IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Date heard: **28 June 2019**

Date delivered: **30 July 2019**

Case No: 1203/2018

In the matters between:

NEDBANK LIMITED Plaintiff

and

V W GQIRANA N.O. First Defendant

V W GQIRANA Second Defendant

Case No: 1298/2018

FIRST RAND BANK LIMITED Plaintiff

and

F C CORNELLISSON First Defendant

R B CORNELLISSON Second Defendant

Case No: 1777/2018

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

M MSUTU First Defendant

Y V TUTU-MSUTU Second Defendant

Case No: 3434/2018

NEDBANK LIMITED Plaintiff

and

Y GCINA Defendant

Case No: 3706/2018

FIRSTRAND BANK LIMITED T/A WESBANK Plaintiff

and

B J TWYNHAM Defendant

Case No: 49/2019

FFS FINANCE SA (PTY) LIMITED T/A FORD CREDIT Plaintiff

and

F P JABANGA Defendant

Case No: 264/2019

FFS FINANCE SA (PTY) LIMITED T/A FORD CREDIT Plaintiff

and

S T ROLOMANE First Defendant

JUDGMENT

LOWE, J:

INTRODUCTION

[1] The Judge President of this Court directed that the above matters, being Applications for Default Judgment, be heard by a Full Court in order that the following issues be considered:

[1.1] Why the High Court should entertain matters that fall within the jurisdiction of the Magistrates' Courts;

[1.2] Whether the High Court is 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;

[1.3] Whether there is an obligation on financial institutions to consider the cost implication and access to justice of financially distressed people when a particular forum is considered.

[2] In summary the broader question is whether Plaintiff or Applicant litigants are entitled to elect in which court to bring actions or applications, particularly the High Court and not the Magistrate's Court, in matters that fall within the monetary jurisdiction of that Court – particularly thus where there is a concurrency of jurisdiction. This arises particularly (but not exclusively) in

bank and financial Institution proceedings, both foreclosure and other matters in respect of home and other loan clients with (in some cases) execution against associated immovable property.

[3] Also and particularly the issue of costs and access to justice in respect of financially distressed people is raised.

[4] These issues arose for a number of reasons not least of all due to the decision of the Full Bench in ***Nedbank Ltd v Thobejane and Similar Matters***[1] which found amongst other things there to be an access to justice issue implicating relevant Applicants and Respondents.

[5] The background to these matters and ***Thobejane*** is the issue particularly that banks and financial institutions have elected in many cases to institute proceedings in the High Court, falling within the monetary jurisdiction of the Magistrates' Courts.

[6] In ***Thobejane*** the Full Court concluded that in order to *"promote access to justice"*, 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' Courts having jurisdiction, unless the High Court has granted leave to hear the matter. It also declared that a High Court could, *mero motu,* transfer a matter to another High Court or a Magistrate's Court where it is in the interests of justice to do so.

[1] 2019 (1) SA 594 (GP)

[7] This clearly spreads the prohibition across the full range of actions and applications, without limit, insofar as they are matters which can be decided in the Magistrates' Courts and not only matters brought by financial institutions but by all litigants.

[8] Initially there were seven matters before this Full Court, of these several were withdrawn and only three matters proceeded. FFS Finance SA (Pty) Limited t/a Ford Credit abided this Court's decision whilst Nedbank made submissions in any event. The Minister of Justice and Correctional Services and the Black Lawyers Association *("the BLA")* were admitted as *amici curiae*.

[9] The details of all the matters referred were as follows:

Case Name	Nature	Total Claimed	Total Arrears	Costs Sought
1203/2018 Nedbank Limited v V W Gqirana N.O. & Another	Default Judgment	R151,906.42 Plus interest	R7,227.39 2018/02/18	Attorney & Client
1298/2018 Firstrand Bank Ltd v F C Cornellisson & Another	Default Judgment	R239,728.30	R12,941.82 2018/03/27	Attorney & Client
1777/2018 Standard Bank of South Africa Ltd v M Msutu & Another	Judgment	R118,292.03 Plus interest	R14,407.30 2018/04/23	Attorney & Client
3434/2018 Nedbank Limited v Y	Default	R343,733.18	R42,878.78	Costs of Suit

Gcingca	Judgment	Plus interest	2018/09/16	Magistrate's Court Tariff
3706/2018 Firstrand Bank Ltd t/a Wesbank v B J Twynham	Default Judgment	Return of Vehicle		Cost of Suit Magistrate's Court Tariff
49/2019 FFS Finance SA (Pty) Ltd t/a Ford Credit v F P Jabanga	Default Judgment	R277,856.20	R11,102.75 2019/03/25	Attorney & Client Regional Court Tariff
264/2019 FFS Finance SA (Pty) Ltd t/a Ford Credit v S T Rolomane	Default Judgment	R335,422.43	R18,081.25 2019/03/20	Attorney & Client Regional Court Tariff

[10] In short then in Gauteng litigants and Financial Institutions have no right to proceed in the High Court of jurisdiction (even if there is concurrent jurisdiction) and must litigate in the Magistrate's Court (if having jurisdiction) unless the High Court grants leave to bring these claims – if it is more appropriate for a matter to be heard in the High Court (inefficiency of any other court, real or perceived and convenience for a Plaintiff alone was held not to constitute sufficient grounds for such leave).

[11] In these matters the Banks urge upon us, in summary, that such an approach infringes on the existing common law as to concurrency of jurisdiction and the Banks' constitutional right of access to Courts.[2] It was argued that the Constitutional Court *("the CC")* has held that any measure that limits an existing right of access to Courts impacts on Section 34 of the Constitution.

[2] ***Beinash and Another v Ernst & Young and Others*** 1999 (2) SA 116 (CC) [16]

[12] It would seem that the Banks, with some justification, argue that it is not clear in ***Thobejane*** whether the result therein arose from an exercise by the Court of its inherent power to regulate its own process or a development of the common law.[3]

[13] The Banks suggest that the High Court has no inherent jurisdiction to deprive litigants of their existing access to Courts of concurrent jurisdiction and that this is, in any event, inconsistent with the Constitution as Section 8(3) requires Courts, when they develop the common law in a matter limiting a constitutional right, to ensure that the limitation complies with Section 36 – which it is argued the Court in ***Thobejane*** failed to do and moreover with no proportionality analysis.

CONCURRENCY OF JURISDICTION BEFORE 1994

[14] Our Courts have accepted for over a century that a High Court will not decline to hear a matter properly before it, merely because a Magistrates' Court also has jurisdiction.[4] More recently in ***Metcash Trading Ltd v Commissioner, South African Revenue Services and Another*** [5] the Constitutional Court

[3] Standard Bank, Heads of Argument - paras [65] – [70]
[4] ***Koch v Reality Corporation of South Africa*** 1918 TPD 356 at 359; ***Goldberg v Goldberg*** 1938 WLD 83 at 85-6; ***Brand NO v Volkas BPK & Another*** 1959 (1) SA 494 (T) at 502 F; ***Sparks v David Polliack & Co (Pty) Ltd*** 1963 (2) SA 491 (T) at 494 – 495; ***Standard Credit Corporation Ltd v Bester*** 1987 (1) SA 812 (W) 819 – 820; ***In re Anastassiades*** 1955 (2) SA 220 (W); ***Corderoy v Union Government*** 1918 AD 512 at 517.
[5] 2001 (1) SA 1109 CC

held that if the legislature intended to deprive the High Court of jurisdiction it would have to do so expressly or by necessary implication.[6]

[15] In sum and arising from concurrency of jurisdiction between the High Court and Magistrates' Court, a Plaintiff could choose which court to utilise if within the monetary jurisdiction of the Magistrates' Court. The High Court of course had inherent jurisdiction to regulate its own process by refusing to hear matters that constitute an abuse of process – fact specific assessment being required in this regard on a case-by-case basis.

CONCURRENCY OF JURISDICTION POST 1994

[16] The question arises generally whether the pre-1994 position has been altered by the Constitution. In this matter the Banks argue not, whilst the Minister follows ***Thobejane*** – effectively a yes. The BLA argue that there is no concurrency in the first place.

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[6] ***Metcash (supra)*** para 43:

"Once the Commissioner has disallowed an objection an aggrieved vendor can appeal such decision. What section 36 clearly does not do is place any impediment in the way of such an appeal, either to the Special Court or from its decision to an ordinary court of law. The crucial point, however, is that the section expressly does not preclude a disgruntled vendor against whom an assessment has been made from resorting to a court of law for whatever other relief that may be appropriate in the circumstances. Although the Act vests jurisdiction to vary or set aside assessments — and other decisions by the Commissioner — in the Special Court in the first instance (and prescribes the avenue for further consideration of the case by the ordinary courts thereafter), there is nothing in section 36 to suggest that the inherent jurisdiction of a high court to grant appropriate other or ancillary relief is excluded. 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. It follows that Snyders J erred in holding that:

> ". . . the power of any court of law to provide an aggrieved vendor with interlocutory relief is clearly excluded irrespective of the merits or demerits of his case.""

[17] The starting point is Section 169 of the Constitution which sets out the jurisdiction of the High Court.[7] This provides that the High Court may decide certain Constitutional matters and any other matter that is not assigned to another Court by Act of Parliament.

[18] Section 170 of the Constitution[8] sets out that all Courts (other than the Constitutional Court, High Court and Supreme Court of Appeal) must be created by Act of Parliament that determines their jurisdiction.

[19] Section 171[9] of the Constitution provides that all Courts function in terms of national legislation and rules and procedures must be provided for in terms of national legislation.

[20] Thus it is only Parliament that has the competence to assign a matter to a Court other than the High Court. If this has not been done then the High Court has constitutional jurisdiction to determine any matter in terms of the Superior Courts Act.[10]

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[7] **169. High Courts**
A High Court may decide
a. any constitutional matter except a matter that
 i.only the Constitutional Court may decide; or
 ii.is assigned by an Act of Parliament to another court of a status similar to a High Court; and
b. any other matter not assigned to another court by an Act of Parliament.

[8] **170. Magistrates' Courts and other courts**
Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

[9] **171. Court procedures**
All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

[10] Standard Bank, Heads of Argument – paras [22] to [25].

[21] The question then arises as to whether the BLA's submission that the determination of monetary jurisdiction in the Magistrates' Courts Act 32 of 1944 ousts the High Court jurisdiction in all such matters ending concurrency. I cannot agree herewith. This has not ever been the position and nor can it now be so arising from the above analysis. It would require a clear express legislative provision conferring exclusive jurisdiction upon the Magistrates' Courts or one depriving the High Court of jurisdiction accordingly, or that this was a necessary implication. No legislative provisions exist which in my assessment disturbs concurring directly in general terms nor is this a necessary implication.[11] The BLA was unable to refer to any legislation or authority suggesting the contrary, and to find accordingly I would have to ignore a plethora of authority with no good reason.

[22] The question arises in this context as to whether a High Court can decline to hear a matter within its jurisdiction.[12]

[23] A further question is the impact on the above, if any, of Section 173 of the Constitution. Does this empower the High Court to decline to hear a matter that falls within the jurisdiction of the Magistrates' Court merely because it falls within the monetary value of that Court (and not being an abuse of its process for some reason or another)?

SECTION 173 OF THE CONSTITUTION

[11] ***Richards Bay Bulk Storage (Pty) Ltd v Minister of Public Enterprises*** 1996 (4) SA 490 (SCA) at 494G-I; ***Metcash Trading Ltd v Commissioner, South African Revenue Services and Another*** 2001 (1) SA 1109 CC (at [43]).
[12] Standard Bank, Heads of Argument – paras [27] to [30].

[24] Section 173 of the Constitution provides that the High Court has the inherent power to protect and regulate its own process, and to develop the common law, taking into account the interests of justice. The limitations that attached to the exercise of inherent jurisdiction prior to 1994 have been recognised as limitations that continue to apply to the Section 173 powers under our constitutional scheme.

[25] In ***Phillips and Others v National Director of Public Prosecutions,*** [13] the Constitutional Court held 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".*

[26] As argued by the banks, the Supreme Court of Appeal elaborated on this in ***Oosthuizen v Road Accident Fund*** *[14]*:

[26.1] The SCA held that the Courts ought to be cautious about the exercise of their inherent power to regulate their procedure – that power should be exercised sparingly and not as a matter of course. This is because the Rules are there to regulate the practice and procedure of the courts in general terms and strong grounds would have to be advanced to persuade the Court to act outside the powers specifically provided for in the Rules.[15]

[13] 2006 (1) SA 505 (CC) at para [48].
[14] 2011 (6) SA 31 (SCA)
[15] Para [19]

[26.2] The Courts can only do so when confronted with procedures and rules of court that do not provide a mechanism to deal with a particular problem. The Court will, in that case, be entitled to fashion the means to deal with the problem in order to enable it to do justice between the parties.[16]

[26.3] Where there is a mechanism or alternative remedy available to a party, it is not in the interests of justice for the High Court to exercise its inherent jurisdiction.[17] In other words, there must be a lacuna in the law.[18]

[27] The Banks argue that in order to exercise its power under Section 173, there must be a lacuna that requires the Court to step in to ensure that the interests of justice are saved, and argue that there is no lacuna in the present case. Under the legislative scheme, the High Court selected by a Plaintiff is obliged, so it is argued, to entertain a matter where it has concurrent jurisdiction with a Magistrates' Court, unless the parties agree to transfer it in accordance with Uniform Rule 39(22) or unless there is an abuse of process. That is not a lacuna, it is suggested, but rather represents a deliberate choice made by the legislature.

[28] The Supreme Court of Appeal in ***Oosthuizen***[19] found that the High Court's inherent jurisdiction to regulate its own process *"does not extend to the*

[16] Para [20]
[17] Para [24]
[18] Para [25]
[19] Para [17]

assumption of jurisdiction which it does not otherwise have". Given the constitutional scheme set out above and the exclusive role of Parliament in delineating the jurisdiction of the courts, the converse must also be true, it is argued: the High Court's power does not extend to refusing to entertain matters properly before it that are within its jurisdiction.

[29] In the light of what is set out above, the Banks argue that the Minister is wrong to claim (without any reference to authority) that Section 173 of the Constitution empowers the High Court to decline to hear a matter that falls within the jurisdiction of the Magistrates' Court.[20]

[30] As to abuse of process it seems clear that the Courts have continued to apply the common-law principles set out in ***Anastassiades (supra)*** under the Constitutional dispensation.

[31] In 2008, in ***Absa Bank Ltd v Dlamini*** [21] the High Court reiterated that:

> "the inherent jurisdiction of South African courts only extends to the prevention of abuse of its own process without being concerned with the process of other courts; only protects the parties to the litigation with which the court is dealing and is not concerned with other parties who are not before it; and does not extend beyond the immediate requirements of the particular case before it." [22]

[20] Minister's affidavit paras 51 to 53.
[21] 2008 (2) SA 262 (T)
[22] ***Dlamini*** at para 20. See also ***MEC for Co-operative Governance and Traditional Affairs v Maphanga*** 2018 (3) SA 246 (KZP) at paras 12 to 14.

[32] The Supreme Court of Appeal has held, *"[w]hat 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 'abuse of process'".*[23]

[33] The Banks argue thus that the High Court must therefore determine whether its process has been abused on the facts of any particular case, and that the High Court cannot use its inherent jurisdiction to create a general rule about abuse of process that extends to all Plaintiffs or all Defendants.

[34] In ***Price Waterhouse Coopers Inc*** [24] the Supreme Court of Appeal held that, in *"general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end".*

[35] Clearly a Plaintiff which has no *bona fide* claim but intends rather to use Court process to cause the Defendant financial or other prejudice will be abusing the Court's process.[25] It is correct (as the Banks point out) that the Courts have held that using a procedural right for a purpose other than that for which it was intended, does not of itself mean that a party is acting *mala fide* and therefore abusing the Court process. It may be one indication thereof, but that alone is

[23] ***Beinash v Wixley*** 1997 (3) SA 721 (SCA) at 734F-G.
[24] ***Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd*** 2004 (6) SA 66 (SCA) at para 50.
[25] ***Price Waterhouse Coopers*** at para 50. See also ***Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere*** 1999 (3) SA 389 (SCA); ***Premium & Claims Administrators (Pty) Ltd v Sheriff for the Districts of Stellenbosch and Kuils River South and Another*** 2016 ZAWCHC 176.

insufficient.[26] In order to determine whether there has been an abuse of process, the Court will enquire as to whether the act was done with the predominant intention to harm or prejudice the other party, and whether the act served no appreciable or legitimate interest of the acting party.[27]

[36] Accordingly the Banks are correct in arguing that the test for an abuse of process is necessarily fact-specific. A High Court, in my view, does not have the power pre-emptively to prevent an abuse across all cases of a particular type unless empowered to do so by legislation or rules consistent with constitutional imperatives. The nature of an abuse of process does not, ordinarily at least, lend itself to a blanket rule of this kind.

THE PURPOSE OF THE NCA

[37] It is here that a further issue arises which was referred to in passing in ***Thobejane*** and essentially ignored by the parties in argument:

[37.1] A large number of Defendants/Respondents in matters involving credit transactions and car and homeowners transactions on credit are historically disadvantaged individuals.

[37.2] Such individuals have previously in most instances been paying instalments in reduction of their obligations before defaulting.

[26] ***Brummer*** at 414I-J.
[27] ***Koukoudis and Another v Abrina 1772 (Pty) Ltd and Another*** 2016 (5) SA 352 (SCA) at paras 30-31.

[37.3] The arrears are frequently trifling in their amounts and insignificant to the Banks, but not to the debtor.

[37.4] Prejudice to the homeowners and debtors is substantial on default, thus all (or mostly at least) fall within the category of *'low income persons'* as contemplated in Section 13(a)(ii) of the National Credit Act 34 of 2005 *("the NCA").*[28]

[37.5] The NCA is Consumer Legislation introducing new form of protection for Debtors in South Africa, rich and poor.

[37.6] The NCA seeks to balance the inequities arising from unequal bargaining power between large credit providers and credit applicants.[29]

[37.7] Most significantly as correctly stated in ***Maleke***: [30]

> "The Act is further designed to render assistance and protection to the previously disadvantaged section of our population who may wish to enter the property market. The Act levels the playing field between a relatively indigent and unsophisticated consumer and a moneyed and

[28] "13. The National Credit Regulator is responsible to—
(a) promote and support the development, where the need exists, of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry to serve the needs of—
...
(ii) low income persons and communities;".

[29] ***Firstrand Bank Limited v Maleke and Three Similar Cases*** 2010 (1) SA 143 (GSJ) and see the Preamble to the NCA and its Purposes in Section 3; ***Absa Bank v Myburgh*** 2009 (3) SA 340 (T).

[30] At 148B-149B.

well-advised credit provider, and attempts to limit the financial harm that the consumer may suffer if he/she is unable to perform in terms of the credit agreement. I also, respectfully, agree with the succinct and insightful overview of the Act as set out by Bertelsmann J in *Absa Bank v Myburgh* (supra)."

[37.8] The provisions of Section 29(1)(e)[31] of the Magistrates' Court Act, as read with Section 172(2) of the NCA, provides that the Magistrates' Courts have jurisdiction over all NCA matters whatever monetary sum.[32]

[37.9] It was held by Bertelsmann J in ***Myburgh (supra)*** [33] (in my view correctly) 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.

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[31] "(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 ─

...

(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);

...

(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.*

In respect of matters falling under the National Credit Act 34 of 2005, magistrates' courts have unlimited monetary jurisdiction by virtue of the provisions of this subsection and s 172 (2) of the National Credit Act 34 of 2005.

[32] As mentioned in *Jones & Buckle, The Civil Practice of the Magistrates' Court in South Africa* (10th Ed, Vol 1) Act 367:
"The NCA also makes provision for debt enforcement procedures. Section 172(1), read with Schedule 1, of the NCA provides that the following provisions thereof prevail in the case of conflict with s 57, s 58 and Chapter IX of the Magistrates' Court Act 32 of 1944, and to the extent of such conflict: Part D of Chapter 4, ss 127, 129, 131, 132, Chapter 7 and s 164."

[33] Para [41]

[37.10] Whilst a Full Bench in ***Nedbank Ltd v Mateman and Another*** [34] overruled ***Maleke*** on the issue of the validity of a debtors submission to High Court jurisdiction in an NCA agreement this did not, as I understand it, curtail the High Court jurisdiction to decline to hear a NCA case as set out in ***Maleke*** [35]:

> "In my view, the High Court's discretion to decline the hearing of a case under the Act is still unfettered and not curtailed by the decisions in *Nedbank v Mateman*. The High Court does have a discretion to terminate the proceedings and refer the matter to the magistrates' court with jurisdiction. In certain circumstances it may be very appropriate to refer a matter to the magistrates' court. This is particularly so where the amount claimed is within the jurisdiction of the magistrates' court, unless difficult principles of law and/or fact require decision, in which case a hearing in the High Court will be more appropriate. It would appear that the Act contemplates the debt review process to be controlled and concluded in the magistrates' court. It would therefore not be foreign or contrary to the provisions or purposes of the Act if a High Court terminates the proceedings and refers a matter to a magistrates' court in appropriate cases."

[38] The above position in respect of NCA matters must be seen as relevant to the issue as to whether, notwithstanding a general concurrency of jurisdiction between the High Court and the Magistrates' Court such NCA matters, at least, are such as to make it inequitable, unconstitutional and wrong to bring such matters in the High Court, this not being to say that in appropriate circumstances the High Court jurisdiction is not ousted – such cases however

[34] 2008 (4) SA 276 (T). See also ***Standard Bank of South Africa Ltd v Panayiotts*** 2009 (3) SA 363 (W)
[35] At [23]

will be rare indeed and only arise where difficult and complex issues of law, and possibly fact, arise.

[39] This implicates Section 34 of the Constitution, and the issue of equality.

THE CONTENT AND INTERPRETATION OF SECTION 34 OF THE CONSTITUTION AND THE ISSUE OF EQUITY

[40] In terms of Section 34 of the Constitution every person 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 impartial tribunal or forum.

[41] This fundamentally allows, as a substantive right, every person access to Courts, individual equality and non-discrimination. This is laid down as a fundamental right. Inequality clearly goes against the principle of equality.[36]

[42] Whilst it is clear that the background to this arises in the South African history of equality, apartheid and ousters clauses interfering with the access to Courts it is intended to have a broader effect and give rights which are practical and effective.[37] A right must be linked to a right of access to a Court (or forum). This must be practical effective access or the right loses meaning. This

[36] LAWSA 5(4); 199.
[37] LAWSA 5(4) 199 : Budlender (2004) (2) SALJ 339.

includes as a fundamental part of the rule of law the protection of the right to matters of procedure.[38]

[43] The legislature has acted in accordance with its mandate to ensure impartiality and the efficiency of the Court, and accessibility by way of legislative measures.[39] This includes the CCMA, Small Claims Court, Maintenance Court, Rental Housing Tribunal and the National Consumer Commission. Importantly the NCA also established the National Credit Regulator and National Consumer Tribunal.

[44] Section 34 is closely related to Section 1(c) of the Constitution which recognises the rule of law. It forms part of a three piece composite of rights being Sections 34, 33 and 32 and is referred to as a leverage right allowing litigants to leverage their other substantive rights. These are thus predominately procedural guarantees rather than rights to specific entitlements.[40] However as suggested *"an element of meaningful access (to the Courts) is the end remedy"*.

[45] The structure of the right in Section 34 contains three central components:

i) The right for disputes to be decided before a Court;

ii) The right to a *fair* public hearing;

iii) That where appropriate the Court may be replaced by an independent impartial tribunal or forum.

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[38] LAWSA 5(4) 199 : which expresses the view that access to legal services and justice and procedural protection is fundamental to the rule of law.
[39] ***Nyathi v Member of Executive Council for Department of Health, Gauteng and Another*** 2008 (5) SA 94 (CC), para [84].
[40] Constitutional Law of SA, 2nd Ed, Vol 4, Woolman 59-3.

[46] Procedural rules enhance the fairness of proceedings.[41]

[47] The right to a fair public hearing is central to this matter. In the interim Constitution, Section 22, the forerunner of Section 34, made no reference to a fair hearing. In ***Bernstein v Bester***,[42] referring to Section 22, it was suggested that the exclusion of reference to a fair hearing right indicated an election not to constitutionalize this right to a 'fair' civil trial. This inclusion in Section 34 is surely a deliberate inclusion for this reason. This, suggests Constitutional Law of SA *(supra)*, has both procedural and substantive components.

[48] This is in my view of crucial significance in this matter. Fairness of a hearing with its undoubted inclusion of the right to be heard *(audi alteram partem)* bears on the fact that for the right to be practical and effective it is intended that this be accessible and possible to achieve in the Court of litigation chosen. This in turn has regard to numerous factors, accessibility, physical access to legal assistance, achievable cost implications if legal assistance is sought or required, the ability to appear in person if not, and the intention of the Legislature in taking legislative steps to promote access to justice, to mention some but probably not all relevant.

[49] This must be seen in the context of the structure of the various relevant Courts and their jurisdictional limits, monetary and otherwise, as also the

[41] ***Giddey v JC Barnard & Partners*** 2007 (2) BCLR 125 (CC), para [16].
[42] 1996 (2) SA 751 CC, para [106].

legislative creation of various methods and means to make justice accessible to the people, by way of (for example) the NCA. It cannot be gainsaid that Section 29(1)(e) of the Magistrates' Court Act read with Sections 1, 3 and 90(2)(k)(vi*)(aa)*[43] of the NCA, providing Magistrates' Courts with unlimited jurisdiction in NCA matters, indicates the Legislature's intention in such matters to bring justice to the people ensuring access to justice generally, but in particular to NCA matters against the background and purpose of the NCA

[43] Section 3 of the NCA:

"3. 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 provides;
(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 provides and contractual default by consumers;
(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
(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 harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

Section 90(2)(k)(vi)*(aa)* of the NCA:

"(2) A provision of a credit agreement is unlawful if—
...
(k) it expresses, on behalf of the consumer—
...
(vi) a consent to the jurisdiction of—
(aa) the High Court, if the magistrates' court has concurrent jurisdiction;"

and to bring *inter alia* various legislative benefits to previously disadvantaged people.

[50] This, in my view, simply cannot be ignored when it comes to the fairness component of Section 34 relevant to these matters and others similar.

[51] In this regard, I agree with ***Thobejane*** [44] when the following was said:

> "Access to justice as envisaged by the Constitution is not served, where alternative Courts are created and equipped to deal with matters and litigants bypass those institutions, because they claim that they have a right to do so. What section 34 envisages is a meaningful opportunity to institute and defend legal action in a court of law and places an obligation on the State to take steps to remove any regulatory, social or economic obstacles, which may present or hinder the possibility of access to justice. The position that a plaintiff is *dominus litus* and can choose any form that suits him/her is at best outdated. It loses sight of the deep seated inequalities in our society and the constitutional imperative of access to justice."

[52] How far this goes and how access to justice in the context of Section 34 can be achieved is however another matter.

[53] This must be closely linked to Section 9 of the Constitution – everyone has *inter alia* the right to be equal before the law and to equal protection and benefit of the law and lies at the heart of the Constitution.[45] Very recently, in ***S v S and Another*** [46] the Court considered the question of equality before

[44] At para [79].
[45] ***Brink v Kitshoff*** 1996 (6) BCLR 752 (CC), [40] – [41], ***Fraser v Children's Court, Pretoria North*** 1997 (2) BCLR 153 (CC).
[46] (CT147/18) [2019] ZACC 22 (27 January 2019)

the law and access to the Courts in the context of Rule 43 and the issue of non-appealability. This raised the issue of the right to equality before the law.[47] Whilst referring to ***S v Rens*** [48] the Court does not appear to deviate from the submission that equality of legal process requires procedures which reach a standard of rationality and fairness. This involves the 'equality of arms principle' ensuring that parties in a dispute receive equal opportunity (this has an obvious parallel in this matter). As to access to Courts in the context of Section 34 of the Constitution, and the expansive interpretation of Rule 43 enjoyed by the Courts (also in my view applicable to this matter), the Court went on to point out that where strict adherence to the Rules is at variance with the interests of justice, a court may exercise its inherent powers in terms of Section 173 to regulate its own process in the interest of justice.[49]

[54] In ***Masiya v Director of Public Prosecutions Pretoria (Centre for Applied Legal Studies, Amici curiae)*** [50] the Court explained that the Court's Constitutional power to develop the common law must be distinguishable from the Constitutional power of the Court to test legislation against the Constitution.[51] There is a two stage enquiry referred to by the Bank which a Court must undertake. In my view this matter does not require development of the common law, but rather a constitutional interpretation of the relevant legislation. In ***ex parte Minister of Safety and Security: In Re: S v Walters*** [52]; ***Gcada v Minister of Safety and Security*** [53] it was pointed out

[47] [36] to [44]
[48] 1996 (2) BCLR 155 (CC) [29]
[49] [45] – [58]
[50] 2007 (8) BCLR 827 (CC)
[51] [31]
[52] 2002 (7) BCLR 633 (CC);

that the Constitution enjoins all Courts to interpret legislation in accordance with the spirit purport and objects of the Bill of Rights as per Section 39 (2) of the Constitution. This must be done in a purposive manner. The Bill of Rights and Section 34 is not to be seen in isolation but in context which includes the history of human rights abuse in South Africa. [54] This often calls for a generous interpretation to ensure that individuals secure the full protection of the Bill of Rights. In this matter, in my view, such an approach is called for. A Court may *mero motu* raise an infringement issue as in this matter.

[55] Inaccessibility to the Courts goes against *inter alia* the principle of equality.

[56] As pointed out in *LAWSA (supra)* [55]:

> "The right to a fair and public hearing in civil matters requires the rules of civil procedure to be in line with the constitutional right. These rights include the impartial composition and functioning of the courts in civil proceedings, the equality of parties in civil proceedings, the parties' entitlement to information concerning the hearing and concerning the opposition's case, every party's opportunity to be heard and to adduce evidence, the furnishing by the courts of the reasons for their decisions, and the parties' right to appeal."

[57] The starting point is the recognition of the common law as set out above with a general acceptance of the fact that there is a concurrency of monetary jurisdictional Courts, a Plaintiff as *dominus litus* generally, in the past, was entitled to choose the Court of litigation subject to potential costs penalty, and

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[53] [2009] 12 BCLR 1145 (CC); 2010 (1) BCLR 35 (CC) [58] – [62}
[54] ***Residents of Joe Slovo Community Western Cape v Thubelisha Homes*** 2009 (9) BCLR 847 (CC).
[55] Para 205

removal from the High Court, if this constituted an abuse of its process, a case by case fact analysis in general being required.

[58] In these matters no reliance is placed on the potential overburdening of a High Court by having to deal with Magistrates' Court matters. Even had this been the case it is highly doubtful, in my view, against the above, that this would have been a relevant consideration.

[59] In the main the Bank relied on the speed and efficiency of the High Courts to justify their choice arguing that costs are thereby limited, a more reliable decision achieved particularly on foreclosure and executions against property, and that Defendants/Respondents usually do not oppose following extensive attempts by the Banks to resolve the issues prior to litigation. I may say that in my view the reliance on Defendants/Respondents usually not opposing, rings hollow on a number of levels. That a litigant or litigants usually do not oppose does not relieve the parties or Court of the obligation to protect the Section 34 right. Secondly what possible reliance can be placed on non-defence where that party is not given an opportunity to appear in Court and equally have his/her say.

[60] This of itself, even if assumed to be correct for the purpose of this matter, fails to adequately address the Section 34 argument, in respect of at least NCA matters, as also ignoring the equality rights being entirely one sided as to the ability to appear or be represented in that Court.

[61] Content and effect must be given to the Section 34 right, in these matters at least in the context of the Magistrates' Court Act and the NCA, the very litigation which is the subject matter of these Applications.

[62] It is unnecessary to consider the burdening of the High Court relevant to the issue of litigation in the High Court of Magistrates' Court matters as this is most certainly not before us and would go too far.

[63] Sections 9 and 34 surely recognise the balancing of fairness in a hearing. It is not open to Plaintiffs/Applicants to argue across the board that their *dominus litus* entitlement to choose a Court cuts out a Defendants'/Respondents' entitlement to access to justice, this being simply satisfied by access to the High Court chosen, in NCA matters. This is far too narrow an approach in my view.

[64] The balancing of fairness contemplated in Section 34 (as read with the equality right) between litigants must recognise that Defendants/Respondents, in litigation, must have practical reasonable and effective access to the Court chosen and that it is virtually inevitable that in the context of the NCA this cannot generally be the case in the High Court which is not only usually geographically more difficult for the majority of litigants to access but also practically and financially more difficult to access requiring at least up front greater cost, probably more experienced and expert High Court Practitioners and greater difficulty to represent oneself in person, an inalienable right.

[65] This was clearly recognised in the Magistrates' Court Act and NCA in respect of NCA matters and in context, and through the prism of the Constitution, it is clear that to give proper effect to the Section 34 right of access to justice and the equality right this cannot be achieved on the issue of Magistrates' Court matters (relevant to the NCA) being brought in the High Court, in the context of the creation by the legislature of specific methods and processes to afford the previously disadvantaged and currently financially deprived with specific means of access to the Magistrates' Courts as the appropriate forum.

[66] This does not require in my view a development of the common law or an application of Section 173 being simply a proper interpretation and application of the NCA read in its legislative and constitutional context.

[67] The position in ***Agri Wire (Pty) Ltd v Competition Commissioner*** [56] has in my respectful view been overstated nor is it a decision which is dispositive of

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[56] 2013 (5) SA 484 (SCA) at Para [19]:
"The argument that the high court's jurisdiction was excluded in favour of an exclusive jurisdiction conferred on the Tribunal under the Act was therefore incorrect. Counsel then submitted that nonetheless the high court should defer to the Tribunal and allow the challenge to be dealt with by that body. For this they relied upon two passages in the judgment of this court in *Competition Commission of South Africa v Telkom SA Ltd & another*.[8] The first, in which it was observed that the legislature had established the competition authorities as the primary regulator in competition matters, is disposed of quite easily. The court there dealt with the concurrent jurisdiction of different regulatory agencies and not with concurrent jurisdiction between the Tribunal and the high court. The second merely indicates that, where the legislature has created specialist structures to resolve particular disputes effectively and speedily, it is best to use those structures. The court went on to hold, on the facts of that case, that the court before which the review proceedings were brought should have exercised its discretion to decline to grant relief by way of review and left the issues in the case to be dealt with by the Tribunal in the course of the referral. That is a different matter from the court declining to exercise the jurisdiction with which it is vested by law. Save 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.[9]
[8]*Competition Commission of South Africa v Telkom SA Ltd & another*, supra, paras 27 and 36.
[9]*Makhanya v University of Zululand*, supra, paras 33 and 34; *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* [1990] ZASCA 39; 1990 (2) SA 906 (A) at 914E-G; *Standard Credit*

the issues raised in these matters, whilst it being accepted that the doctrine of forum non convenience is not applicable in our law generally as such. This however does not dilute the structure or force of the fair hearing and equality constitutional imperative, raised in NCA litigation.

[68] The argument for equality of fairness in the context of NCA litigation requires no development of the common law, in my view, but simply an application of the Section 34 right with the proper purpose and interpretation of the NCA – nor does this amount to a *"limitation"* of a Plaintiff's Section 34 right when seen in conjunction with that of the Defendants'/Respondents' right.

[69] Notwithstanding ***Barkhuizen v Napier*** [57] the application of the Section 34 right read in its legislative context of the Magistrates' Court Act and NCA enables a broader approach to NCA based litigation – and does not require a factual enquiry in individual cases.

[70] Section 173 and the *"inherent jurisdiction"* to regulate process has been held to be justified only in the *"procedural field"*, and not to create substantive law. In ***South Africa Broadcasting Corporation v National Director of Public Prosecutions and Others*** [58] it was held that the inherent power was to

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Corporation Ltd v Bester & others 1987 (1) SA 812 (T) at 815E-F and 819D-E; *Marth NO v Collier & others* [1996] 3 All SA 506 (C) at 508e-f."

[57] 2007 (5) SA 323 (CC)
[58] 2007 (1) SA 523 (CC)

regulate and control process and that Section 173 served to prevent an abuse of Court process probably limited to procedural matters.[59]

[71] If I am incorrect in respect of my application of a balancing approach to NCA matters as interpreted via the Section 34 and equality right it is in any event (in that context) competent to Rule that an NCA matter should not be heard in the High Court being, in my view, simply a procedural decision limited to NCA matters, in the context of the NCA and the Constitution.

[72] This principle can, in argument, be adjudicated across the board in respect of all NCA matters and not merely case by case – this is an application of the legislative intention and not the creation of some new substantive legal principle.

RESULT

[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 Section 34 right as read with the Magistrates' Court Act and the NCA recognising the purpose and imperative of the NCA as

[59] ***Moulded Components and Rotomoulding South Africa (Pty) Ltd v Concourakis and Another*** 1979 (2) SA 457 (WLD) at 462 H – 463 B

stated above, makes it clear that to afford equality and access to a fair hearing right to the mostly financially and 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 the 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.

[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, creates 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 Magistrate Courts 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 heard 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.

[77] In respect of the matters still before me for judgment, the merits thereof have not been fully addressed as yet. Further some time has now passed since the matters were launched and the circumstances may thus have changed. In my view therefore these matters should be referred to the Motion Court for decision and the Plaintiffs/Applicants are to file a short affidavit as to any change in circumstances and updating the financial issues now present in each matter.

[78] **ORDER**

1. To promote access to justice in the context of the Magistrates' Court Act and the NCA, as read with Sections 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.

2. The remaining three applications (3706/2018 Firstrand Bank Ltd t/a Wesbank v B J Twynham, 49/2019 FFS Finance SA (Pty) Ltd t/a Ford Credit v F P Jabanga and 264/2019 FFS Finance SA (Pty) Ltd t/a Ford Credit v S T Rolomane) herein are referred to the High Court (Motion Court) for hearing on their merits as soon as possible (as having predated 1 August 2019) together with an affidavit by

Plaintiffs/Applicants in each matter as to any changed circumstances and the current financial position.

3. No costs are awarded.

_____
M.J. LOWE
JUDGE OF THE HIGH COURT

HARTLE, J:

I agree.

_____
B C HARTLE
JUDGE OF THE HIGH COURT

JOLWANA, J:

[79] I have had the benefit of reading the judgment of my brother Lowe J (the main judgment) and regrettably I am unable to agree with some of his reasoning and some of his conclusions. It is to some matters of constitutional interpretation that I have a slightly different approach. It is largely to these matters, specifically the common law and the NCA that I will focus. On the facts and the general approach to section 34 of the Constitution, I am in respectful agreement save insofar as may be indicated hereinbelow.

[80] Section 173 of the Constitution gives the Constitutional Court, the Supreme Court of Appeal and the High Courts two distinct powers. The first one is that

these courts are empowered to protect and regulate their own process. The second one is that they are empowered to develop the common law. Both of these powers are to be exercised with only one condition and that is as they exercise these powers courts are to always take into account the interests of justice.

[81] It is indeed so that in *Phillips and Others v National Director of Public Prosecutions*[60] and *Oosthuizen v Road Accident Fund* [61] and other similar cases both the Constitutional Court and the Supreme Court of Appeal said that the inherent power of the courts to regulate their own procedures are to be exercised sparingly and they may be exercised only when there is a *lacuna* in the legislated processes. When these courts clarified the manner in which these powers are to be exercised they were not, in my view, introducing a new requirement or condition. They were essentially cautioning against overzealousness in the exercise of these constitutional powers by the courts which could, wittingly or unwittingly bypass the legislative framework. Courts have to seriously consider the legislative framework and only if it is in the interests of justice shall they fill a *lacuna* therein, if it is found to exist. I wish to add that even if there is no *lacuna* but the available processes are insufficient to deal with a particular situation that exists and is confronting the courts they shall have inherent power to ensure that the interests of justice are not compromised either by the *lacuna* or insufficiency in the legislated processes.

[60] Footnote 13 above
[61] Footnote 14 above

[82] I do not agree with the banks' submission that it is not clear whether in *Thobejane* the court used its inherent power to protect and regulate its process or developed the common law. The first point to make in this regard is that it is not an either or situation. Courts are, on any reading of section 173 of the Constitution, entitled to do either of the two or both depending on the facts of the matter under consideration. There is no legal basis for any suggestion that courts have to make an election. To do so would be to impose a condition that is not in the Constitution at all. Secondly, I am not aware of any case in which either the Supreme Court of Appeal or the Constitutional Court have imposed a restrictive condition that courts must choose between exercising their power to regulate their process or developing common law.

[83] In *Thobejane* the full court unanimously held that:

> "[69] We have no doubt that the right envisaged in section 173 of the Constitution should be exercised sparingly and with due caution and in the interests of justice. That does however not entail that it should never be exercised. It is important that the rights of litigants to access to justice should be balanced without closing the doors of any litigant and to ensure a sustainable and effective system. Although it was stated in Philips that the right should "*ordinarily*" be confined to regulating the process of court, where a legislative lacuna exists, the emphasis should be on the word "*ordinarily*". We are of the view that it does not exclude the possibility of other instances arising, which may call for the Court to intervene in an exercise of the power conferred on it in terms of section 173 of the Constitution. It is wholly acceptable that the High Court develops the common law pertaining to the exercise of jurisdiction in a

way that ensures access to justice and that due regard is given to the values enshrined in the Constitution."

[84] The court went on to say:

> "[73] In our view it will be appropriate for the Court to regulate its own procedures in order to ensure access to justice. One must consider this within the broader context of the duty to bring the Court to the people. This intention, of bringing justice to the people is reflected in the Preamble to the Magistrates Court Act, which reads as follows:
>
> > 'IT IS CONSEQUENTLY THE PURPOSE of this Act, as an interim measure, pending the further rationalization of the lower courts, to
> >
> > - Enhance access to justice by conferring jurisdiction on courts for regional divisions which are distributed throughout the national territory to deal with civil matters, including matters currently dealt with in the Divorce Courts established under section 10 of the Administration Amendment Act, 1929; and
> >
> > - promote the development of judicial expertise among the ranks of magistrates with the view to broadening the pool of fit and proper persons qualifying for appointment to the Superior Courts.'"

[85] I am in full agreement with the Court in *Thobejane* both as regards the inherent power of the High Court to regulate its procedures and the development of common law. Furthermore, the interpretation placed by the banks on the abuse of process is too narrow and unnecessarily restrictive. If I understood their submission correctly, the banks say that abuse of process only occurs when in a specific case an issue of abuse of process arises on those specific facts and cannot arise in a blanket fashion. In these matters it is a fact that banks as a group, in dealing with distressed debtors or defendants, have all largely elected to come to the High Courts in this Division

especially to this court in circumstances in which such matters could be dealt with in the Magistrates' Courts having jurisdiction.

[86] If one looks at the banks as financial institutions that are frequently faced with a particular problem of distressed debtors who are unable to meet their financial obligations, over the years they have been coming to the High Courts regardless of the fact that the amounts involved "may be trifling". Their choice in adopting the same approach to address the same problem can, in my view, be regarded as an abuse of process within the meaning that has been given to that term in our jurisprudence, depending on the analysis of their reasons for coming to the High Courts.

[87] As far as could be gleaned from the heads of argument[62] banks accept that in appropriate cases common law may be developed with the understanding that law making is the function of the legislature and not the judiciary. Secondly the requirements of section 36 of the Constitution must be met. While I agree with this submission in principle, I however cannot see how addressing issues of access to justice could be seen to be contrary or falling short of the requirements provided for in section 36.

[88] Historically and as part of our common law jurisprudence a plaintiff has been entitled to litigate in a court of his/her or its choice having jurisdiction on the

[62] Para 89 to 97 of the heads of argument filed on behalf of Standard with the Supreme Court of Appeal in Thobejane which were made available to this court.

basis that they are *dominus litis*. If common law is developed in this regard neither the law making powers of the legislature are usurped nor is the plaintiff prejudiced in a manner that offends the provisions of section 36. In fact doing so promotes the spirit and objects of the Bill of Rights by ensuring equal treatment of both the plaintiff and the defendant in so far as access to justice is concerned.

[89] That can be and should be done without closing the door to a plaintiff who feels that a matter will best be adjudicated in the High Court even though that matter may be within the jurisdiction of the Magistrates' Court. This may be done by requiring such a plaintiff to make a case in that regard by first launching an application to the High Court seeking leave to have a matter adjudicated before it. It might also very well be that where a matter has been instituted in the Magistrates' Court, a defendant could be entitled to seek leave of the High Court to stop such proceedings in the Magistrates' Court and move them to the High Court in an appropriate case. However, I refrain from deciding the latter point as no submissions were made on it. This will bring about the equal treatment of litigants with a punitive costs order being visited upon any of the litigants who makes such an application vexatiously. Treating plaintiffs and defendants differently on the basis that the plaintiff is *dominus litis* is an old common law principle and the time for it to be reconsidered may have arrived as access to justice is such a fundamental constitutional principle.

[90] There is no tension between the powers of the legislature to make and pass legislation[63] and the powers of the courts to develop common law as provided for in section 173 of the Constitution. The legislature has no power to develop common law which has been given exclusively to the courts. If courts being mindful that only the legislature is empowered to legislate, develop common law in the interests of justice, I cannot see how it can be said that courts have usurped the power of the legislature. A suggestion that the legislative power may have been or might be usurped cannot be made as a general proposition to oppose the development of common law where facts call for common law to be developed. It would have to be shown on the facts of a specific case that if common law is developed that would be tantamount to courts assuming powers they do not otherwise have.

[91] I turn now to deal with the NCA matters. The main judgment, having carefully and correctly analysed the issues of access to justice came to the conclusion that certain provisions of the National Credit Act read with section 29 of the Magistrates' Court Act make it clear that the legislature intended that such matters should ordinarily be heard in the Magistrates' Court regardless of the amount involved. On this basis a conclusion is made that the rights of access to justice which I must emphasize are commendably articulated mean that such matters should ordinarily be heard in those courts. I agree with this conclusion.

[63] Section 43(a) of the Constitution provides that the legislative authority in the national sphere of government is vested in Parliament and section 44(ii) gives authority to the National Assembly to pass legislation with regard to any matter.

[92] However, I do have serious reservations that all of those section 34 rights should not be available in any other matters save those under the NCA. The differentiation in this regard is, with respect, difficult to understand. This is because fundamentally it means that constitutional rights are not ordinarily available by themselves. They become available if the legislature takes steps to extend them by passing legislation such as the NCA in this regard. Once it is concluded that rights are available as a matter of constitutional interpretation, I do not think that such rights can be said to be unavailable to similar parties and in similar situations merely because the legislature has not yet taken steps to make them available. Constitutional rights cannot, in my view, depend on the legislature to avail them. They flow directly from the Constitution.

[93] If the basis of such conclusion in this regard is that the rights enshrined in section 34 of the Constitution have been made available by the NCA legal framework, it suggests that faced with similar facts as we have in this case minus the relevant provisions in the NCA and section 29 of the Magistrates' Court the conclusion would have been that the rights of access to justice are not implicated. The consequence of that is that unless and until the legislature passes legislation the courts would not extend constitutional rights of access to justice to litigants by developing common law even if section 34 of the Constitution correctly interpreted as it has been, such rights should be available. I do not think so.

[94] In the context of the socio-economic rights, Yacoob J had this to say in *Government of the Republic of South Africa and Others v Grootboom and Others*[64]

> "These rights need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. They entrench the right of access to land, to adequate housing and to health care, food, water and social security. They also protect the rights of the child and the right to education.
>
> [20] While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the certification judgment. During the certification proceedings before this Court, it was contended that they were not justiciable and should therefore not have been included in the text of the new Constitution. In response to this argument, this Court held:
>
> > "[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion."
>
> [21] Socio-economic rights are expressly included in the Bill of Rights, they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfill the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis. To address the challenge

[64] Government of South Africa and Others v Grootboom and Others 2001 (1) SA (CC) 46 para 19-21

> raised in the present case, it is necessary first to consider the terms and context of the relevant constitutional provisions and their application to the circumstances of this case…"

[95] The sentiments espoused in *Grootboom* above are, in my view, eminently applicable to the facts of this case. The question then is, should the rights in section 34 of the Constitution, in so far as they relate to the defendants exist on paper only simply because the legislature has not yet passed a relevant legislation to make these rights available to all defendants? I do not think so. On no less than three occasions in the Constitution, section 173, section 8 and section 39, the Constitution harps on the courts having to develop common law, if necessary in order to make the rights in the Bill of Rights available to all. In my view there is no justification or basis for the differentiation. Such differentiation is in fact counter-productive and is not assisting the courts to ensure that constitutional aspirations of equality and equal treatment before the law are realized beyond existing *on paper only.*

[96] The remaining three applications in this matter must be re-enrolled in the Motion Court for the reasons stated in the main judgment.

[97] I would therefore make the following order:

1. To promote access to justice as provided for in section 34 of the Constitution all civil actions and/or applications instituted after the date of

this judgment in respect of which the Magistrates' Courts and the High Courts have concurrent jurisdiction shall be instituted in the Magistrate's Court having jurisdiction.

2. The remaining three applications are to be re-enrolled in the Motion Court.

3. There shall be no order as to costs.

_____

M S JOLWANA
JUDGE OF THE HIGH COURT

Appearances:

As *AMICUS CURIAE*:

Minister of Justice and Correctional Services: Adv B Boswell and Adv G Appels

Instructed by: State Attorney, Port Elizabeth
c/o Mabece Tilana Inc., Grahamstown

Black Lawyers Association: Mr B Maswazi
Instructed by: Mbabane & Sokutu Inc.
c/o Caps Pangwa & Associates, Grahamstown

Case No: 1203/2018:

Obo Plaintiff: Adv R Ismail
Instructed by: Netteltons, Grahamstown

Obo Defendants: No Appearance

Case No: 1298/2018:

Obo Plaintiff: No Appearance
Instructed by: Vezi and De Beer Incorporated
c/o Huxtable Attorneys

Obo Defendants: No Appearance

Case No: 1777/2018:

Obo Plaintiff: Adv A Cockrell SC and Adv A Armstrong
Instructed by: Netteltons, Grahamstown

Obo Defendants: No Appearance

Case No: 3434/2018:

Obo Plaintiff: No Appearance
Instructed by: Friedman Scheckter
c/o Carinus Jagga, Grahamstown

Obo Defendant: No Appearance

Case No: 3706/2018:

Obo Plaintiff: Adv D de la Harpe
Instructed by: Huxtable Attorneys

Obo Defendant: No Appearance

Case No: 49/2019:

Obo Plaintiff: No Appearance
Instructed by: McWilliams & Elliot Inc.
c/o Huxtable Attorneys, Grahamstown

Obo Defendant: No Appearance

Case No: 264/2019:

Obo Plaintiff: No Appearance
Instructed by: McWilliams & Elliot Inc.

c/o Huxtable Attorneys, Grahamstown

Obo Defendants: No Appearance