious litigants are denied proper access to justice, or the High Court is incapable of dealing property and effectively with its workload".[50] Again, there is no basis for this finding. The banks explained why they choose to litigate in the High Court rather than the Magistrates' Court.[51] In the face of that explanation, the Full Court could

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47 Full Court judgment: volume 5 page 420 para 81

48 Full Court judgment: volume 5 page 418 para 76.

49 *Beinash v Wixley* (supra) at 734G.

50 Full Court judgment: volume 5 page 406 para 52.

51 The reasons are summarised in the Full Court judgment: volume 5 page 385 para 10.

not permissibly conclude that the banks were abusing the process of court.

43.3 The Full Court held that "if a litigant bypasses the Magistrates' Court such litigant is actually defying the attempt by the legislature to bring justice to the people".[52] That is incorrect. A litigant who has an election whether to sue in the High Court or the Magistrates' Court, does not "by-pass" the latter by suing in the former. One might as well say that a litigant who sues in the latter is "by-passing" the former.

43.4 The Full Court stated that "it is an abuse of the rules to approach this Court in instances where there is denial of access to justice and the consequent delay of litigation, which is otherwise intended for this Court".[53] There was no evidential basis for the Full Court to reach this conclusion. As indicated above, it cannot be said that "the procedures permitted by the Rules of Court to facilitate the pursuit of the truth are [being] used for a purpose extraneous to that objective"[54] merely because a plaintiff has elected to use one court rather than another.

The reasoning of the SCA

44 The SCA held that that the High Court may not decline to exercise jurisdiction that it shares concurrently with the Magistrates' Court. It found that the judgment

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52 Full Court judgment: volume 5 page 417 para 74.

53 Full Court judgment: volume 5 page 419 para 78.

54 *Beinash v Wixley* (supra) at 734G.

of the Full Court was flawed "at its very root" because it was based on "the fundamental misconception that a High Court can decline to hear a matter which is within its jurisdiction".[55]

45 The SCA accordingly set aside the order of the Full Court and replaced it with an order declaring that "the High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrates' Court because the High Court has concurrent jurisdiction".[56]

The SAHRC's criticisms of the SCA judgment

46 The SAHRC offers a number of criticisms of the SCA judgment. We address each of those criticisms in turn and show that they are unfounded.

<u>The SAHRC's reliance on section 34 of the Constitution</u>

47 The SAHRC contends that

> "section 34 of the Constitution should be interpreted to require that respondents be given a meaningful opportunity to present their legal arguments and evidence to court. Measures must be taken to reduce the economic, social and geographical barriers that prevent a respondent's success to the court."[57]

48 However, the SAHRC's argument is internally inconsistent because the SAHRC agrees with the Full Court that "section 34 does not entitle a person to access a

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55 SCA judgment volume 6 para 39 page 519.

56 SCA judgment volume 6 para 88 page 543.

57 Founding affidavit: Vol 6 p 571 para 46.

particular court or tribunal."[58] If section 34 does not entitle a plaintiff to access a particular court (as this Court held in *Mukaddam*),[59] then section 34 cannot be relied on to say that defendants have a right to be sued in the Magistrates' Court rather than in the High Court.

49 The foreign authorities referred to by the SAHRC take the argument no further.[60]

The SAHRC's reliance on section 169(1) of the Constitution

50 The SAHRC's most expansive argument involves its reliance on section 169(1) of the Constitution. The SAHRC argues that, since section 169(1) uses the word "may" rather than "must", it confers on the High Court a discretion to decline to hear a matter in circumstances where the Magistrates' Court has concurrent jurisdiction. The SAHRC concludes that the "mandatory jurisdiction principle" is no longer applicable in the constitutional era.

51 We respectfully submit that the SAHRC has misconstrued the import of section 169(1) of the Constitution.

52 Section 169 of the Constitution regulates what sorts of matters may be determined by "the High Court of South Africa" as a unitary body (i.e. without regard to the position of particular Divisions). Section 168 does the same thing in relation to the Supreme Court of Appeal, as does section 167 in relation to this Court. As the SCA held, "the term 'may decide' simply means that each court is

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58 SAHRC Heads of Argument para 26.

59 *Mukaddam v Pioneer Foods (Pty) Ltd and others* 2013 (5) SA 89 (CC) para 28.

60 SAHRC heads of argument paragraphs 27 to 41.

empowered to decide the types of cases listed in the various empowering sections".[61]

53 Section 169(1) does not use the word "jurisdiction" and it does not deal with the particular circumstances in which "the High Court of South Africa" may adjudicate on a matter falling within the ambit of section 169(1). On the contrary, it leaves that task to the legislature. Section 169(2) provides in express terms that "the High Court of South Africa consists of the Divisions determined by an Act of Parliament", and requires that an Act of Parliament "must provide for … the assigning of jurisdiction to a Division or a seat within a Division".

54 The legislation envisaged by section 169(2) takes the form of the Superior Court Act. It creates Divisions of the High Court,[62] all of which have territorial boundaries.[63] It then provides that "a Division has jurisdiction over all persons residing or being in, and in relation to all causes of action arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance".[64]

55 If a Division of the High Court does not have jurisdiction over a particular matter in terms of section 21(1) of the Superior Courts Act, then it would be futile to suggest that the Division is nevertheless vested with jurisdiction in terms of section 169(1) of the Constitution. The most obvious reason for this is that

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61 SCA judgment volume 6 para 41 page 520.

62 Section 6(1).

63 Section 6(3).

64 Section 21(1).

section 169(1) of the Constitution and section 21(1) of the Superior Courts Act are talking about different things: the former deals with the sorts of matters that may be decided by "the High Court of South Africa", while the heading to the latter explains that it deals with "persons over whom and matters in relation to which Divisions have jurisdiction". Moreover, the principle of subsidiarity means that the jurisdiction of a Division of the High Court must be determined with reference to the specific provisions in section 21(1) of the Superior Courts Act rather than the general provisions in section 169(1) of the Constitution.

56 Even if the High Court were to be regarded as "a single entity divided into divisions as a matter of administrative structure",[65] it would be meaningless to ask what persons and causes of action the "High Court of South Africa" has jurisdiction over. The meaningful question is what persons and causes of action a particular Division of the High Court has jurisdiction over. The answer to that question does not depend on section 169(1) of the Constitution; it depends on section 21(1) of the Superior Courts Act.

57 It follows that the relevant question for present purposes is not whether "the High Court of South Africa" has jurisdiction over a matter envisaged by section 169(1) of the Constitution and, if so, whether it may decline to exercise jurisdiction. The relevant question is a different one, namely whether a particular Division of the High Court has jurisdiction over a matter in terms of section 21(1) of the Superior Courts Act and, if so, whether that Division may decline to exercise jurisdiction. When it comes to answering that question, section 169(1) is irrelevant since it

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65 The view of MJD Wallis "Whose Decisis must we Stare?" (2018) 135 SALJ 1 at 6.

does not talk to the issue at all. In other words, even if the word "may" in section 169(1) were to be construed as being permissive, it would not mean that a Division of the High Court may decline to exercise the jurisdiction that is conferred on it by section 21(1) of the Superior Courts Act.

58 The principle of subsidiarity buttresses our submission:

58.1 This Court has recently explained that the principle of subsidiarity "is based on the understanding that, although the Constitution enjoys superiority over other legal sources, its existence does not threaten or displace ordinary legal principles and its superiority cannot oust legislative provisions enacted to give life and content to rights introduced by the Constitution."[66]

58.2 The SAHRC's direct recourse to section 169(1) of the Constitution flies in the face of this principle since the SAHRC ignores the provisions of the Superior Courts Act that give effect to section 169 of the Constitution.

58.3 The point may be made by a hypothetical example: assume that a plaintiff relies directly on section 169(1) of the Constitution in order to institute an action out of the Gauteng Division of the High Court in circumstances where the defendant does not reside in that area and the cause of action did not arise in that area. In such a hypothetical situation, the plaintiff's direct reliance on section 169(1) of the Constitution to establish

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66 *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* (CCT 14/19) [2022] ZACC 5 (16 February 2022)) para 102.

jurisdiction would be misplaced because the position is regulated by section 21(1) of the Superior Courts Act. We submit that the SAHRC's direct reliance on section 169(1) of the Constitution is equally misplaced in the present circumstances. [67]

59 In any event, the jurisprudence of this Court establishes that the word "may" sometimes imposes a power coupled with a duty to exercise the power.[68] We submit that this is the case here:

59.1 Sections 167, 168 and 170 of the Constitution all use the word "may". If the word "may" does not impose a duty to exercise the power, then all of those Courts could decline to hear a matter that falls within their jurisdiction. As was pointed out in paragraph 41 of the SCA judgment, this could conceivably mean that there is no Court willing to hear a particular matter.[69]

59.2 The SAHRC argues that "the SCA's observation [in paragraph 41 of the judgment] is not destructive of the SAHRC's case"[70] because courts may indeed decline to hear matters that fall within their jurisdiction: "for example, the SCA may refuse to hear an appeal from a matter arising in the High Court on the basis that the appeal has no prospects of success" and "the Constitutional court may decline to hear an appeal where it is not in the

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67 See *Randgold & Exploration Co Ltd and Another v Gold Fields Operations Ltd and Others* 2020 (3) SA 251 (GJ).

68 See for example *Van Rooyen v The State* 2002 5 SA 246 (CC) and *South African Police Service v Public Servants Association* 2007 3 SA 521 (CC).

69 SCA Judgment: Vol 6 p 519 para 41.

70 The SAHRC heads of argument para 52.3.3.

> interests of justice to do so, even when that appeal raises an arguable point of public importance or a constitutional issue."[71] However, the first example is regulated by section 17 of the Superior Courts Act and the second example is regulated by section 167(3)(b) of the Constitution. Section 169(1) of the Constitution does not mean that the High Court has a free-floating power to decline to exercise the jurisdiction that is vested in it by section 21(1) of the Superior Courts Act.

The SAHRC's reliance on the "factual findings of the Full Court"

60 The SAHRC contends that

> "the SCA incorrectly dismissed the factual findings of the High Court and found that it was unhelpful the High Court made findings in the abstract. There were sufficient facts arising from the cases of the 13 defendants and the affidavit by the Minister of Justice and Correctional Services to justify the conclusions of the High Court."[72]

61 In support of this contention, the SAHRC states that "the facts arising from each of the individual respondent's cases effectively proved that the institution of proceedings in the High Court, which could be conveniently dealt with in the Magistrates Court, impeded the respondents' access to justice."[73]

62 In order for this statement to be correct, the SAHRC would have to show that there are defendants who would have opposed the actions had they been instituted in the Magistrates' Court but who did not oppose the actions because

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71 The SAHRC heads of argument para 52.3.2.

72 Founding affidavit: Volume 6 p 569 para 39.2.

73 Founding affidavit: Vol 6 p 573 para 53.

they were instituted in the High Court. That would be a matter for evidence. However, no such evidence forms part of the record.

63 In its application for leave to be admitted as an *amicus curiae* before the High Court, the SAHRC said that it would make "submissions" regarding "the costs that a respondent will face when defending an application in the High Court as compared to an application in the Magistrate's Court" and "the impact that additional costs will have on the debtor's financial position".[74] However, no evidence was forthcoming from the SAHRC.

Conclusion

64 For all the reasons set out above, we submit that the SCA judgment is correct.

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[74] Founding affidavit: volume 1 page 31 paras 22.1 and 22.2.

RELIEF IF THIS COURT WERE TO UPHOLD THE APPEAL

65 An appeal lies against the order of the court *a quo*, not the reasons for its decision.[75] If this Court were to uphold the appeal, then it would replace the SCA order in the Gauteng matter with a different order. Ordinarily, that would involve reinstating the order of the High Court that was overturned by the SCA on appeal. We submit, however, that paragraph 1 of the order of the Full Court should not be reinstated even if the appeal were to succeed.

The SAHRC does not defend paragraph 1 of the order of the Full Court

66 Paragraph 1 of the order of the Full Court provides that, where the monetary value claimed is within the jurisdiction of the Magistrates' Court, actions and applications "should be instituted in the Magistrates' Court … unless the High Court has granted leave to hear the matter in the High Court".[76]

67 The SAHRC indicated in oral argument before the SCA that it was <u>not</u> seeking to defend paragraph 1 of the order of the Full Court.[77]

68 Significantly, the SAHRC made no attempt to defend paragraph 1 of the order of the Full Court in its application seeking leave to appeal to this Court.

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75 *South African Reserve Bank v Khumalo* 2010 (5) SA 449 (SCA) para 4, referred to with approval in *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) para 8

76 Full Court judgment: volume 5 page 425 para 96.1.

77 Nedbank answering affidavit volume 6 para 29 page 601.

69 It is not apparent from its heads of argument whether the SAHRC now adopts a different position:

69.1 The SAHRC's main argument is that "the High Court may exercise its inherent power in terms of section 173 of the Constitution to decline to hear the matter and transfer it to the Magistrates' Court".[78] That argument is not consistent with paragraph 1 of the order of the Full Court, which directs that a matter must be instituted in the Magistrates' Court "unless the High Court has granted leave to hear the matter in the High Court". It would be unnecessary for the High Court to exercise its "inherent power" to transfer a matter to the Magistrates' Court if there is a rule that prohibits the matter from being instituted in the High Court in the first place.

69.2 The SAHRC says in its heads of argument that it "aligns itself with the position of the [Full] Court".[79] It is not clear whether this includes an "alignment" with paragraph 1 of the order of the Full Court. The SAHRC does say that "if a party believes that the matter should be heard in the High Court, that party must make an application setting out the grounds upon which they believe the exercise of the High Court's jurisdiction is justified".[80] However, this is difficult to reconcile with the SAHRC's submission that the High Court should "transfer the matters meru [sic]

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78 SAHRC heads of argument para 5. See also para 11.6 ("In such cases, the High Court must accordingly decline to hear the matter and should transfer it to the Magistrates' Court").

79 SAHRC heads of argument para 11.

80 SAHRC heads of argument para 54.3.

motu in terms of section 173 of the Constitution if it is in the interests of justice to do so".[81] There would be no need for the High Court to transfer a matter to the Magistrates' Court if there is an anterior rule requiring the matter to be instituted in the Magistrates' Court.

70 Whatever the SAHRC's current position may be, it is noticeable that it has made no meaningful attempt to defend paragraph 1 of the order of the Full Court. We respectfully submit that the SAHRC is correct not to defend that part of the order. We elaborate on the reasons for this in the next section.

Paragraph 1 of the order of the Full Court is inappropriate

71 Paragraph 1 of the order of the Full Court imposes a rule that, where the monetary value claimed is within the jurisdiction of the Magistrates' Court, actions and applications "should be instituted in the Magistrates' Court". In order to avoid any suggestion that it was closing the doors of the court in the face of litigants, the Full Court added the following proviso: "unless the High Court has granted leave to hear the matter in the High Court".[82] The proviso means that it would notionally be possible for a plaintiff to sue out of the High Court if leave were to be granted. This would require that "an application must be issued setting out reasonable grounds why the matter should be heard in this division".[83]

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81 SAHRC heads of argument para 50.4.

82 Full Court judgment: volume 5 page 425 para 96.1.

83 Full Court judgment: volume 5 page 424 para 91.

72 We respectfully submit that there is no proper basis for paragraph 1 of the order of the Full Court. We make this submission for four reasons.

73 The *first* reason is that the Full Court had no competence in law to issue what is, in effect, a direction that litigants may not use the High Court in cases of concurrent jurisdiction. Although the SAHRC suggests that the Full Court was exercising its inherent jurisdiction "to formulate a rule",[84] section 173 of the Constitution does not empower the Full Court to issue a blanket rule that litigants may not use the High Court.

74 The *second* reason is that, applying the logic of the Full Court, it would be impossible for a plaintiff ever to obtain leave to sue out of the High Court. The Full Court found that "it is an abuse of process to allow a matter which can be decided in the Magistrates' Court [or] a Local Division of the High Court to be heard in the Provincial Division simply because it has concurrent jurisdiction".[85] If that is axiomatically the case, then a plaintiff seeking leave to sue out of the High Court would never be able to show that it is <u>not</u> abusing the process of the High Court. The requirement to obtain leave is therefore a dead letter.

75 The *third* reason is that, if a plaintiff were to be granted leave to sue out of the High Court and if the action were not opposed, the costs of seeking leave would likely form part of the costs order against the defendant. The requirement that a plaintiff must seek leave to sue out of the High Court therefore has the perverse

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84 SAHRC heads of argument para 50.

85 Full Court judgment: volume 5 page 418 para 76.

result of adding to the costs that will be borne by a defendant at the end of the case if the action were to be successful.

76 The *fourth* reason is that, although the proviso is intended to benefit consumers, it may have the opposite effect by making credit providers reluctant to extend credit in circumstances where they will be required to obtain leave to sue out of the High Court in the event of default. In other words, if credit providers form the view that they will be unable effectively to recover loans falling within the jurisdiction of the Magistrates' Court, then they may decline to grant such loans at all. This would harm the very consumers who are intended to benefit from the Full Court judgment. As this Court pointed out in *Nkata*, "[c]redit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good."[86]

Conclusion

77 For all of the reasons set out above, we submit that paragraph 1 of the order of the Full Court should not be reinstated even if the appeal were to succeed.

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86 *Nkata v Firstrand Bank Limited* 2016 4 SA 257 (CC) para 94.

RELIEF SOUGHT BY NEDBANK

78 Nedbank asks that the application for leave to appeal be dismissed, *alternatively* that the appeal be dismissed.

79 In the event that this Court were to take a different view of the matter and were to uphold the appeal, then we submit that paragraph 1 of the order of the Full Court should not form part of any substituted order.

80 Nedbank does not ask for costs.

ALFRED COCKRELL S.C.

NDUMISO LUTHULI

Counsel for Nedbank

Chambers
Cape Town and Johannesburg
17 March 2022

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 291/2021

SCA CASE NOs: 38/2019 AND 47/2019

In the matter between:

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Applicant
And	
THE STANDARD BANK OF SOUTH AFRICA LIMITED	1st Respondent
NEDBANK LIMITED	2nd Respondent
FIRSTRAND BANK LIMITED	3rd Respondent
EZRA MAKIKOLE MPONGO	4th Respondent
MYRA GERALDINE WOODITADPERSAD	5th Respondent
RADESH WOODITADPERSAD	6th Respondent
JOYCE HLUPHEKILE NKWINIKA	7th Respondent
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ONESIMUS SOLOMON MATOME MALATJI	13th Respondent
MODIEGI PERTUNIA MALATJI	14th Respondent
GRACE M MAHLANGU	15th Respondent
KEY HINRICH LANGBEHN	16th Respondent

PRACTICE NOTE OF THE SECOND RESPONDENT (NEDBANK)

Nature of the proceedings

1 The applicant ("SAHRC"), who was admitted as the *amicus curiae* before the Full Court in Gauteng ("the Full Court") and also appeared before the Supreme Court of Appeal as an *amicus curiae*, seeks leave to appeal against the judgment and order of the Supreme Court of Appeal handed down on 21 June 2021 (**"**the SCA judgment"), but only to the extent that it upheld an appeal against the order of the Full Court.

Issues to be argued

2 Whether it would be in the interests of justice to grant the SAHRC leave to appeal against the order of the Full Court.

3 Whether the SAHRC's criticisms of the SCA judgment are misdirected and the SCA judgment is correct.

4 Whether, if this Court were minded to uphold the appeal, what relief should be granted.

Portion of the record necessary for the determination of the matter

5 We submit that the following portions of the record have to be read:

5.1 The Full Court judgment (Volume 5);

5.2 The SCA judgment (Volume 6); and

5.3 The papers filed in this application for leave to appeal (without annexures) (Volumes 5 and 6).

6 The parties will refer the Court to the annexures or the sections of the Full Court and or the SCA papers to which they may wish to refer in oral submissions.

Estimated duration of oral argument

7 One day

Summary of argument

8 We submit that it would not be in the interests of justice to grant leave to appeal against the order of the Full Court because:

8.1 the SCA judgment dealt with two discrete appeals that had been argued before it on the same occasion. The first was an appeal against a decision of the Full Court in Gauteng under case numbers 38/2019 and 47/2019 ("the Gauteng matter"). The second was an appeal against a decision of the Full Court in the Eastern Cape under case number 999/2019 ("the Eastern Cape matter"). The SCA upheld both appeals and substituted the orders in both matters. The substituted order was the same in each case save that the order in the Gauteng matter contains an additional paragraph dealing with the position where there is concurrent jurisdiction between the main seat and the local seat of a Division of the High Court. The SAHRC does not seek leave to appeal against the Eastern Cape matter. If the appeal of the SAHRC were to succeed, the order of the Full Court in the

Gauteng matter would be reinstated or this Court may grant some other order in its place. However, the substituted order in the Eastern Cape matter would be unaffected. Such an outcome would not be in the interests of justice because there would be different orders operating in different Divisions;

8.2 the SAHRC has offered no proper explanation for its delay in bringing its application for leave to appeal; and

8.3 the SAHRC does not have reasonable prospects of success on appeal.

9 In the event that this Court were to grant leave to appeal, we submit that the appeal should be dismissed for the following reasons:

9.1 Nedbank's decision to use the High Court in circumstances where the Magistrates' Court has concurrent jurisdiction conscientious, and rational and cannot possibly be described as an abuse of process.

9.1.1 Where a matter falls within the monetary jurisdiction of the Magistrates' Court and Nedbank sues out of the High Court, Nedbank asks for costs on the Magistrates' Court scale.

9.1.2 Very few of these matters are opposed, if they go to court at all. In cases where a defendant has no intention of opposing an action, he or she suffers no prejudice by virtue of the fact that the action has been sued out of the High Court rather than the Magistrates' Court.

9.1.3 Distressed debtors who wish to defend proceedings will generally have better prospects of finding *pro bono* legal representation in the High Court because of the location of societies of advocates in the urban hubs.

10 The reasoning of the Full Court is untenable.

10.1 The Full Court held – correctly – that section 34 of the Constitution does not guarantee a right of access to a particular court. The Full Court reached this conclusion in relation to the position of plaintiffs, but we submit that the same conclusion must also apply in relation to the position of defendants. The right of access to Court in section 34 of the Constitution cannot mean that a plaintiff is not entitled to choose a court of convenience but that a defendant is entitled to choose a court of convenience.

10.2 The SCA held in *Oosthuizen*[1] that the High Court's inherent jurisdiction to regulate its own process "does not extend to the assumption of jurisdiction which it does not otherwise have".[2] We submit that a similar principle applies in reverse: the High Court's inherent jurisdiction does not extend to refusing to exercise jurisdiction that it does have. Inherent jurisdiction is a reservoir of residual power that may be used in order to allow a High Court to perform its functions, not to avoid its functions.

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1 *Oosthuizen v RAF* 2011 6 SA 31 (SCA).

2 Para 17.

10.3 If section 34 of the Constitution does not entitle a plaintiff to access a particular court (which is what the Full Court held), then section 34 cannot be relied upon for the conclusion that a defendant has a right to litigate in a court of his or her choice. In other words, section 34 of the Constitution cannot have one meaning for a defendant and a different meaning for a plaintiff.

10.4 In support of "access to justice", the Full Court also referred to section 7(1) and section 8(1) of the Constitution. But this begs the question as to what constitutional right must be "respected", "protected" and "promoted". It could not be the right in section 34 of the Constitution for the reasons given above, and the Full Court did not identify any other rights that might be relevant.

10.5 We accept that the High Court may decline to hear a matter that falls within its jurisdiction on the basis that its process is being abused. But that can only be the position where the High Court considers the facts of a particular case and concludes that the plaintiff is abusing the process of the Court in that case. In other words, a finding that there has been an abuse of process must necessarily involve a fact-specific enquiry.

11 The SAHRC's criticisms of the SCA judgment are unfounded.

11.1 The SAHRC contention that "section 34 of the Constitution should be interpreted to require that respondents be given a meaningful opportunity to present their legal arguments and evidence to court - measures must be taken to reduce the economic, social and geographical barriers that

prevent a respondent's success to the court," is internally inconsistent since the SAHRC agrees with the Full Court that "section 34 does not entitle a person to access a particular court or tribunal." If section 34 does not entitle a plaintiff to access a particular court (as this Court held in *Mukaddam*),[3] then section 34 cannot be relied on to say that defendants have a right to be sued in the Magistrates' Court rather than in the High Court.

11.2 The SAHRC has misconstrued the import of section 169(1) of the Constitution. Section 169 of the Constitution regulates what sorts of matters may be determined by "the High Court of South Africa" as a unitary body (i.e. without regard to the position of particular Divisions of the High Court). Section 168 does the same thing in relation to the Supreme Court of Appeal, as does section 167 in relation to this Court. The SCA held that "the term 'may decide' simply means that each court is empowered to decide the types of cases listed in the various empowering sections".[4] Moreover, the principle of subsidiarity means that the jurisdiction of a Division of the High Court must be determined with reference to the particular provisions in section 21(1) of the Superior Courts Act rather than the general provisions in section 169(1) of the Constitution.

11.3 The SAHRC's contention that "the SCA incorrectly dismissed the factual findings of the High Court and found that it was unhelpful the High Court made findings in the abstract - There were sufficient facts arising from the

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3 *Mukaddam v Pioneer Foods (Pty) Ltd and others* 2013 (5) SA 89 (CC) para 28.

4 SCA judgment volume 6 para 41 page 520.

cases of the 13 defendants and the affidavit by the Minister of Justice and Correctional Services to justify the conclusions of the High Court" is not borne out by the evidence. In order for this statement to be correct, the SAHRC would have to show that there are defendants who would have opposed the actions had they been instituted in the Magistrates' Court but who did not oppose the actions because they were instituted in the High Court. That is a matter for evidence. However, there is no such evidence in the record.

12 Paragraph 1 of the order of the Full Court should not be reinstated even if the appeal were to succeed. It imposes a rule that, where the monetary value claimed is within the jurisdiction of the Magistrates' Court, actions and applications "should be instituted in the Magistrates' Court". In an attempt to avoid the suggestion that it was closing the doors of the court in the face of litigants, the Full Court added the following proviso: "unless the High Court has granted leave to hear the matter in the High Court".[5] The proviso means that it would notionally be possible for a plaintiff to sue out of the High Court if leave were to be granted. This would require that "an application must be issued setting out reasonable grounds why the matter should be heard in this division".[6]

12.1 We respectfully submit that there is no proper basis for paragraph 1 of the order of the Full Court for four reasons:

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5 Full Court judgment: volume 5 page 425 para 96.1.

6 Full Court judgment: volume 5 page 424 para 91.

12.1.1 The *first* reason is that the Full Court had no competence in law to issue what is, in effect, a direction that litigants may not use the High Court in cases of concurrent jurisdiction.

12.1.2 The *second* reason is that, applying the logic of the Full Court, it would be impossible for a plaintiff to obtain leave to sue out of the High Court. The Full Court found that "it is an abuse of process to allow a matter which can be decided in the Magistrates' Court [or] a Local Division of the High Court to be heard in the Provincial Division simply because it has concurrent jurisdiction".[7] If that is axiomatically the case, then a plaintiff seeking leave to sue out of the High Court would never be able to show that it is <u>not</u> abusing the process of the High Court. The requirement to obtain leave is therefore a dead letter.

12.1.3 The *third* reason is that, if a plaintiff were to be granted leave to sue out of the High Court and if the action were not opposed, the costs of seeking leave would likely form part of the costs order against the defendant. The requirement that a plaintiff must seek leave to sue out of the High Court therefore has the perverse result of adding to the costs that will be borne by a defendant at the end of the case if the action were to be successful.

12.1.4 The *fourth* reason is that, although the proviso is intended to benefit consumers, it may have the opposite effect by making

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7 Full Court judgment: volume 5 page 418 para 76.

credit providers reluctant to extend credit in circumstances where they will be required to obtain leave to sue out of the High Court in the event of default. As this Court pointed out in *Nkata*, "[c]redit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good."[8]

List of authorities on which particular reliance will be placed

13 Mukaddam v Pioneer Foods (Pty) Ltd and others 2013 (5) SA 89 (CC).

14 Oosthuizen v RAF 2011 6 SA 31 (SCA).

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NDUMISO LUTHULI

Counsel for Nedbank

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Cape Town and Johannesburg
17 March 2022

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8 *Nkata v Firstrand Bank Limited* 2016 4 SA 257 (CC) para 94.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 291/2021

SCA CASE NOs: 38/2019 AND 47/2019

In the matter between:

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And	
THE STANDARD BANK OF SOUTH AFRICA LIMITED	1st Respondent
NEDBANK LIMITED	2nd Respondent
FIRSTRAND BANK LIMITED	3rd Respondent
EZRA MAKIKOLE MPONGO	4th Respondent
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RADESH WOODITADPERSAD	6th Respondent
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KARIN MADIAU SAMANTHA LEMPA	8th Respondent
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JULIA MAMPURU THOBEJANE	11th Respondent
AUBREY RAMORABANE SONKO	12th Respondent
ONESIMUS SOLOMON MATOME MALATJI	13th Respondent
MODIEGI PERTUNIA MALATJI	14th Respondent
GRACE M MAHLANGU	15th Respondent
KEY HINRICH LANGBEHN	16th Respondent

SECOND RESPONDENT'S (NEDBANK) TABLE OF AUTHORITIES

Cases

1. Baliso v FirstRand Bank Ltd t/a Wesbank 2017 (1) SA 292 (CC)
2. Beinash v Wixley 1997 3 SA 721 (SCA)
3. General Accident Versekeringsmaatskappy SA Bpk v Bailey [1988] 4 All SA 614 (A)
4. Gundwana v Steko Development CC 2011 3 SA 608 (CC)
5. Jaftha v Schoeman; Van Rooyen v Stoltz 2005 (1) BCLR 78 (CC)
6. Mathale v Linda 2016 2 SA 461 (CC)
7. Mukaddam v Pioneer Foods (Pty) Ltd and others 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC)
8. Nkata v Firstrand Bank Limited 2016 4 SA 257 (CC)
9. Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality 2012 (9) BCLR 951 (CC)
10. Oosthuizen v RAF 2011 6 SA 31 (SCA)
11. Randgold & Exploration Co Ltd and Another v Gold Fields Operations Ltd and Others 2020 (3) SA 251 (GJ)
12. South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another (CCT 14/19) [2022] ZACC 5 (16 February 2022))
13. South African Police Service v Public Servants Association 2007 3 SA 521 (CC)
14. South African Reserve Bank v Khumalo 2010 (5) SA 449 (SCA)
15. Standard Bank of SA Ltd v Saunderson 2006 (9) BCLR 1022 (SCA)
16. Standard Credit Corporation Ltd v Bester 1987 (1) SA 812 (W)
17. Van Rooyen v The State 2002 5 SA 246 (CC)

Journal articles

18. The view of MJD Wallis “Whose Decisis must we Stare?” (2018) 135 SALJ 1 at 6.

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 291/2021
SCA CASE NO: 38/2019 & 47/2019

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Appellant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED	First Respondent
NEDBANK LIMITED	Second Respondent
FIRSTRAND BANK LIMITED	Third Respondent
EZRA MAKIKOLE MPONGO	Fourth Respondent
MYRA GERALDINE WOODITADPERSAD	Fifth Respondent
RADESH WOODITADPERSAD	Sixth Respondent
JOYCE HLUPHEKILE NKWINKIKA	Seventh Respondent
KARIN MADIAU SAMANTHA LEMPA	Eight Respondent
NEELSIE GOEIEMAN	Ninth Respondent
ANGELINE ROSE GOEIEMAN	Tenth Respondent
JULIA MAMPURU THOBEJANE	Eleventh Respondent
AUBREY RAMORABANE SONKO	Twelfth Respondent
ONESIMUS SOLOMON MATOME MALATJI	Thirteenth Respondent
MODIEGI PERTUNIA MAATJE	Fourteenth Respondent
GRACE M MAHLANGU	Fifteenth Respondent
KEY HINRICH LANGBEHN	Sixteenth Respondent

THE THIRD RESPONDENT'S WRITTEN SUBMISSIONS

INTRODUCTION

1. In essence, this application concerns whether the jurisdiction principle that courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction is consistent with the Constitution.

2. The Supreme Court of Appeal ("the SCA") held that it is settled law that courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction. The SCA considered it a fundamental misconception that a High Court can decline to hear a matter which is within its jurisdiction.[1]

3. The SAHRC does not challenge the constitutional validity of the statutory mechanisms provided by the State for resolution of disputes. These mechanisms include the legislative framework, as well as mechanisms and institutions such as courts and an infrastructure created to facilitate the execution of court orders.[2]

4. The SAHRC also does not attack the validity of the conferring of concurrent jurisdiction between High Courts and Magistrates Courts.

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[1] SCA judgement, paragraphs [31] and [[39]; Vol 6, pp 516 and 519.

[2] President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd) (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC) at [41].

5. The SAHRC confines the challenge to the judgement and order of the SCA to an interpretation exercise of the existing legislation. In this regard it is advanced by the SAHRC that the High Court is not obliged to hear matters that fall within the jurisdiction of the Magistrates' Court purely on the basis that it has concurrent jurisdiction and that the "default rule" should be that banks must issue applications for default judgment and for declarations that property is specially executable in the Magistrates' Courts, if those applications fall within the monetary jurisdiction limits of the Magistrates' Courts.[3]

6. It is not clear whether the SAHRC seeks the introduction of the "default rule" as a new substantive principle or whether the SAHRC seeks the development of the common law in terms of sections 8(3)(a) and 39(2) of the Constitution.

7. At the core of the SAHRC's reasoning is the assumption that the effect of the jurisdiction principle is that debtors have access to courts, but that they do not have **adequate** or meaningful access to courts unless the access is on the basis of access to a particular court. This notion was already dispelled by the Constitutional Court in ***Mukaddam***[4] where it was held that the guarantee in section 34 does not include the choice of procedure or forum in which access to courts is to be exercised.

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[3] SAHRC Written submissions, paragraphs 54.2 and 54.3.

[4] Mukaddam v Pioneer Foods (Pty) Ltd and Others 2013 (5) SA 89 (CC) at [28].

8. The theoretical argument, without any reference to material evidence is that "*there is a material threat that impecunious debtors will be unable to defend their cases*".[5] This essentially concerns the corollary right or entitlement in section 34 of the Constitution of every person to have access to courts.[6]

9. The Third Respondent contends that it is not in the interests of justice that the SAHRC be granted leave to appeal and that an appeal, should leave to appeal be granted has no prospects of success.

THE ISSUE OF CONDONATION

10. The SAHRC delivered the application for leave to appeal some two (2) months out of time.

11. The SAHRC was required to deliver the application for leave to appeal by no later than 16 July 2021. It was only delivered on 17 September 2021.

12. The explanation proffered as an excuse for bringing the application out of time is highly unsatisfactory. In short, it involves scant statements on lengthy internal processes and an alleged impact by the unrest in Kwazulu-Natal. No particulars are provided to come to

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[5] SAHRC Written submissions, paragraph 5.

[6] Modderklip Boerdery (supra) at [39].

an understanding of exactly how the delay came about.[7]

13. In the result, the SAHRC failed to make out a case for condonation.

THE CONSTITUTIONAL PROVISIONS

Section 34

14. Section 34 of the Constitution contains the fundamental leverage right that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

15. Langa CJ stated in ***Modderklip Boerdery***[8] that the first aspect of the rule of law is the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them and that the obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums provided by the State for settlement of such disputes.

Chapter 8

16. Chapter 8 deals with courts and the administration of justice. In terms of section 165(2) the courts are independent and subject to the Constitution and the law.

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[7] Founding Affidavit: Volume 6 p 582, paragraphs 71 to 74.

[8] At paragraph [39].

17. Section 166 establishes the various courts, amongst them the High Court of South Africa and Magistrate's Courts.

18. Section 169 empowers the High Court to decide any constitutional matter (save for the exclusions in section 169(1)(a)(i) and (ii)), as well as any other matter not assigned to another court by an Act of Parliament.

19. Section 169(2) provides that the High Court consists of Divisions determined by an Act of Parliament, which Act must provide for:

    19.1 The establishing of Divisions, with one or more seats in a Division; and

    19.2 The assigning of jurisdiction to a Division or a seat within a Division.

20. In terms of section 173 of the Constitution, the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own processes.

21. In terms of section 170 of the Constitution, the Magistrates Court (amongst other courts) may decide any matter determined by an Act of Parliament.

22. Section 171 provides that all courts function in terms of national legislation, and their rules and procedures must be provided for in

terms of national legislation.

THE LEGISLATIVE FRAMEWORK

23. The legislative framework, as well as mechanisms and institutions such as courts and an infrastructure created to facilitate the execution of court orders serve as the mechanisms provided by the State for citizens to resolve disputes.[9] They accordingly give effect to the section 34-right and Chapter 8 of the Constitution.

24. The Supreme Court of Appeal correctly held[10] that nothing in the legislative framework contradicts the provisions of section 34 of the constitution. The SAHRC also does not contend as much.

25. The legislative framework and the jurisdiction principle is designed to afford the defendant (in context the debtor) the convenience of being sued out of the court in which area of jurisdiction he/she/it resides or in which he/she/it concluded the (in context) the credit agreement.

The Superior Courts Act

26. The preamble to the Superior Courts Act, 10 of 2013 refers expressly to the provisions of section 165, section 166, section 171 and section 180 of the Constitution.

27. In addition, the Superior Courts Act refers to item 16(6)(a) of

[9] Modderklip Boerdery (supra) at [41].
[10] In paragraph [50].

Schedule 6 to the Constitution that provides that as soon as practical after the Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the Constitution.

28. It is accordingly evident that the Superior Courts Act gives effect to the Constitutional imperatives contained in Chapter 8 of the Constitution, as well as the section 34-right.

29. Section 6 provides, *inter alia* for the following:

29.1 The establishment of Divisions of the High Court of South Africa.[11]

29.2 The conferring of power on the Minister to determine the area under jurisdiction of a Division.[12]

29.3 The conferring of the power on the Minister to establish one or more local seats for a Division and to determine the area under the jurisdiction of such a local seat.[13]

30. Section 21 *inter alia* confers jurisdiction on Divisions of the High Court over all persons residing or being in, and in relation to all causes arising and all offences triable within its area of jurisdiction.

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[11] Section 6(1).
[12] Section 6(3)(a).
[13] Section 6(3)(c).

31. Section 27 provides the mechanism by which proceedings instituted in a Division or a seat of a Division can be transferred to another seat of that Division or another Division.

32. Uniform Rule 39(22) also contains a mechanism for the transfer of a cause to a Magistrates Court by consent of the parties.

33. The Determination of Areas under the Jurisdiction of Divisions of the High Court of South Africa[14] is part of the legislative scheme and the regulation expressly provides for concurrent jurisdiction between main seats and local seats of Divisions of the High Court, as well as concurrent jurisdiction between the High Courts and Magistrates' Courts.

The Magistrates Courts and Regional Courts

34. In terms of section 16(1) of Schedule 6 to the Constitution, the jurisdiction of the Magistrates Courts in terms of the Magistrates' Courts Act, 32 of 1944 is retained.

35. Section 29(1) sets out the causes of action in respect of which a Magistrates Court has jurisdiction and section 50 (1) contains a mechanism for the transfer of an action to a High Court with jurisdiction.

36. In terms of the Jurisdiction of Regional Courts Amendment Act, 31 of

[14] GN 30 in GG 39601 of 15 January 2016, as amended by GN 408 in GG 41552 of 29 March 2018.

2008, the purpose of the Act was stated to be, *inter alia*, to enhance access to justice by conferring jurisdiction on courts for regional divisions which are distributed throughout the national territory to deal with certain civil matters.

The National Credit Act and the Consumer Protection Act

37. The National Credit Act, 34 of 2005 ("the NCA") governs the rights and obligations of consumers and credit providers during the entirety of the credit process – from the inception of negotiations to the ultimate coming to an end of the agreement and any execution process.[15]

38. The NCA also establishes the National Consumer Tribunal in Chapter 5, Part B of the NCA. The NCA also makes detailed provision for alternative dispute resolution mechanisms in Chapter 7 of the NCA.

39. The Consumer Protection Act, 68 of 2008 confers jurisdiction on the Equality Court (section 10) and provides for alternative dispute resolution by the National Consumer Tribunal and the conferring of extensive powers on the National Consumer Commission.

40. The provisions in the NCA and the Consumer Protection Act evidently gives effect to the State's obligation in section 34 of the Constitution to provide the necessary mechanisms for citizens to resolve disputes that arise between them.

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[15] Sections 66 to 148 only deals with debtors' rights.

CONCURRENT JURISDICTION

41. Voet[16] stated the common law rule of a choice of forum by a Plaintiff where concurrent jurisdiction exists as follows:

> "*If many fora is open, Plaintiff can choose. – But if a Defendant finds a competent forum in more places than one it is in the discretion of the Plaintiff in what forum he wishes to sue the Defendant so that he, being sued in a competent forum, would claim in vain to have himself sent to another judge*."

42. In ***Makhanya***[17] Nugent JA stated the nature of concurrent jurisdiction as follows:

> "*But if a claim as formulated by the claimant, is enforceable in a particular court, then the plaintiff is entitled to bring it before that court. And if there are two courts before which it might be brought then that should not evoke surprise, because that is the nature of concurrent jurisdiction.*

43. The concurrency of jurisdiction between Magistrates' Courts and High Courts has consistently been recognised since 1918.[18]

44. In ***Agriwire***[19] the Supreme Court of Appeal held that our law does not recognise the doctrine of *forum non conveniens* and our courts are not entitled to decline to hear cases properly brought before them

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16 The selective Voet being the commentary on the Pandects Vol. 2 [Books V to XII] (translated by Percival Gane) Book V Title 1 Section 66(a):

17 Makhanya v University of Zululand 2010 (1) SA 62 (SCA) at paragraph [34].

18 Koch v Realty Corporation of South Africa 1918 TPD 356 at 359; Goldberg v Goldberg 1938 WLD 83; Standard Credit corporation v Bester and Others 1987 (1) SA 812 (W); Nedbank v Mateman and Others; Nedbank v Stringer and Another 2008 (4) SA 276 (T) ; Mofokeng v General Accident Versekering Bpk 1990 (2) SA 712 (W).

19 Agriwire (Pty) Ltd and Another v Commissioner, Competition Commission and Others 2013 (5) SA 484 (SCA) at par. 19.

in the exercise of their jurisdiction.

45. The joint working of the legislative framework (that permits of concurrent jurisdiction) and the jurisdiction principle facilitates the widest possible pool of courts to provide access to courts. The access includes both Plaintiffs (banks) and Defendants (debtors). Both of these categories of persons are the holders of the section 34-right.

46. The importance of a court exercising its jurisdiction was stated as follows in **Bester**:[20]

> *"…courts should be extremely wary of closing their doors to any litigant entitled to approach a particular court. The doors of courts should at all times be open to litigants falling within their jurisdiction. If congested rolls tend to hamper the proper functioning of the courts then the solution should be found elsewhere, but not by refusing to hear a litigant or to entertain proceedings in a matter within the court's jurisdiction and properly before the court."*[21]

47. Ironically, the startling effect of the SAHRC's proposed "default rule" would serve to limit the possible pool of courts to which both banks and debtors have access for the resolution of disputes. The proposed rule accordingly constitutes a limitation of the section 34-right held by banks and debtors.

48. This proposed limitation of the section 34-rights by introduction of the "default rule" is made by the SAHRC in circumstances that no material facts were adduced as evidence in the High Court. Statistics regarding the number of Magistrates' Courts and High Courts and

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[20] See footnote 5.

[21] At 820I.

interpreters, as well as generalised statements that Magistrates' Courts are less expensive and geographically closer, serve no evidentiary value.

49. The SAHRC's arguments are founded solely on the notional stereotypical debtor against whom a bank institute proceedings to recover an indebtedness. It is therefore an objective approach that is followed by the SAHRC.

50. An objective approach to a consideration of section 34-rights is fundamentally flawed. In **Barkhuizen v Napier**[22] the majority preferred a subjective analysis of the facts of each matter to establish whether there is an infringement of section 34 rights – as opposed to the preference of an objective approach in the minority judgments of Moseneke DCJ and Sachs J. The proper approach for determining a possible infringement on the right of access to courts in individual cases ought to be approached on the basis of a factual enquiry in individual cases – should the need in a particular matter arise to do so. The absence of material facts to show on a subjective approach that the effect of the jurisdiction principle is that debtors do not have adequate access to courts, has the effect that the jurisdiction of the Constitutional Court is not engaged.[23]

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[22] 2007 (5) SA 323 (CC).

[23] Baloyi N.O. and Others v Pawn Stars CC and Another [2022] ZACC 10 (15 March 2022) at [23].

THE JURISDICTION PRINCIPLE

51. The jurisdiction principle is that that courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction.

Is the jurisdiction principle rigid?

52. In ***Goldberg***[24] it was held as follows:

> "*But apart from such cases and apart from the exercise of the court's inherent jurisdiction to refuse to entertain proceedings which amount to abuse of process….I think that there is no power to refuse to hear a matter which is within the Court's jurisdiction. The discretion which the Court has in regard to costs provides a powerful deterrent against the bringing of proceedings in the Supreme court which might more conveniently have been brought in the Magistrate's Court.*"

53. The jurisdiction principle is therefore justifiably rigid to the extent that it guarantees access to courts, but it is tempered by the inherent power of the High Court (now contained in terms of section 173 of the Constitution) to prevent an abuse of its own processes and to make an appropriate order for costs if the matter can be dealt with at less expense in the Magistrates' Court.

54. The SAHRC argues that ***Strang***[25] is authority for the proposition that a High Court has the discretion not to exercise jurisdiction having regard to considerations of appropriateness and

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[24] Goldberg v Goldberg 1938 WLD 83 at 85-86.

[25] Bid Industrial Holdings (Pty) Ltd v Strang and another (Minister of Justice and Constitutional Development, Third Party) 2008(3) SA 355 (SCA) at paragraphs 55 to 59.

convenience.[26] This is not correct. In ***Strang***, the doctrine of *forum non convenience* was applied in the context of deciding whether or not to exercise jurisdiction over foreign defendants. It was, *inter alia* stated that "…*appropriateness and convenience are elastic concepts which can be developed case by case*", but that was said when dealing with the issue of the absence of any possibility of meaningful execution in the plaintiff's jurisdiction, i.e. practical and reasonable effectiveness of execution of a court order abroad.[27] The doctrine of *forum non convenience* simply is not part of our law.

55. The jurisdiction principle gives effect to the corollary right in section 34 of the Constitution that the State is obliged to provide access to courts. It would indeed be destructive of the section 34-right if the jurisdiction rule does not exist. Persons would then only have theoretical access to courts with competent jurisdiction.

Is the concept of dominus litis outdated?

56. The SAHRC advances that the SCA's approach was inconsistent with section 34 of the Constitution in that the SCA (so the SAHRC says) failed to engage with the issue of access to courts and to consider the impact of a Plaintiff's right to choose the forum of litigation on access to courts by financially distressed and unrepresented defendants.[28]

57. The SAHRC does not attack the validity of a Plaintiff's right to choose

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[26] SAHRC Written submissions, paragraph 17.
[27] Paragraph 55 of the judgment.
[28] SAHRC Written submissions, paragraph 52.2.

the forum of litigation. The attack is much narrower. It seeks the crafting of a new rule (or the development of the common law) with extremely limited application i.e., that only commercial banks in the limited circumstance of applications for default judgements and declarations of immoveable property as specially executable be deprived of the existing right to choose the forum of litigation.

58. The new rule that the SAHRC proposes limits commercial banks' section 34 right. As the SCA correctly pointed out[29] no analysis as contemplated in section 36 of the Constitution took place.

59. The dominus litis rule indeed gives expression to the section 34-right in that the widest possible number of courts are made available for persons to realise their right to access to courts.

60. The jurisdiction rule is therefore not outdated, but rather in consonance with the imperatives of section 34 of the Constitution.

Is the jurisdiction principle inconsistent with the Constitution?

The provisions of section 169(1) of the Constitution

61. Section 169(1) of the Constitution appears in Chapter 8 and provides that the High Court may decide specific identified matters. The provision appears as part of all of the sections dealing with the jurisdiction of all courts listed in Chapter 8.

[29] SCA judgement, paragraph [51].

62. The SAHRC interprets section 169(1) on the basis that the word "may" is permissive – thereby carrying the meaning of affording a discretionary entitlement to either hear or refuse to hear the specific identified matters.

63. The interpretation contended for by the SAHRC is fundamentally wrong. On application of the triad of interpretation[30] the word "may" in section 169(1) only confers the jurisdiction to hear the specific identified matters. It does not carry the meaning of conferring a discretion. If the word "may" is ascribed the meaning of affording a discretion to hear matters it immediately excludes the conferring of jurisdiction. The provisions of section 169(1) would thereby be rendered meaningless and impossible to reconcile with the section 34-right in the Bill of Rights.

64. The argument by the SAHRC that the interpretation that it contends for is supported by the fact that the SCA and the Constitutional court may refuse to hear appeals is not helpful.[31] It conflates issues. The refusal to hear an appeal on considerations of prospects of success on appeal and the interests of justice only concerns the administration of justice and court processes after access to courts had already been obtained. It does not implicate the interpretation of section 169(1) of the Constitution or the section 34-right.

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[30] Capitec Bank holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA) at [25].

[31] SAHRC Written submissions, paragraph 52.3.2.

65. The jurisdictional principle is accordingly not inconsistent with section 169(1) of the Constitution. The contrary holds true. It is consistent with section 169(1).

Section 34

66. The SCA correctly held that the role of section 34 is that of a grundnorm and does not implicate the peculiar organisation of a litigation system in which respect for the value must exist.[32]

67. The jurisdictional principle is inextricably interwoven with the litigation system that provides for concurrent jurisdiction. To implicate the jurisdiction principle by application of section 34, would lead to the unavoidable implication of the system of concurrent jurisdiction. The mechanisms provided by the State to fulfil the section 34-right (including concurrent jurisdiction) is not challenged and it is therefore not open for the SAHRC to challenge the jurisdiction principle.

68. On a proper consideration of the jurisdiction principle, it gives full effect to the section 34-right. A consideration whether section 34-rights are limited by the jurisdiction principle and, if so, whether it is reasonable and justifiable in an open and democratic society was never undertaken. Similarly, the limitation of commercial banks' section 34-right by the proposed "default rule" was never undertaken

[32] SCA judgement, paragraph [49].

and the limitation analysis was also not done (or called for by the SAHRC).

69. As dealt with above, the facts that served before the High Court were general and sweeping. It is not sufficient to deduce from generalised statements and facts - as the SAHRC does - that a real danger exists of a hypothetical limitation on the right of access to courts. It can well be conceived in this regard that a number of notional debtors might be in closer proximity to High Courts than to Magistrates' Courts and find the High Court easier and cheaper to access. It begs the question how long a piece of string is. The hypothetical argument of the SAHRC inevitably leads to the absurdity that the section 34-right would always be infringed if a closer court is available. Section 34 cannot be used to conclude which court of concurrent jurisdiction is to be preferred, with a choice of the other court amounting to a section 34 infringement.

70. The above is illustrative of the reason why it was held by the majority in ***Barkhuizen*** that a subjective approach to a consideration of the infringement of section 34-rights is to be preferred over an objective approach.

71. In the result, the conclusion cannot be reached that the jurisdiction principle is inconsistent with section 34 of the Constitution.

Is institutional independence implicated?

72. Judicial independence requires on an institutional level structures to protect courts and judicial officers against external interference.[33]

73. It is difficult to conceive how the jurisdiction principle offends institutional independence. The SAHRC relies heavily on ***Valente v The Queen***.[34] ***Valente*** is instructive only, but it makes plain that it concerns only judicial control over administrative decisions that bear directly and immediately on the exercise of judicial function.

74. Section 165(2) of the Constitution makes courts subject to the Constitution and the law. The jurisdiction principle forms part of the body of law and the adherence thereto by a court does not entail external interference.

75. Institutional independence concerns judicial control over administrative decisions. The giving effect to the jurisdiction principle does not amount to an administrative decision.

76. Institutional independence can accordingly not be used to warrant a refusal by a High Court to hear a matter properly placed before the High Court. The jurisdiction principle is not inconsistent with judicial independence.

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[33] Van Rooyen and others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) at [19].

[34] Valente v The Queen [1985] 2 SCR 673.

THE ISSUE OF INHERENT JURISDICTION

77. In terms of section 173 of the Constitution, the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. This constitutional imperative to regulate process resonates back to the pre-constitutional era when Corbett JA already expressed in **Universal City Studios**[35] that the then Supreme Court possessed an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice.

78. The right to exercise the 'inherent jurisdiction' can however only be justifiably exercised in the "procedural field".[36] The High Court cannot rely upon its inherent jurisdiction to create substantive law.[37] This principle that were laid down in the pre-constitutional era remain unchanged. In the last-mentioned regard the Constitutional Court expressly deals with the High Courts' power to regulate its own process to procedural matter. In **South African Broadcasting Corp v National Director of Public Prosecutions and Others**[38] it was said that the inherent power was to regulate and control process and section 173 of the Constitution is the authority to prevent any

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35 Universal City Studios In v Network Video (Pty) Ltd 1986 (2) SA 734 (A) at 754

36 Chunguete v Minister of Home Affairs & others 1990 (2) SA 836 (W) at 847.

37 Minister of the Interior & others v Harris & others 1952 (4) SA 769 (A) at 781C – H and Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and another 1984 (4) SA 149 (T) at 171.

38 2007 (1) SA 523 (CC).

possible abuse of court process. In **Moulded Components**[39] the court also confined the inherent power to procedural matter:

> "*I would sound a word of caution generally in regard to the exercise of the court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The rules are there to regulate the practice and procedure of the court in general terms and strong grounds would have to be advanced, in my view, to persuade the court to act outside the powers provided for specifically in the rules. Its inherent power, in other words, is something that will be exercised sparingly…I think that the court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the court will come to the assistance of an applicant outside the provisions of the rules when the court can be satisfied that justice cannot be properly done unless relief is granted to the applicant.* (our emphasis)

79. The High Court is not empowered to alter substantive law by taking away the Plaintiff's right, as *dominus litis,* to choose the court in which it wants to institute its action where more than one court has jurisdiction in a matter.

FOREIGN LAW

International instruments

80. The SAHRC referred to various sets of international instruments that provide for access to courts.

81. They include in most important part the African Charter on Human and People's Rights (1986), the American Convention on Human

[39] Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another 1979 (2) SA 457 (W) at 462H – 463B

Rights (1969), the European Convention on Human Rights (ECHR) (1953) and the UN General Assembly Resolution: the Declaration of the High-level Meeting on the Rule of Law (2012).

82. The international instruments underscore in general the pivotal importance of the leverage fundamental right of access to courts. In our law the position is not different. In ***Zondi***[40] the Constitutional Court stated in this regard the cardinal importance of the right of access to court. It described the right as foundational to the stability of an orderly society and that it ensures peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help. It also serves as bulwark against vigilantism, and the chaos and anarchy which it causes.

83. The legislative framework and the mechanisms provided by the State to provide access to courts are however not impugned and they can be accepted as constitutionally compliant.

84. Importantly, the legislative scheme now provides for main seats and local seats in every Division. This give expression to, *inter alia* the guidelines in a submitted report by the African Commission on Human and People's Rights in 2003 that States shall ensure that judicial bodies are accessible to everyone; not impeded by distance to the location of judicial institutions and the international trend that obstacles be removed that may impede access to justice.

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[40] Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC) at [61].

85. Lastly, the mechanisms provided by the State is the task of statute law, as the SCA correctly observed.[41] It does not fall in the sphere of the judiciary to provide the mechanisms for access to courts or to act as legislature. The SAHRC's endeavour to interpret the existing legislative framework and the mechanisms with reference to section 34 is indeed misplaced.

Foreign case law

86. We were not able to find international case law dealing in point with the issue in this application for leave to appeal and the appeal.

87. The SAHRC refers to a number of foreign judgements that deal with the impediment created by imposing fees on gaining access to tribunals and courts.[42] These foreign judgements are not of assistance. They deal with court fees that prevent access to a court. It does not concern the different scales of the costs of legal representatives in different courts. It is not alleged and no evidence was introduced that the High Court of South Africa imposes a fee for a person to gain access to the High Court. The jurisdiction rule creates the anthesis position, namely an obligation on the court to hear matters properly placed before them.

88. The SAHRC also relies on various foreign judgements that express concerns about the impediments to access of courts that are created

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41 SCA judgement, paragraph [50].

42 The most notable are R (on application of UNISON) v Lord Chancellor [2017] UKSC 51; R v Lord Chancellor, ex p Witham [1998] QB 575; Trial Lawyers Association of British Colombia v British Colombia (Attorney General) 2014 SCC 59;

by insufficient institutional mechanisms for persons to access courts.[43] This is not apposite to the issues in the present matter where the mechanisms provided by the State is not challenged as inadequate or of such institutional nature that it impedes access to courts.

CONCLUSION

89. In the result, it will not be in the interests of justice that the application for leave to appeal be granted.

90. The Third respondent therefore asks that the application for leave to appeal be dismissed.

91. In the event that leave to appeal is granted, the Third Respondent contends that no prospect of success is present and that the appeal be dismissed.

92. No order for costs is sought.

DATED at **PRETORIA** on this the **17TH** day of **MARCH 2022**.

[43] The most notable are R v Domm 1996 CanLII (ON CA), section 4; Hryniak v Mauldin 2014 SCC 7, [2014] 1 S.C.R.87; Case of Cantos v Argentina, referred to the SAHRC as Judgement of November 28, 2002. Series C No. 97 and Case of Girls Yean and Bosico v Dominican Republic., referred by the SAHRC as Judgement of September 8, 2005. Series C No. 130.

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