



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**  
Case no: 160/23

In the matter between:

**NEDBANK LIMITED** **FIRST**

**APPELLANT**

**NEDGROUP PRIVATE WEALTH  
STOCKBROKERS (PTY) LTD** **SECOND**

**APPELLANT**

and

**MOHAMMED IQBAL SURVÉ** **FIRST**

**RESPONDENT**

**SEKUNJALO INVESTMENT  
HOLDINGS (PTY) LTD** **SECOND**

**RESPONDENT**

**AFRICAN EQUITY EMPOWERMENT  
INVESTMENT LIMITED** **THIRD RESPONDENT**

**PREMIER FISHING  
AND BRANDS LIMITED** **FOURTH RESPONDENT**

**PREMIER FISHING SA (PTY) LTD** **FIFTH RESPONDENT**

**PREMFRESH SEAFOODS (PTY) LTD** **SIXTH RESPONDENT**

<b>MARINE GROWERS (PTY) LTD</b>	<b>SEVENTH RESPONDENT</b>
<b>TALHADO FISHING ENTERPRISES (PTY) LTD</b>	<b>EIGHTH RESPONDENT</b>
<b>RUPESTRIS INVESTMENTS (PTY) LTD</b>	<b>NINTH RESPONDENT</b>
<b>DAZZALLE TRADERS (PTY) LTD</b>	<b>TENTH RESPONDENT</b>
<b>MANICWA FISHING (PTY) LTD</b>	<b>ELEVENTH RESPONDENT</b>
<b>MB FISHING VENTURES (PTY) LTD</b>	<b>TWELFTH RESPONDENT</b>
<b>ROBBERG SEA FREEZE (PTY) LTD</b>	<b>THIRTEENTH RESPONDENT</b>
<b>3 LAWS CAPITAL SOUTH AFRICA (PTY) LTD</b>	<b>FOURTEENTH RESPONDENT</b>
<b>AFRICAN NEWS AGENCY (PTY) LTD</b>	<b>FIFTEENTH RESPONDENT</b>
<b>BUSINESS VENTURE INVESTMENTS NO. 1126 (RF) (PTY) LTD</b>	<b>SIXTEENTH RESPONDENT</b>
<b>CAPE SUNSET VILLAS (PTY) LTD</b>	<b>SEVENTEENTH RESPONDENT</b>
<b>GLOBAL COMMAND &amp; CONTROL TECHNOLOGIES (PTY) LTD</b>	<b>EIGHTEENTH RESPONDENT</b>
<b>HAIFAMS INVESTMENTS (PTY) LTD</b>	<b>NINETEENTH RESPONDENT</b>
<b>JABSTER TECHNOLOGIES (PTY) LTD</b>	<b>TWENTIETH RESPONDENT</b>
<b>KATHEA</b>	

**COMMUNICATIONS (PTY) LTD      TWENTY FIRST RESPONDENT**

**LINACRE**

**INVESTMENTS (PTY) LTD      TWENTY SECOND RESPONDENT**

**AFRICA ONLINE**

**RETAIL (PTY) LTD      TWENTY THIRD RESPONDENT**

**MADJADJI AFRICAN EMPOWERMENT**

**CONSORTIUM (PTY) LTD      TWENTY FOURTH RESPONDENT**

**SAGARMATHA GROUP**

**HOLDINGS (PTY) LTD      TWENTY FIFTH RESPONDENT**

**SAGARMARtha**

**TECHNOLOGIES LIMITED      TWENTY SIXTH RESPONDENT**

**INDEPENDENT MEDIA**

**CONSORTIUM (PTY) LTD      TWENTY SEVENTH RESPONDENT**

**SEKUNJALO**

**CAPITAL (PTY) LTD      TWENTY EIGHTH RESPONDENT**

**SEKUNJALO**

**PROPERTIES (PTY) LTD      TWENTY NINTH RESPONDENT**

**SILO CAPE WATERFRONT**

**PROPERY INVESTMENTS (PTY) LTD      THIRTIETH RESPONDENT**

**SIYOLO ENERGY AND AFRICAN**

**RESOURCES (PTY) LTD      THIRTY FIRST RESPONDENT**

**THE TRUSTEES OF THE SOUTH AFRICAN**

**INSTITUTE FOR THE ADVANCEMENT OF SOCIAL**

**ENTREPRENEURS TRUST      THIRTY SECOND RESPONDENT**

<b>SOUTH AFRICAN PRESS ASSOCIATION (PTY) LTD</b>	<b>THIRTY THIRD RESPONDENT</b>
<b>SURVÉ PHILANTHROPIES NPC</b>	<b>THIRTY FOURTH RESPONDENT</b>
<b>THE TRUSTEES OF THE HARAAS TRUST</b>	<b>THIRTY FIFTH RESPONDENT</b>
<b>THE TRUSTEES OF THE IQBAL SURVÉ BURSARY TRUST</b>	<b>THIRTY SIXTH RESPONDENT</b>
<b>THE TRUSTEES OF THE SAVNASI VILLAGE TRUST</b>	<b>THIRTY SEVENTH RESPONDENT</b>
<b>THE TRUSTEES OF THE IQBAL SURVÉ FAMILY TRUST</b>	<b>THIRTY EIGHTH RESPONDENT</b>
<b>THE TRUSTEES OF THE SEKUNJALO DEVELOPMENT FOUNDATION TRUST</b>	<b>THIRTY NINTH RESPONDENT</b>
<b>THE TRUSTEES OF THE SOCIAL ENTREPRENEURSHIP FOUNDATION TRUST</b>	<b>FORTIETH RESPONDENT</b>
<b>THE TRUSTEES OF THE SURVÉ FAMILY FOUNDATION TRUST</b>	<b>FORTY FIRST RESPONDENT</b>
<b>KALULA COMMUNICATIONS (PTY) LTD RESPONDENT</b>	<b>FORTY SECOND</b>
<b>THE TRUSTEES OF THE SOUTH ATLANTIC ARTS AND CULTURE TRUST</b>	<b>FORTY THIRD RESPONDENT</b>

**INDEPENDENT NEWSPAPERS****FORTY FOURTH RESPONDENT**

**Neutral citation:** *Nedbank Limited and Another v Survé and Others* (Case no 160/2023) [2023] ZASCA 178 (18 December 2023)

**Coram:** GORVEN, MEYER and WEINER JJA and BINNS-WARD and KEIGHTLEY AJJA

**Heard:** 14 November 2023

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email publication on the Supreme Court of Appeal website and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 18 December 2023.

**Summary:** Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – application for interim interdict in Equality Court – failure to establish prima facie case – appealability of interim interdict.

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## ORDER

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**On appeal from:** Western Cape Division of the High Court, Cape Town (Dolamo J, sitting as the Equality Court):

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The order of the Equality Court is set aside and replaced with the following order:  
‘The application is dismissed with costs, including the costs of two counsel where so employed.’

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## JUDGMENT

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**Keightley AJA (Gorven, Meyer and Weiner JJA and Binns-Ward AJA concurring)**

[1] This appeal has its origins in proceedings instituted in the Western Cape Division of the High Court, Cape Town sitting as the Equality Court (the equality court), by the first respondent, Dr Survé, and the remaining respondents (the equality court proceedings). The latter are entities within what may broadly be termed the Sekunjalo Group of Companies (the Sekunjalo Group). Dr Survé describes himself as the founder of the Sekunjalo Group. The appellants, Nedbank Limited and Nedgroup Private Wealth Stockbrokers (Pty) Ltd (Nedbank), are two of several banks cited as respondents in the equality court proceedings. The nature of the equality court complaint against the banks is that the decision to close the

accounts of Dr Survé and the other entities in the Sekunjalo Group constitutes conduct amounting to unfair discrimination on the ground of race.

[2] The equality court complaint was lodged against the backdrop of several banks, including Nedbank, placing the accounts of the respondents on review. On 15 November 2021, Nedbank dispatched termination letters notifying the respondents that their accounts would be closed (the termination letters). In February 2022, the equality court complaint was filed against Nedbank. On 21 February 2022, the respondents instituted an urgent application (the application) in the equality court for an interim interdict in terms of s 21(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). It is this application that is the subject matter of the appeal.

[3] In brief, the respondents sought to prohibit Nedbank from closing the bank accounts of those respondents that had received termination letters, but whose accounts had not yet been closed. In respect of those respondents whose accounts had already been closed, an order was sought directing Nedbank to re-open them with immediate effect, coupled with a prohibition against subsequent closure. Both categories of relief were to be effective pending the final determination of the equality court proceedings.

[4] The equality court (per Dolamo J) granted an interdict in the terms sought and ordered Nedbank to pay the costs of the application. Leave to appeal was dismissed with costs. The appeal is with leave of this Court.

[5] The event that triggered Nedbank's decision to review its banker-customer relationship with the respondents, was the Mpati Commission of Inquiry (the

Commission). The Commission was appointed in October 2018 to investigate, report and make findings and recommendations on allegations of impropriety concerning the Public Investment Corporation (the PIC). One aspect of the Commission's scope of inquiry was the relationship between the PIC and certain companies within the Sekunjalo Group, notably, but not solely, Ayo Technology Solutions (Pty) Ltd (Ayo), and certain transactions that had been concluded between them.

[6] The Commission's report was released to the public in March 2020. It contained several findings which raised concern for Nedbank. The Commission found that Ayo's shares were grossly over-valued at its listing date, when the PIC subscribed for shares at a price previously agreed between the PIC and Ayo. Soon thereafter, the value of the shares plummeted by 87%. This, concluded the Commission, demonstrated 'the malfeasance of the Sekunjalo Group'. It observed that the PIC's interactions with, and investments in, the Sekunjalo Group were questionable from the outset and that investment proposals had emanated from direct discussions between Dr Survé and Dr Matjila, the then Chief Executive Officer of the PIC. This close relationship created top-down pressure on the PIC teams involved to recommend approval for the investments.

[7] The inquiry and the Commission's report also generated significant adverse media attention for Dr Survé and the Sekunjalo Group. Concerned about the possible reputational risk its continued relationship with the respondents would generate, Nedbank embarked on a process of reviewing that relationship. There were extensive engagements between the parties over several months in 2021 and in January 2022. Nedbank received representations from Dr Survé, as well as receiving responses to queries directed at other representatives of the Sekunjalo



Group. These included queries about the flow of funds between different accounts held by the respondents with Nedbank. Ultimately, Nedbank decided to terminate its banking relationship with the respondents.

[8] It is common cause that all the contracts governing the banking relationship permitted Nedbank to terminate the contracts on reasonable notice. In the termination letters, Nedbank gave the various respondents 120 days' notice of the closure of their accounts. Notwithstanding that Nedbank was under no obligation to provide reasons for its decision,<sup>1</sup> the letters recorded that the reason for the closures was that, in Nedbank's view, taking into account a number of factors, a continued relationship with the respondents was likely to pose significant reputational and association risks for Nedbank.

[9] The termination letters listed the factors. Common to most of the respondents, these were identified as: the respondents' direct or indirect association with Dr Survé and the Sekunjalo Group; the serious nature of the allegations levelled against Dr Survé and the Sekunjalo Group; the litigation in which some companies in the Sekunjalo Group had been involved; the adverse inferences and statements made in the Commission's report; and the Sekunjalo Group's failure to appreciate that the report implicated certain entities in the group in wrongdoing. In respect of some respondents, the termination letters also cited, as factors, Nedbank's detailed transactional analysis of certain bank accounts and the unsatisfactory responses Nedbank had received to its associated queries.

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<sup>1</sup> *Bredenkamp v Standard Bank of SA Ltd* [2010] ZASCA 75; 2010 (4) SA 468 (SCA) para 23; [2010] 4 All SA 113 (SCA).

[10] Following the dispatch of the termination letters, there was further engagement between the parties. The Sekunjalo Group appointed Mr Heath SC to conduct an independent review of the Commission's report. He wrote to Nedbank on 30 November 2021 advising them of this fact. He also quoted from his letter of appointment from Dr Survé, in which the latter had indicated that the Sekunjalo Group intended to make the report available to, among others, their bankers. However, on 5 January 2022, he wrote again indicating that he had prepared a preliminary report but that the Sekunjalo Group had claimed privilege over it. According to Nedbank, the respondents were prepared to share the report with the bank if it withdrew its termination notices. This was not acceptable to Nedbank and the notices remained in effect.

[11] With the imminent closure of some affected bank accounts, the respondents turned to the courts. They first approached the high court for an urgent interdict against Nedbank to prohibit the closure on the basis of unfair discrimination on the ground of race. On 14 February 2022 the high court ruled that it did not have jurisdiction to consider the application as the matter fell within the exclusive jurisdiction of the equality court. A week later the respondents instituted the application now on appeal.

[12] Two main issues arose for consideration in the appeal. First, the issue of whether the order of the equality court is appealable. Second, the question of whether the respondents established a prima facie case of racial discrimination. Nedbank contended that they did not, that the equality court erred in concluding otherwise, and that the order was appealable. The respondents' submission was that, even if the order was appealable (which they dispute), it was correctly granted.

[13] The question of appealability arose because the equality court's order was expressly stated to be an interim interdict under s 21(5) of the Equality Act.<sup>2</sup> Nedbank submitted that despite the apparent interim nature of the order, its reach rendered the order final in effect. This was so because the order prohibits Nedbank from closing the bank accounts of the respondents for any reason, even if that reason has nothing to do with unfair discrimination. If a respondent, for example, breached the terms of the banker-customer contract, the equality court order prohibits Nedbank from exercising its contractual right to terminate the relationship. Due to the equality court's limited jurisdiction, which is restricted to unfair discrimination related matters, it would never reconsider its order insofar as it dealt with the prohibition against non-discrimination related terminations. Nedbank submitted that to this extent the equality court order was final and appealable.

[14] The respondents disputed Nedbank's interpretation of the equality court order. They contended that, properly interpreted, the order is not as broad as Nedbank suggested, and that it simply does not prohibit non-discrimination based terminations. They based this contention on the order requiring Nedbank to re-open any accounts of the respondents which it had closed. The balance of that order was that the re-opening was directed to 'retain the terms and conditions on which these accounts were operating prior to their closure'. While that is true of that paragraph of the order, it clearly does not apply to the prohibitory interdicts of the first two paragraphs of the order. Those are not made subject to the accounts being governed by the prior terms and conditions. The respondents relied on

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<sup>2</sup> Section 21(5) states that:

'The court has all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts.'

Dolamo J's statement, in his judgment in the application for leave to appeal, that the order was not intended to enforce a total prohibition on account closures. However, this is not how the order reads. Nonetheless, I do not consider that it is necessary to make a finding on this interpretational dispute. In my view, the question of appealability in this case does not turn on whether the order is interim or final in effect. For the reasons set out below, my view is that even if the order is interim in effect, it is appealable.

[15] As a matter of general principle, an appealable decision is one which is final in effect and not susceptible to reconsideration by the court that granted it, is definitive of the rights of the parties, and has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.<sup>3</sup> It follows that, ordinarily, an interlocutory interdict that operates pending the outcome of further proceedings is not appealable.<sup>4</sup> Orders of this nature do not usually satisfy the triad of requirements for appealability mentioned above.

[16] However, these requirements do not constitute a closed list.<sup>5</sup> Where a decision does not dispose of all the issues in the case, s 17(1)(c) of the Superior Courts Act 10 of 2013 provides that leave to appeal may be granted if this would lead to a just and prompt resolution of the real issues between the parties.<sup>6</sup> In recent years, the role of the interests of justice in determining whether an order is appealable has received attention. This has resulted in judgments of this Court

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<sup>3</sup> *Zweni v Minister of Law and Order of the Republic of South Africa* [1992] ZASCA 197; [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) (*Zweni*) at 536B.

<sup>4</sup> *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* [2017] ZASCA 134; [2017] 4 All SA 605 (SCA); 2018 (6) SA 440 (SCA) (*Cipla*) para 36.

<sup>5</sup> *Cipla* para 37.

<sup>6</sup> See also *DRDGold Limited and Another v Nkala and Others* [2023] ZASCA 9; 2023 (3) SA 461 (SCA) (*DRDGold*) paras 22-26.

which could be said to differ in approach to this issue.<sup>7</sup> Since, however, none of them deals with interim interdicts, and the Constitutional Court has done so expressly, it will not benefit this judgment to rehearse them.

[17] In *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*<sup>8</sup> the Constitutional Court dealt with the application of the interests of justice in an appeal relating to interim interdicts. This Court had struck a matter from its roll on the basis that the order, which was an interim interdict, was not appealable under the *Zweni* test. The Constitutional Court upheld an appeal against that judgment. It found that ‘[o]ver and above the common law test, it is well established that an interim order may be appealed against if the interests of justice so dictate’.<sup>9</sup> It found further that, in deciding whether an order is appealable, this Court does not exercise a discretion but rather makes a finding of law.<sup>10</sup> The Constitutional Court concluded that the interim interdict in question was appealable because it had resulted in the infringement of the right to freedom of expression.<sup>11</sup> This Court is bound by that finding.

[18] In a matter where no case was made out for an interim interdict and the order accordingly ought never to have been granted in the first place, along with other relevant considerations, interests of justice might well render an interim interdict

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<sup>7</sup> See *S v Western Areas* [2005] ZASCA 31; 2005 (5) SA 215 (SCA) paras 215-216; [2005] 3 All SA 541 (SCA); *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 All SA 459 (SCA); 2010 (2) SA 573 (SCA) para 20; *Cipla* para 37; *DRDGold* n 5 paras 22-26; *Road Accident Fund v Taylor* [2023] ZASCA 64; 2023 (5) SA 147 (SCA) para 26; *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA) paras 30; *Knoop NO and Others v National Director of Public Prosecutions* [2023] ZASCA 141.

<sup>8</sup> *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC).

<sup>9</sup> *Ibid* para 45.

<sup>10</sup> *Ibid* para 40.

<sup>11</sup> *Ibid* para 45.

appealable despite the *Zweni* requirements not having been met.<sup>12</sup> An analysis of the second issue in this appeal, namely, whether the respondents made out a prima facie case for the interim interdict granted, demonstrates that this appeal is one of those exceptional cases.

[19] The established requirements for an interim interdict in common law apply to an application for interim relief in the equality court.<sup>13</sup> The well-established approach to interim relief requires the court to consider the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to assess whether the applicant should, on those facts, obtain final relief in due course.<sup>14</sup> The inquiry is fact-based. In the context of equality court proceedings, this Court has emphasised that mere allegation or speculation as to an infringement of the Equality Act will not suffice, and that an application may not be based on ‘conjecture, perception and supposition’.<sup>15</sup> This means that it is not sufficient for an applicant to baldly aver that there has been unfair discrimination. It must adduce evidence of facts that objectively support the conclusion contended for. In order to succeed the respondents had to make factual allegations to support a prima facie case that Nedbank had discriminated unfairly against the respondents on the basis of race when it closed the respondents’ accounts.

[20] The thrust of the respondents’ case was that there appeared to be a collective effort among the banks to ‘unbank’ (the term used in the affidavits) the Sekunjalo Group. Nedbank was one of several banks that had either closed bank accounts

<sup>12</sup> *Old Mutual Limited and Others v Moyo and Another* [2020] ZAGPJHC 1; [2020] 4 BLLR 401 (GJ); [2020] 2 All SA 261 (GJ); (2020) 41 ILJ 1085 (GJ) para 103, endorsed in *Eskom Holdings SOC Limited v Lekwas Ratepayers Association NPC and Others; Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZASCA 10; [2022] 1 All SA 642 (SCA); 2022 (4) SA 78 (SCA) para 7.

<sup>13</sup> *Manong and Associates (Pty) Ltd v Minister of Public Works and Another* [2009] ZASCA 110; 2010 (2) SA 167 (SCA); [2010] 1 All SA 267 (SCA) (*Manong*) para 22.

<sup>14</sup> *Gool v Minister of Justice* 1955 (2) SA 682 (C) 688D-E.

<sup>15</sup> *Manong* para 30.

held by entities within the Sekunjalo Group or had placed the accounts under review. Although, like the other banks, Nedbank had cited reputational risks as the underlying reason, the respondents cast suspicion on this explanation. The key element of the respondents' case for unfair discrimination was that Nedbank had been selective in its assessment of which customers posed a reputational risk, and that this selective assessment was based on the race of the entities in question.

[21] In support of this thesis, the respondents identified the Steinhoff Group (Steinhoff), EOH Limited (EOH) and Tongaat Hulett Limited (Tongaat) as entities that had not had their bank accounts closed despite them having been found guilty of fraud and other offences. By way of contrast, no actual findings of financial misconduct had been made against the Sekunjalo Group, and yet entities within that group had either had their relationship with Nedbank terminated or threatened with termination. The respondents asserted that these examples of what the respondents labelled as 'white dominated businesses' not being punished by Nedbank in the same manner as the respondents was absurd and that it was 'difficult not to infer that there is racial discrimination at play here'. Consequently, Dr Survé stated in the founding affidavit that 'the [respondents] have taken the view that they are being targeted inter alia, on the basis of race'.

[22] Of course, the respondents' view or perception that it was being discriminated against on the basis of race is not sufficient to establish a prima facie case. Their case was expressly inferential. Consequently, they were required to adduce facts sufficient to satisfy the equality court that the inference of unfair racial discrimination they sought to draw from the facts was more plausible than

the alternative inference drawn from the facts averred by Nedbank in its defence to the charge.<sup>16</sup>

[23] This means that the respondents had to show that:

(a) the other impugned companies, which had not had their accounts closed, were ‘white companies’, whereas the respondents, which had faced closure, were ‘black companies’;

(b) these two groups were similarly situated in all other respects apart from race; and (c) the reason for this differential treatment was the race of the companies.

Without this, a plausible inference could not be drawn that it was the victim of unfair racial discrimination by Nedbank.

[24] There were fundamental inadequacies in the respondents’ case on each of these aspects of the application. On the first, being the asserted race of the two contrasted groups of customers, the respondents applied the racial designation of ‘white’ or ‘white dominated’ to Steinhoff, EOH and Tongaat without any underlying factual basis to support that designation. In their submissions, the respondents contended that the race profile of a company must be determined by considering factors such as the racial composition of its senior management, its board of directors and its beneficial shareholders. However, the affidavits filed in support of the application were devoid of any reference to these factors, let alone an evaluation, based on them, of the alleged ‘white companies’ identified.

[25] Effectively, the respondents’ case rested on no more than an assumption of racial designation. That assumption was insufficient to establish even a prima facie case that Nedbank had treated the respondents, as black customers, differently

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<sup>16</sup> *Cooper v Merchant Trade Finance Limited* [1999] ZASCA 97; 2000 (3) SA 1009 (SCA) para 7.



from white customers. The equality court compounded the problem by itself expressly assuming, without deciding, that Steinhoff, EOH and Tongaat were white companies. Having done so, it went on to decide the case on precisely this basis. It misdirected itself in this regard by making this assumption in the absence of any evidence to support it, and then proceeding to the next leg of the inquiry without being satisfied that the respondents had discharged their onus on this, the foundational element of their case. This, in itself, is decisive of the matter. The necessary foundational element of racial identity had not been established.

[26] As to establishing a prima facie case that they were treated differently to other, similarly situated, customers of Nedbank for racial reasons, the respondents similarly fell short. Nedbank met the respondents' case with an express denial that its decision to terminate its relationship with the respondents was motivated by racial factors. It went further and explained why it had not decided to terminate its relationships with Steinhoff, EOH and Tongaat. These companies did not pose the same reputational risk as the respondents. This was because, unlike the respondents, they had all been restructured following the adverse findings against them; they had acknowledged their past wrongdoing; those implicated had been dismissed or resigned; new management was in place and other remedial actions had been undertaken. In contrast, its interaction with the respondents demonstrated that they had sought to downplay the seriousness of the Commission's adverse findings and comments directed at the Sekunjalo Group and Dr Survé. Further, a number of Nedbank's queries regarding account transactions had not been adequately explained.

[27] It was inherent in Nedbank's defence that the respondents and the other entities were not similarly situated. There were material differences between them,

bearing no relation to race, that informed Nedbank's decision to terminate its relationship with the respondents and not with the other entities. The respondents did not substantially dispute Nedbank's explanation. Their case essentially remained one based on their expressed perception that Nedbank's conduct was racially motivated. This is insufficient to sustain a prima facie averment of unfair racial discrimination. Consequently, the equality court could not properly have found that the respondents had discharged their onus of establishing a prima facie case of unfair racial discrimination. It ought to have dismissed the application for this reason.

[28] Inexplicably, the equality court reversed the onus of proof. Relying on s 13 of the Equality Act,<sup>17</sup> the equality court found that Nedbank had not proved that its conduct was not based on the prohibited ground of race. The application being for an interim interdict, the court clearly misdirected itself in this respect. As this Court confirmed in, *Manong*<sup>18</sup> it was the respondents that bore the onus of establishing a prima facie case of discrimination before Nedbank attracted an onus. They could not do so based on mere perception of unfair racial discrimination and an inferential case unsupported by facts. For the reasons already stated, it failed to clear that bar.

[29] In sum, the respondents did not allege the facts necessary to make out a prima facie case. The order of the equality court should not have been granted in

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<sup>17</sup> Section 13 deals with burden of proof. It provides, in relevant parts:

'(1) If the complainant makes out a prima facie case of discrimination-

(a) The respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or

(b) The respondent must prove that the conduct is not based on one or more of the prohibited grounds.

(2) If the discrimination did take place-

(a) on a ground in paragraph (a) of the definition of "prohibited grounds" then it is unfair, unless the respondent proves that the discrimination is fair. . . '.

<sup>18</sup> *Manong* paras 22 & 27.

the first place.<sup>19</sup> For this reason, it is one of those exceptional cases where, despite the interim nature of the order, it falls within the appeal jurisdiction of this Court.

[30] There is an additional reason for this interim interdict being appealable. The equality court found, albeit on a prima facie basis, that Nedbank's decision to close the respondents' accounts was based on unfair racial discrimination. This is a serious charge. Racism is a scourge which has infected the fabric of our national life for well over three hundred years. The Equality Act was specifically devised, in part, to address and eliminate this scourge. Any order under this section of the Equality Act requires a finding that the entity against which the order is granted has unfairly discriminated on the ground of race. A finding of that nature has obvious serious reputational repercussions, particularly considering Nedbank's standing as one of the major banks in South Africa. 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 requires that the impugned decision is rendered appealable and rectified.

[31] It follows for this reason that the appeal must succeed. In the result, the following order is granted:

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The order of the Equality Court is set aside and replaced with the following order:  
'The application is dismissed with costs, including the costs of two counsel where so employed.'

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<sup>19</sup> Ibid para 22.

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R M KEIGHTLEY  
ACTING JUDGE OF APPEAL

## Appearances

For the appellants:

A Cockrell SC with M Mbikiwa

Instructed by:

Edward Nathan Sonnenbergs Inc, Sandton

Mayet & Associates Inc, Bloemfontein

For the respondents:

V Ngalwana SC with J Moodley

Instructed by:

Adriaans Attorneys, Cape Town

Honey Attorneys, Bloemfontein.