IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, Functioning as MPUMALANGA DIVISION,MBOMBELA)

DATE: 16 MAY 2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO.~~

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO.~~

(3) REVISED.

16/05/16 .....

DATE **SIGNATURE**

IN THE MATTER BETWEEN

First National Bank v Kosinathi S Lukhele	Case no:	01/16
Absa Bank Ltd v Cloete GJ	Case no:	32/16
Absa Bank Ltd v JK Leshaba and J Leshaba	Case no:	33/16
The Standard Bank of SA v G and PJ Smith	Case no:	35/16
First Rand Bank LTD v MV Sikhosana	Case no:	40/16
First Rand Bank Limited v SM Mongo	Case no:	84/16
The Standard Bank of SA LTD v S J Visser	Case no:	89/16
First Rand Bank v FV Mativandlela	Caseno:	107/16

JUDGMENT

Matter heard on: **21 April 2016**
Judgment handed down on: **16 May 2016**

LEGODI, J

[1] 'Our Constitution guarantees everyone the right of access to courts which are independent of other arms of government.[1] But the guarantee in section 34 of the Constitution does not include the choice of the procedure or forum in which access to courts is to be exercised. This omission is in line with the recognition that courts have inherent power to protect and regulate their own process in terms of section 173 of the Constitution. Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but, also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the state. Our courts are mandated to review the exercise of any power of state functionaries from the lowest to the highest ranking officials.[2] The rights of access to courts are indeed foundational to the stability of an orderly society. It ensures peaceful, regulated and institutionalized mechanism to resolve disputes... The right of access to courts is bulwark against vigilantism, and the chaos and anarchy which it causes... Access to courts is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitations to be reasonable and justifiable.[3] A litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main, these procedures are contained in the rules of each court. The Uniform Rules regulate the form and process of the high courts... These rules confer procedural rights on litigants and also help in creating certainty in procedures to be followed if relief of a particular kind is sought'.[4]

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[1] Mukaddam v Pioneer Foods (Pty) Ltd and other [2013] (5) SA 89 (CC) at para 28; s34 Everyone has the right to have any dispute that can be resolved by application of the law decided in a fair public hearing before court or, where appropriate, another independent and impartial tribunal or forum; s167:
(1) Judicial authority of the Republic is vested in the courts;
(2) The courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice;
(3) No person or organ may interfere with the functioning of the courts;
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
(5) An order or decision, issued by a court finds all persons whom and organs of state to which it applies.
[2] Para 29 of Mukaddam supra.
[3] Chief Lesapo v North West Agricultureal Bank and Another 2000(1) SA 409 (CC), 1999(12) BCLR 420.
[4] Para 31 of Mukaddam supra.

[2] It is important that the rules of courts are used as tools to falicitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are for the rules... Therefore, the primary function of the rules of courts is the attainment of justice. But sometimes circumstances arise which are not provided for in the rules. The proper cause in those circumstances is to approach the court itself for guidance. After all, in terms of section 173 each superior court is the master of its process.[5] Our courts are familiar with the evaluation of factors with a view to determine where the interests of justice lie in a given case.[6]

[3] The following cases are about access to courts, the mechanism to facilitate such access, the hindrance of access to courts brought about by the issuing thereof in Mbombela circuit court, the interpretation of clause 2.1 of the practice directive issued by the Judge President of the Gauteng Provincial Division on 29 January 2016 and the superior courts' inherent powers to regulate their own processes and the development of common law, taking into account the interests of justice as envisaged in section 173 of the Constitution:

3.1	First National Bank v Kosinathi S Lukhele	Case no:	01/16
3.2	Absa Bank Ltd v Cloete GJ	Case no:	32/16
3.3	Absa Bank Ltd ve JK Leshaba and J Leshaba	Case no:	33/16
3.4	The Standard Bank of SA v G and PJ Smith	Case no:	35/16
3.5	First Rand Bank LTD v MV Sikhosana	Case no:	40/16
3.6	First Rand Bank Limited v SM Mongo	Case no:	84/16
3.7	The Standard Bank of SA Ltd v S J Visser	Case no:	89/16
3.8	First Rand Bank v FV Mativandlela	Case no:	107/16

[4] As could be deduced from the particulars of the plaintiffs, they are all financial institutions who had issued summonses against the defendants based on their failures to comply with their obligations to pay in terms of the credit agreements to which the

[5] Para 32 of Mukaddam supra,
[6] Para 35 of Mukaddam supra,

provisions of the National Credit Act 34 of 2005 apply. The eight matters were all applications for default judgments and were consolidated to be heard together at the same time in the unopposed motion roll.

[5] Advocate Snyman instructed by Mbombela firm of attorneys, Seymore, du Toit and Basson appeared in matters indicated in paragraphs 3.1, 3.5, 3.6 and 3.8 above. On the other hand, attorney Mr Siebrits of attorneys Swanepoel and Partners based in Mbombela, appeared on behalf of the plaintiffs in the remaining four cases mentioned in paragraphs 3.2, 3.3, 3.4 and 3.7 above. The latter attorneys are correspondent attorneys, having been instructed by attorneys based in Pretoria. Furthermore, in all the eight matters, immovable properties which appear to be the primary residences are involved and the plaintiffs in all the cases are, inter alia, asking for the orders declaring the said immovable properties to be specially executable. They are also asking for the issuing of the writs against the immovable properties aforesaid.

[6] This court, in dealing with these matters, raised concerns prompted by the fact that in matters 3.1 and 3.2 above, the defendants reside in Middelburg and the mortgage loan agreements appear to have been concluded in Middelburg. The summonses were also served in Middelburg. In matters 3.3, 3.4, and 3.5 above, the defendants are residing in Witbank. It appears that the mortgage loan agreements were also concluded in Witbank. Similarly, summonses were served on the defendants in Witbank. In the matter of Visser indicated in paragraph 3.7 above, the defendant is residing in Hendrina within the magisterial district of Middelburg which is about 50 Km from Middelburg. In the matter of Mongo indicated in paragraph 3.6 above, the defendant is a resident in Evander and summonses were served at the residential home of the defendant in Evander. Evander is closer to Middelburg circuit court than Mbombela.

Legislative framework and establishment of the two circuit courts in Mpumalnga

[7] On 29 January 2016, the Judge President of Gauteng Provincial Division issued a notice in terms of which he announced the establishment of two circuit courts in Mpumalanga Province as contemplated in section 7(1) of the Superior Courts Act 10 of 2013. Section 7(1) provides that the Judge President of the Division may by notice in the Gazette within the area under the jurisdiction of that Division, establish circuit

districts for the adjudication of civil or criminal matters, and may like notice, alter the boundaries of any such district. In terms of subsection (2), a court hearing such matters must be presided by a judge of that Division and such court referred to in subsection (2) is in terms of subsection (3) called a "circuit court" of the Division in question. In other words, the two circuit courts established effective from 1 February 2016, are circuit courts of the Gauteng Division functioning as Mpumalanga Division.

[8] It is also important to mention that whilst in terms of section 6(1) of the Act, the High Court of South Africa consists of several divisions, inter alia, Mpumalanga Division with its main seat in Nelspruit, the Gauteng Division in terms of section 50(2), functions as the Mpumalanga Division until a notice published in terms of section 6(3) in respect of Mpumalanga Division comes into effect. Subsection 6(3) (a) provides that the Minister must, after consultation with the Judicial Services Commission, by notice in the Gazette, determine the area under the jurisdiction of the Division, and may in the same manner amend or withdraw such a notice. The determination of the area under the jurisdiction of the Mpumalanga Division of the High Court is still pending. Furthermore, the Minister may in terms of subsection (3) (c) of section 6, establish local seat or seats of a division and may determine an area or areas under the jurisdiction of such a local division.

[9] One sees a hierarchy within the legislative framework which, in my view, is aimed at the attainment of justice by bringing the courts closer to the people. That is, each division of the high court shall have a main seat for the adjudication of cases. A local seat or seats of a division in addition to the main seat may be established and an area or areas under the jurisdiction of such a local seat or seats may be determined for adjudication of cases. It must be assumed that a Judge President of each division is better placed to know where and when a service is required within a division, for this, he or she is given the latitude in terms of section 7 to establish a circuit court or courts within his or her division and may determine an area or areas falling under the jurisdiction of such a circuit court. I revert later in this judgment to some of this and other legislative framework when dealing with the intention in the establishment of the two circuit courts under discussion.

Alleged entitlement to issue the eight matters in Mbombela circuit court

[10] This court raised concerns about the issuing of summonses in Mbombela circuit court against the eight defendants residing in Middelburg and or within the proximity of Middelburg circuit court. Two grounds were raised as the basis for issuing in Mbombela: First, that the plaintiffs are *dominis litis* and that therefore, they are entitled to choose their forums. Second, that the notice issued on 29 January 2016 by the Judge President of the Gauteng Division entitles them to do so. The notice issued by the Judge President in terms of section 7 (1) of the Superior Courts Act, allows concurrent jurisdiction between the two established circuit courts and that the plaintiffs in the eight matters were entitled to issue the summonses in Mbombela circuit court, so was the argument. This contention was based on the wording of clause 2.1 of the Practice Directive and it reads:

> *"All action and motion proceedings including urgent applications in any area in the Mpumalanga province shall, with effect from 1 February 2016, be issued through designated officially and at the offices situated at the Mbombela and Middelburg courts specified in clause 4 below which shall operate as the Registrar's office of the circuit court..."*

[11] Any suggestion to have it all in the issuing of processes at the plaintiffs' or applicants' choice of forum throughout the province, in my view, ought to be seen in context, and the correctness of the suggestion ought be questioned and examined as it would appear hereunder.

Rationale in establishing the two circuit courts

[12] Mpumalanga is the only Province in the country which up to date does not have its division of the high court functioning. The interim arrangement as envisaged in section 50 (2) read with section 6(3), is in effect, maintaining the status quo. That is, matters in the whole of Mpumalanga Province will continue to be serviced by the Gauteng Division of the High Court as it has been the case for many years. It would be fair to conclude that the arrangements which existed for so many years long before the Superior Courts Act and thereafter, had brought about hardships to many litigants who were denied easy and reasonable access to our courts until the establishment of the two circuit courts. Accepting that this is so, one must also accept that, the High Court of South Africa which consists of divisions in each province as envisaged in subsection (1)

of section 6 of the Act, is to ensure that our people have access to courts and that the interest of justice is enhanced by bringing courts for adjudication of matters closer to the people. This notion appears to be in line with what is provided for in the Act. For example, subsection (3) (c) of section 6 provides that the Minister may after consultation with the Judicial Services Commission, by notice in the Gazette establish one or more local seats of a division, in addition to the main seats referred to in subsection (1), and he or she may determine the area or areas under the jurisdiction of such local seat, and may in the same manner amend or withdraw such a notice. (My emphasis). For these proceedings, it suffices to mention that the subsection (3) (a) is silent on the concurrent jurisdiction of the main seat over the local seat.

[13] It must be clear that the area or areas of jurisdiction for a local seat ought to be determined when such local seat or seats are established. Sub-section (4) is also important, although one does not have to pronounce on its correct interpretation in the present cases. It suffices however, to mention that the alleged concurrent jurisdiction between the two circuit courts is clearly debatable. Of relevance, subsection (4) provides:

> *"(4) If a Division has one or more local seats:-*
> *(a) The main seat of that Division has concurrent appeal jurisdiction over the area of any local seat of that Division, and the Judge President of the Division may direct that on appeal against the decision of a single judge or of a Magistrates' Court within the area of jurisdiction may be heard at the main seat of the Division."*
> *(b) ...*
> *(c) ..."*

[14] The determination of an area or areas of a local seat of the Division can only be aimed at ensuring that access to courts and attainment of justice is achieved when courts are brought closer to the people. Now, using the same reasoning in the present matters, it must be accepted, as was also conceded by Advocate Roelofse on behalf of Mpumalanga Society of Advocates, whom the court allowed to address at his request, although not representing any party, that the establishment of two circuit courts was aimed at ensuring that access to courts and attainment of justice, are achieved. In paragraph 47 of Advocate JH Roelofse's written heads, is stated:

"It is appreciated that the result of what is set out regarding the current jurisdiction of the Mpumalanga Court and the manner in which proceedings are currently issued in terms of the directive defeats the whole objective of the establishment of the Mpumalanga civil circuit court, namely to give effective access to justice to the residents of Mpumalanga." (My emphasis).

[15] The statement was made in the context of the submission that clause 2.1 of the practice directive allows the issuing of the eight matters in Mbombela and that until clause 2.1 is amended, parties are free to sue in any circuit court of their preference. Whilst I agree in part with the statement quoted above, I cannot agree that the problem is with the practice directive. The problem, as see it, is with the litigants and or practitioners who seek to adopt a hostile attitude towards the defendants by wanting the defendants to follow them, instead of the plaintiffs or their attorneys following the defendants. Whilst clause 2.1 did not determine the area, or areas of jurisdiction for each circuit, it is not like it is difficult to determine which area and circuit are closer to a particular defendant. The determination is based on territorial concepts. In other words, it cannot be difficult to establish that the defendant has a connection and or is closer to a geographical area in Mbombela or Middelburg where the circuit court seat, is.

[16] An attempt to rely on the provisions of section 21 of the Superior Courts Act is in my view also misplaced. The section deals with 'persons over whom and matters in relation to which the Divisions have jurisdiction'. Subsection (1) provides that " a Division has jurisdiction over all persons residing or being in, and in relation to all cases arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance...' As a start, neither of the circuit courts established, are "Divisions". Secondly, each Division established in terms of section 6 (1) has a main seat. That is, a mean seat of the high court within a Division where matters are adjudicated. On the other hand, in terms of subsection (3) (c), 'the Minister may, after consultation with the Judicial Service Commission, by notice in the Gazette establish one or more local seats for a Division, in addition to the mean seats referred to in subsection (1), and determine the area under the jurisdiction of such local seat, and may in the same manner amend or withdraw such a notice'. As I said, there is no mention of concurrent jurisdiction between the mean seat and the local seat. That read together

with the provisions of subsection (4) of section (6) quoted in paragraph 12 of this judgment, is left for another day to consider.

[17] What is important for these proceedings is that there has always been a notion of fair play, and substantial justice. Forcing a person to litigate in a forum far from his residence or home, in my view, does not constitute fair play and offends against the principle of substantial justice, unless there are other grounds of jurisdiction for the chosen forum. In the present cases, the defendants are not only been hauled to a place far away from the civil circuit court in Middelburg, but a distance away from the main seat of the Division in Pretoria bearing in mind that, that is, where the forum used to be, until the establishment of the two civil circuit courts in Mpumalanga Province effective from I February 2016.

[18] It could never have been the intention in establishing the two circuits that defendants who are residents in Middelburg will have to travel for about 200 kilometers to Mbombela to defend their cases instead of travelling less than10 kilometers to the circuit court in Middelburg when previously they had to travel to Pretoria which is far less than 200 kilometres. Similarly, those staying or residing in Witbank, are required to defend their matters in Mbombela and in doing so, had to travel for more than 200 kilometers to Mbombela circuit court instead of about 25 kilometers to Middelburg circuit court. Hendrina and Evander are areas closer to Middelburg than Mbombela. Election to litigate in Mbombela in the name of *dominis litis* and clause 2.1 of the practice directive, in the present matters, in my view, amount to an abuse, which ought to be curbed before it escalates into an alarming proportion.

[19] Again, the suggestion that the two circuit courts have concurrent jurisdictions over each other, in my view, is misplaced. Such concurrent jurisdiction cannot be inferred. If it was to be there, it must be clearly spelt out. But even then, any concurrent jurisdiction that seeks to impact adversely on fair play and substantial justice ought to be discouraged and rooted out. The notion that the plaintiffs in the present matters had properly brought their matters in Mbombela as per clause 2.1 of the practice directive, and that this court is not competent to refuse to hear the applications for default judgments, ought to be rejected.

[20] The lacuna in not determining the areas within the jurisdiction of each circuit court, when the two circuit courts were established, cannot be fatal for two reasons: First, at the risk of repetition, it is not difficult to determine areas or districts closer to Middelburg circuit court and Mbombela circuit court respectively. Second, the intention for the establishment of the two circuit courts is obvious and if not, is a matter for serious consideration. I find the following principle laid down in the matter of S v Toms; S v Bruce[7] to be applicable to the present proceedings:

> "*The primary rule in the construction of statutory provision is to ascertain the intention of the legislature. One does so by attributing to the words of a statute, their ordinary literal grammatical meaning. Where the language of a statute, so viewed, is clear and unambiguous, effect must be given thereto, unless to do so;*
>
> *"would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other consideration as a court is justified in taking into account..."* (My emphasis).

[21] I have already dealt with the context and consideration, as the court is justified to take into account. But, it is important to stress the point that personal jurisdiction rules can be a bit sticker when you file a law suit in an area other than the one in which the defendant is a resident or does business. You can't just sue someone in your home town, area or circuit if the defendant does not live in that area, has never been in that area or does not do business in that area, town or circuit. To protect a defendant from being sued in a hostile, possibly far-off location, personal jurisdiction requires the facts to exist that make it fair. In the present proceedings, such facts for this court at Mbombela, to exercise jurisdiction over the defendants who are residing in Middelburg or closer to Middelburg circuit court, have not been established. I now turn to deal with the other issues for consideration, in the event I was to be wrong on the notion of fair play, substantial justice at common law, and construction of clause 2.1 of the practice directive.

National Credit Act no. 34 of 2005 and constitutional imperative

[7] 1990(2) SA 802(A)

[22] 'The Act seeks to infuse values of fairness, good faith, reasonableness and, equality in the manner actors in the credit marked relate. Unlike in the past, the sheer raw financial power difference between the credit giver and its much needed but weaker counterpart, the credit consumer, will, not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibilities. Yes, debtors must diligently and honestly meet their undertakings towards their creditors. If they do not, credit market will not be sustainable, But the human conditions suggests that it is not always possible- particularly in credit arrangements that run over many years or decades, as mortgage bonds over homes do. Credit givers serve a beneficial and indispensible role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness, and equality. No doubt, credit givers ought to be astute to recognize the imbalance in negotiating power between themselves and consumers. They ought to realize that at play in the dispute is not only the profit motive, but also, the values of our constitution'.[8] (My emphasis).

[23] 'The core of the Act is the objective to protect consumers. The protection however, must be balanced against the interests of credit providers and should not stifle a "competitive, sustainable responsible, efficient [and] effective... credit market and industry". The Act, ... replaces the apartheid era legislation that regulates the credit market, and infuses constitutional considerations into the culture of borrowing and lending between consumers and credit providers'.[9]

[24] The Act referred to in the two preceding paragraphs, is reference to the National Credit Act. The plaintiffs and defendants in the present matters are credit providers and credit consumers to which the provisions of the National Credit Act apply. That being so, what is quoted in paragraphs 22 and 23 above should find application, in particular, the constitutional considerations relevant to the present proceedings. The plaintiffs are financial institutions with financial muscles. They are therefore required to 'act within the constraints' bearing in mind that they are dealing with "a credit consumer" who 'honestly

[8] Nkata v Firstrand Bank Limited and others [2016] ZACC 12 para [94] (decided on 21 April 2016).
[9] Sebola and another v Standard Bank of SA Ltd and another 2012 (5) SA 142 at para [40].

runs into financial distress that precipitates repayment defaults'. The resolution of the resultant default or dispute in the Mbombela circuit court, instead of Middelburg circuit court, in my view, does not 'bear the hallmarks of equity, good faith, reasonableness and equality.' By so doing, the plaintiffs failed 'to be astute and to recognize the imbalance' in litigating power 'between themselves and the credit consumers' (the defendants) in the present proceedings. They failed and ignored to realize that at play in the present litigations is not only the recovery of what is owed to them or making profit but also 'the civilized values of our constitution' especially where a consumer is at the brink of losing his or her primary residence. The civilized values of our constitution cannot be achieved in the present cases by selecting a court far-located where the defendants reside as such a route would only aggravate their financial distress and perhaps, that is why none of the defendants appeared.

Sections 34 and 173 of the Constitution

[25] Section 34 of the Constitution deals with access to courts. On the other hand, section 173 deals with the inherent powers of the courts and reads:

"The Constitutional Court, the Supreme Court and the High Court of South Africa each has inherent powers to protect, and regulate their own process and to develop the common law, taking into account the interests of justice".

[26] As indicated in paragraph 2 of this judgment, it is important that the rules of courts be used as tools to facilitate access to courts rather than hindering it. Suing the defendants in Mbombela circuit court instead of Middelburg circuit court regarding the eight matters under consideration, is tantamount to hindering the defendants' rights of access to courts. The next question therefore is whether clause 2.1 of the practice directive, assuming that it is defective as suggested, should take precedent over the right of access to courts which 'is indeed foundational to the stability of an orderly society'. I do not think that the defect, if any in clause 2.1, can take precedent over the right of access to courts in the present proceedings. Linked to this, is the development of the common law, taking into account the interests of justice as espoused in section 173 of the Constitution.

[27] The unwritten rule, and I say this at the risk of repetition, is that personal justification rules can be a bit sticker when you file a law suit in an area other than the one in which the defendant resides, or doing business. Put differently, you cannot just sue someone in your town or area if that person does not live in your area, and does not do business in your area. To protect a defendant from being sued in a hostile, possibly far-off location, personal jurisdiction requires the facts to exist that make it fair for a court to exercise power over a person who is peregrinis of the area or jurisdiction of the court, in the present case, being Mbombela circuit court instead Middelburg circuit court. This is the common law principle that needs to be developed in line with the provisions of section 173, taking into account the interests of justice.

[28] Our courts are familiar with an evaluation of factors with the view to determine where the interests of justice lie.[10] The factors in the present proceedings are that, until 1 February 2016, all action and motion proceedings coming from Mpumalanga Province were instituted and heard in Pretoria. Mbombela and many other areas around it, are about more than 300 kilometers from Pretoria. Making it possible for parties in Mbombela or Middelburg or around Mbombela and Middelburg to issue action and motion proceedings in the two circuit courts respectively, came as a huge relief to the people of Mpumalanga and was widely publicized and welcomed.

[29] For example, on 5 February 2016 a most senior attorney in Middelburg, Mr Helgaardt du Preez was reported in the Middelburg Observer newspaper as having said:

> *"The courts would certainly be busy, with the main aim of providing a speedy and accessible justice system for the adjudication of civil disputes."*

[30] Similarly, in the Citizen Newspaper, edition of 24 February 2016 in an article titled "New High Court brings justice home", by- Caxton News Service, it was reported, inter alia:

"As a result, attorneys and clients with offices closer to Middelburg will not have to travel to Mbombela".

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[10] Mukkadam para36

[31] To now renege from this promise and the legitimate expectation created in the minds of the many by issuing the summonses in the present matters, in Mbombela and hauling the defendants to Mbombela far-away from Middelburg or around Middelburg, 'would lead to absurdity, so glaring that it could never have been contemplated' by clause 2.1 of the practice directive and that would be a betrayal to the people of Mpumalanga.

[32] Furthermore, in the Lowvelder Newspaper's edition of 24 February 2016 and in an article titled "Mpumalanga High Court functional in Mbombela," a journalist, Helene Eloff wrote:

"It's wonderful news," she quoted attorney Spoor. 'Spoor applied for an urgent interdict on Tuesday. He described it as historic day and said that, whereas he usually travels to Pretoria for this kind of thing, he could now do it in Mbombela.'

In the same article, Ms Helene Eloff, further wrote: *"The Mpumalanga High Court has been bringing justice to the people of the province since the first day of this month*".

[33] Now, imagine a respondent residing in Mbombela having to face and defend an interdict brought against him or her on an urgent basis in Middelburg simply because the applicant prefers a particular attorney in Middelburg or because clause 2.1 does not set out the areas to be serviced by Mbombela or Middelburg circuit court, or because of the alleged concurrent jurisdiction between the two circuit courts. That will be absurd and contrary to the constitutional imperative to make the courts accessible as contemplated in section 34 of the constitution. The development of the common law, taking into account the interests of justice, in the present matters, required of the plaintiffs as *dominis litis* parties, to institute proceedings in a circuit court closer to where the defendants reside or doing business. The issuing in Mbombela circuit court was not founded on other grounds, for example, that the cause of action arose within or closer to Mbombela circuit court.

[34] Clause 2.1 of the practice directive should be construed in such a manner as it would give effect to access to courts in the interests of justice to a broader community in the province bearing in mind that the superior courts enjoy in terms of section 173, the power to regulate their own processes. It is this power that makes every superior court

the master of its own process. It enables a superior court to lay down the process to be followed in particular cases, even if that process deviates from its rules. Consistent with the power, this court may in the interests of justice depart from what its own process provides.[11] Therefore, even if clause 2.1 of the practice directive was to be found lacking, that did not entitle the plaintiffs the choice of a forum as they did, far away from where the defendants reside when Middelburg circuit court is the closest. Therefore, this court is entitled deviate from clause 2.1 insofar as it might be lacking because, it is in the interests of justice to do so.

[35] The attempt to rely on the case of Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission, and Others[12] for the preposition that this court is not entitled to decline to hear the eight matters, as they are properly brought before Mbombela circuit court, in my view, is misplaced. Firstly, I have already indicated that the principle of fair play, substantial justice and the provisions of section 34 read with section 173 of the constitution, have been brought into question and offended against by selecting Mbombela civil circuit court as a court of issue in the eight matters. Secondly, the directive as I said, even if it was to be lacking, a submission I do not agree with, this court is entitled to deviate therefrom, taking into account the interests of justice and the development of the common law. Lastly, it is important to mention that Agri Wire (Pty) Ltd matter, did not deal with sections 34 and 173 of the Constitution, and therefore reliance on it, lacks substance.

[36] Section 173 of the Constitution empowers this court to ensure that attainment of justice is achieved and not to allow big financial institutions to trample on the rights of their weaker counter-parts, the credit consumers who are all defendants in these proceedings. When that happens, this court will step in swiftly to ensure that attainment of justice facilitated by bringing the courts closer to the people is achieved.

[37] Furthermore, I was referred to the case of Thembani Wholesalers (Pty) v September and Another.[13] It is important to mention upfront that in this case, the full court of the Eastern Cape High Court sitting as the court of first instance in Grahamtown, did not deal with the provisions of s173 of the Constitution. It however, dealt with the

[11] PEE International and other v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC) para 30
[12] 2013 (5) SA 484 SCA.
[13] 2014 (5) SA 51 (ECG) at para [12].

provisions of s34 of the Constitution and s27 of the Superior Courts Act 10 of 2013. The issue before it was whether an application for summary judgment, which ordinarily is heard before a single judge in the unopposed motion court, should be heard in the Eastern Cape High Court, Mthata or in the Eastern Cape High Court, Grahamstown. Whilst it dealt with the jurisdiction of a division visa-vis local division and not circuit court, as is the case in the present proceedings, I find it important to quote what was said in paragraphs 12 and 13 of Thembani Wholesalers's judgment because, it dealt with both discretionary power of removal and access to courts:

"[12] This discretionary power to order the removal of a matter from one court to another, albeit, apropos the similarly worded corresponding section of the old Act, Plasket J, with reference to earlier authority, emphasized in the ***Jeremy Davis v Kenneth James Denton[5],*** *had to be exercised as follows:-*

"[5] The proper way to exercise this discretion was set out by Britowe J in Ogilvie v Bettini and Co, a matter involving whether an action that had been initiated in the Transvaal Supreme Court, with its seat in Pretoria, should be transferred to the Transvaal High Court, with its seat in Johannesburg. The court's power to transfer a matter was founded in s29 of Proclamation 14 of 1902 of the Transvaal Colony, which, much like s9(1) of the Supreme Court Act, allowed for the transfer of a matter where it appeared that it may be more conveniently heard in another court. Having rejected the argument that the most convenient court was, of necessity, the court within which jurisdiction the defendant resided, Bristowe J proceeded to say:

'It seems to me that under the Proclamation the plaintiff has the choice of two courts, - either the Supreme Court or the High Court-and prima facie it seems to me he may choose whichever court he likes. Now if there was something to show that an action could be tried in Johannesburg more conveniently, having regard to the the expense to which the parties would be put and the places where their witnesses were living or any other circumstances, an application of this kind very probably would be granted." (My emphasis).

[6] ...

[7] It is clear from the case law that the convenience of the parties and of witnesses are of importance in determining the balance of convenience .So, for instance, in Rothman v Woodrow and Co, Buchanan J held that the balance of convenience favoured transferring a matter to a circuit court sitting in Graaf Reinet where all of the defendant's witnesses resided there while neither of the two witnesses to be called by the plaintiff resided in Grahamstown."

[38] The full court in Thembani Wholesalers having referred to case law authorities in paragraph 12 of its judgment, and referring to section 27 of the Superior Courts Act then held in paragraph 13 as follows:

"[13] 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 court of first instance in 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 particular local seat and order that it be removed. The inconvenience to a litigant hauled before a far flung court will no doubt, not be lightly countenance and, and the court's opprobrium, marked by an appropriate costs order..." (My emphasis).

[39] Inasmuch as the plaintiffs wanted to rely on Thembani Wholesalers's case for their choice of Mbombela circuit court, that entitlement in the circumstances of the present matters, does not apply for reasons already mentioned elsewhere in this judgment. Section 27 of the Superior Courts Act allows a transfer of a matter from one court to another on application by any party to the proceedings or by agreement of the parties. Whilst I agree that 'there is nothing to preclude a judge sitting as a court of the first instance... from *mero motu* concluding that, notwithstanding the court having original territorial jurisdiction, the balance of convenience ...dictates, that the matters properly be heard at particular local seat and order that it be removed', I do not intend exercising this discretionary power of removal, in case one was to be wrong in this regard. I prefer to leave it up to the plaintiffs to decide what to do with their respective matters once the present applications for default judgments are struck-off from the roll, as I intend to do. They have three options: to ask the defendants to agree to the transfers of these matters to Middelburg circuit court or to apply for such matters to be

transferred to Middelburg, or as the last resort, to abandon the cases and issue the summonses afresh in Middelburg.

Costs

[40] I should not be worrying myself about the issue of costs because, in all the eight applications, there is no appearance by any of the defendants. My worry is, however, that whatever happens to these matters, the plaintiffs might be tempted to debit the accounts of the defendants with legal costs relating to the present proceedings. That would be unfair to the defendants because the plaintiffs should never have chosen Mbombela circuit as a forum for these eight matters. For this reason, the plaintiffs should be ordered not to recover any legal costs from the defendants arising from these proceedings.

Order

[41] Consequently an order is hereby made as follows:

41.1 The applications for default judgments in all the eight matters mentioned in paragraphs 3.1 to 3.8 of this judgment are hereby struck-off from the roll.

41.2 All the plaintiffs in the present proceedings are hereby ordered not to debit any of the defendants' accounts with legal costs or charge them for any legal fees and or disbursements arising from the issuing of the summonses to date hereof.

M F LEGODI
JUDGE OF THE HIGH COURT

Nie reg nie.

FOR THE APPELLANT: Adv. Snyman
INSTRUCTED BY Seymore, Du Tiot & Basson (Mbombela)

FOR THE RESPONDENT:	Attorney Mr Sieberts of Attorneys Swanepoel and Parners (Mbombela)

Mr reg no.