THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 4028/2020

In the matter between:

FIRSTRAND BANK LIMITED t/a WESBANK **Plaintiff**

and

ADRE SHAHIED PRINS **Defendant**

Case No: 15702/2020

In the matter between:

NEDBANK LIMITED **Plaintiff**

and

EMIL DE KOCK **Defendant**

Coram: Bozalek J
Heard: 12 February 2021
Delivered: 26 February 2021

JUDGMENT

BOZALEK J

[1] These two applications for default judgment for an order for the return of motor vehicles purchased in instalment sale agreements were called on my Third Division

(unopposed motions) roll on 12 February 2021. Upon my enquiry as to why the Registrar had declined to grant default judgment and referred the matters to open court I was advised that the reason was the Registrar's apparent belief that he/she lacked the jurisdiction to do so. More particularly, the Registrar had interpreted the jurisdiction clauses in the underlying agreements as requiring that the claims be dealt with in the Magistrates Court.

[2] The jurisdiction clause in respect of the claim by Firstrand Bank Limited trading as Wesbank reads as follows:

> *'28.2 In terms of sec 45 of the Magistrates Court Act, 32 of 1944 and at our option, any claim that may arise may be recovered in any Magistrates Court having jurisdiction and you hereby consent to the jurisdiction of the Magistrates Court'.*

[3] In the claim brought by Nedbank the jurisdiction clause reads as follows:

> *'20 Legal Proceedings*
>
> *You agree that any legal proceedings that may be brought in terms of this Agreement may be heard in a magistrates court, regardless of the amount claimed'.*

[4] Both clauses make it quite clear that the plaintiff retains a discretion regarding the Court out of which it elects to issue summons. The clauses permit but do not compel the plaintiff to issue a summons out of the Magistrates Court even though the claim would ordinarily fall within the jurisdiction of the High Court and they imply a consent by the debtor to the Magistrates Court jurisdiction should the plaintiff elect to sue there[1]. They certainly do not operate to deprive the plaintiff of the right to institute proceedings in the High Court for a claim for relief arising out of cancelled instalment sale agreements even

[1] Section 45 of the Magistrates Court Act permits parties to consent in writing to an extension of that Court's jurisdiction.

though the value of the contract may fall within the monetary jurisdiction of the Magistrates Court. In the circumstances the Registrar erred in each case in refusing, in terms of Rule 31(5)(iii), to grant default judgment on the ground that the High Court lacked jurisdiction.

[5] Subrule 31(5) deals with judgments by default and establishes a vital role for the Registrar as the official who considers applications for default judgment in the first instance, thereby relieving the Judges of the Court of the burden of hearing countless straightforward default judgment applications.

[6] Unfortunately, these two cases are not isolated instances. From my own experience and from discussions with colleagues it appears that over the past few months it has become an increasing practice of the Registrar to refuse to grant default judgments where he or she considers that the amount of the claim or value of the contract falls within the jurisdiction of the Magistrates Court and/or where the jurisdiction clause makes reference to the plaintiff's right to institute proceedings in the Magistrates Court. Ironically, the effect of this practice on the part of the Registrar is to reduce the workload in that office and to increase the workload of the Judges presiding over the daily Third Division roll.

[7] This practice has moreover been held to be 'legally incorrect' by Sievers AJ in the matter of *Absa Bank Ltd v Treister*[2] delivered on 28 November 2019. The judgment of Sievers AJ appears to have had no effect and I shall therefore direct that that judgment as well as a copy of this judgment to be drawn to the attention of the Chief Registrar for action.

[2] (WCHC Case No: 17476/2019 delivered on 28 November 2019).

[8] I am aware that the question of whether the High Court should allow litigants to pursue claims in that Court where the claims falls within the monetary jurisdiction of the Magistrates Court has been the subject of several judgments over the past few years. In *Nedbank Ltd v Thobejane and Similar matters*[3] a full bench of the Gauteng Division of the High Court granted a declaratory order to the effect that matters falling within the monetary jurisdiction of the Magistrates Court should be issued in those Courts and that should a party be of the view that a matter falling within the jurisdiction of the Magistrates Court should more appropriately be heard in that Division of the High Court, an application must be issued setting out reasonable grounds why, and only once leave is granted may the summons be issued in the High Court.

[9] A different conclusion was reached by a full bench of the Eastern Cape Division in *Nedbank Ltd v Gqirana N.O. and Another, and Similar matters*[4] where the majority of the Court held that, generally speaking, the common law position of concurrency of jurisdiction remained in place and was not altered by the passing of the Constitution. This was so unless the jurisdiction of the High Court was ousted by legislation, either expressly or by necessary implication. It held further that the inherent jurisdiction of the High Court to regulate its own processes by refusing to hear matters that constitute an abuse of process was case specific; a High Court did not have the power to pre-emptively prevent an abuse across all cases of a particular type, (unless empowered to do so by legislation or rules consistent with constitutional imperatives).

[10] Counsel advises that the two above decisions are the subject of appeal to the Supreme Court of Appeal and hopefully clarity should emerge sooner rather than later.

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[3] 2019 (1) SA 594 (GP).
[4] 2019 (6) SA 139.

[11] For my part I favour the rationale in *Nedbank Ltd v Gqirana N.O.* and the prior judgment in *Carlyn Medical Extrusions (Pty) Ltd and Lighting (Pty) Ltd and others*[5] where Van Oosten J held that, all things being equal, a party remains entitled to a free choice of a forum in which to bring proceedings on condition that such Court has the necessary jurisdiction and subject to the possibility of an order limiting or, if appropriate, disallowing costs. I associate myself fully with the reasoning of Van Oosten J in that matter and particularly with the quotation from *Standard Credit Corporation Ltd v Bester and Others*[6] to the following effect:

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

[12] I am also aware of a practice directive issued by the Judge President of this Division having effect from 1 February 2021[7] which directs that matters which fall within the jurisdiction of the Magistrates Court should be brought within those respective Magistrates Courts, arguably precluding litigants from bringing such proceedings in the High Court. That directive obviously does not apply to applications for default judgment brought before that date. Counsel acting for Firstrand Bank Ltd raised the question of the legality of such a practice directive contending that it may well be *ultra vires* inasmuch as it is at variance with the provisions of sec 21 of the Superior Courts Act, 10 of 2013. Section 21(1) provides that Divisions of the High Court have jurisdiction *'over all persons residing or being in, and in relation to all causes arising in ... within its area of*

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[5] (GPJHC case no: 16312/2013 delivered on 2 December 2013).
[6] 1987 (1) 812 (W).
[7] Part E of Directives (issued on 26 January 2021).

jurisdiction'.

[13] The issue of whether the relevant directive is *ultra vires* does not arise in the present matters however and therefore the question, if it requires determination, must wait for another day.

[14] As far as applications for default judgments which are not hit by the provisions of this new practice directive, the Chief Registrar must ensure that her officials perform their duties in terms of Rule 31(5) rather than referring these applications for default judgment to open court on the basis *inter alia* of misconceived interpretations of the underlying jurisdiction clauses.

[15] In both of these matters the plaintiffs are entitled to default judgment and the appropriate orders, which include costs orders on the Magistrate Court scale, are made. I further order that copies of this judgment and that of Sievers AJ be provided to the Chief Registrar for her notice and attention.

BOZALEK J

For the Plaintiff in case no 4208/2020	Adv E Nel
As Instructed by	Jeff Gowar Inc
For the Plaintiff in case no 156702/2020	Adv M Garces
As Instructed by	Kemp & Associates