



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 18 December 2023

Status: Immediate

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Nedbank Limited and Another v Mohammed Iqbal Survé and Others (Case no 160/2023) [2023] ZASCA 178 (18 December 2023).

Today the Supreme Court of Appeal (SCA) handed down a judgment upholding, with costs, an appeal against the decision of the Western Cape Division of the High Court, Cape Town, sitting as the Equality Court (equality court). The equality court had granted an interim interdict against the appellants, Nedbank Limited and Nedbank Private Wealth Stockbrokers (Pty) Ltd (Nedbank), prohibiting them from closing the bank accounts held by the respondents, being Dr Survé, Sekunjalo Investment Holdings (Pty) Ltd and forty two entities associated with them. Nedbank was further directed to re-open those bank accounts of the respondent that it had already closed. The order had effect pending the finalisation of proceedings in the equality court arising from a complaint of unfair racial discrimination lodged by the respondents.

Nedbank's decision to review its banker-customer relationship with the respondents was triggered by the Mpati Commission of Inquiry (the Commission) which was appointed in October 2018 to investigate, report and make findings and recommendations on allegations of impropriety concerning the Public Investment Corporation (the PIC). Its scope of inquiry included the relationship between the PIC and certain companies within the Sekunjalo Group. The Commission concluded, among other things, that there was 'malfeasance' on the part of the Sekunjalo Group, particularly in relation to the subscription by the PIC for shares in Ayo Technology Solutions Ltd. Nedbank proceeded to review its banker-customer relationship with the respondents. After interactions with them over several months, it gave notice that it intended to close the respondents' accounts. It cited, among other things, the reputational risks to Nedbank of a continued banker-customer relationship with the respondent.

The respondents' case was that Nedbank's conduct constituted unfair discrimination based on race. They pointed to the Steinhoff Group (Steinhoff), EOH Limited (EOH) and Tongaat Hulett Limited (Tongaatt), which had all been found to have been involved in fraudulent conduct, but whose accounts Nedbank had not closed. Describing these companies as 'white' or 'white dominated', the respondents averred that it was difficult to avoid the inference that the different treatment meted out to the Sekunjalo Group, which was constituted of 'black' entities, was racially motivated.

The SCA found that although the interdict granted by the equality court was interim, and ordinarily not appealable, this was one of those exceptional cases in which considerations of justice rendered it appealable. The respondents had failed to make out the prima facie case necessary for the grant of an interim interdict. Their case rested on no more than an assumption that Steinhoff, EOH and Tongaat were 'white', with no factual averments to support it. That assumption was insufficient to establish a prima facie case that Nedbank had treated the respondents, as black customers, differently from its white customers. Therefore the necessary foundational element of racial identity had not been established.

The respondents had also failed to make out a prima facie case that they had been treated differently to similarly situated customers of Nedbank for racial reasons. Nedbank had explained the reasons why its relationship with Steinhoff, EOH and Tongaat did not pose the same reputational risk as the respondents. The explanation pointed to material differences between them bearing no relation to race. The respondents had not substantively disputed this explanation. Their case was based on a perception and inference of racial discrimination unsupported by the necessary evidence. This was insufficient to sustain a prima facie case for relief. The SCA concluded that the order ought never to have been granted in the first place.

The SCA held that there was a further reason that rendered the order of the equality court appealable. The prima facie finding by the equality court that Nedbank's decision to close the respondents' accounts was based on unfair racial discrimination was a serious charge with reputational repercussions for Nedbank. The SCA found that where a case is properly made out for an order having this effect, a party cannot be heard to complain. However, where, as in this case, the order ought never to have been made, justice required that the impugned decision must be appealable and rectified.

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