

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

FILING SHEET

DOCUMENT PRESENTED FOR FILING : **Nedbank's Answering Affidavit**

DATED at Sandton this 30TH September 2021.

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MODIEGIE PERTUNIA MALATJI

14th Respondent

GRACE M MAHLANGU

15th Respondent

KEY HINRICH LANGBEHN

16th Respondent





NEDBANK'S ANSWERING AFFIDAVIT

I, the undersigned,

ALBERT MINNAAR SORGDRAGER

do hereby make oath and say:

- 1 I am the Group Legal Counsel: Litigation and Disputes of Nedbank Limited (“**Nedbank**”). Nedbank is cited as the second respondent in this application for leave to appeal.
- 2 I am duly authorised to depose to this affidavit on behalf of Nedbank.
- 3 The facts set out below are, to the best of my knowledge and belief, both true and correct. Save where the contrary is expressed or appears from the context, they lie within my personal knowledge.
- 4 I have read the founding affidavit deposed to by **MS PHILILE NTULI** on behalf of the applicant (the “**SAHRC**”). I respond to it below.
- 5 Nedbank opposes the SAHRC's application for leave to appeal for the reasons set out in this affidavit.

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INTRODUCTION

- 6 The SAHRC belatedly seeks leave to appeal against the judgment and order of the Supreme Court of Appeal handed down on 21 June 2021 under SCA case numbers 38/2019 and 47/2019 (“the SCA judgment”). The SCA judgment is reported as *Standard Bank and others v Mpongo and others and a related matter (South African Human Rights Commission and others as amici curiae)* [2021] 3 All SA 812 (SCA); [2021] JOL 50624 (SCA).
- 7 The SAHRC was admitted as an *amicus curiae* in the High Court, and also appeared before the SCA as an *amicus curiae*. It asks this Court for an order that “the SAHRC has standing to appeal the decision of the SCA”.¹ In support of this, it relies on *Wits Law Clinic v Minister of Home Affairs*² where this Court held that “an *amicus curiae* would ordinarily be permitted to appeal against an order of another court only where the actual parties to that litigation were not seeking to pursue an appeal and there was a clear public interest requiring it to be permitted to lodge the appeal.”
- 8 I am advised that, for the reasons set out below, there is no public interest in the appeal sought to be brought by the SAHRC. Nevertheless, I accept that on the authority of *Campus Law Clinic*³ the SAHRC has standing to bring the application for leave to appeal.

¹ FA para 23.1

² *University of Witwatersrand Law Clinic v Minister of Home Affairs and Another* 2008 (1) SA 447 (CC); 2007 (7) BCLR 821 (CC); 2007 (8) BCLR 900 (CC) para 6

³ *Campus Law Clinic, University of Kwazulu-Natal v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) paras 21 and 22

9 The SAHRC contends that the SCA judgment is wrong for two reasons:

9.1 *“the SCA incorrectly interpreted sections 34 and 173 of the Constitution and overemphasised the common law at the expense of the fundamental right to access to justice” (sic);⁴ and*

9.2 *“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.”⁵*

10 I deny that there is any merit in these contentions. But even if there were, the application for leave to appeal is misconceived because the arguments advanced by the SAHRC are out of alignment with the order that would be granted if its appeal were to succeed. As I shall explain below, the SAHRC is attempting – impermissibly – to appeal against the reasons of the SCA rather than the order of the SCA.

11 My affidavit is structured as follows:

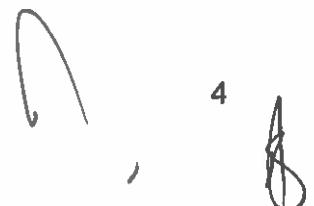
11.1 I first address the SAHRC’s delay in bringing its application.

11.2 I then submit that it would not be in the interests of justice for the SAHRC to be granted leave to appeal.

⁴ FA para 39.1

⁵ FA para 39.2

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11.3 Finally, I answer on a paragraph-by-paragraph basis the averments in the founding affidavit to the extent that this is necessary.

THE APPLICATION FOR LEAVE TO APPEAL IS OUT OF TIME

12 I am advised that the following principles apply to an application for condonation for the late filing of an application for leave to appeal to this Court:

12.1 Condonation will not be granted unless it is in the interests of justice to do so.

12.2 Two of the key factors relevant to the determination of where the interests of justice lie in a condonation application are:

12.2.1 the explanation given by the applicant for its delay; and

12.2.2 the prospects of success on the merits.

12.3 Another important factor will be the question whether there is a public interest that the matter be heard and determined.

12.4 In an application for condonation, a detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand the reasons and to assess the responsibility.

12.5 If the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.

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- 13 The SCA judgment was handed down on 25 June 2021.⁶ The fifteen days within which SAHRC had to file its application for leave to appeal to this Court expired on 16 July 2021. The application was served, unissued, on Nedbank on Friday, 17 September 2021 – some two months after the application ought to have been lodged.
- 14 I respectfully submit that the SAHRC has offered no proper explanation for its inordinate delay.
- 15 The SAHRC says that it needed to secure internal approval to seek leave to appeal.⁷ It does not explain when such approval was sought and when it was granted. The SAHRC merely says that “*the internal processes are lengthy*”.⁸ 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.
- 16 The SAHRC says that it wrote to its attorneys (the Legal Resources Centre) on 29 June 2021, seeking advice on its standing to bring the application for leave to appeal and to find out if the Legal Resources Centre would continue to act.⁹ 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

⁶ FA para 20

⁷ FA para 69

⁸ FA para 70

⁹ FA para 71



to follow its own internal processes to decide whether it would continue to act for the SAHRC.¹⁰

17 The founding affidavit says that while the SAHRC was still corresponding with its attorneys, the unrest in the provinces of KwaZulu-Natal and Gauteng started.¹¹ 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."*¹² Once again, we are not told who was working on the application and how they were affected by the unrest. This is confusing given that later on the founding affidavit says that counsel worked on the application, and it is not suggested that counsel were affected by the unrest. Without the necessary detail being provided, this Court is not placed in a position where it can assess the alleged impact of the unrest.

18 For all these reasons, I am advised and submit that the SAHRC has failed to make out a proper case for condonation. On this basis alone, the application should be dismissed.

IT IS NOT IN THE INTERESTS OF JUSTICE TO GRANT LEAVE TO APPEAL

19 In any event, I submit that it would not be in the interests of justice to grant leave to appeal for the reasons that follow.

¹⁰ FA para 72

¹¹ FA para 73

¹² FA para 74



20 As indicated above, the SAHRC seeks leave to appeal on the grounds that (a) the SCA erred in its interpretation of section 34 and 173 of the Constitution and (b) the SCA erred in rejecting the factual findings of the High Court.¹³ I shall submit below that both these grounds are without merit. Before doing so, however, I explain why the application for leave is entirely misconceived.

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

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

22 The order of the SCA distinguished clearly between the two appeals:

"In case numbers 38/2019 and 47/2019 [i.e. the Gauteng matter]:

1. The appeal is upheld, with no order as to costs.

2. The order of the court below is set aside and replaced with the following order:

"It is declared that:

(1) The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrates' Courts, if brought before it, because it has concurrent jurisdiction with the Magistrate's Court.

¹³ FA para 39

(2) The High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrate's Court because the High Court has concurrent jurisdiction.

(3) The main seat of a Division of a High Court is obliged to entertain matters that fall within the jurisdiction of a local seat of that Division because the main seat has concurrent jurisdiction.

(4) There is no obligation in law on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings."

3. *There is no order as to costs.*

In case number 999/2019 [i.e. the Eastern Cape matter]:

1. *The appeal succeeds, with no order as to costs.*

2. *The order of the court below is set aside and replaced with the following:*

"It is declared that:

(1) The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrates' Courts, if brought before it, because it has concurrent jurisdiction with the Magistrate's Court.

(2) The High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrate's Court because the High Court has concurrent jurisdiction.

(3) There is no obligation in law on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings."

3. *There is no order as to costs."*

23 Significantly, the SAHRC does not seek leave to appeal in the Eastern Cape matter. The SAHRC makes this clear in paragraph 22 of its founding affidavit

and in prayer 3 of its notice of motion. The SAHRC only seeks leave to appeal in the Gauteng matter.

24 The problem is that the order of the SCA in the Eastern Cape matter is formulated in the same terms as the order of the SCA in the Gauteng matter. The only difference is that it does not deal with overlapping jurisdiction between a main seat and a local seat of the High Court.

25 If the appeal of the SAHRC were to succeed, the order of the Full Court in the Gauteng matter would be reinstated. However, the order of the SCA in the Eastern Cape matter would be unaffected. It follows that there would then be two orders dealing with the same issues: the order of the SCA in the Eastern Cape matter, and the order of the Full Court in the Gauteng matter that would have been reinstated (*ex hypothesi*) by this Court on appeal.

26 I respectfully submit that such an outcome would be absurd since the two declaratory orders would be at war with one another. However, that is the outcome that would ensue if the SAHRC were to succeed in its appeal since it has elected not to appeal against the SCA order in the Eastern Cape matter. For this reason alone, it would not be in the interests of justice to grant leave to appeal.

An appeal lies against an order not the reasons

27 The SAHRC seeks leave to appeal against the whole of the order of the SCA in the Gauteng matter.

- 28 It is well established that an appeal lies against the order of the court *a quo*, not its reasons. The SAHRC appears to misunderstand this. Its founding affidavit criticises the reasoning of the SCA but does not make any mention of the order of the SCA.
- 29 The problems for the SAHRC do not end there. If the SAHRC's appeal were to succeed, the order of the Full Court in the Gauteng matter would be reinstated since the SAHRC does not ask for a different order. However, the SAHRC does not attempt to defend that order in its founding affidavit. Indeed, the SAHRC made it clear in oral argument before the SCA that it was not seeking to defend the order of the Full Court in the Gauteng matter.
- 30 The order of the Full Court in the Gauteng matter does not purport to declare that the High Court may decline to hear an action that falls within the jurisdiction of the Magistrates' Court if it would be more appropriate to have the action decided in the Magistrates' Court (i.e. the outcome contended for by the SAHRC). On the contrary, the order of the Full Court in the Gauteng matter 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 is this order that would be reinstated if the SAHRC were to succeed on appeal because it does not ask for any different order. (Indeed, it is not even clear from the founding affidavit whether the SAHRC envisages that the High Court should decline to exercise jurisdiction or whether it should transfer the matter to the Magistrates Court.¹⁴)

¹⁴ FA para 51.

31 The SAHRC seeks leave to appeal on the basis that this Court should provide “legal certainty regarding the ambit of the rights at stake”.¹⁵ However, the order of the Full Court in the Gauteng matter would not provide the “legal certainty” sought by the SAHRC and the SAHRC does not ask for any different order.

32 I respectfully submit that the SAHRC is correct not to defend the order of the Full Court in the Gauteng matter because that order gives rise to undesirable outcomes:

32.1 The Full Court ordered that civil actions within the monetary jurisdiction of the Magistrates’ Court “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” (my underlining).¹⁶ The Full Court explained that “an application must be issued setting out reasonable grounds why the matter should be heard in this division”.¹⁷

32.2 If a plaintiff were to be granted leave to sue out of the High Court and if the action were not opposed in the High Court, then the costs of seeking leave would be likely to form part of the costs order against the defendant. The requirement that a plaintiff must seek leave to sue out of the High Court would therefore have the perverse result of adding to the costs that would be borne by a defendant at the end of the case (if the action is successful).

¹⁵ FA para 67.

¹⁶ Full Court judgment para 96.1

¹⁷ Full Court judgment para 91



32.3 Although the requirement to obtain leave was apparently intended to benefit consumers, it may have the opposite result 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 were intended to benefit from the Full Court order. As this Court pointed out in *Nkata*, "[c]redit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good."¹⁸

33 For this reason as well, I submit that it would not be in the interests of justice for the SAHRC to be granted leave to appeal. No purpose would be served by granting leave to appeal in circumstances where the SAHRC does not seek to defend the order of the Full Court in the Gauteng matter.

The SCA's interpretation of section 34 and 173 of the Constitution

34 The SAHRC criticises the SCA for incorrectly interpreting section 34 of the Constitution. However, this Court has already rejected the SAHRC's interpretation of section 34 of the Constitution. It did so in *Mukkadam*, where it held as follows: "*Our Constitution guarantees everyone the right of access to courts which are independent of other arms of government. But the guarantee in section 34 of the Constitution does not include the choice of procedure or forum*"

¹⁸ *Nkata v Firstrand Bank Limited* 2016 4 SA 257 (CC) para 94

in which access to courts is to be exercised.¹⁹ This passage is quoted in paragraph 51 of the SCA judgment.

35 The SAHRC's criticisms of the SCA's interpretation of section 173 of the Constitution are also misplaced. The High Court may not utilise its inherent jurisdiction in order to refuse to hear a matter that falls within the jurisdiction conferred on it by the Constitution and the Superior Courts Act. In other words, the inherent jurisdiction referred to in section 173 of the Constitution does not empower the High Court to decline to exercise jurisdiction.

36 The SAHRC contends that the SCA erred in not having regard to the fact that the word "may" in section 169(1) of the Constitution means that the High Court is at liberty to decline to hear a matter falling within its jurisdiction.²⁰ This contention is misconceived:

36.1 Section 169 of the Constitution is not concerned with jurisdiction over the person; it is concerned with the subject matters that may be dealt with by the High Court. This is apparent when the content of section 169 is compared to section 168 (SCA), section 170 (other courts) and section 167 (Constitutional Court).

36.2 In any event, the jurisprudence of this Court establishes that the word "may" sometimes imposes a power coupled with a duty to exercise that

¹⁹ *Mukaddam v Pioneer Foods (Pty) Ltd and others* 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) para 28, my underlining.

²⁰ FA para 40.

power.²¹ I submit that this is the case here. I make this submission because sections 167, 168 and 170 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 even though it falls within their jurisdiction. That may mean that there is no Court that is willing to hear a particular matter. That is the point made in paragraph 41 of the SCA judgment and the SAHRC makes no attempt to suggest that the reasoning of the SCA is incorrect.

37 For all of these reasons, there is no merit to the SAHRC’s contention that the SCA misinterpreted sections 34 and 173 of the Constitution.

The facts on the record

38 The SAHRC criticises the SCA for finding that there were insufficient facts before the Full Court to justify the findings it made. The SAHRC makes the positive averment 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.”*²²

39 There is no evidence in the record that justifies this positive averment:

39.1 The Full Court stated that *“often impecunious defendants or respondents will have to travel in person from distances far away from the Court, to*

²¹ 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)

²² FA para 14

appear and oppose these matters, in other instances being unable to appear in person, due to the prohibitive transport and other costs".²³

However, there was nothing in the record to support this. There was not a jot 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 cost of litigating in the High Court as opposed to the Magistrates' Court.

39.2 In its application for leave to be admitted as an *amicus curiae* before the Full Court, the SAHRC hinted that it may adduce evidence to this effect. However, no such evidence was forthcoming from the SAHRC before the Full Court or before the SCA.

39.3 In its founding affidavit seeking leave to appeal to this Court, the SAHRC is driven to contend that these facts are "common sense and self-evident",²⁴ and that "judicial notice" can be taken of them.²⁵ I deny that this is the case. The facts had to be established by evidence, but there was no evidence to this effect. This is the point correctly made in paragraph 12 of the SCA judgment.

40 Even if the SAHRC is correct that there may be particular defendants who would have defended an action in the Magistrates Court but who elected not to defend them because the action was instituted in the High Court, that is a finding that would have to be made on the facts of a particular case. It cannot be seriously

²³ Full Court judgment para 3

²⁴ FA para 41.

²⁵ FA para 57.



suggested that all defendants in unopposed actions fall into this category. The SCA was therefore correct when it held as follows:

*"The application of all of these rules involves a fact specific enquiry on a case-by-case basis. That, of necessity, requires a defendant who alleges prejudice of one form or another to establish that prejudice. Decisions of this nature cannot be made in the abstract."*²⁶

41 The SAHRC does not dispute the SCA's conclusion that the determination of the interests of justice could not be made in abstract but would depend on the facts of each case. Once this is so, the entire foundation of the SAHRC's case crumbles since it cannot be said that in all cases where actions are instituted in the High Court for amounts falling within the jurisdiction of the Magistrates' Court, *"there is a material threat that impecunious debtors will be unable to defend their cases."*²⁷

Conclusion

42 For all the reasons set out above, I submit that it would not be in the interests of justice to grant leave to appeal.

AD SERIATIM RESPONSES

43 In what follows I respond to the specific paragraphs in the founding affidavit. I will only answer to those paragraphs which I consider to still require a specific response. My failure to deal specifically with any particular paragraph should not be taken as an admission of any averment in the founding affidavit. Averments

²⁶ At para 59

²⁷ FA para 14

in the founding affidavit should be taken as denied to the extent that they are inconsistent with what is stated in this answering affidavit.

44 Ad paragraphs 1 to 3

Save to deny that the averments in the founding affidavit are true and correct to the extent that they contradict what is set out in this affidavit, the rest of the averments under these paragraphs are noted.

45 Ad paragraphs 4 and 9

I admit these allegations.

46 Ad paragraphs 10, 21 and 22

I note that the SAHRC seeks leave to appeal the SCA judgment in respect of case numbers 38/2019 and 47/2019 only (i.e. the Gauteng matter).²⁸ The failure of the SAHRC to seek leave to appeal in case number 999/2019 (i.e. the Easter Cape matter) is fatal for the reasons given above.

47 Ad paragraphs 11 to 15

I dispute these paragraphs for the reasons given above.

48 Ad paragraphs 16 to 20

The averments in these paragraphs are noted.

²⁸ FA paras 21 and 22

49 Ad paragraphs 23 to 35

I have dealt with these issues above.

50 Ad paragraphs 36 to 38

The SCA judgment speaks for itself.

51 Ad paragraphs 39 to 57

I dispute the contents of these paragraphs for the reasons given above.

52 Ad paragraphs 58 to 64

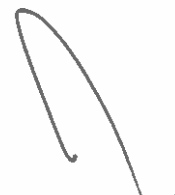
Save to admit the provisions of the Magistrates Courts Rules referred to in paragraphs 60.4.1 and 60.4.2, the rest of the averments under these paragraphs are denied and I refer to what is stated above in this affidavit.

53 Ad paragraphs 65 to 67

I deny that it would be in the interest of justice for the application to be granted, and refer to what is stated above.

54 Ad paragraphs 68 to 81

54.1 Save to deny the averments under these paragraphs to the extent that they contradict what is already stated above in this affidavit, the averments are noted.




54.2 I deny that the SAHRC has provided a sufficient explanation or that the averments establish a reasonable excuse for the very late filing of the application for leave to appeal. I refer to what is stated above in this affidavit.

55 Ad paragraph 82

The averments in this paragraph are denied.

CONCLUSION

56 Nedbank asks that the application for leave to appeal be dismissed with costs (including the costs of two counsel).



ALBERT MINNAAR SORGDRAGER

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at Summit on this the 29th day of **SEPTEMBER 2021**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



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