

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: _____

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**

1st Respondent

NEDBANK LIMITED

2nd Respondent

FIRSTRAND BANK LIMITED

3rd Respondent

EZRA MAKIKOLE MPONGO

4th Respondent

MYRA GERALDINE WOODITADPERSAD

5th Respondent

RADESH WOODITADPERSAD

6th Respondent

JOYCE HLUPHEKILE NKWINIKA

7th Respondent

KARIN MADIAU SAMANTHA LEMPA

8th Respondent

NEELSIE GOEIEMAN

9th Respondent

ANGELINE ROSE GOEIEMAN

10th Respondent

JULIA MAMPURU THOBEJANE

11th Respondent

AUBREY RAMORABANE SONKO

12th 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

NOTICE OF APPLICATION IN TERMS OF RULE 19(2)

KINDLY TAKE NOTICE that the Appellant intends to apply to this Honourable Court, on a date to be determined by the Registrar, for relief in the following terms:

- 1 The Appellant is granted condonation for non-compliance with Rule 19(2) of this Honourable Court and the late filing of this application.
- 2 The Appellant is declared to have standing to lodge this appeal and, to the extent necessary, is granted leave to be joined as a party in the matters 38/2019 and 47/2019.
- 3 The Appellant is granted leave to appeal to this Court against the whole of the order and judgment of Sutherland AJA handed down on 25 June 2021 under case numbers 38/2019 and 47/2019 in the Supreme Court of Appeal.
- 4 The Appellant's appeal is upheld.
- 5 Costs, only in the event of opposition.

6 Further or alternative relief.

TAKE NOTICE THAT the affidavit of **PHILILE NTULI** attached hereto will be used in support of this application.

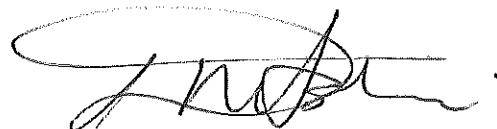
TAKE NOTICE FURTHER THAT the Appellant has appointed the address of its attorneys below where it will accept service of all process in this matter, save as otherwise agreed between the parties.

TAKE NOTICE FURTHER THAT if you intend opposing this application, you are required, in terms of Rule 11 of the above Court:

- a) to notify the Appellant's attorney and the Court's Registrar in writing, within 5 days after service hereof on you, of your intention to oppose this application or not;
- b) to appoint in your notification an address within 25 kilometres of the office of the Court's Registrar at which you will accept notice and service of all documentation in these proceedings; and
- c) within 15 days of notifying the applicant of your intention to oppose the application, to lodge your answering affidavit, if any, together with any relevant documents, which may include supporting affidavits.

TAKE NOTICE FURTHER THAT if no such notice of intention to oppose be given, the Court's Registrar will be requested to place the matter before the Chief Justice to be dealt with in terms of Rule 11(4).

DATED and SIGNED at JOHANNESBURG on this 17th day of **SEPTEMBER** 2021.



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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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SCA Case No: 38/2019 & 47/2019

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Appellant
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p.n GST



ONESIMUS SOLOMON MATOME MALATJI

13th Respondent

MODIEGI PERTUNIA MALATJI

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GRACE M MAHLANGU

15th Respondent

KEY HINRICH LANGBEHN

16th Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

Philile Ntuli

declare under oath as follows: –

- 1 I am a Commissioner at the South African Human Rights Commission (“SAHRC” or “the Commission”) situated at Forum III, Braampark Offices, 33 Hoofd Street, Braamfontein.
- 2 I am duly authorised by the Commission to depose to this affidavit and to bring this application on its behalf.
- 3 The facts herein contained, unless otherwise stated or indicated, are within my personal knowledge. They are, to the best of my knowledge and belief, true and correct in all respects.

P. N. G. S. T.



THE PARTIES

- 4 The applicant, the SAHRC, is a national and independent institution established to support constitutional democracy in terms of section 181 of the Constitution and the South African Human Rights Commission Act 40 of 2013.
- 5 The first respondent is the Standard Bank of South Africa Limited ("**Standard Bank**"), a public company registered in accordance with the company laws of the Republic of South Africa and a duly registered credit provider in terms of the NCA, with its head office situated at 5 Simmonds Street, Johannesburg.
- 6 The second respondent is Nedbank Limited ("**Nedbank**"), a public company registered in accordance with the company laws of the Republic of South Africa and a duly registered credit provider in terms of the NCA, with its head office situated at 135 Rivonia Road, Sandown, Sandton, Johannesburg.
- 7 The third respondent is Firststrand Bank Limited ("**FNB**"), a public company registered in accordance with the company laws of the Republic of South Africa and a duly registered credit provider in terms of the NCA, with its head office situated at 4 Merchant Place, cnr Fredman Drive and Rivonia Road, Sandown Johannesburg.
- 8 The fourth to sixteenth respondents are respondents in various applications for default judgment lodged by the first to third respondents in the High Court. The Pretoria Society of Advocates was requested to assist these unrepresented respondents and complied with the request.

- 9 This application will also be served on the Minister of Justice and Correctional Services and the Pretoria Society of Advocates who were parties in the High Court and Supreme Court of Appeal.

THE PURPOSE OF THIS APPLICATION

- 10 The SAHRC seeks leave to appeal under Rule 19(2) of the Rules of this Court against the judgment and order of the Supreme Court of Appeal (“SCA”) handed down on 25 June 2021 under case numbers 38/2019 and 47/2019. A copy of the order and judgment is attached as annexure “SAHRC 1”.
- 11 This is a matter of critical importance, which will affect debtors facing default judgment across the country. This case 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 to access to justice on the common law.
- 12 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.

- 13 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.

- 14 In the SAHRC's view, 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 right to 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.

- 15 In this application, I address the following issues:
 - 15.1 The relevant background;
 - 15.2 The SAHRC's standing to appeal as *amicus curiae*;
 - 15.3 The judgment of the Supreme Court of Appeal;
 - 15.4 The grounds for appeal;
 - 15.5 Constitutional issues and arguable points of law of general public importance;
 - 15.6 The interests of justice; and
 - 15.7 Condonation.

THE RELEVANT BACKGROUND

- 16 This matter arises from thirteen applications that were set down for hearing, pursuant to a practice directive issued by the Judge President of the Gauteng Division, Pretoria on 24 June 2016. In all thirteen matters, the applicant (a bank) seeks 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.
- 17 The practice directive issued by the Judge President called upon the parties to address the following questions:
- 17.1 Why the High Court should entertain matters that fall within the jurisdiction of the Magistrates' Court?
 - 17.2 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?
 - 17.3 Is the provincial division of a High Court obliged to entertain matters that fall within the jurisdiction of a local division on the basis that the provincial division has concurrent jurisdiction?
 - 17.4 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?

18 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.

18.1 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.¹ 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 Court.²

18.2 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.³

18.3 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

¹ *Nedbank Limited v Thobejane; Firstrand Bank Limited v Malatjie; Standard Bank of South Africa v Mpongo; Absa Bank Limited v Van der Merwe; First Rand Bank Limited v Mahlangu; Standard Bank of South Africa v Wooditadpersad; Nedbank Limited v Sonko; Standard Bank of South Africa Limited v Nkwiniika; Firstrand Bank Limited v Langbehn; Standard Bank of South Africa v Lempe; Standard Bank of South Africa v Goeleman; Absa Bank Limited v Igwilo; Absa Bank Limited v Pillay 2019 (1) SA 594 (GP) ("Nedbank v Thobejane")* at para 91.

² *Nedbank v Thobejane*, para 92.

³ *Nedbank v Thobejane*, para 92.

the courts have an obligation to ensure that access to justice is safeguarded, by exercising appropriate jurisdictional oversight.⁴

- 19 A copy of the order and judgment of the High Court is attached as annexure "SAHRC 2".
- 20 The decision of the Gauteng High Court was overturned by the Supreme Court of Appeal on 25 June 2021. The judgment of the SCA is attached hereto as "SAHRC1" and is discussed in detail below.
- 21 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.
- 22 The SAHRC does not seek leave to appeal the decision of the SCA in respect 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.

⁴ *Nedbank v Thobejane*, para 92.

THE SAHRC'S STANDING TO APPEAL AS AMICUS CURIAE

23 The SAHRC applies to this court for an order that:

23.1 The SAHRC has standing to appeal the decision of the SCA; and

23.2 Leave is granted to appeal against the order and judgment of the SCA.

24 The SAHRC was admitted as *amicus curiae* in the Gauteng High Court and SCA, and made oral and written submissions in support of its arguments. This Court has held that *amici curiae* may seek leave to appeal matters, in circumstances where the parties to the matter fail to do so. However, this is not an automatic right.

25 In this respect, the SAHRC relies on the case of ***University of Witwatersrand Law Clinic v Minister of Home Affairs***,⁵ where this Court stated as follows:

"This court made it clear in Campus Law Clinic that an amicus curiae would ordinarily be permitted to appeal against an order of another court only where the actual parties to that litigation were not seeking to pursue an appeal and there was a clear public interest requiring it to be permitted to lodge the appeal."

26 Further, this Court's decision in *Freedom of Religion v Minister of Justice* ("**FORSA**")⁶ supports the SAHRC application to lodge this appeal in the public interest. This court stated that:

"A jump or translation from being a friend of the court in a lower court to becoming a party at an appeal stage is at times permissible on considerations of justice. And the case of Freedom of Religion finds itself in that same situation. Not only does it seek to become a party in the public interest, but the issues raised also bear out the need for

⁵ 2008 (1) SA 447 (CC) at para 6.

⁶ 2020 (1) SA 1 (CC) paras 13 to 20

intervention as a party on behalf of the general body of parents and children in our country."

27 I submit that the SAHRC is in a similar position. The judgment and order of the SCA impact upon the public interest and vulnerable members of society. The intervention by the SAHRC is necessary to ensure that issues in the public interest are referred to this court for the attainment of a final and authoritative pronouncement.

28 The judgment of this court in ***Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd*** ("***Campus Law Clinic***") provides on-point support for the SAHRC's contention that it has standing to lodge the application for leave to appeal.⁷ ***Campus Law Clinic*** involved debtors who did not wish to represent themselves and banks who were the main parties. This court indicated that the relevant factors to consider whether a non-party has standing to appeal would be:⁸

"[W]hether there is another reasonable and effective manner in which the challenge may be brought; the nature of the relief sought and the extent to which it is of general and prospective application; the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the court; the degree of vulnerability of the people affected; the nature of the rights said to be infringed; as well as the consequences of the infringement. The list of factors is not closed."

⁷ 2006 (6) SA 103 (CC) at para 19 – 22.

⁸ *Campus Law Clinic* at para 21.

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29 In addition, in ***Campus Law Clinic*** this court accepted that the matter was exceptional and that the applicant had standing to appeal based on the following factors:⁹

29.1 The matter was driven by judicial concern to ensure that in enforcing warrants for sales in execution of properties where mortgage debtors were in default, constitutional rights concerning access to adequate housing be considered.

29.2 The individual debtors did not actively pursue the matter themselves nor did they instruct counsel to appear. Counsel acting as *amici curiae* appeared at the request of the respective courts.

29.3 Once the appeal by Standard Bank succeeded in the SCA there was no litigant willing and able to take the matter further.

29.4 Since the SCA decision will be binding on the High Court, and would be followed by the SCA itself, fresh proceedings would serve no useful purpose, and only involve unnecessary delay and expense.

30 The facts of ***Campus Law Clinic*** are almost identical to this matter. I submit that this is an exceptional matter and that it is in the interests of justice that this court grant the SAHRC leave to appeal as a party. I say so for the following reasons:

30.1 Neither the appellant nor the respondents in the SCA have appealed and all indications are that they do not intend to. There is considerable public

⁹ *Campus Law Clinic* at para 22.

interest in this matter which directly affects the public, and the fourth to sixteenth respondents¹⁰

30.2 There is no other reasonable and effective manner in which the appeal may be brought.¹¹ The defendants have not participated in the proceedings during the High Court or SCA stage. The respondents, having succeeded in the SCA, will not take the matter further.

30.3 The judgment raises important constitutional issues relating to access to justice for indigent litigants.

30.4 The relief sought would have the impact that applications for default judgment falling within the monetary jurisdiction of the Magistrate's Court should not be instituted in the High Court. If a litigant does institute litigation in the High Court, the High Court may decline to hear the matter and transfer the matter to the appropriate Magistrate's Court having jurisdiction. This remedy would directly protect and promote the rights of debtors to access to justice.

30.5 The remedy would only be available should this court allow the appeal and decide in favour of the SAHRC and will therefore only have prospective effect.¹²

30.6 The range of persons or groups who may be directly or indirectly affected by the relief include poor debtors who are financially stressed and

¹⁰ *FORSA* at para 16.

¹¹ *FORSA* at para 15.

¹² *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* 1996 (1) SA 984 (CC) at para 234.

vulnerable and unable to participate in the litigation against them. The nature of the matters that gave rise to this matter shows that in most cases, it is the debtors primary home that is at stake. They have a high degree of vulnerability and their right to access to justice is at risk.¹³

- 31 The SAHRC was admitted as *amicus curiae* in the High Court and SCA. The SAHRC is not seeking to be involved in this matter for the first time. It took part in the proceedings in the High Court and the SCA as *amicus curiae*. The SAHRC is familiar with the issues that it seeks to raise on behalf of the broader public.¹⁴
- 32 In **FORSA** this court held that the technicalities regarding an appeal by a party should not be rigidly applied where there is a legitimate and demonstrable pursuit of justice. This court held that:¹⁵

“Technicalities and senseless constraints that come with rigidity should never be allowed to stand in the way of a legitimate and demonstrably desirable pursuit and attainment of justice. True, only parties to litigation should ordinarily be allowed, by reason of their direct and active participation born of their material interest in the case, to challenge the decision of the court which decided against them. Courts must, after all, protect scarce judicial resources by not easily allowing litigious busybodies to clog the roll in circumstances where those directly and materially affected by the outcome see no need to challenge an adverse outcome. But there are exceptions to that guiding principle and those exceptions are grounded on the interests of the public.” (Emphasis added)

- 33 I submit with respect that there are no procedural or substantive reasons why the SAHRC should not have standing. The SAHRC has a legitimate interest in protecting and advancing the rights of vulnerable persons. This is an exceptional

¹³ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) at para 18.

¹⁴ **FORSA** at para 18.

¹⁵ **FORSA** at para 19.

case arising from the directions of the Judge-President of the Gauteng Division demonstrating the concerns of the High Court in protecting poor and vulnerable persons during litigation.

34 The SAHRC has reasonable prospects of success on appeal, and that there is a reasonable possibility that this court may come to a different conclusion on appeal.

35 In the circumstances, I submit that it is in the public interest, and the interests of justice, that this court confirms the standing of the SAHRC to appeal against the order and judgment of the SCA.

THE SUPREME COURT OF APPEAL JUDGMENT

36 In principle, the SCA held that a High Court has no power to refuse to hear a matter within its jurisdiction. This flows from a consideration of sections 169 of the Constitution, read with section 21 of the Superior Courts Act 10 of 2013 ("**SC Act**").¹⁶ In particular, the SCA held:

36.1 Section 169(1) of the Constitution and section 21 of the SC Act confers on the High Court broad authorisation to hear matters that come before it and that its constitutionally mandated jurisdiction should not easily be compromised.

¹⁶ SCA judgment at para 16 to 25.

36.2 In contradistinction, the powers of the Magistrate's Court are limited by section 29(1) of the Magistrate's Act which expressly limits the jurisdiction of Magistrate's Courts, in particular, by placing a monetary cap on litigation that may be instituted in the Magistrate's Court.

36.3 In addition, a matter that has been instituted in the High Court may only be removed and transferred to the Magistrates Court with the consent of the parties. This is pursuant to Rule 39(22) of the Uniform Rules of Court ("Uniform Rules") and subject to the proviso that the matter must fall within the jurisdiction of the Magistrate's Court.

36.4 The High Court has the power to transfer a matter to another seat of the same Division or another Division but only on application by one of the parties.¹⁷

36.5 There is no provision in law or in the Uniform Rules which allows a High Court to transfer a matter to the Magistrate's Court *mero motu*, nor is there any limitation on the jurisdiction of the High Court in respect of a matter that is instituted in the High Court if it falls within the jurisdiction of the High Court as set out in section 21 of the SC Act.

37 The SCA interpreted the relevant sections with reference to the common law rules regarding the jurisdiction of the High Court.

¹⁷ Section 27 of the SC Act.

- 37.1 The SCA confirmed that the concurrency of jurisdiction in circumstances in which a claim justiciable in a Magistrates' Court has been brought in a High Court has been recognised for over a century.¹⁸
- 37.2 Further, the principle set out in *Goldberg v Goldberg*¹⁹ remains set in stone i.e., that a High Court has no power to refuse to hear a matter if that matter could have been brought in a Magistrates' Court. A High Court must hear a matter properly before it and within its jurisdiction and if a Magistrates' Court also had jurisdiction, and the matter could be dealt with less expensively in that court, the High Court can discourage litigation before it with an appropriate costs order.²⁰
- 37.3 Finally, the SCA confirmed that a litigant has a choice as to which forum to bring a claim. With reference to *Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission*²¹ the SCA held that:²²

"our law does not recognise the doctrine of forum non-conveniens and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction."

38 In light of these findings the court rejected the High Court judgment on the following basis:

38.1 First, the Gauteng High Court found as follows:

¹⁸ SCA judgment at para 26.

¹⁹ 1938 WLD 83. *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W); *Standard Bank of South Africa Ltd v Shiba* 1984 (1) SA 153 (W)

²⁰ SCA judgment at 27 to 30.

²¹ 2013 (5) SA 484 (SCA) para 19. *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA).

²² SCA judgment at paras 31 – 32.

- 38.1.1 it was an abuse of process to sue out of the High Court where a matter could have been dealt with in the Magistrate's Court;
- 38.1.2 The fact that a defendant has to travel and incur additional costs at the High Court level, violated the defendant's right to access to justice as guaranteed in section 34 of the Constitution;
- 38.1.3 This violation could be cured by the High Court exercising its inherent jurisdiction in terms of section 173 of the Constitution by refusing to hear matters that could have been brought in the Magistrate's Court;
- 38.1.4 The same reasoning applied to matters brought in a provincial division that could have been brought in a local seat of that division.
- 38.2 The SCA rejected the reasoning of the High Court. The SCA held that it does not constitute an abuse of the process to choose to sue in the High Court when the Magistrates' Court also had jurisdiction or to sue in a provincial division instead of a local seat of that division.
- 38.3 Such a choice cannot be an abuse because the law gave a plaintiff or applicant exactly that right. A court could not, pursuant to its inherent jurisdiction, overturn that right.
- 38.4 The inherent jurisdiction of a High Court to regulate and protect its process was available to address acts that exploited the process for improper

purposes but to exercise a right to choose a court of jurisdiction could not constitute such an abuse.²³

38.5 Second, the SCA found that section 34 of the Constitution was not infringed as section 34 goes no further than to guarantee that there must be a court that could hear any claim about a right and it must be presided over by persons who can render a fair process.

38.6 The SC Act and Magistrate's Court Act gives effect to section 34 of the Constitution and specifically provides for concurrent jurisdiction. The plaintiff may therefore choose where to initiate litigation. The objective of section 34 is realised regardless of which court hears the matter.²⁴

38.7 Third, the SCA held that the High Court's inherent power in terms of section 173 of the Constitution could not be used to create a new right or deprive a litigant of an existing right. Nor can it be used to create a hierarchy of courts that is not supported by the prevailing legislation. The statutory provisions and common law rules that provide a plaintiff with a choice of forum cannot be limited by invoking the High Court's inherent power to regulate its own process. The SCA held that section 173 can only be invoked when there is a lacuna in the statute or Uniform Rules in respect of process but that no such lacuna exists in this case.²⁵

38.8 Finally, in general, the SCA rejected the High Court's approach as being too broad an invocation of the right to access to justice. The SCA

²³ SCA judgment at paras 34 - 47.

²⁴ SCA judgment at paras 49 - 51.

²⁵ SCA judgment at paras 53 - 57.

acknowledges that the High Court was focused on the necessity to facilitate an impecunious person being able to effectively assert or defend a right in a court of law. However, the SCA found that there were insufficient facts on the record to support the High Court's conclusions. The factors at play preventing a poor person from effectively defending an action could be multiple and are not causally connected to concurrent jurisdictions of courts.²⁶

GROUNDS OF APPEAL

39 I submit that the decision of the SCA is wrong and should be set aside on two grounds:

39.1 The SCA incorrectly interpreted sections 34 and 173 of the Constitution and overemphasised the common law at the expense of the fundamental right to access to justice. The SCA's judgment is wrong in law for the reasons set out below.

39.2 The SCA incorrectly dismissed the factual findings of the High Court and found that it was unhelpful the High Court made findings in the abstract. There were sufficient facts arising from the cases of the 13 defendants and the affidavit by the Minister of Justice and Correctional Services to justify the conclusions of the High Court.

²⁶ SCA judgment at paras 60 – 62.

The incorrect interpretation of sections 34 and 173 of the Constitution and overemphasis on the common law

- 40 First, the Constitution does not oblige the High Court to hear all matters falling within its jurisdiction. Section 169(1) 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.
- 41 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 Constitution, the High Court is accordingly entitled to decline to exercise its jurisdiction over matters that are more appropriately heard by other courts.
- 42 The mandatory jurisdiction principle does not flow from a statutory provision. It is a pre-Constitution common law principle and was never a rigid rule.
- 43 In the **Strang** case,²⁷ the SCA developed a new rule of jurisdiction over foreign defendants but made clear that the High Court has a discretion not to exercise such jurisdiction having regard to considerations of appropriateness and convenience.
- 44 The **Strang** case illustrates that any pre-constitutional common law "rules" of High Court jurisdiction are now subject to the Constitution, and the Bill of Rights

²⁷ *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

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. This case involves a tension between the fundamental right of access to court and the common law mandatory jurisdiction principle.

45 Second, the SCA incorrectly relies on the *Agri Wire* matter as support for the mandatory jurisdiction principle. *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 this Court had held in the *Strang* case.²⁸

46 Third, section 34 of the Constitution should be interpreted to require that 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 the court.

47 The right to access to justice must be interpreted with the aid of international law and foreign law. Foreign case law indicates that to ensure access to justice, the cost of access to courts must be affordable not in a theoretical sense, but in the

²⁸ *Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) SA 355 (SCA).

sense that they can reasonably be afforded. Further, access to courts must be meaningful. This includes affordable access to the civil justice system.²⁹

48 International law encourages states to remove any economic obstacles that impede access to justice. States have a positive duty to organise institutional structures in a manner that ensures access to justice. Access to courts should not be impaired by the prohibitive cost of the proceeding given the individual's financial capacity.

49 Fourth, the judiciary is bound by the Bill of Rights³⁰ and bears a constitutional duty to respect, protect, promote and fulfil the rights therein (including the right of access to courts).³¹ 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.

50 The SCA incorrectly held that there exists no legislative lacuna in the process which requires the High Court to exercise its inherent jurisdiction. 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*,³² the High Court held that there was a

²⁹ *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51; *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *B.C.G.E.U. v. British Columbia (Attorney General)* [1988] 2 S.C.R. 214,

³⁰ Section 8(1) of the Constitution

³¹ Section 7(2) of the Constitution

³² 1990 (4) SA 93 (SE).

lacuna in the rule and exercised its inherent jurisdiction to provide for transfer where there was no consent, but one party sought transfer.

51 Similarly, a lacuna exists in section 27 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, *mero 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 *mero motu* in terms of section 173 of the Constitution if it is in the interests of justice to do so.

52 I submit that 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 to access to courts. The High Court is under a duty to take measures to mitigate or reduce the impediments to access.

The incorrect finding that there were insufficient facts before the court

53 The facts arising from each of the individual respondent's cases effectively proved that the institution of proceedings in the High Court, which could be conveniently dealt with in the Magistrate's Court, impeded the respondent's access to justice.

54 The High Court correctly recognised that the Magistrates' Courts are more accessible than High Courts in several respects.³³ These include the following:

54.1 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.

54.2 By contrast, there are 82 Regional Magistrates' Courts³⁴ and 468 District Magistrates' Courts.³⁵

54.3 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. This will ensure a Magistrates' Court is geographically accessible to the persons living in each municipality.

55 The difficulties facing the 13 individual debtors appear from the applications by the first to third respondents. They are also a matter of common sense and self-evident as part of the litigation process.

55.1 Distressed debtors who default on their loan agreements, and against whom legal proceedings are brought, generally have limited financial means. 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

³³ *Nedbank v Thobejane* para 11.4.

³⁴ With monetary jurisdiction over claims of R200 000 to R400 000.

³⁵ With monetary jurisdiction over claims up to R200 000.

arrears was relatively small yet the debtor had been unable to pay it, despite the threat of losing his or her home.

55.2 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 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 to travel to court.³⁶

55.3 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

³⁶ *Nedbank v Thobejane* para 11.2.

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.³⁷

56 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. 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. By explaining the legal concepts and process to the respondent or defendant, the interpreters make the process less intimidating and enable them to defend their case. 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.

57 The SCA found that the High Court did not have sufficient facts before it to conclude that Magistrates' Courts are, in general, more accessible to distressed debtors than High Courts. I submit that the SCA is wrong in this respect. The evidence outlined above was set out in the Minister of Justice's affidavit and the affidavits in the 13 applications before the Court. The remainder of the allegations are self-evident and the High Court was entitled to take judicial notice thereof.

³⁷ *Nedbank v Thobejane* para 11.3.

CONSTITUTIONAL ISSUES AND ARGUABLE POINT OF LAW OF GENERAL PUBLIC IMPORTANCE

58 I respectfully submit that this matter raises both constitutional issues and concerns arguable points of law of general public importance which ought to be considered by this Court, as contemplated in section 167(3)(b)(i) and (ii) of the Constitution.

59 This matter plainly engages the section 34 constitutional right to access to justice and the ambit of the High Court's jurisdiction and inherent powers as set out in sections 169 and 173 of the Constitution.

60 In particular:

60.1 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.

60.2 Access to courts must be affordable. Individuals should not be required to sacrifice the expenditure required to maintain an acceptable standard of living or endure undue hardship to gain access to a court.

60.3 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.

60.4 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:

60.4.1 Rule 46(1)(a)(ii) of the Uniform Rules of Court is relevant. It provides that no writ of execution shall be issued for the attachment of a debtor's primary residence until the court, *having considered all relevant circumstances*, orders execution against such property.

60.4.2 Rule 43A of the Magistrates' Courts Rules imposes similar conditions. The recently amended 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.

60.4.3 Much of the above information (regarding the circumstances of the debtor and her family) is exclusively within the knowledge of

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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.

- 60.5 Accordingly, if the practical effect of the exercise of a High Court's 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.
- 61 The differing interpretations of the High Court and the SCA on the constitutional rights at stake and the appropriate balance to be struck with the common law principle of mandatory jurisdiction gives rise to arguable points of law of general public importance. The statistics cited by the High Court makes clear that the plight of thousands of distressed debtors is at stake. This engages this Court's constitutional jurisdiction but is also of general public importance.
- 62 In addition, the power of the High Court to regulate its own process to ensure effective access to justice and to protect the rights of impecunious litigants is a matter of public importance that requires a definitive decision by this court.
- 63 The issue is ripe for decision by this Court. The institution of default judgment applications, including applications to make primary residences specially executable, arises as a daily issue in Courts throughout South Africa.

- 64 The impact of this matter and the consequences are self-evidently broad-based, transcends the litigation interests of the parties and is of public importance. A decision by this court will affect and is of importance to a large section of the public.

INTERESTS OF JUSTICE

- 65 I submit that it would in the interests of justice for the application to be granted, as contemplated in section 167(6)(b) of the Constitution. There is substantial merit to the arguments advanced by the SAHRC and there are reasonable prospects that the appeal will succeed.

- 66 Moreover, this case raises novel and difficult questions of law in respect of:

66.1 The appropriate balance to be struck between an impecunious litigant's right to access to justice and the common law mandatory jurisdiction principle.

66.2 The impact of the right to access to justice on the concurrent jurisdiction of the High Court and the Magistrate's Court, and the provincial division of the High Court and a local seat of that Division.

66.3 The ambit of the High Court's inherent power to regulate its own process in the presence of a legislative lacuna permitting the court to decline to hear a matter that falls within the jurisdiction of the Magistrate's Court or a local seat of a division where the interest of justice indicates that it would

be detrimental to the rights of the defendant to have the matter heard in the provincial division of the High Court.

67 I submit that there are compelling interests at stake regarding the rights of indigent litigants and the right to access to justice which the SCA overlooked or disregarded. It is in the interest of justice that this court provides legal certainty regarding the ambit of the rights at stake.

CONDONATION

68 The judgment of the SCA was handed down on 25 June 2021. I am advised that in terms of Rule 19(2) of the Rules of this Court, the SAHRC was obliged to apply for leave to appeal within 15 days of the order of the SCA.

69 Following the judgment of the SCA, the SAHRC immediately set about following the required internal procedure to secure authorisation to conduct litigation. Considering the nature of the litigation and an appeal to this Court, we needed to consult extensively, both internally and with our attorneys and counsel of record.

70 Unfortunately, the internal processes are lengthy and we were not able to consult with our attorneys immediately. After properly considering the SCA judgment internally, the SAHRC required further advice from our legal team regarding the prospect of success of an appeal by an *amicus curiae*.

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- 71 We wrote to our attorneys on the 29 June 2021, enquiring about the standing of an *amicus curiae* in an appeal, where none of the parties are appealing. Furthermore, we needed to establish whether our attorneys would continue to represent us on the appeal.
- 72 The Legal Resources Centre, being a public interest litigation organisation with limited funding and resources, was also required to follow internal processes to approve the budget for the matter and to confirm its capacity to act in the appeal.
- 73 While we were still corresponding with our attorneys via email, two provinces (KZN and Gauteng) experienced serious unrest shortly after the Constitutional Court handed down judgment in the contempt case involving former President Jacob Zuma.
- 74 This unrest made it impossible for us and our attorneys to work on this application, as some of our attorneys' staff members were severely affected by the unrest. The unrest lasted for approximately 9 days and caused significant trauma to the communities with which we work.
- 75 As soon as the situation was back to normal, a meeting was convened with counsel in the week before the filing deadline and the SAHRC's questions were conveyed. This required further research by our legal team. A further consultation was then held by the legal team.

- 76 Two days before the deadline, our counsel were instructed to draft the application for leave to appeal. They were informed that, once the application was drafted, a final instruction would be given.
- 77 Unfortunately, the impact of the Covid-19 pandemic and other health concerns significantly hampered our legal team's attempts to finalise the application expeditiously. The silk on the matter contracted Covid-19 and was unable to work on the matter. One of the junior counsel fell badly ill and was similarly unable to work on the matter. The second junior in the matter was in the Eastern Cape, having to spend most (if not all) of her time caring for her elderly parents, who had contracted Covid-19. As a consequence, the draft took a significant period to finalise.
- 78 After the draft was received, it was necessary for the SAHRC (and the LRC) to receive their final authorisations to proceed with the appeal. This internal process requires the input of various SAHRC staff members and authorisation from the CEO and COO of the SAHRC. This is preceded by the tabling of the matter in our weekly meetings. Furthermore, the fact that a Commissioner, who deposed to all affidavits while the matter was in the court *a quo*, is no longer with the Commission meant that another Commissioner would have to be authorised to depose to this affidavit. This added to the delay.
- 79 Once the abovementioned internal processes and challenges were completed, we were able to sign and commission the affidavit as soon as reasonably possible.

80 Every effort was made to finalise the application as expeditiously as possible subject to severe time constraints and disruptions.

81 The SAHRC respectfully seek condonation for the late filing of this application. I submit that it is in the interest of justice that condonation is granted for the following reasons:

81.1 The SAHRC had made every effort to ensure that this application is brought as soon as practically possible considering the financial and human resource constraints, including the impact of the Covid-19 and health issues on our legal team. The SAHRC (and the public at large) should not be non-suited due to the inability of the legal team to finalise the draft sooner.

81.2 The nature of the relief sought is of significant public importance and the constitutional rights of a particularly vulnerable group of persons are implicated.

81.3 In addition, the constitutional interpretation of the High Court's jurisdiction as set out in sections 169 and 173 of the Constitution is directly implicated and it is in the interest of justice that these issues be properly ventilated in this court for an authoritative final determination.

81.4 The delay does not have a significant impact on the rights of any of the parties concerned. The 13 individual respondents have not participated in these proceedings and their cases have been finalised. The first to third respondent will be in a position to continue issuing applications for default

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judgment in the court of their choice until this court makes a final decision.

There is therefore no prejudice to the parties.

81.5 The final determination of this court will have a significant impact on the day to day administration of justice in the High Court. I submit that it is vital to the administration of justice that this court makes a final determination regarding the jurisdiction of the High Court and the impact of the constitutional right to access to justice on the common law mandatory jurisdiction principle.

81.6 Finally, I submit that there is substantial merit to the arguments advanced by the SAHRC and there are reasonable prospects that the appeal will succeed.

CONCLUSION

82 On the basis of what is set out above, the SAHRC submits that the appeal has a reasonable prospect of success and that there are compelling reasons why the appeal should be heard. The SAHRC accordingly requests the relief as set out in the notice of application.

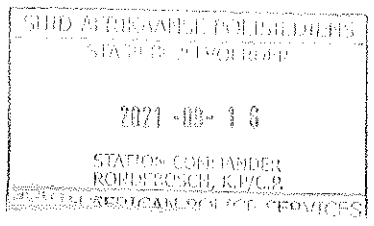


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I certify that this affidavit was signed and sworn to before me at RONDEBOSCH on this the 16 day of September 2021, the deponent having acknowledged that ^{SHE}he knows and understands the content of this affidavit, the Regulations contained in Government Notice No 1258 of 21 July 1972 and R1648 of 19 August 1977, having been complied with.

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(CAPT
GTS JOSEPH)

COMMISSIONER OF OATHS



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case Nos: 38/2019; 47/2019 & 999/2019

In the matter between:

**THE STANDARD BANK
NEDBANK LIMITED
FIRSTRAND BANK LIMITED**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT**

and

**EZRA MAKIKOLE MPONGO
MYRA GERALDINE WOODITADPERSAD
RADESH WOODITADPERSAD
JOYCE HLUPHEKILE NKWINIKA
KARIN MADIAU SAMANTHA LEMPA
NEELSIE GOEIEMAN
ANGELINE ROSE GOEIEMAN
JULIA MAMPURU THOBEJANE
AUBREY RAMORABANE SONKO
ONESIMUS SOLOMON MATOME MALATJI
MODIEGI PERTUNIA MALATJI
GRACE M MAHLANGU
KEY HINRICH LANGBEHN**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHTH RESPONDENT
NINTH RESPONDENT
TENTH RESPONDENT
ELEVENTH RESPONDENT
TWELFTH RESPONDENT
THIRTEENTH RESPONDENT**

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and in the matter between:

**THE STANDARD BANK
NEDBANK LIMITED**

**FIRST APPELLANT
SECOND APPELLANT**

and

**V W GQIRANA N O
V W GQIRANA**

**FIRST RESPONDENT
SECOND RESPONDENT**

and

**THE SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

AMICUS CURIAE

**THE DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

AMICUS CURIAE

PRETORIA SOCIETY OF ADVOCATES

AMICUS CURIAE

Neutral citation: *The Standard Bank of SA Ltd and Others v Thobejane and Others* (38/2019 & 47/2019) and *The Standard Bank of SA Ltd v Gqirana N O and Another* (999/2019) [2021] ZASCA 92 (25 June 2021)

Coram: MAYA P, PETSE DP, DAMBUZA and PLASKET JJA and SUTHERLAND AJA

Heard: 20 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal

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website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 25 June 2021.

Summary: A court is obliged by law to hear any matter that falls within its jurisdiction and has no power to exercise a discretion to decline to hear such a matter on the ground that another court has concurrent jurisdiction.

ORDER

In case numbers 38/2019 and 47/2019:

On appeal from the Gauteng Division of the High Court, Pretoria (Ledwaba DJP, Tolmay and Mothe JJ sitting as court of first instance):

- 1 The appeal is upheld, with no order as to costs.
- 2 The order of the court below is set aside and replaced with the following order:
'It is declared that:
 - (1) The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrates' Courts, if brought before it, because it has concurrent jurisdiction with the Magistrates' Court.
 - (2) The High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrates' Court because the High Court has concurrent jurisdiction.
 - (3) The main seat of a Division of a High Court is obliged to entertain matters that fall within the jurisdiction of a local seat of that Division because the main seat has concurrent jurisdiction.
 - (4) There is no obligation in law on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings.
3. There is no order as to costs.'

In case number 999/2019:

On appeal from the Eastern Cape Division of the High Court, Grahamstown (Hartle, Lowe and Jolwana JJ sitting as court of first instance):

- 1 The appeal succeeds, with no order as to costs.
2. The order of the court below is set aside and replaced with the following:
'It is declared that:'
 - (1) The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrates' Courts, if brought before it, because it has concurrent jurisdiction with the Magistrates' Court.
 - (2) The High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrates' Court because the High Court has concurrent jurisdiction.
 - (3) There is no obligation in law on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings.
3. There is no order as to costs.'

JUDGMENT

Sutherland AJA (Maya P, and Petse, Dambuza and Plasket JJA concurring)

[1] This appeal concerns two matters, one decided in the Gauteng Division of the High Court, Pretoria (the Gauteng Court) and the other in the Eastern Cape Division of the High Court, Grahamstown (the Eastern Cape Court) dealing with jurisdictional issues. The essence of this matter is whether a High Court may properly refuse to hear a matter over which it has jurisdiction where another court has concurrent jurisdiction in either of two circumstances: when a High Court and a Magistrates' Court both have jurisdiction in respect of the same proceedings, and

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when the main seat of a Division of a High Court and a local seat both have jurisdiction in respect of the same proceedings.

Background and facts

[2] The context in which these matters came to be heard, and the orders which were given, were unusual. Before both courts, there were applications by several banks, the applicants a quo and the present appellants, against debtors who had either taken up mortgages or had purchased motor vehicles on credit and had defaulted on repayment. As is usual, and in accordance with established practice, in the absence of any notices of intention to oppose from the defendants, the applications were enrolled in the Unopposed Motion Court where orders were sought for repayment of the outstanding indebtedness and for leave to specially execute on the mortgaged residential properties. At no stage did the debtors cited as defendants in the court a quo, participate in the hearing.

[3] At the instance of the respective Judges-President several of such cases were placed before a full court of each Division. As appears from the judgments, the trigger was apparently twofold. First there was a concern that the rolls of the High Court were being congested by matters which could have been heard in the Magistrates' Court. In Gauteng there was a concern about matters that could have been heard in the local seat in Johannesburg clogging-up the roll in the main seat in Pretoria. Second, there was a belief that impecunious debtors were suffering prejudice because they would, should they wish to oppose a claim, have to travel to a High Court when a Magistrates' Court was supposedly nearby and more convenient to attend. Also, were a debtor to wish to resist a claim, legal costs would be less in the Magistrates' Court than in the High Court. In the light of these

considerations was it appropriate for a plaintiff to sue out of a court other than that closest to the defendant?

[4] Having collected the cases to be heard by the respective full courts, the Judges President formulated a number of questions for them to answer. Four questions were posed to the Gauteng Court. The questions were thus:

(i) Why should the High Court entertain matters that fall within the jurisdiction of the Magistrate's Court?

[ii] Is the High Court obliged to entertain matters that fall within the jurisdiction of the Magistrate's Court purely on the basis that the High Court may have concurrent jurisdiction?

[iii] Is the Provincial Division (sic) of the High Court obliged to entertain matters that fall within the jurisdiction of a Local Division (sic) on the basis that the Provincial Division (sic) has concurrent jurisdiction;¹

[iv] Is there not an obligation on financial institutions to consider the cost implication and access to justice of financially distressed people when a particular forum is considered?

Only questions 1, 2 and 4 were posed to the Eastern Cape Court.

[5] The courts a quo sought assistance from several *amici curiae*. Although it is not entirely clear whether the *amici* approached the debtors to supply any evidence, the position is clear that no debtor did so. The only source of facts were the applications filed by the banks for the judgments by default and the additional affidavits filed by the banks after the several matters had been, pursuant to the directives of the Judges-President, referred to the full courts. These additional affidavits addressed the questions posed and explained why the choice of the High Court as the appropriate forum was premised on several practical

¹ Strictly speaking, there are no longer 'Provincial Divisions' and 'Local Divisions' of the High Court. Each province is host to a single Division of the High Court which has a designated main seat. Any additional seats are not 'Local Divisions' but rather 'local seats' See s 6 of the Superior Courts Act 10 of 2013. See too, Malcolm Wallis: 'What's in a name? A note on nomenclature' (2020) 137 *SALJ* at 25, where the history of these convolutions is described.

considerations. In essence, these considerations were that litigation in the High Courts was quicker and more efficient, and moreover, could often, also be cheaper in the long run. It was also alleged that legal assistance to indigent litigants was usually more accessible at the seat of a High Court than at Magistrates' Courts. These allegations of fact and explanations of motive were unrebutted and were never challenged.

[6] Different answers to the posed questions were given by each of the courts a quo. Appeals against each of the orders were lodged by the banks. The answers given by each court appear from the conclusions stated and orders given, which are set out below.

The Gauteng Court in *Thobejane*²

[7] The Gauteng Court based its conclusions on two sources. First, Tolmay J, in her judgment, cited statistics of the number of cases heard in Pretoria and Johannesburg, as well as the number of judges in the Gauteng Division. The apparent purpose of this 'evidence', which the banks saw for the first time in the judgment, was to support the contention that the High Court 'may soon be unable to provide proper access to justice' and that the system is in danger of collapse. Secondly, she set out in some detail allegations made by the South African Human Rights Commission. These were broad, sweeping generalisations, and not facts. She took the view that the mere fact of the banks instituting proceedings in the High Court when they could have proceeded in the Magistrates' Court was an abuse of process.

[8] The crux of her conclusions and the order that was made were the following:³

² *Nedbank Ltd v Thobejane and similar matters* 2019 (1) SA 594 (GP); [2018] 4 All SA 694 (GP).

³ *Ibid* paras 91-93 and 96.

[91] In our view the solution pertaining to matters that fall within the jurisdiction of the magistrates' courts is that such matters should be issued in the magistrates' courts. If a party is of the view that a matter that falls within the jurisdiction of the magistrates' courts should more appropriately be heard in this division, an application must be issued setting out reasonable grounds why the matter should be heard in this division. Inefficiency of the other court, [ie the Magistrates Court] real or perceived, and the convenience of the plaintiff alone will, however, not constitute such reasonable grounds. Only after leave has been granted may the summons be issued in the High Court.

[92] To answer the questions posed in the directive, in our view the High Court is not obliged to entertain matters that fall within the jurisdiction of the magistrates' courts purely on the basis that the High Court may have concurrent jurisdiction. Furthermore, both the local and provincial division can mero motu transfer a matter to the other court, if it is in the interests of justice to do so. Lastly, there is an obligation, not only on financial institutions, but also on all litigants, to consider the question of access to justice when actions or applications are issued, and the courts have a duty to ensure that access to justice is ensured by exercising appropriate judicial oversight.

[93] Regarding matters where the local and/or provincial division is the more appropriate forum, the court hearing the matter may mero motu transfer the matter to that court.

...

[96] Consequently, the following order [is issued]:

- (1) To promote access to justice, as from 2 February 2019 civil actions and/or applications, where the monetary value claimed is within the jurisdiction of the magistrates' courts, should be instituted in the magistrates' court having jurisdiction, unless the High Court has granted leave to hear the matter in the High Court.
- (2) It is declared that a High Court is entitled to transfer a matter mero motu to another court, ie magistrates' courts and/or local and provincial divisions, if it is in the interests of justice to do so.'

The Eastern Cape Court in *Gqirana*⁴

[9] A majority of the Eastern Cape Court (Lowe and Hartle JJ, Jolwana J dissenting) disagreed with the conclusion arrived at by the Gauteng Court. They held, however, that the National Credit Act 34 of 2005 (the NCA) ousted the jurisdiction of the High Court. The result was that all NCA matters had to be instituted in the Magistrates' Court.

[10] The crux of the reasoning of Lowe J, and the order that was made were the following:

'[73] In the result, I am respectfully of the view that the relief in *Thobejane* was too widely cast and, in any event, on what is before us arises only in fact in respect of NCA matters.

[74] A proper application of the s 34 right, [ie, section 34 of the Constitution] as read with the Magistrates' Courts Act and the NCA, recognising the purpose and imperative of the NCA as stated above, makes it clear that to afford equality and access to a fair hearing right to the mostly financially, previously disadvantaged persons subject to the Act, and thus proper access to justice in all NCA matters falling within the monetary jurisdiction of the magistrates' court (all NCA matters in fact), must be brought in that court, save only if there are exceptional circumstances justifying otherwise (such not to include the banks' suggested advantages in High Court litigation). Put otherwise, the NCA properly provides necessarily that, save in exceptional circumstances, all NCA matters be brought in the magistrates' court. What may constitute exceptional circumstances would have to be decided on a case-by-case basis.

[75] In summary it follows from the above that:

[75.1] Generally, post-1994 the concurrency of jurisdiction between the High Court and magistrates' court remains in place — put otherwise, the High Court retains jurisdiction in respect of matters falling within the monetary jurisdiction of the magistrates' court.

[75.2] This remains so unless the jurisdiction of the High Court in such matters is ousted by legislation either expressly or by necessary implication.

⁴ *Nedbank Ltd v Gqirana N O and Another, and similar matters* 2019 (6) SA 139 (ECG); [2019] 4 All SA 211 (ECG).

[75.3] The NCA extends jurisdiction to the magistrates' court in all matters which properly constitute issues falling within the ambit of the NCA.

[75.4] The NCA seeks to provide for specific structures and procedures in order to enable the mostly financially, previously disadvantaged to benefit from the provisions of the NCA itself.

[75.5] There is no express legislative provision in the NCA or other legislation ousting the High Court jurisdiction generally in respect of matters subject to the magistrates' court jurisdiction.

[75.6] The provisions of the NCA, however, properly interpreted through the prism of the Constitution, create a specific set of structures and procedures relating to NCA matters which, read in context and on a generous interpretation, by necessary implication provides for the magistrates' court to be the court of first adjudication in all NCA matters, to the exclusion of the High Court as a court of first adjudication, save only in the event that there are unusual or extraordinary factual or legal issues raised which in the opinion of the High Court warrant them being heard first in the High Court.

[75.7] Insufficiency and/or related delays in the magistrates' court, perceived or real, are not factors which constitute such unusual circumstances.

[75.8] In the result, all but unusual and extraordinary cases falling within the provisions of the NCA (which will be few and far between) must be brought in the magistrates' court as court of first instance.

[76] This does not implicate other non-NCA matters, upon which I make no finding as this would be clearly obiter.

....

[78] Order

1. To promote access to justice in the context of the Magistrates' Courts Act and the NCA, as read with ss 9 and 34 of the Constitution, and as from 1 August 2019, civil actions and/or applications arising within the ambit of the NCA (and thus falling within the magistrates' courts' jurisdiction) should be instituted in the magistrates' court having jurisdiction.

....'

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Comments on the approach taken by the courts a quo

[11] In neither of the courts a quo were material facts adduced to substantiate the arguments presented about the litigation dynamics and their supposed implications for constitutional values which were central to the debate. Not one of the defendants filed an affidavit to set out their means, why they did not oppose the claims brought against them or whether or not their right of access to court had been affected in any way by the banks' choice of forum. The primary platform for the conclusions reached was the notion that by an appeal to 'constitutional values' the plight of impecunious litigants could be alleviated. The paradigm in which the questions were considered was that in which a stereotypical plaintiff was characterised as a bank foreclosing on a mortgage bond and the stereotypical defendant was characterised as being of poor circumstances.

[12] These characterisations are self-evidently not applicable in every case implicating the concurrent jurisdiction controversy. In any event, the proposition that the debtors were all of poor circumstances and were inhibited by either geography or lack of means from participation in the matters, was wholly unsubstantiated on the record. The debts were all within the jurisdiction of the Magistrates' Court. No other material facts about the debtors were before the courts.

[13] Indeed, the several *amici* were driven to present arguments on the basis of speculative extrapolations from moral sensibilities rather than from established fact. As stated above, in the Gauteng Court, factual averments about the work-load of the Pretoria and of the Johannesburg seats, upon which that court relied to reach its conclusions, were ventilated for the first time in the judgment and were never put to the litigants in the hearing for them to address. In the Eastern Cape Court, the foundation of the thesis for the Court's conclusions that the NCA ousted the

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jurisdiction of the High Court was never put to the parties' counsel. Moreover, both courts addressed the question of transfers of matters from the High Court to another court, and made orders about that subject, despite this plainly not being a question posed by the Judges-President in their directives.

[14] Many of the issues addressed in the judgments may be proper matters for investigation and consideration. However, these issues implicate policy considerations which, in my view, plainly and properly belong within the province of Parliament. The statutory provisions in the Superior Court Act 10 of 2013 (SC Act), the Magistrates' Court Act 32 of 1944 (the MC Act) and in the Uniform Rules of Court which were subjected to a critique were not challenged on the basis that the provisions were unconstitutional. The forensic exploration a quo was therefore limited to an exercise in interpretation of the statutes to endeavour to reach conclusions on their meaning such as to render them consistent with the constitutional guarantee in s 34 of the Constitution as to access to a court to resolve justiciable disputes and, more broadly, consistent with s 9 of the Constitution as to the guarantee of human dignity. Largely, factual findings with no proper evidential basis, the resort to generalised and speculative conclusions with no proper evidential foundation, and the unjustified ignoring or rejection of the only evidence before the courts a quo explain the shortcomings in both judgments.

The law relevant to concurrency of jurisdiction and the choice of court

The constitutional and statutory framework

[15] In our country, the Constitution establishes judicial authority. Several Courts are created. Section 166(b) creates the High Court and s 166(d) creates the Magistrates' Courts. The scope of the substantive decision-making power of these courts is addressed in ss 169 and 170.

[16] 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.’

The import of this section is to authorise the High Court to decide all matters other than those reserved for other courts. The notion that the sweep of this authorisation can lightly be compromised is untenable.⁵ No monetary cap exists in respect of the High Court; an indication of its universal scope of authority, subject only to s 169.

[17] S 170 stipulates that a Magistrates’ Court may decide any matter determined by a statute. The monetary cap on the reach of the jurisdiction of the Magistrates’ Court is stipulated in s 29(1) of the Magistrates’ Court Act.

[18] In s 173 it is provided that the ‘. . . High Court has inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice’.

[19] In s 171, in relation to ‘court procedures’, it is provided that ‘[a]ll courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation’. The national legislation referenced in the Constitution has been, at all relevant times to this case, the SC Act and the Magistrates’ Court Act.

[20] The critical provisions of the SC Act are ss 21 and 27. Section 21 provides:

⁵ See too, para 26 of this judgment *infra*.

'(1) A Division [of the High Court] has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—

- (a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;
- (b) to review the proceedings of all such courts;
- (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice, becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.

....'

[21] S 27 is headed 'Removal of proceedings from one Division to another or from one seat to another in same Division'. It provides:

'(1) If any proceedings have been instituted in a Division or at a 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 other Division or seat, as the case may be.

(2) An order for removal under subsection (1) must be transmitted to the registrar of the court to which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question.'

[22] The relevant sections in the Magistrates' Court Act are s 29(1) and s 50(1). S 29(1) is headed 'Jurisdiction in respect of causes of action'. It provides:

'(1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court in respect of causes of action, shall have jurisdiction in-

(a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the *Gazette*;

(b) actions of ejectment against the occupier of any premises or land within the district or regional division: Provided that, where the right of occupation of any such premises or land is in dispute between the parties, such right does not exceed the amount determined by the Minister from time to time by notice in the *Gazette* in clear value to the occupier;

(c) actions for the determination of a right of way, notwithstanding the provisions of section 46;

(d) actions on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*;

(e) actions on or arising out of any credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005);

(f) actions in terms of section 16 (1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*;

(fA) actions, including an application for liquidation, in terms of the Close Corporations Act, 1984 (Act 69 of 1984);

(g) actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*.'

[23] S 50(1) is headed 'Removal of actions from court to provincial or local division'. It provides:

'(1) Any action in which the amount of the claim exceeds the amount determined by the Minister from time to time by notice in the *Gazette*, exclusive of interest and costs, may, upon application to the court by the defendant, or if there is more than one defendant, by any defendant, be removed to the provincial or local division having jurisdiction where the court is held, subject to the following provisions-

- (a) notice of intention to make such application shall be given to the plaintiff, and to other defendants (if any) before the date on which the action is set down for hearing;
- (b) the notice shall state that the applicant objects to the action being tried by the court or any magistrate's court;

...

Upon compliance by the applicant with those provisions, all proceedings in the action in the court shall be stayed, and the action and all proceedings therein, shall, if the plaintiff so requires, be as to the defendant or defendants, forthwith removed from the court into the provincial or local division aforesaid having jurisdiction. Upon the removal, the summons in the court shall, as to the defendant or defendants, stand as the summons in the division to which the action is removed, the return date thereof being the date of the order of removal in an action other than one founded on a liquid document, and, in an action founded on a liquid document, being such convenient day on which the said division sits for the hearing of provisional sentence cases, as the court may order: Provided that the plaintiff in the action may, instead of requiring the action to be so removed, issue a fresh summons against the defendant or defendants in any competent court and the costs already incurred by the parties to the action shall be costs in the cause.'

[24] In addition, Uniform Rule of Court 39(22) provides:

'By consent the parties to a trial shall be entitled, at any time, before trial, on written application to a judge through the registrar, to have the cause transferred to the magistrates court; Provided that the matter is one within the jurisdiction of the latter court whether by way of consent or otherwise.'

[25] Self-evidently, litigation begins by a plaintiff initiating a claim. Axiomatically, it must be the plaintiff who chooses a court of competent jurisdiction in just the same way that a game of cricket must begin by a ball being bowled. The batsman cannot begin. This elementary fact is recognised as a rule of the common law, founded, as it is, on common sense. The right of a plaintiff to do so was

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recognised in a Full Court of the Gauteng Division in *Moosa v Moosa*,⁶. That Court relied on *Marth v Collier*⁷ where it was stated:

'The granting of an order for the transfer of legal proceedings from the Supreme Court to the Magistrates' Court, in the absence of a Plaintiff's consent, would clearly infringe upon the latter's substantive right to choose the forum in which he or she wishes to institute proceedings. As little as our courts have the inherent power to create substantive law (See: the *Cerebos Foods* case (*supra*) at 173D; *Universal City Studios Inc & Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754E-755E) do they have the power, in the absence of statutory - or common law authorisation or legal precedent. . . to make orders which infringe upon the substantive rights of litigants or others (See: *Eynon v Du Toit* 1927 CPD 76; *E v E and Another* 1940 TPD 333), such as the right of a Plaintiff, as *dominus litis*, to decide in which of concurrent *fora* he or she wishes to enforce his or her rights.'

The Gauteng Court expressed a view that the concept of a plaintiff as *dominus litis* is 'outdated' was unfortunate and was unsubstantiated by reference to any authorities or learning.

Concurrent jurisdiction: the case law

[26] The concurrency of jurisdiction in circumstances in which a claim justiciable in a Magistrates' Court has been brought in a High Court has been recognised for over a century. In *Koch v Realty Corporation of South Africa*⁸ the court held:

'Now the first question we have to decide is: What is the policy of the Magistrates' Courts Act? Is it the policy of the Magistrates' Courts Act to take away from this Court the consideration of questions involving an amount of less than £200, or is it the policy of the Act to enable lawsuits as a general rule to be brought more cheaply than would be the case if they had to be brought before this Court? Was it ever the policy, of the Magistrates Courts Act to deprive this Court of the right of hearing suits involving an amount less than £200? Now there is nothing said in the Magistrates' Courts Act that cases under £200 are to be brought exclusively in that Court, therefore

⁶ *Moosa v Moosa* 2014 JDR 2194 (GP) para 19.

⁷ *Marth v Collier* [1996] 3 All SA 506 (C) at 509.

⁸ *Koch v Realty Corporation of South Africa* 1918 TPD 356 at 359.

this Court has a concurrent jurisdiction with the magistrates' court in all such cases as the magistrate is entitled to hear.'

[27] It is also law of long standing that when a High Court has a matter before it that could have been brought in a Magistrates' Court, it has no power to refuse to hear the matter. In *Goldberg v Goldberg*,⁹ the point was taken that as a Magistrates' Court had jurisdiction (in respect of contempt proceedings concerning the non-payment of maintenance) the Supreme Court should refuse to hear the matter. After referring to a statutory provision that was unique to Natal at the time, that allowed for the transfer of cases where there was concurrent jurisdiction, Schreiner J held:¹⁰

'But apart from such cases and apart from the exercise of the Court's inherent jurisdiction to refuse to entertain proceedings which amount to 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. The discretion which the Court has in regard to costs provides a powerful deterrent against the bringing of proceedings in the Supreme Court which might more conveniently have been brought in the Magistrate's Court. Not only may a successful applicant be awarded only Magistrate's Court costs but he may even be deprived of his costs and be ordered to pay any additional costs incurred by the respondent by reason of the case having been brought to the Supreme Court. In all normal cases these powers should suffice to protect the respondent against the hardship of being subjected to bring unnecessarily expensive proceedings.'

[28] In circumstances similar to those in the two cases with which this appeal is concerned, the issue of the concurrence of jurisdiction between Magistrates' Courts and High Courts was considered by a full court of the then Witwatersrand Local Division of the Transvaal Provincial Division in *Standard Credit Corporation Ltd v*

⁹ *Goldberg v Goldberg* 1938 WLD 83.

¹⁰ *Ibid* at 85-86.

Bester and Others.¹¹ The issues to be decided in that case were defined by the court to be 'the right of the plaintiff to issue summons and to claim judgment in the Supreme Court, since each claim falls within the jurisdiction of the Magistrate's Court, and, conversely, the right of the Supreme Court to refuse to hear these actions because they fall within the jurisdiction of the Magistrate's Court'.¹²

[29] Van der Walt J, with reference to Coetzee DJP's judgment in *Standard Bank of South Africa Ltd v Shiba*,¹³ held that if he had 'intended to hold 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, his judgment cannot be supported'.¹⁴ With reference to a slew of cases on this issue, Van der Walt J concluded:¹⁵

'In spite of statements referring to an apparent right vested in the Supreme Court to refuse to entertain a matter within its jurisdiction in some of these cases, in none of these cases did the Supreme Court in fact purport to exercise such a right of summarily refusing to entertain a matter within its jurisdiction because a lower court also had jurisdiction. A predominant feature in these cases was the Supreme Court's concern about the expenses caused to the litigants by recourse to the Supreme Court, and appropriate orders limiting or disallowing costs were consequently made. 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.'

Indeed, he found that *Goldberg's* case was 'clear authority that no such principle exists'.¹⁶

¹¹ *Standard Credit Corporation v Bester and Others* 1987 (1) SA 812 (W); [1987] 3 All SA 96 (W).

¹² *Ibid* at 814C-D.

¹³ *Standard Bank of South Africa Ltd v Shiba Standard Bank of South Africa v van Den Berg* 1984 (1) SA 153 (W); [1984] 3 All SA 152 (W).

¹⁴ *Standard Credit Corporation v Bester and Others* above note 12 at 815E.

¹⁵ *Ibid* at 817J-818B.

¹⁶ *Ibid* at 818B-C.

[30] After an exhaustive analysis of the authorities, Van der Walt J came to the conclusion that a High Court ‘should hear a matter properly before it and within its jurisdiction’ and that if a Magistrates’ Court also had jurisdiction, and the matter could be dealt with less expensively in that court, the High Court can discourage litigation before it ‘by an appropriate order regarding costs’.¹⁷

[31] This court confirmed the correctness of *Bester in Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission and Others*,¹⁸ holding that ‘[s]ave in admiralty matters, our law does not recognise the doctrine of *forum non conveniens*, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction’.

[32] In *Makhanya v University of Zululand*,¹⁹ this court set out the position when litigants have a choice of fora in which to bring their claims. Nugent JA said:

‘Some surprise was expressed in *Chirwa* at the notion that a plaintiff might formulate his or her claim in different ways and thereby bring it before a forum of his or her choice but that surprise seems to me to be misplaced. A plaintiff might indeed formulate a claim in whatever way he or she chooses – though it might end up that the claim is bad. But if a claim, as formulated by the claimant, is enforceable in a particular court, then the plaintiff is entitled to bring it before that court. And if there are two courts before which it might be brought then that should not evoke surprise, because that is the nature of concurrent jurisdiction. It might be that the claim, as formulated, is a bad claim, and it will be dismissed for that reason, but that is another matter.’

¹⁷ *Standard Credit Corporation v Bester and Others* above note 12 at 819E.

¹⁸ *Agri Wire (Pty) Ltd v Commissioner, Competition Commission and Others* [2012] ZASCA 134; [2012] 4 All SA 365 (SCA); 2013 (5) SA 484 (SCA) para 19.

¹⁹ *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA); [2009] 4 All SA 146 (SCA) para 34.

[33] There is also a jurisdictional overlap in those Divisions of the High Court that have local seats. In those instances, concurrent jurisdiction is enjoyed by a local seat, within its area of jurisdiction, and the main seat, which has jurisdiction over its entire province. In *Thembani Wholesalers (Pty) Ltd v September and Another*,²⁰ Chetty J, with reference to s 50 of the SC Act held that ‘[g]rammatically, its meaning is clear and unambiguous – the local seats of the division, identified as the Eastern Cape High Courts, Bhisho, Mthatha and Port Elizabeth, are endowed with concurrent jurisdiction over smaller areas than that enjoyed by the main seat’ and that ‘the division's area of jurisdiction, conferred by s 21, comprises the entire province of the Eastern Cape’.

The *Thobejane* judgment

[34] It was argued on behalf of the banks that the *Thobejane* judgment strove to synthesise three aspects to reach its conclusions: the notion of an abuse of the process, a violation of the guarantee of access to a court in s 34 of the Constitution, and the scope of the exercise of the inherent jurisdiction of the High Court as codified in s 173 of the Constitution. I agree that it is useful to analyse the judgment in relation to those themes.

[35] The essence of the judgment is that a plaintiff commits an abuse of the process by suing out of a court that suits its interests when, supposedly, that choice would not necessarily suit the defendant’s interests. In answer to the banks’ assertion to the contrary, Tolmay J said:

²⁰ *Thembani Wholesalers (Pty) Ltd v September and Another* 2014 (5) SA 51 (ECG); [2014] 3 All SA 683 (WCC) para 10.

'We beg to differ, if impecunious litigants are denied proper access to justice, or the High Court is incapable of dealing properly and effectively with its workload, due to this practice, it must constitute an abuse.'

This supposed abuse is illustrated by a plaintiff suing out of the High Court when the alternative exists of suing out of the Magistrates' Court or suing in the Pretoria seat of the Gauteng Division when the matter could have been sued out of the Johannesburg seat.

[36] The judgment holds that the abuse manifests itself in two ways. First, a defendant could have more conveniently attended a Magistrates' Court having concurrent jurisdiction, supposedly nearby, rather than travel to the seat of a High Court, assumed to be remote. Second, a defendant has to incur greater legal costs if the case is before the High Court. As to suing out of the Pretoria seat, rather than out of the Johannesburg seat, proximity, not costs is the concern as regards the defendants. These hypothetical effects violate, according to the Gauteng Court, a defendant's s 34 right of access to court. In addition, it is egregiously unfair to burden the roll in Pretoria with matters that could have been heard in Johannesburg.

[37] In the view of the Gauteng Court, the violation of s 34 can be cured by the High Court exercising its inherent jurisdiction, as contemplated in s 173 of the Constitution: the High Court would, by refusing, as a matter of course, to hear any matter that could have been brought in another court having jurisdiction, eliminate the abuse of the process it was concerned with and uphold s 34 rights.

[38] This premise is relied on to justify a general injunction to prevent any plaintiff from instituting a matter in the Pretoria seat of the Division when the Johannesburg seat has jurisdiction or instituting a matter in either seat where the Magistrates' Court has jurisdiction. A single qualification to this regime was recognised by the

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Gauteng Court: in a case where good cause can be shown why it would be appropriate that the High Court, rather than a Magistrates' Court, should hear a matter, an application prior to the issue of process must be brought to obtain leave from a High Court to do so.

[39] In my view, the reasoning of the Gauteng Court cannot be sustained. At its very root it is flawed. Anterior to the justifications offered by it in support of its thesis is the fundamental misconception that a High Court can decline to hear a matter which is within its jurisdiction. This finding is contrary to *Goldberg*,²¹ *Bester*²² and also contrary to *Agri Wire*²³ which, being a judgment of this Court that was on point, bound the Court a quo. *Agri Wire* confirmed the correctness of *Bester* on the point in issue.

[40] It was argued by the South African Human Rights Commission that s 169 of the Constitution now grants a High Court a discretion to decline to hear a matter within its jurisdiction. This argument is based on the fact that s 169(1) provides that the 'High Court of South Africa may decide' the types of matter listed in subsections (a) and (b).

[41] This argument is untenable. The term 'may decide' is used in all of the sections dealing with the jurisdiction of all of the courts listed in chapter 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

²¹ *Goldberg v Goldberg* above note 10.

²² *Standard Credit Corporation v Bester and Others* above note 12.

²³ *Agri Wire (Pty) Ltd v Commissioner, Competition Commission and Others* above note 19.

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and Magistrates' Courts could refuse to hear matters within their jurisdiction. Bizarrely, this interpretation would enable a High Court to refuse to hear a matter that falls within the jurisdiction of a Magistrates' Court, for that reason, and the Magistrates' Court to refuse to hear the same matter because the High Court has concurrent jurisdiction. Counsel for the banks were correct, in my view, when they argued that, in proper context that the term 'may decide' simply means that each court is empowered to decide the types of cases listed in the various empowering sections. In the result, s 169 of the Constitution does not enable a High Court to refuse to hear a matter because a Magistrates' Court also has jurisdiction to do so; and the cases cited above remain good law.

[42] The Gauteng Court's finding that a court may refuse to hear matters in order to reduce its workload is also wrong. This issue is a well-trodden trail.²⁴ Only two cases need to be addressed. In *Bester*,²⁵ the Full Court addressed virtually all the concerns ventilated in the Court a quo and reached the opposite conclusion. The judgment contains a traverse of the case law about the debate concerning congestion of the roll by matters that could have been heard by another court. It concluded that it was not open to the High Court to decline to hear any matter over which it had jurisdiction and no abuse could exist on the part of a plaintiff who deemed it more propitious to sue out of the High Court than out of the Magistrates' Court. It also held:²⁶

'That, however, is not the end of the matter. In the *Bank of Lisbon and South Africa* judgment Coetzee DJP elaborated on the problem of the congested rolls and what should be understood by the term "access to justice". Without being drawn into a fruitless debate on this topic, I can only

²⁴ The topic was ventilated as early *Koch v Realty Corporation of South Africa* above note 9 where it was held that it was policy that the High Court deal with all matters over which it had jurisdiction. This verdict was reiterated in *Goldberg v Goldberg* above note 10.

²⁵ *Standard Credit Corporation v Bester and Others* above note 12.

²⁶ *Ibid* at 820H-1.

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state that courts should be extremely wary of closing their doors to any litigant entitled to approach a particular court. The doors of the courts should at all times be open to litigants falling within their jurisdiction. If congested rolls tend to hamper the proper functioning of the courts then a solution should be found elsewhere, but not by refusing to hear a litigant or to entertain proceedings in a matter within the court's jurisdiction and properly before the court.'

[43] In *Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another*,²⁷ also a Full Court decision of the Gauteng Court, it was held, following *Bester*, that it was beyond the reach of the Court to refuse to hear any matter within its jurisdiction. It concluded:

'As can be seen from the registrar's letter referred to above, he complains about the number of actions issued out of the Transvaal Provincial Division whereas they could have been dealt with in the Witwatersrand Local Division. As also pointed out above the Transvaal Provincial Division and the Witwatersrand Local Division have concurrent jurisdiction in terms of s 6 of the [Supreme Court Act 59 of 1959]. That is something that this court cannot change. If it is a matter of concern to the registrar and if it is something that affects the efficient functioning of this court, it is a matter of policy which should be dealt with by the department of justice and constitutional development. Once a court has jurisdiction to entertain a matter it cannot refuse to do so unless the action amounts to an abuse of the process of the court. See the [*Bester* case]. Any abuse of the process of the court in the matters before us was disavowed.'

[44] The Gauteng Court also erred in finding that the mere fact that the banks instituted proceedings in the High Court when they could have done so in the Magistrates' Court was an abuse of process. Once again, the case law is clear.

²⁷ *Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another* 2008 (4) SA 276 (T); [2008] 1 All SA 593 (T) at 286B-C.

[45] In *Corderoy v Union Government (Minister of Finance)*,²⁸ a case concerning vexatious litigation (now regulated by statute), Innes CJ held that there was no doubt that a court 'has an inherent power to stop frivolous and vexatious proceedings, for they amount to an abuse of process'. He went on to find that the power was exercisable on a case-by-case basis:

'That individual suits or applications may be stayed on this ground is clear, and that power has been frequently recognized by South African Courts. But the order with which we are concerned goes far beyond that. It prohibits all suits in the future, in any court, in connection with a particular subject matter, not only against the defendant but against any person in his employ.'

[46] In *Bester*,²⁹ Van der Walt J said that while it would be 'unwise to endeavor to formulate an all-encompassing definition of "abuse of process", because that would encroach upon the exercise of the discretion of a court', an abuse of process could be said, in general terms, to occur when a court process 'is used by a litigant for a purpose for which it was not intended or designed, to the prejudice or potential prejudice of the other party to the proceedings'. Interestingly, the reasons given by the bank in that case for instituting proceedings in the Supreme Court are essentially similar to the reasons given in the two cases with which this appeal is concerned; and Van der Walt J held that those reasons did not constitute an abuse of process.³⁰

[47] *Bester's* definition was endorsed by Mahomed CJ in *Beinash v Wixley*,³¹ who said:

'What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of

²⁸ *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 517. See too *In re Anastassiades* 1955 (2) SA 220 (W) at 225-226.

²⁹ *Standard Credit Corporation v Bester and Others* above note 12 at 820A-B.

³⁰ *Ibid* at 820G-H.

³¹ *Beinash v Wixley* 1997 (3) SA 721 (SCA); [1997] 2 All SA 241 (A) at 734G.

“abuse of process”. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.’

[48] There was no evidence before the court to even suggest that by instituting proceedings in the High Court the banks were using a procedure for an extraneous or improper purpose. Indeed, the banks gave a full explanation of why they follow this procedure. Their reasons include the saving of time and money as a result of a greater efficiency in disposing of these matters in the High Court as opposed the Magistrates’ Court; the saving of costs through the centralisation of litigation; and the benefit of judges, rather than magistrates, overseeing the process of execution that inevitably follows a judgment on a mortgage bond which, they say, is an inherently complex decision-making process. In cases falling within the monetary jurisdiction of the Magistrates’ Court, the banks usually only seek a costs order on the Magistrates’ Court scale. In any event, it is difficult to see how litigants can be accused of abusing the process by exercising a choice that the law gives them.

[49] Section 34 of the Constitution reads:

‘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.’

For present purposes, the controversy is confined to access to a court. Care must be taken not to impose on s 34 work that it is not designed to perform. Its role is that of a grundnorm and does not implicate the peculiar organisation of a litigation system in which respect for this value must exist. The guarantee is solely that there must be a forum with competence to address any and every dispute about a legal right and it must be presided over by persons who can render a fair process.

[50] It is the task of statute law, in this case, the SC Act and the Magistrates' Court Act, to establish a system that is consistent with the guarantee. Nothing in either statute contradicts the provisions of s 34. Therefore, the invocation of s 34 as a basis for an interpretation of national legislation (or the common law) to conclude that one of the two courts with concurrent jurisdiction ought to be preferred over the other is misconceived. Where the statute offers alternative fora, it is a matter of sheer practicality that the initiating party may choose one or the other.³²

[51] The irony that lies within the notion that, in a democratic society, a litigant is denied access to a High Court of competent jurisdiction in the absence of an express ouster ought not to be overlooked; and as rightly argued on behalf of the banks, no analysis as contemplated by s 36 of the Constitution took place in this regard.³³ Accordingly, the policy choice favoured by the Court a quo, cannot be founded on the provisions of s 34 because the objective of the section is realised regardless of which court hears the matter. This proposition is incontrovertible as the Constitutional Court has plainly stated in *Mukaddam v Pioneer Foods (Pty) Ltd and Others*.³⁴

'... Our Constitution guarantees everyone the right of access to courts which are independent of other arms of government. But the guarantee in section 34 of the Constitution does not include the choice of procedure or forum in which access to courts is to be exercised. This omission is in line

³² See para 25 of this judgment, above.

³³ Section 36 of the Constitution:

'Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

³⁴ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* [2013] ZACC 23; 2013 (5) SA 89 (CC) para 28.

with the recognition that courts have an inherent power to protect and regulate their own process in terms of section 173 of the Constitution . . . ?

[52] It may of course be speculated that by reason of a deliberate policy choice by Parliament, it might be thought that where more than one court has jurisdiction, a particular court should have pride of place over the other. However, that policy choice cannot be informed by s 34 and, insofar as the issues in this case are concerned, has not been made.

[53] The concept of the High Court's inherent jurisdiction to regulate its own process was invoked to justify compelling the banks to initiate proceedings in the court supposedly closer to the defendant, despite concurrent jurisdiction existing. The application of inherent jurisdiction to these circumstances is misconceived. The inherent jurisdiction of the High Court can only be applied to address a lacuna which, in the absence of judicial intervention, would result in injustice.

[54] The circumstances where inherent power can properly be employed has been extensively addressed by this Court and by the Constitutional Court and the authorities demonstrate that resort to that power under the circumstances dealt with in the Court a quo, would be inappropriate. The High Court cannot by a purported exercise of inherent jurisdiction create a new legal right to contradict an existing legal right and thereby deprive a person of an existing legal right.

[55] The Constitutional Court held in *Phillips and Others v National Director of Public Prosecutions*:³⁵

³⁵ *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) paras 47-51.

[47] The Constitution requires that judicial authority must vest in the courts which must be independent and subject only to the Constitution and the law. Therefore, courts derive their power from the Constitution itself. They do not enjoy original jurisdiction conferred by a source other than the Constitution. Moreover, in procedural matters, s 171 makes plain that "(a)ll courts function in terms of national legislation and their rules and procedures must be provided for in national legislation". On the other hand, s 173 of the Constitution preserves the inherent power of the courts to protect and regulate their own process in the interests of justice.

In *S v Pennington and Another*, this Court held that:

"It is a power which has to be exercised with caution. It is not necessary to decide whether it is subject to the same constraints as the "inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice" which vested in the Appellate Division prior to the passing of the 1996 Constitution. Even if it is subject to such constraints, the present situation, in which there is a vacuum because the legislation and rules contemplated by the Constitution have not been passed, is an extraordinary one in which it would be appropriate to exercise the power."

[48] In *Parbhoo and Others v Getz NO and Another* too, this Court turned to its "inherent power" to meet an "extraordinary" procedural situation pending enactment of relevant legislation and promulgation of rules of procedure. In both cases the points are made that ordinarily the power in s 173 to protect and regulate relates to the process of court and arises when there is a legislative *lacuna* in the process. The power must be exercised sparingly having taken into account interests of justice in a manner consistent with the Constitution.

[49] It may be that the High Court could legitimately claim inherent power of holding the scales of justice where no specific law directly provides for a given situation or where there is a need to supplement an otherwise limited statutory procedure such as the one in s 26 of the Act. This can wait for a decision in the future when such a case presents itself.

[50] In the present matter the applicants made no attempt whatsoever to bring their case within the provisions of the Act, which they could have done. The effect of the High Court order rescinding the restraint order was to ignore the statutory provisions of an Act of Parliament.

[51] Whatever the true meaning and ambit of s 173, I do not think that an Act of Parliament can simply be ignored and reliance placed directly on a provision in the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common law.'

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[56] This Court, in *Oosthuizen v Road Accident Fund*,³⁶ addressed a controversy concerning a plaintiff who wished to have the action he had instituted in the Magistrates' Court transferred to the High Court. The issue implicated s 50(1) of the Magistrates' Court Act that provided for a defendant to seek such a transfer but did not accord a plaintiff a similar option. A High Court had dismissed the application. On appeal it was held:

'[21] This brings me to the point where it is necessary to deal with the appellant's general submission that the interests of justice" required of the High Court to use its inherent jurisdiction to order a transfer of the case to the High Court. In this regard the submission appears to be that in appropriate circumstances a court was obliged to create a remedy for the appellant where none exists.

[22] It was submitted that there was a discrimination of sorts between plaintiff and defendant reflected in s 50(1) of the Magistrates' Courts Act, which impacts negatively on the appellant's entitlement to have his case adjudicated. It was contended on behalf of the appellant that constitutional norms dictated that a litigant in the circumstances of the appellant should not be left destitute. These submissions ignore the fact that it is a plaintiff who chooses the forum in which to litigate and not a defendant. In the present case the appellant was legally represented and fully informed about all the implications of the injuries sustained by him. The appellant's attorneys, even when they became aware of the full extent of his claim, nevertheless persisted in the path that led them to the application to the High Court, which is the subject of the present appeal. They ought to have switched forums when it became clear that they should do so to protect his interests.

[23] Counsel for the Fund contended that to allow a transfer of the case in the prevailing circumstances would be more than overcoming a procedural hurdle, as submitted by the appellant, but would be akin to breathing new life into a claim that has been extinguished by prescription. Put differently, the contention that the appellant requests no more than procedural intervention is fallacious. Acceding to the appellant's request would have a substantive effect, namely the revival of a prescribed claim. Claims against the Fund are understandably time-bound.

³⁶ *Oosthuizen v Road Accident Fund* [2011] ZASCA 118; 2011 (6) SA 31 (SCA); [2011] 4 All SA 71 (SCA) paras 21-27.

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There are statutorily prescribed prescription periods. The Fund, like any other litigant, is entitled to raise a defence based on prescription. The appellant seeks to deprive the Fund of such a lawful defence in circumstances in which his attorneys have been remiss.

[24] As conceded by counsel on appellant's behalf, the appellant is not without remedy. He has a right to institute a claim for compensation against his attorneys for the difference between what might be recovered through the magistrates' court and the full extent of his loss. In these circumstances, I fail to see how it can be in the interests of justice for the High Court to come to the appellant's assistance on the basis suggested by him. Indeed, the contrary is true.

[25] The appellant's access to court was not impeded by some lacuna in the law. His attorneys chose the wrong forum and persisted therein when it was clear on the available evidence that a change of forum was imperative.

[26] A High Court may not use its inherent jurisdiction to create a right. The appellant's reliance on the expression "*ubi jus ibi remedium*" is misplaced. The appellant had a right to institute action in the appropriate forum to the full extent of his claim. Prescription has extinguished part of his claim. For that consequence his attorneys are to blame. As pointed out above, he has a remedy in that regard.

[27] In the circumstances of the present case, I share the reservations of the court below that allowing the exercise of inherent jurisdiction in the manner suggested opens the door to uncertainty and potential chaos. If there is a case in which it is necessary to fashion a constitutionally acceptable remedy because of the interests of justice, this is not it.'

[57] Accordingly, the premise relied on in the court a quo that the inherent jurisdiction of the court can be the basis for directly contradicting a legal right cannot be sustained. The statutory provision or the rule of common law which founds the premise of the legal right would have to be declared unconstitutional, an issue never addressed, and indeed, in relation to the questions posed to the court, could not legitimately have been addressed. If as a matter of policy, a hierarchy of choice about courts of concurrent jurisdiction is to be imposed on litigants, it is beyond the power

of the High Court to create such a hierarchy pursuant to a purported exercise of an inherent jurisdiction to regulate its own process.

[58] In recognition of the fact that a plaintiff's choice of forum may have a prejudicial impact on a defendant, common law and statutory mechanisms are in place to mitigate any such consequences. The first is the transfer of matters from one court to another. In terms of s 27 of the SC Act, on the application of one of the parties, a matter may be transferred from one Division of the High Court to another or from one seat a Division of the High Court to another. Section 50(1) of the Magistrates' Court Act provides for a transfer from the Magistrates' Court to the High Court on application by a defendant, while Uniform Rule of Court 39(22) requires consent to transfer a matter from the High Court to the Magistrates' Court.³⁷

[59] Secondly, as an exception to the general rule, a court may refuse to hear a matter over which it has jurisdiction if the plaintiff is guilty of an abuse of process.³⁸

³⁷ There is authority that a High Court can nevertheless *mero motu* effect a transfer from the High Court to a Magistrates' Court. In *Them bani Wholesalers (Pty) Ltd v September and Another* 2014 (5) SA 51 (ECG); [2014] 3 All SA 683 (WCC) para 13, s 27 of the SC Act was addressed. After citing an unreported judgment by Plasket J in *Jeremy Davis v Kenneth James Denton* ECD (case no. 630/08) unreported, which addressed the circumstances that would make an application for a transfer meritorious, the court stated:

'Although the section provides the machinery for the removal of a matter to another court on application, there is in my view nothing to preclude a judge, sitting as a court of first instance in the Eastern Cape High Court, Grahamstown, from *mero motu* concluding that, notwithstanding the court having original territorial jurisdiction, the balance of convenience clearly dictates that the matter properly be heard at a particular local seat and order that it be so removed. The inconvenience to a litigant hauled before a far-flung court will, no doubt, not be lightly countenanced and, the court's opprobrium, marked by an appropriate costs order. Consequently, the convenience argument relied upon as an aid to the interpretation contended for, must fail.'

A similar decision was made in *Veto v Ibhayi City Council* 1990 (4) SA 93 (SE) where the Court, dealing with the effect of Uniform Rule of Court 39(22) took the view that it could transfer a case unilaterally by a resort to its inherent power. It is doubtful that these decisions are correct. This approach was criticised by Binns-Ward J in *PT v LT and Another* 2012 (2) 623 (WCC) para 15 and footnote 13, where he questioned whether a cogent rationale could exist to effect transfer at variance with the procedure provided in the statute and the Rules of Court. Again, in *Marth N O v Collier and Another* [1996] 3 All SA 506 (C) Van Reenen J disapproved of the dictum in *Ibhayi*. I am in full agreement with these criticisms. In any event, such an approach is self-evidently one that recognises that it could only be applied in a fact-specific enquiry in a given case and is no precedent for a pre-emptive ruling.

³⁸ *Corderoy v Union Government (Minister of Finance)* above note 31 at 517.

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Thirdly, courts may make appropriate costs orders. In *Goldberg v Goldberg*,³⁹ Schreiner J said that that not only could a 'successful applicant be awarded only magistrate's court costs but he may even be deprived of his costs and be ordered to pay any additional costs incurred by the respondent by reason of the case having been brought to the Supreme Court'. The application of all of these rules involves a fact specific enquiry on a case-by-case basis. That, of necessity, requires a defendant who alleges prejudice of one form or another to establish that prejudice. Decisions of this nature cannot be made in the abstract.

[60] The Court a quo endeavoured to rationalise its conclusions by an appeal to constitutional values in the abstract, and that approach dominates the judgment. As alluded to earlier, in the absence of facts of actual prejudice, the Court a quo was not equipped to properly delve into these concerns. The moral value expressed as 'access to justice' is so broad that it can encompass almost every shortcoming of a legal system to effectively meet the needs of the litigating populace. The primary focus of the Court a quo's attention was on what is necessary to facilitate an impecunious person being able to effectively assert or defend a right in a court of law. That concern covers a very wide range of social factors.

[61] It does not automatically follow that the obvious need to address the plight of the poor means that the practicalities of concurrent jurisdiction are causally connected with that plight. The facilitation of an effective opportunity for poor folk to vindicate their rights requires more than proximity of a forum and low costs. It

³⁹ *Goldberg v Goldberg* above note 10. See too *Koch v Realty Corporation of South Africa* above note 9. See further, *Greef v Raubenheimer en 'n Ander* 1976 (3) SA 37 (A); [1976] 3 All SA 321 (A), a defamation case, where the court held at 44E that the appropriate order as to the scale upon which costs should be awarded, on either of the Magistrates' Court or of the High Court scale, is to be determined by reference to what the 'reasonable plaintiff', at the time of instituting proceedings, had to consider. A vindication of reputation warranted costs on the higher scale.

requires, regardless of where the *lis* is contested, to have appropriate expertise available to them. Moreover, it is an appropriate question to pose, in relation to foreclosure matters as a prime example, whether so drastic an event as the repossession of a person's home ought not, as a matter of policy, to enjoy the scrutiny of the High Court rather than the Magistrates' Court.⁴⁰ In the absence of a holistic and evidence-based enquiry the invocation of constitutional values in the abstract is unhelpful. The subject of how to enable poor folk to use the courts effectively implicates the role (and funding) of Legal Aid South Africa, and the several NGOs which give assistance to the poor to litigate, no less than the exercise by a plaintiff of a choice of venue. The idea that there might be a causal connection between the implications of concurrent jurisdiction and an effective way to alleviate these social circumstances warrants an empirical enquiry to determine that as a fact. The court a quo was denied the opportunity to consider the matter based on the fruits of such an enquiry.

[62] Accordingly, the decision in *Thobejane* cannot be sustained. The appeal must succeed and the appropriate answers to the questions are those as set out in the order of this court.

The *Gqirana* judgment

[63] The Eastern Cape Court decided *Gqirana* after *Thobejane* had been decided and thus had the benefit of the analysis and reasoning set out in *Thobejane*. Interestingly, the evidence put up by the banks that after they had, in compliance with the *Thobejane* judgment, instituted process only in the Magistrates' Court there

⁴⁰ Since the decision in *Jaffha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) an application to deprive mortgagees of their homes by way of foreclosure has required a judicial interrogation, *mero motu*, of the circumstances that make such an order consistent with s 26 of the Constitution. This enquiry is a delicate exercise as is amply demonstrated by the burgeoning case law on the issue.

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had been no evidence of an increase in the number of matters being defended. This evidence was unrebutted. The Eastern Cape Court rejected the Gauteng Court's reasoning, holding that the test for an abuse of the process is fact-specific and could only be determined *ex post facto*, that a resort to the exercise of inherent jurisdiction to regulate process was inappropriate and that no common law rule needed development. Instead, it conducted an interpretation exercise to determine whether the NCA ousted the jurisdiction of the High Court, leaving the Magistrates' Court with exclusive jurisdiction in NCA matters.

[64] It was argued on behalf of the banks that this issue was not within the purview of the questions posed in the Judge-President's directive. This is correct. Moreover, and more importantly, as alluded to earlier, the NCA thesis was not put to the counsel who argued the matter. The Court a quo states that the topic was ignored by the parties. The upshot was that the Court a quo did not have the benefit of any argument by any party as to the merits of the NCA thesis. Regrettably, a consequence of that is that the arguments advanced on appeal were never considered by the Court a quo. The conclusions reached in the *Gqirana* judgment are, however, unsustainable.

[65] The judgment acknowledged that there was no express ouster of the High Courts' jurisdiction. Rather, an implied ouster rested on the statement that '(generally) issuing summons in the High Court for a debt that could be recovered in the Magistrates' Court runs counter to the express purpose of the NCA'.⁴¹ This proposition exhibits an obvious internal difficulty. Quite how an ouster can 'generally' exist, and thus not exist in every instance, is puzzling and a fundamental flaw in this thesis.

⁴¹ Paragraphs 37.9 of the *Thobejane* judgment, read with para 37.8.

[66] The proposition was seemingly inspired by a remark in *Absa Bank v Myburgh*,⁴² an application for default judgment in an NCA matter. The registrar had referred it to the court because the credit agreement concerned included a clause that stated that the debtor consented to the jurisdiction of the High Court. This violated s 90(2)(k)(vi)(aa) of the NCA. The case turned on that crisp point. However, the court engaged in an expansive obiter traverse of the NCA and, among several observations, it opined that it was irregular for a plaintiff to institute a claim in the High Court for a sum within the Magistrates' Court jurisdiction.⁴³ Notably, *Myburgh* did not state that High Courts' jurisdiction, per se, over NCA matters, was ousted. This decision cannot be taken as authority for the proposition that the High Courts' jurisdiction is ousted in NCA matters, wholly or partially.

[67] The nub of the Eastern Cape Court's finding in respect of the implied ouster of the High Court's jurisdiction is the following:⁴⁴

'The provisions of the NCA, however, properly interpreted through the prism of the Constitution, create a specific set of structures and procedures relating to NCA matters which, read in context and on a generous interpretation, by necessary implication, provides for the magistrates' court to be the court of first adjudication of all NCA matters, to the exclusion of the High Court as a court of first adjudication, save only in the event that there are unusual or extraordinary factual or legal issues raised which in the opinion of the High Court warrant them being heard first in the High Court.'

[68] There is a strong presumption against the ouster of the High Court's jurisdiction, and the mere fact that a statute vests jurisdiction in one court is insufficient to create an implication that the jurisdiction of another court is thereby

⁴² *Absa Bank v Myburgh* 2009 (3) SA 209 (T).

⁴³ *Ibid* paras 53-55.

⁴⁴ *Nedbank Ltd v Gqirana N O and Another, and similar matters* above note 4 para 75.6.

ousted. In *Makhanya v University of Zululand*,⁴⁵ Nugent JA explained the position thus:

[24] In general, the High Courts thus exercise the original authority of the state to resolve all disputes, of any kind, that are capable of being resolved by a resort to law, unless that authority has been assigned to another court. When a High Court resolves a contractual claim it exercises that original jurisdiction. When it considers a claim for enforcement of a constitutional right it exercises that original jurisdiction. So too when it enforces a statutory right.

[25] But the state might also create special courts to resolve disputes of a particular kind. Generally those will be disputes concerning the infringement of rights that are created by the particular statute that creates the special court (though that will not always be so). When a statute confers judicial power upon a special court it will do so in one of two ways. It will do so either by (a) conferring power on the special court and simultaneously (b) excluding the ordinary power of the High Court in such cases (it does that when “exclusive jurisdiction” is conferred on the special court). Or it will do so by conferring power on the special court without excluding the ordinary power of the High Court (by conferring on the special court jurisdiction to be exercised concurrently with the original power of the High Courts). In the latter case the claim might be brought before either court.

[26] . . .

[27] Naturally a claim that falls within the concurrent jurisdiction of both the High Court and a special court could not be brought in both courts. A litigant who did that would be confronted in one court by either a plea of *lis pendens* (the claim is pending in another court) or by a plea of *res judicata* (the claim has been disposed of by the other court). A claimant who has a claim that is capable of being considered by either of two courts that have concurrent jurisdiction must necessarily choose in which court to pursue the claim and, once having made that election, will not be able to bring the same claim before the other court. But where a person has two separate claims, each for enforcement of a different right, the position is altogether different, because then both claims will be capable of being pursued, simultaneously or sequentially, either both in one court, or each in one of those courts.’

⁴⁵ *Makhanya v University of Zululand* above note 20 paras 24, 25 and 27.

[69] The threshold to sustain the proposition that there is an ouster of the High Court's jurisdiction is very high. In *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another*,⁴⁶ Kriegler J, in the course of determining whether a statute had ousted the jurisdiction, the High Court demonstrated the method of deciding the question. He said that 'there is nothing in s 36 to suggest that the inherent jurisdiction of a High Court to grant appropriate other or ancillary relief is excluded' and that the section 'does not say so expressly nor is such an ouster necessarily implicit in its terms, while it is trite that there is a strong presumption against such an implication'.

[70] In *Richards Bay Bulk Storage (Pty) Ltd v Minister of Public Enterprises*⁴⁷ this Court set out the approach to deciding whether an ouster can be inferred:

'The question at issue is therefore whether the Court *a quo* had jurisdiction to hear the review application. This in turn depends on whether the Act excluded such jurisdiction. The Act does not do so in express terms, and the question then is whether it contains an implication to that effect. The parties were *ad idem* that there is a strong presumption against such an implication:

"... (T)he Court's jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration, and then only to the extent indicated by such necessary implication. . . ."

(*Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502G-H. See also *Local Road Transportation Board and Another v Durban City Council and Another* 1965 (1) SA 586 (A) at 593B-C and *Paper Printing, Wood and Allied Workers' Union v Pienaar NO and Others* 1993 (4) SA 621 (A) at 635A-B.)

In argument before us the respondent's counsel contended that an intention to exclude the Supreme Court's review jurisdiction should be inferred from the nature and amplitude of the powers granted to the Special Court created by s 15 of the Act. Now, of course, it would not be

⁴⁶ *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) para 43.

⁴⁷ *Richards Bay Bulk Storage v Minister of Public Enterprises* 1996 (4) SA 490 (A).

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enough for the respondent to show that the Special Court enjoys powers of review similar to those exercised by the Supreme Court under its inherent jurisdiction. In the present context the respondent would have to go further and show that the Legislature intended such powers to be exclusive. It is quite conceivable that review powers concurrent with those exercised by the Supreme Court could be bestowed, as was found to have happened in *Pienaar's case supra*. In such a case the grant of review powers to the tribunal in question would not mean that the Supreme Court has been deprived of its common-law jurisdiction. However, before any suggestion of concurrent jurisdiction can arise one must examine whether the Special Court was clothed with any review jurisdiction at all⁴⁸

[71] The Eastern Cape Court relied for the implied ouster of the High Court's jurisdiction on two sections of the NCA, namely ss 3 and 90(2)(k)(vi)(aa), and s 29(1)(e) of the MC Act.

[72] Section 3 of the NCA sets out its purposes as follows:

'The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by—

- (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
- (b) ensuring consistent treatment of different credit products and different credit providers;
- (c) promoting responsibility in the credit market by—
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
 - (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

⁴⁸ *Richards Bay Bulk Storage (Pty) Ltd v Minister of Public Enterprises* 1996 (4) SA 490 (A) at 494G – 495.

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- (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by—
- (i) providing consumers with education about credit and consumer rights;
 - (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
- (f) improving consumer credit information and reporting and regulation of credit bureaux;
- (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
- (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
- (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.’

[73] Section 90 of the NCA is concerned with unlawful provisions in credit agreements. Section 90(1) states that a credit agreement ‘must not contain an unlawful provision’ and s 90(2) then lists a range of provisions that are unlawful. So, for instance, a provision in a credit agreement is unlawful if its purpose or effect is to ‘defeat the purposes or policies’ of the NCA⁴⁹ or to ‘deceive the consumer’.⁵⁰ S 90(2)(k)(vi)(aa) provides:

‘A provision of a credit agreement is unlawful if—

...

(k) it expresses, on behalf of the consumer—

...

(vi) a consent to the jurisdiction of—

⁴⁹ Section 90(2)(a)(i).

⁵⁰ Section 90(2)(a)(ii).

(aa) the High Court, if the magistrate's court has concurrent jurisdiction.'

[74] Section 29 of the Magistrates' Court Act, in so far as NCA matters are concerned, provides:

'(1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court in respect of causes of action, shall have jurisdiction in-

(a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the *Gazette*;

...

(e) actions on or arising out of any credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005).'

[75] The complete answer to the Eastern Cape Court's finding is contained in Standard Bank's argument. It is that, far from impliedly ousting the concurrent jurisdiction of the High Court, the sections of the NCA that it relied on and s 29 of the Magistrates' Court Act are premised on the High Court having concurrent jurisdiction with Magistrates' Courts.

[76] There is no indication of an implied ouster of jurisdiction in s 3 of the NCA. It is concerned with the purposes of the Act. These purposes, as one would expect of a provision such as this, are expressed in broad and general terms and not one of these even mentions a court, let alone a preferred choice of court. Section 29 of the Magistrates' Court Act is, and has always been, premised on concurrent jurisdiction. All that s 29(1)(e) has done is to expand the jurisdiction of Magistrates' Courts – and that does not carry with it an implication that the jurisdiction the High Court is

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correspondingly decreased.⁵¹ Section 90(2)(k)(vi)(aa) of the NCA puts the matter beyond doubt, but not in the way that the Eastern Cape Court found. It prohibits, when a credit agreement is concluded, the inclusion of a term that the parties agree to the exclusive jurisdiction of the High Court if a Magistrates' Court 'has concurrent jurisdiction'. Far from impliedly ousting the jurisdiction of the High Court, this section of the NCA expressly recognises that the High Court has jurisdiction, concurrent with Magistrates' Courts.

[77] The approach of the Eastern Cape Court was considered and rejected by a Full Court in *Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another*.⁵² The credit agreements in issue in that case contained a provision to the effect that while the debtor consented to the jurisdiction of the Magistrates' Court, the bank was 'nonetheless, at its option entitled to institute proceedings in any division of the High Court of South Africa which has jurisdiction'. It was argued that this provision was in conflict with s 90(2)(k)(vi)(aa) of the NCA.

[78] The court accepted that, leaving the NCA aside, it was 'settled law that the High Court has concurrent jurisdiction with any magistrates' court in its area of jurisdiction'⁵³ and that where reliance is placed on an implied ouster of jurisdiction, the inference to that effect must be clear and unequivocal.⁵⁴ The court found that

⁵¹ *Makhanya v University of Zululand* above note 20 para 25; *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502-503.

⁵² *Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another* above note 30.

⁵³ *Ibid* at 280B.

⁵⁴ *Ibid* at 280J-281D. Reliance was placed, inter alia, on *Welkom Village Management Board v Leteno* above note 55 at 502-503; *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 584A-B; *Reid-Daly v Hickman and Others* 1981 (2) SA 315 (ZA) at 318F-G; *Millman and Another NNO v Pieterse and Others* 1997 (1) SA 784 (C) at 788G-J.

s 90(2)(k)(vi)(aa) did not oust the jurisdiction of the High Court in NCA matters. It held:⁵⁵

‘In my judgment s 90 of the NCA does not affect the jurisdiction of the High Court. The High Courts retain their jurisdiction in terms of the [Supreme Court Act 59 of 1959] as set out earlier herein. Section 90 was intended to outlaw forum shopping in credit agreements. To extend its scope and purview to the overall jurisdiction of the High Court beyond mere clauses in credit agreements is to accord the section a meaning which it neither has nor was ever intended to have.’

[79] It also dealt with s 3 of the NCA, and its purpose. It held:⁵⁶

‘Section 2(1) of the NCA provides as follows: “The Act must be interpreted in a manner that gives effect to the purposes set out in s 3.” Section 3 then deals with the purpose of the Act. The purposes are set out in detail. All the purposes so set out are laudable purposes to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers. Not a single purpose, however, is indicative of the fact that the jurisdiction of the High Court is intended to be ousted.’

[80] There are other indications in the NCA which demonstrate incompatibility with an ouster of the High Court’s jurisdiction and strengthen the conclusion that no such inference of an ouster can be drawn. For instance, s 130(1) states:

‘Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and. . . .’

There is no qualification to which ‘court’ reference is made, the word ‘court’ being undefined in the NCA. This provision can only be understood to refer to any court with competent jurisdiction and therefore includes both the High Court and the Magistrates’ Court.

⁵⁵ *Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another* above note 30 at 284F-G.

⁵⁶ *Nedbank Ltd v Mateman and Others; Nedbank Ltd v Stringer and Another* above note 30 at 285I-J.

[81] Sometimes, however, the NCA is specific about the Magistrates' Court being the exclusive forum to make certain decisions. In those instances, the NCA expressly stipulates the Magistrates' Court to the exclusion of any other court. For example: s 86(9) provides that if 'a debt counsellor rejects an application as contemplated in subsection (7)(a), the consumer, with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for an order contemplated in subsection (7)(c)'; s 87 provides that if 'a debt counsellor makes a proposal to the Magistrates' Court in terms of section 86(8)(b), or a consumer applies to the Magistrates' Court in terms of section 86(9), the Magistrate's Court must conduct . . .'; s 127(8)(a) provides that if a debtor 'fails to pay an amount demanded in terms of subsection (7) within 10 business days after receiving a demand notice, the credit provider may commence proceedings in terms of the Magistrates' Courts Act for judgment enforcing the credit agreement'; and s 162 provides that '[d]espite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in section 161'.

[82] By implication in the last example, the High Court has such a power, and s 162 exists to confer a like power on the Magistrates' Court to impose such penalties too, an example of the need to authorise power to the Magistrates' Court by statute, as contemplated in s 170 of the Constitution. If the NCA had intended to impliedly oust the jurisdiction of the High Court, and to vest exclusive jurisdiction in the Magistrates' Court, these provisions, which do indeed reserve particular decisions for that court, would be odd, if not superfluous.

[83] The foundation of the Eastern Cape Court's thesis was that a constitutional value was somehow thwarted if the Magistrates' Court was not assigned primacy of jurisdiction in NCA matters and this justified an interpretation that, so it held, would

promote those values. The articulation of this thesis was at a high level of generality. Reference was made to a 'balancing of fairness' and to examining the NCA through the 'prism of the Constitution'. In this, the approach was an echo of approach of the Gauteng Court in *Thobejane* and a repetition of the analysis in respect of that judgment is unnecessary.

[84] Paradoxically, having held that the High Court's jurisdiction was excluded because it would otherwise violate constitutional values, the court found that the High Court was somehow nevertheless vested with a form of residual jurisdiction to hear exceptional cases. This thesis too must falter on grounds of incoherence. Fish cannot sometimes be fowl.

[85] The majority judgment of the Eastern Cape Court is wrong. So too, in my view, is the minority judgment which holds, on grounds similar to the Gauteng Court, that in all cases in which a Magistrates' Court has jurisdiction, a High Court's jurisdiction is ousted.

[86] In the result, in my view, the NCA cannot have the effect as found by the court a quo. Accordingly, the decision in *Gqirana* cannot be sustained and the appeal must succeed. The answers to the questions posed to the Court will be set out in the order below.

Conclusion

[87] As to costs, given the test-case character of the matter, no costs were sought. The Court expresses its appreciation, in particular, to the several *amici curiae* and their counsel.

[88] The following orders are made:

In case numbers 38/2019 and 47/2019:

- 1 The appeal is upheld, with no order as to costs.
- 2 The order of the court below is set aside and replaced with the following order:
'It is declared that:
 - (1) The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrates' Courts, if brought before it, because it has concurrent jurisdiction with the Magistrates' Court.
 - (2) The High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrates' Court because the High Court has concurrent jurisdiction.
 - (3) The main seat of a Division of a High Court is obliged to entertain matters that fall within the jurisdiction of a local seat of that Division because the main seat has concurrent jurisdiction.
 - (4) There is no obligation in law on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings.
3. There is no order as to costs'

In case number 999/2019:

- 1 The appeal succeeds, with no order as to costs.
- 2 The order of the court below is set aside and replaced with the following:
'It is declared that:
 - (1) The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrates' Courts, if brought before it, because it has concurrent jurisdiction with the Magistrates' Court.

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- (2) The High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrates' Court because the High Court has concurrent jurisdiction.
- (3) There is no obligation in law on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings.
- 3. There is no order as to costs.'

Roland Sutherland

**ROLAND SUTHERLAND
ACTING JUDGE OF APPEAL**

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The South African Human Rights Commission, Johannesburg:

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The Pretoria Society of Advocates, Pretoria

AJ Louw SC, with him,
SW Davies and
S Van der Walt.

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ANNEXURE SAHRC 2

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

WHICHEVER IS NOT APPLICABLE

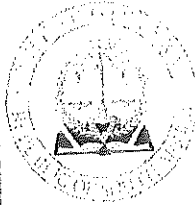
REPORTABLE: YES/NO. YES NO

OF INTEREST TO OTHER JUDGES: YES/NO. YES NO

REVISED.

16-9-18
DATE

[Signature]
SIGNATURE



IN THE MATTERS:

NEDBANK LIMITED vs THOBEJANE	84041/15
FIRSTRAND BANK LIMITED vs MALATJIE AND ANOTHER	93088/15
THE STANDARD BANK OF SOUTH AFRICA vs MPONGO	99562/15
ABSA BANK LIMITED vs VAN DER MERWE AND ANOTHER	36/16
FIRST RAND BANK LIMITED vs MAHLANGU	736/16
THE STANDARD BANK OF SOUTH AFRICA vs WOODITADPERSAD AND ANOTHER	1114/16
NEDBANK LIMITED vs SONKO	1429/16
THE STANDARD BANK OF SOUTH AFRICA LIMITED vs NKWINIKA	3429/16
FIRSTRAND BANK LIMITED vs LANGBEHN AND ANOTHER	3595/16
THE STANDARD BANK OF SOUTH AFRICA vs LEMPE	6996/16
THE STANDARD BANK OF SOUTH AFRICA vs GOEIEMAN AND ANOTHER	16228/16
ABSA BANK LIMITED vs IGWILO AND ANOTHER	29736/1
ABSA BANK LIMITED vs PILLAY AND ANOTHER	30302/16

JUDGMENT

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TOLMAY, J (with LEDWABA DJP and MOTHLE J concurring)

INTRODUCTION

- [1] This matter raises concerns that are two-fold. The first is the ever increasing tendency by litigants, mainly banks and other commercial institutions, to enrol in the High Court, foreclosure applications with amounts falling within the jurisdiction of the Magistrates' Courts. Secondly, litigants taking advantage of concurrent jurisdiction between the Gauteng Division, Pretoria and the Gauteng Local Division, Johannesburg, by enrolling matters in Pretoria even where it involves parties located within the jurisdiction of the Gauteng Local Division, Johannesburg.
- [2] The consequence is that, the court roll in the Gauteng Division, Pretoria, is congested resulting in matters which legitimately belong to the High Court being edged-out and their adjudication delayed. Further, it increases the workload for Judges causing a delay in handing down judgments and the waiting period for dates of hearing. This results in the adage "justice delayed is justice denied" becoming a sad reality in this Division.
- [3] The aforesaid raised concern for two reasons. The first being that, especially in matters brought by financial institutions, often impecunious defendants or respondents will have to travel in person from distances far away from the Court, to appear and oppose these

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matters, in other instances being unable to appear in person, due to the prohibitive transport and other related costs.

[4] This is of concern as the possibility arises that these people are denied proper access to justice. The second concern was that these matters, which could easily have been dealt with, within the jurisdiction of other courts caused enormous congestion of the rolls and results in delays in matters where parties have no choice, but to institute action in this Court.

[5] The scenario referred to above resulted in that Court identifying applications, which were postponed as a result of a directive issued to address these concerns. The directive reads as follows:

"The parties are called upon to address the following questions

- a. Why the High Court should entertain matters that fall within the jurisdiction of the Magistrates' Courts;*
- b. Is the High Court obliged to entertain matters that fall within the jurisdiction of the Magistrates' Courts purely on the basis that the High Court may have concurrent jurisdiction'*
- c. Is the Provincial division of the High Court obliged to entertain matters that fall within the jurisdiction of a Local Division on the basis that the Provincial division has concurrent jurisdiction;*

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d. Is there not an obligation on financial institutions to consider the cost implication and access to justice of financially distressed people when a particular forum is considered?"

[6] In the end, because of the importance of these matters the Judge President constituted a full court to consider the issues raised in the directive. In all the matters the applicants were financial institutions (the banks) and through a process of case management, they were given an opportunity to file affidavits in an attempt to answer the questions posed.

[7] Initially there were 13 (thirteen) applications before the Full Court, the matter of **Standard Bank of South Africa v Nkwini**¹ did not fall within the jurisdiction of the Magistrate Court and was withdrawn. During the hearing we were informed that in three matters, the cases were withdrawn because the client discharged the debt. The relevant details of the remaining eight of the applications are the following:

<u>CASE NAME</u>	<u>TOTAL AMOUNT CLAIMED</u> <u>(excludes interest and insurance premiums)</u>	<u>TOTAL ARREARS</u>	<u>COSTS SOUGHT</u>
<u>Standard Bank of South Africa Limited v Ezra Makikole Mpongo</u>	<u>R227 436.09</u>	<u>R13 777.84</u>	<u>Attorney and client scale</u>
<u>Standard Bank of South Africa Limited v Karin</u>	<u>R 218 324.73</u>	<u>R20 782.10</u>	<u>Attorney and client scale</u>

¹ Case no 3429/16 (unreported)

<u>Madiou Samantha Lempe</u>			
<u>Standard Bank Of South Africa Limited v Radesh and Myra Geraldien Wooditadpersad</u>	<u>R 95 129.64</u>	<u>R 7 772.18</u>	<u>Attorney and client scale</u>
<u>Standard Bank Of South Africa Limited v Neelsie and Angeline Rose Goeleman</u>	<u>R161 430.23</u>	<u>R 9 533.86</u>	<u>Attorney and client scale</u>
<u>ABSA Bank Limited v Anayo Prince and Portia Nomandla Iqwilo</u>	<u>R121 906.57</u>	<u>R12 928.63</u>	<u>Attorney and own client scale</u>
<u>ABSA Bank Limited v Jagathisan and Thirunadevi Pillay</u>	<u>R125 009.47</u>	<u>R20 200.78</u>	<u>Attorney and own client scale</u>
<u>Nedbank Limited v Aubrey Ramorabane Sonko</u>	<u>R255 245.56</u>	<u>R13 586.64</u>	<u>Attorney and client scale</u>
<u>Nedbank Limited v Julia Mampuru Thobejane</u>	<u>R125 700.27</u>	<u>R9 662.82</u>	<u>Costs on the magistrates Court scale</u>

THE BACKGROUND AND ARGUMENTS RAISED

[8] Appearing before the Full Court, were the financial institutions that brought the default applications. The Pretoria Society of Advocates was requested to assist the unrepresented Defendants and did comply with the request. The South African Human Rights Commission (SAHRC) and the Department of Justice and Constitutional Development (the Minister) requested and were granted leave to be admitted as *amici curiae*. The court is grateful for their assistance.

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[9] At the hearing, the Banks' main argument was that the High Court is obligated to entertain all matters once the Court is seized with jurisdiction. In support of this contention they relied on section 21 of the Superior Courts Act, no 10 of 2013 (Superior Courts Act). The SAHRC and the Minister did not support this argument and argued that constitutional imperatives support the contention that the High Court is not obliged to deal with these matters.

[10] The Banks stated various reasons why they rather choose to institute actions in the High Court. They also conceded that in foreclosure matters and even in credit agreement matters, where vehicles are involved, they as a matter of course, institute actions in the High Court. These matters not only fall within the Magistrates' Courts jurisdiction, but are often for paltry amounts. The following were stated as reasons, why they choose not to institute actions in the Magistrates' Courts:

- a) There are inordinate delays;
- b) They experience problems in obtaining dates of hearing;
- c) There is no uniform approach pertaining to the granting of orders;
- d) Unnecessary queries are raised;
- e) There exists a general reluctance to declare immovable property specially executable;
- f) Section 66(4) of the Magistrates' Courts Act² poses a problem as attachments lapse after a year;

² Act 32 of 1944 (as amended)

- g) Administration and staff at the Magistrates' Courts are not efficient;
- h) Delays occur due to unavailability of stenographers and recordings machines;
- i) It is not always less expensive to litigate there;
- j) They will have to appoint correspondent attorneys, which will result in additional costs; and
- k) Due to the depreciation in the value of motor vehicles, they need swift and effective action.

[11] The SAHRC submitted that the rights of distressed debtors are affected. It raised the following arguments in this regard:

11.1 Distressed debtors who default on their loan agreements, and against whom legal proceedings are brought, generally have limited financial means. This much was apparent from the 13 applications that this case concerns. 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 amounts in arrears were relatively small, yet the debtors had been unable to pay it, despite of the threat of losing their houses.

11.2 In light of the limited financial means of the 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 have a restricted budget for travel and accommodation as well as legal costs. 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 debtors will be unable to defend the application or action brought against them. By contrast, if the matter is set down in Magistrates' Courts (which are greater in number and are generally 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.

- 11.3 Even if a debtor is able to afford legal representation to defend 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 Magistrate 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 a right of appearance in the High Court, the debtor will also have

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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.

11.4 In the context of the applications before us, it was argued that, the Magistrates' Courts are more accessible than High Courts in a number of respects. It is a well-known fact that Magistrates' Courts are more accessible due to their number and geographical location. There are fourteen High Courts in South Africa, all of which are situated in large urban centres. By contrast, there are eighty two Regional Magistrates' Courts and four hundred and sixty eight District Magistrates' Courts. 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. This will ensure that Magistrates' Courts are geographically accessible to the persons living in each municipal area.

[12] The Minister of Justice submitted that there are no designated interpreters in the High Courts and warns that this may have the effect of denying the respondent or defendant his or her right to a fair hearing. By contrast, there are four hundred and fifty senior court interpreters, seventy nine principal court interpreters and one thousand

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one hundred and twenty five court interpreters designated for assisting the Regional and District Courts across the Provinces.

[13] It was further submitted in regard to the significance of the role of interpreters, that their presence in court assists the litigants in understanding the language used in the proceedings consequently, the proceedings become less intimidating. This objective will not be achieved in the Pretoria High Court, where casual interpreters charge a fee of approximately R2000 to provide this service.

[14] The one important factor when considering access to justice is access for litigants, but the other is the fact that the High Court, due to lack of resources may soon be unable to provide proper access to justice, it would be foolhardy and irresponsible to wait until the system collapses, before steps are taken. In order to understand the context of this statement one needs to consider the statistics relevant to this Court.

[15] In a broader context this division has seen an immense increase in the issuing of new matters over the years. The following statistics illustrate this point:

YEAR	NUMBER OF CASES
2012	74 310
2013	76 960

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