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	**FIRST APPELLANT**
NEDBANK LIMITED	**SECOND APPELLANT**
FIRSTRAND BANK LIMITED	**THIRD APPELLANT**

and

EZRA MAKIKOLE MPONGO	**FIRST RESPONDENT**
MYRA GERALDINE WOODITADPERSAD	**SECOND RESPONDENT**
RADESH WOODITADPERSAD	**THIRD RESPONDENT**
JOYCE HLUPHEKILE NKWINIKA	**FOURTH RESPONDENT**
KARIN MADIAU SAMANTHA LEMPA	**FIFTH RESPONDENT**
NEELSIE GOEIEMAN	**SIXTH RESPONDENT**
ANGELINE ROSE GOEIEMAN	**SEVENTH RESPONDENT**
JULIA MAMPURU THOBEJANE	**EIGHTH RESPONDENT**
AUBREY RAMORABANE SONKO	**NINTH RESPONDENT**
ONESIMUS SOLOMON MATOME MALATJI	**TENTH RESPONDENT**
MODIEGI PERTUNIA MALATJI	**ELEVENTH RESPONDENT**
GRACE M MAHLANGU	**TWELFTH RESPONDENT**
KEY HINRICH LANGBEHN	**THIRTEENTH RESPONDENT**

and in the matter between:

THE STANDARD BANK	**FIRST APPELLANT**
NEDBANK LIMITED	**SECOND APPELLANT**

and

V W GQIRANA N O	**FIRST RESPONDENT**
V W GQIRANA	**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

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 Mothle 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

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.

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[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.

. . . .’

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

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*;

*(f*A*)* 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

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 *dominis 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]

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[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.'

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[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

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.

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-I.

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

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[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

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[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.'

[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.

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

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]

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[37] There is authority that a High Court can nevertheless *mero motu* effect a transfer from the High Court to a Magistrates' Court. In *Thembani 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 *Ihbayi*. 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.

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 *Jaftha 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.

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).

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 all . . . .'[48]

[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.

(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 NCA[49] 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

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.

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[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.

(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.'

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ROLAND SUTHERLAND

ACTING JUDGE OF APPEAL

APPEARANCES

For Standard Bank	K. Hofmeyr, with her, A. Armstrong.
Instructed by:	Edward Nathan Sonnenbergs Inc., Johannesburg Webbers Attorneys, Bloemfontein
For Nedbank	A. Cockrell SC, with him, N. Luthuli.
Instructed by:	Cliffe Dekker Hofmeyr Inc., Sandton Webbers, Bloemfontein.
For First National Bank	P G Cilliers SC, with him, A P Ellis.
Instructed by:	PDR Attorneys, Pretoria Rossouws Attorneys, Bloemfontein

The Amici Curiae:

The Department of Justice and Constitutional Development, Pretoria:
A. Platt, with her,
L. Maite.

The South African Human Rights Commission, Johannesburg:
M. Chaskalson SC, with him,
E. Webber,
L. Makapela.

The Pretoria Society of Advocates, Pretoria
AJ Louw SC, with him,
SW Davies and
S Van der Walt.