

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	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 NKWINIKA	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 MATOME MALATJI	13 th Respondent
MODIEGI PERTUNIA MALATJI	14 th Respondent
GRACE M MAHLANGU	15 th Respondent
KEY HINRICH LANGBEHN	16 th 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 Rights⁸ 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

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:

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 708e-f

²² *Valente v The Queen* at 712a-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

²³ *Valente v The Queen* at 709f-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.

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) of 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:

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/AccessoDESC07eng/Accessodesci-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

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 Law⁶¹ 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' Courts⁶⁷ 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
<i>Standard Bank of South Africa Limited v Ezra Makikole <u>Mpongo</u></i>	R227 436.09	R13 777.84
<i>Standard Bank of South Africa Limited v Joyce Hluphekile <u>Nkwinika</u></i> (Withdrawn as client discharged debt)	R622 639.10	R117 518.18
<i>Standard Bank of South Africa Limited v Karin Madiou Samantha <u>Lempe</u></i>	R 218 324.73	R20 782.10
<i>Standard Bank Of South Africa Limited v Radesh and Myra Geraldien <u>Wooditadpersad</u></i>	R 95 129.64	R 7 772.18
<i>Standard Bank Of South Africa Limited v Neelsie and Angeline Rose <u>Goeieman</u></i>	R161 430.23	R 9 533.86
<i>ABSA Bank Limited v Anayo Prince and Portia Nomandla <u>Igwilo</u></i>	R121 906.57	R12 928.63
<i>ABSA Bank Limited v Jagathisan and Thirunadevi <u>Pillay</u></i>	R125 009.47	R20 200.78
<i>Nedbank Limited v Aubrey Ramorabane <u>Sonko</u></i>	R255 245.56	R13 586.64

<i>Nedbank Limited v Julia Mampuru <u>Thobejane</u></i>	R125 700.27	R9 662.82
<i>Firstrand Bank Limited v Grace Mmamtena <u>Mahlangu</u></i> (Subsequently withdrawn as client discharged debt)	R269 229.41	R16 930.02
<i>Firstrand Bank Limited v Kay Hinrich and Eunice <u>Langbehn</u></i> (Subsequently withdrawn as client discharged debt)	R207 595.01	R7 271.94
<i>Firstrand Bank Limited v Onesimus Solomon Matome and Modiegi <u>Pertunia Malatji</u></i> (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 affidavit⁷⁶ 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 27⁸¹ 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:

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

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.

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3 March 2022