

A bank's choice of forum – what does the law say?

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Setting the Scene

It is common practice for consumers to take up mortgages and purchase motor vehicles on credit from financial institutions. However, what happens if, somewhere along the line, these consumers default on their repayment obligations to such financial institutions? Typically, legal proceedings will be instituted, in terms of which orders for the repayment of the outstanding indebtedness or leave to specially execute the mortgaged properties will be sought by such institutions. This all seems relatively simple. However, the question which has recently come under scrutiny is in which forum such legal proceedings should be instituted?

Ordinarily, it is the financial institution (as plaintiff or applicant, as the case may be) who elects the relevant court with competent jurisdiction within which to institute legal proceedings. Our courts have recently had to consider whether, in circumstances where a financial institution has elected to institute proceedings in a High Court, such High Court may refuse to hear the matter on the basis that another court has concurrent jurisdiction, specifically where (1) the High Court and a Magistrates Court both have jurisdiction in respect of the same proceedings, or (2) where the main seat of a Division of the High Court and a local seat of such Division both have jurisdiction in respect of the same proceedings. In addition, a question has been raised as to whether a financial institution has an obligation to consider the cost implication and access to justice of financially distressed persons when electing a particular court of competent jurisdiction within which to institute proceedings.

These matters, amongst others, came up for consideration by the Supreme Court of Appeal (the “SCA”) in the judgment of *The Standard Bank of SA Ltd and Others v Thobejane and Others and The Standard Bank of SA Ltd v Gqirana N.O and Another* (the “**Judgment**”).^[1] Given the outcome of this Judgment, consideration of the above factors will be of relevance to financial institutions when instituting legal proceedings against delinquent customers.

Cases before the High Court

For purposes of this discussion, the relevant matters in issue before the Gauteng Division of the High Court, Pretoria (the “**Gauteng Court**”) and the Eastern Cape Division of the High Court, Grahamstown (the “**Eastern Cape Court**”) related to claims brought by financial institutions against their customers (ie debtors) due to the non-payment of their indebtedness. Of particular relevance, is the manner in which these matters were heard. In brief, several cases, involving three of South Africa's major banks, were placed before full courts of the Gauteng and Eastern Cape Divisions of the High Court, at the instance of their respective Judges President and revolved around the question of “jurisdiction”. The Judges President of the two Divisions of the High Court formulated a set of questions for determination by the two Divisions. The questions included: (1) whether a High Court ought to entertain matters which fall within the jurisdiction of a Magistrates Court; (2) whether a High Court is obliged to entertain matters which falls within the jurisdiction of a Magistrates Court purely on the basis that a High Court may have concurrent jurisdiction; (3) whether 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 such Division on the basis that the main seat has concurrent jurisdiction, and (4) whether there is an obligation on a financial institution to consider the cost implications and access to justice of financially distressed people when considering a particular forum for the institution of legal proceedings.

The Judgment of the Gauteng Court in *Nedbank Ltd v Thobejane* and similar matters^[2]

In essence, the Gauteng Court found that where matters fall within the jurisdiction of the Magistrates Courts, such matters should be issued out of the Magistrates Courts. A High Court is not obliged to entertain matters that fall within the jurisdiction of the Magistrates Courts purely on the

basis that a High Court may have concurrent jurisdiction. It was further held that should a party to a proceeding which falls within the jurisdiction of the Magistrates Court be of the view that the matter should nevertheless be heard by a High Court, such party may bring an application, setting out reasonable grounds, for the matter to be heard in the High Court. The Gauteng Court also held that both the main seat and the local seat of a Division of a High Court are entitled to transfer a matter, *mero motu*, to another court, provided it is in the interests of justice to do so.

It is however pertinent to point out that the Gauteng Court went further and stated that there is an obligation on both financial institutions and litigants, when instituting legal proceedings to consider the question of access to justice in such proceedings. Furthermore, courts have a duty to ensure that access to justice is effectively provided by exercising the appropriate judicial oversight in matters. Accordingly, the Gauteng Court found that the institution of legal proceedings by financial institutions in the High Court in circumstances where the matter could just as well have proceeded in the Magistrates Court was an abuse of process by such financial institutions.

The Judgment of the Eastern Cape Court in *Nedbank Ltd v Gqirana N.O and Another*, and similar matters^[3]

In this matter, the Eastern Cape Court disagreed with the findings of the Gauteng Court. The Eastern Cape Court held that the National Credit Act, 2005 (the “**NCA**”) ousted the jurisdiction of the High Court and accordingly all matters falling within the purview of the NCA had to be instituted in the Magistrates Courts.

Whilst there is no express legislative provision in the NCA (or any other legislation) ousting the High Court’s jurisdiction, generally, in respect of matters subject to the Magistrates Courts’ jurisdiction, the Eastern Cape Court rationalised their finding on the basis of the application of Section 34 of the Constitution of the Republic of South Africa, 1996, as read in conjunction with the provisions of the Magistrates Court Act as well as the NCA. In this regard, the Eastern Cape Court was of the view that the provisions of the NCA provide that, save for exceptional circumstances, all NCA matters should be brought before a Magistrates Court in order to afford equality and access for a fair hearing by financially and previously disadvantaged persons, subject to the provisions of the NCA. Under the NCA, a Magistrates Court is to be considered as the court of first adjudication to the exclusion of the High Court, save only in the event that there are unusual or extraordinary factual or legal issues which would require and/or warrant a High Court being the first court of adjudication in such instances.

The Appeal before the SCA

Following the judgements set out above, the three banks took the matters on appeal to the SCA. The SCA unsurprisingly set aside the orders of the Gauteng Court as well as the Eastern Cape Court.

The SCA, in considering the judgements, pointed out the following. Firstly, the judgment of the Gauteng Court, which held that the High Court has the authority to decline to hear a matter, despite such matter being within its jurisdiction and having been properly brought before it, purely on the basis that another court has concurrent jurisdiction is incorrect. As correctly pointed out by the SCA, this flies in the face of established case law authority indicating the contrary.^[4] A High Court has no power to refuse to hear a matter before it which could have been brought in the Magistrates Court. Furthermore, the SCA confirmed that a plaintiff who initiates litigation proceedings has the right, as *dominus litis* to decide in which court he or she wishes to enforce his or her rights. There is simply no principle pursuant to which a High Court may refuse to hear a litigant or to entertain proceedings in a matter within its jurisdiction and properly placed before it. The judgment of the Eastern Cape Court which sought to summarily oust the High Court’s jurisdiction to hear matters relating to the NCA was also found by the SCA to be wrong. The SCA stated that there is a strong presumption against an 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 ousted.

With reference to the Gauteng Court’s judgment, the SCA held that it is long-standing law that when a High Court has a matter before it which could have been brought in a Magistrates Court, the High Court has no power to refuse to hear such matter. The High Court does not have the inherent jurisdiction to refuse to hear a litigant in a matter within its jurisdiction, properly brought before it. This similarly applies where there is a jurisdictional overlap in Divisions of the High Court that have local seats and main seats, and where concurrent jurisdiction is enjoyed by a local seat within its area of jurisdiction, and the main seat, which has jurisdiction over its entire province. The SCA was further of the view that there was no abuse of process when a plaintiff (including a bank) instituted proceedings in the High Court in circumstances where they deemed it more favourable to sue out of such court. The SCA accordingly confirmed that it is beyond the reach of a court to refuse to hear any matter falling within its jurisdiction.

In respect of the Eastern Cape Court’s judgment, the SCA found that as there is a strong presumption against the ouster of a High Court’s jurisdiction, the mere fact that a statute vests jurisdiction in one court is insufficient to imply that the jurisdiction of another court is thereby expunged. Following an analysis of the legislative provisions relied upon by the Eastern Cape Court in finding that the Magistrates Courts enjoyed

exclusive jurisdiction as the court of first adjudication in respect of NCA matters,^[5] the SCA found that there is no indication of an implied ouster of jurisdiction within the confines of the NCA and that the relevant provisions of the Magistrates Courts Act are premised on concurrent jurisdiction and as such do not carry with it an implication that the jurisdiction of the High Court is correspondingly decreased. The SCA further held that the NCA expressly recognised the concurrency of the jurisdictions of the High Court and the Magistrates Courts and was accordingly of the view that the Eastern Cape Court's judgment was wrong and fell to be set aside.

Conclusion

In light of the SCA's findings, the orders of the Gauteng Court and the Eastern Cape Court were replaced with the following orders: (1) the High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrates Court if brought before it; (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; and (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.

In view hereof, a High Court may not decline to hear a matter which is within its jurisdiction and is properly brought before it. NCA matters are not the exclusive purview of the Magistrates Court as the court of the first adjudication, as the High Court enjoys concurrent jurisdiction. The established position that it is for the plaintiff (in legal proceedings) to choose a court of competent jurisdiction remains intact and, as such, there is no abuse of process where proceedings are instituted in the High Court, where the alternative exists of suing out of a Magistrates Court. Importantly, financial institutions are not saddled with a legal obligation to consider the cost implications and access to justice of financially distressed people when determining the appropriate forum within which to initiate legal proceedings. Accordingly, the findings of the SCA go a long way in clearing up the position for, *inter alia*, financial institutions, in respect of the institution of legal proceedings in the forum of their choice against defaulting customers.

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[1] *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] ZASCA92 (25 June 2021).

[2] *Nedbank Ltd v Thobejane and similar matters* 2019(1) SA 594 (GP).

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

[4] *Goldberg v Goldberg* 1938 WLD 83; *Standard Credit Corporation v Bester and Others* 1987 (1) SA 812 (W); *Agri Wire (Pty) Ltd v Commissioner, Competition Commission and Others* 2013 (5) SA 484 (SCA).

[5] Sections 3 and 90(2)(k)(vi)(aa) of the NCA, and section 29 of the Magistrates Courts Act.



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