

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

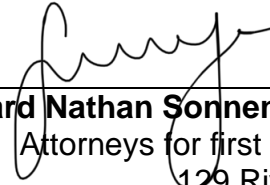
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FILING SHEET

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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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

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

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

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

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 relic¹⁴ 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

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

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.

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

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 jurisdiction²⁴, 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

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.

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.

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

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 exercise³¹ 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 speedier³³ 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.

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

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

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 Court⁵¹ 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

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

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

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

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

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.

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

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.

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:

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.

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

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

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.

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

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

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

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.

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

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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