IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION, MIDDELBURG

(LOCAL SEAT)

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
…….	…….
SIGNATURE	DATE

CASE NOS: 4050/18 & 3269/19 & 3166/19

In the matter between:

IN RE: SEVERAL MATTERS ON THE UNOPPOSED ROLL OF 06 JULY 2020

CASE NO: 4050/18

FIRST RAND BANK LTD **APPLICANT**

And

JOHANNES FG MOSTERT **FIRST RESPONDENT**

SONJA MOSTERT **SECOND RESPONDENT**

CASE NO: 3269/19

STANDARD BANK OF SA LTD **APPLICANT**

And

JOHANNES JACOBUS MEYER **FIRST RESPONDENT**

MARIA ELIZABETH MEYER **SECOND RESPONDENT**

CASE NO: 3166/19

NEDBANK LTD t/a MFC **APPLICANT**

and

THEMBA MAKHATINI **RESPONDENT**

JUDGMENT

JUDGMENT HANDED DOWN VIA EMAIL DUE TO COVID 19. JUDGMENT DEEMED TO HAVE BEEN HANDED DOWN ON 30 JULY 2020.

BRAUCKMANN AJ

INTRODUCTION

[1] The Judge President of this, the newest Division of the High Courts of South Africa had this to say about access to justice in the context of plaintiffs issuing summonses against home owners ("*consumers*") in matters where the banks called up the security they held over immovable property in the Mbombela circuit Court (as it then was), whilst the debtors resided , and the immovable properties were situated closer to the Middelburg circuit Court:

> "*Our Constitution guarantees everyone the right of access to courts which are independent of other arms of government. But the guarantee in section 34* [1] *of the Constitution* [2] *does not include the choice of procedure or forum in which access to courts is to be exercised. This omission is in line with the recognition that courts have an inherent power to protect and regulate their own process in terms of section 173 of the Constitution*[3] *to which I will turn in a moment. In Chief Lesapo v*

[1] Section 34 of the Constitution provides:
"*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*."
[2] Act 108 of 1969.
[3] Section 173 of the Constitution provides:

North West Agricultural Bank and Another[4]*, the Constitutional Court underscored the importance of access to courts in these terms*:

'The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.'" [5] [Own emphasis]

[2] With this very often quoted paragraphs from the well-known judgment by the Constitutional Court in mind, and as background, I had to consider whether the matters referred to in the heading and the body of this judgment should have been instituted by the plaintiffs in this Court, or in the relevant Magistrates' Courts that had jurisdiction over the persons of the respective defendants/ respondents in the matters. All the matters came before me on the unopposed roll during the nation-wide lockdown on 06 July 2020.

"*The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.*"

[4] 2000 (1) SA 409 (CC).

[5]First National Bank v and seven other cases [2016] ZAGPPHC 616 (16 May 2016), paragraph [1], quoting from Mukaddam v Pioneer Foods (Pty) Ltd and Others (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) (27 June 2013) para 28 and 30, and Chief Lesapo v North West Agricultural Bank and Another

The appearance by legal representatives were the exception rather than the rule, and I decided to issue a directive to the parties' attorneys directing them to submit heads of argument on behalf of their clients addressing the question posed in the directive[6]. I also invited the local attorneys to file submissions, but only received heads of argument from the attorneys on behalf of Nedbank Ltd t/a MFC ("*Nedbank*") and Firstrand Bank Ltd ("*FRB*"). Of the heads of argument received, only those filed by the attorneys and counsel for Nedbank were of assistance, and I wish to thank them for their contribution. I was surprised by the fact that more attorneys did not join in the debate. The standard of FRB's attorney's heads of arguments was disappointingly poor and virtually of no assistance to the Court.

THE COURT'S DIRECTIVE AND CONCERN

[3] In the directive issued to all relevant attorneys the following was stated:

> *The practitioners involved in the matters must file Heads of Argument with the Registrar and my secretary before 17*

[6] See paragraph 3 of the judgment.

July 2020 at 12h00 addressing the following pertinent questions:

*4.1 Whether the Magistrates' Courts Act[7] (**"The MCA"**) and National Credit Act, Act 34 of 2005 (**"The NCA"**) in respect of NCA matters, and, in context, and through the prism of the Constitution of the Republic of South Africa 1996 proper effect to section 9 equality right and the section 34 right of access to justice can be achieved if 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.*

4.2 Whether the provisions of the NCA, properly interpreted through the prism of the Constitution, create a specific set of structures and procedures relating to NCA matters which, read in context and on an interpretation, by necessary implication provides for the magistrates' court to be the court of first adjudication in all NCA matters, to the exclusion of the High Court as a court of first adjudication, save only in the event that there are unusual or

[7] Act 32 of 1944.

extraordinary factual or legal issues raised which in the opinion of the High Court warrant them being heard first in the High Court.

5. Take note that the Court is not seized with the broader question whether the High Court should entertain matters that fall within the jurisdiction of the magistrates' courts; Or 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; Or 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. That is not before this Court at this stage" [8][Own emphasis]

[4] Many defendants that are sued by credit providers and financial institutions from out of this Court lives in the countryside towns and on farms surrounding the seat of the Court (Middelburg – Mpumalanga) as well as the Main Seat in Mbombela. When the financial institutions decide to take to the courts to enforce its rights in terms of the agreements, the defendants are normally in arrears with their obligations

[8] Directive issued by the Court on 03 July 2020.

for some reason. There is an expectation that as a result of the COVID-19 pandemic, the resultant insolvencies of employers and large-scale retrenchments, the Courts will become inundated with legal processes that are issued to recover outstanding debts from consumers that defaulted and failed to comply with their obligations in terms of the credit agreements concluded in better times. Some defendants are indigent people, and often very poor. The NCA was, amongst other, enacted to help previously disadvantaged citizens to secure access to credit that they would in the past not qualify for, and to eventually protect them against some unscrupulous large finance houses and financially strong creditors. Before credit is granted to a consumer his or her ability to service these loans must also be considered by the financiers to prevent reckless credit to be granted to consumers who were for so long, unfairly deprived from access to credit.

[5] Almost every town in this Court's jurisdiction has its own Magistrates' Office and civil Court. If a town does not have such an office, a periodic Court will be in close proximity of the town. Only Mbombela and Middelburg are home to seats of the High Court in Mpumalanga, and is situated a fair

distance from most of the towns resorting under its jurisdiction. The distances to be travelled between these outlying towns and the High Courts sometimes constitutes a serious deterrent to consumers who are already financially distressed and reliant on public transport that becomes ever more expensive to attend Court. Not all the residents of these outlying towns have access to their own transport. Making use of the public transport has its own challenges as well. The economy has not exactly been performing at its best the last decade either. Many consumers are also farm workers, residing on farms dependent on the employers' goodwill to provide them with transport to the closest town in order to secure public transport to the Courts.

[6] Every Magistrates' Court is manned by one or more properly trained and competent Magistrates, or judicial officers. They have competent staff and are capable of handling all civil matters coming their way. The judicial officers regularly attend training courses, and have generous access to all the acts, law reports and legal reference works to keep them updated on the developments in the law. They are also well versed in NCA-matters.

[7] This has been the state of affairs since the dawn of our democracy, and everybody should have access to the courts and the protection it offers through the capable judicial officers manning it applying the law and upholding the Constitution of South Africa.[9] However, I am of the view that most of our citizens are being deprived of equal access to the courts by credit providers instructing its attorneys to institute legal proceedings in matters based on the NCA in the country's High Courts as court of first instance and not in the Lower Courts as was the intention of the legislator when it drafted the NCA.

THE MATTERS BEFORE COURT AND THE NATURE THEREOF

[8] There were initially five matters that were included in the directive above, but two of the plaintiffs decided not to proceed with the matters. The attorneys initially filed "*Notices to Transfer the Matters to the Magistrates' Courts*". After I indicated that it was not an option considered by the Court, the attorneys for the plaintiffs simply withdrew their clients' actions without providing any reasons.

[9] Act 108 of 1996.

[9] This Court, when sitting as unopposed Court is inundated with cases issued by the Registrar that falls within the monetary jurisdiction of the Magistrates' Courts, most of which has its cause of action to be found in the NCA. In some of the matters the quantum is far below R 50 000.00. Matters that could more cost effectively have been dealt with by the Magistrates' Courts. So too matters in which the parties agreed, and consented to the jurisdiction of the Magistrates' Courts for the enforcement of the obligations flowing from the agreement, or any breach thereof, despite the fact that the Magistrates' Courts would otherwise not have had the jurisdiction to adjudicate those matters. Most of those matters are also subject to the NCA.

[10] There are three matters before me are:

[10.1] *Standard Bank of SA Ltd v JJ Meyer and another*; Case no. 3269/19; plaintiff seeks default judgment and an order declaring the fixed property that is bound as security to the plaintiff specifically executable; the property served to secure a money-lending transaction; the agreement is a credit agreement regulated by the NCA; the total outstanding claim is **R 285 035.45;** ("*Standard Bank matter*").

[10.2] *Firstrand Bank Ltd v JFG Mostert and another*; Case no. 4050/18; plaintiff seeks default judgment and an order

declaring the fixed property that is bound as security to the plaintiff specifically executable; the property served to secure a money lending transaction; the agreement is a credit agreement regulated by the NCA; the total monetary claim is **R 910 500.79**;("*the FRB matter*").

[10.3] *Nedbank Ltd t/a MFC v Themba Makhatini*; Case no. 3166/19; plaintiff seeks on order for delivery of a vehicle in terms of an instalment Sale Agreement entered into between it and Mr Makhatini as he breached the terms of the agreement by defaulting on paying regular instalments; the total contract price (principal debt) in terms of the agreement is **R 316 187.52;** it falls within the monetary jurisdiction of the Regional Magistrates' Courts; ("*The Nedbank matter*").

[11] The NCA and its procedural requirements is apply to all the matters in paragraph 6 hereof. Further, in terms of the agreement in the Standard Bank matter the parties agreed to the following clause (clause 14) with regards to future litigation:

"14 Jurisdiksie

Die Verbandgewer [defendant] stem kragtens artikel 45 van die Wet op anddroshowe, Wet No. 32 van 1944, soos van tyd tot tyd gewysig of

herverorden, in dat die Bank kan besluit of hy regstappe in n landdroshof wil doe nom enige van sy regte af te dwing of te implementer."[10]

[12] The loan agreement in the FRB matter contains a similar clause in terms whereof the defendants consented to the jurisdiction of the Magistrates 'Courts, and states the lender (FRB)[11]:

"shall have the right to institute legal proceedings in any other competent Court having jurisdiction in the matter"

[13] In the Nedbank matter the parties agreed that:

"You [defendant] agree that any legal proceedings that may be brought in terms of this Agreement may be heard in the magistrates court regardless of the amount claimed."[12]

[14] All the matters could, if the plaintiffs elected to, have been instituted in the Magistrates' Courts having jurisdiction over the persons of the defendants. It seems though as is the parties, or their attorneys, are reluctant to approach the Magistrates' Courts. That, despite the

[10] Bundle, Case no 3269/19, page 71.
[11] Bundle, Case no, 4050/18, page 49, clause 5.9.
[12] Bundle, Case no 3166/19, page 21, clause 20.

fact that they obtained consent from the consumer to the lower court's jurisdiction.

ACCESS TO COURTS AND FIRST NATIONAL BANK V LUKHELE AND SEVEN OTHER CASES [2016] ZAGPPHC 616 (16 MAY 2016) (*"LUKHELE"*)

[15] In *Lukhele* judgment[13], penned by the Judge President of this division, Legodi JP (at the time he had not been appointed as the Judge President of this Division), the Court was faced with creditors issuing processes from the Mbombela Circuit Court (as it was then) against defendants residing or working closer to the Middelburg Circuit Court. Both Courts were circuit courts of the Gauteng Division of the High Court. Often the immovable properties that were the subject of the prayers for specific executability were also situated in towns much closer to Middelburg.

[16] Legodi JP summarised the question facing the Court as follows:

> *'The following cases are about access to courts, the mechanism to facilitate such access, the hindrance of access to courts brought about by the issuing thereof in Mbombela circuit court,'* [14] [Own emphasis]

[13] See footnote 5.
[14] Lukhele, paragraph [3].

[17] Referring to section 7 of the Superior Courts Act ("*The SCA*")[15] and the establishment of two circuit courts in Mpumalanga Province as contemplated in section 7(1) of the SCA with seats in Middelburg and Mbombela, Legodi J stated that:

> "*[9] One sees a hierarchy within the legislative framework which, in my view, is aimed at the attainment of justice by bringing the courts closer to the people.*"[16][Own emphasis]

[18] After discussing the law and arguments on behalf of the parties, the JP made the following very important remarks:

> "*[17] What is important for these proceedings is that there has always been a notion of fair play, and substantial justice. Forcing a person to litigate in a forum far from his residence or home, in my view, does not constitute fair play and offends against the principle of substantial justice; unless there are of jurisdiction for the chosen forum. In the present cases, the defendants are not only been hauled to a place far away from the civil circuit court in Middelburg, but a distance away from the main seat of the Division in Pretoria bearing in mind that, that is, where the forum used to be, until the establishment of the two civil circuit courts in Mpumalanga Province effective from I February 2016.*
>
> *[18] It could never have been the intention in establishing the two circuits that defendants who are residents in Middelburg will have to travel for about 200*

[15] Act 10 of 2013.
[16] Lukhele. Paragraph 8.

kilometres to the circuit court in Middelburg to defend their cases instead of travelling less than 10 kilometres to the circuit court in Middelburg when previously they had to travel to Pretoria which is far less than 200 kilometres.[17]

[19] Turning to the NCA, the JP remarked:

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

[17] Lukhele. Paragraphs 17 and 18.

[23] 'The core of the Act is the objective to protect consumers. The protection however, must be balanced against the interests of credit providers and should not stifle a "competitive, sustainable responsible, efficient [and] effective... credit market and industry". The Act, ... replaces the apartheid era legislation that regulates the credit market, and infuses constitutional considerations into the culture of borrowing and lending between consumers and credit providers'."[18] [My emphasis]

[18] The Court then made the following remarks:

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

[18] Lukhele, Paragraphs 22 and 23.

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

[31] To now renege from this promise and the legitimate expectation created in the minds of the many by issuing the summonses in the present matters, in Mbombela and hauling the defendants to Mbombela far-away from Middelburg or around Middelburg, 'would lead to absurdity, so glaring that it could never have been contemplated' by clause. 2.1 of the practice directive and that would be a betrayal to the people of Mpumalanga.[19]

[19] FRB submits that the claim amount in its matter exceeds the monetary jurisdiction limit of the Magistrate's Court. Ms Van Der Hoven, FRB's attorney, does not mention the consent to the

[19] Lukhele, supra, paras 26, 27 and 31.

Magistrates' Courts jurisdiction provided by defendants in the loan agreement. She correctly states that the jurisdiction of the Magistrate's Court is determined in Section 29 of the MCA, which includes subsection 1, but fails to take into account the fact that the Magistrates' Courts monetary jurisdiction in NCA-matters is not limited at all. Ms Van der Hoven further submits that there:

> *" aren't any provisions in the National Credit Act 34 of 2005 that directs or compels the Applicant to enforce the credit agreement by instituting action in the Magistrate's Court. The Applicant submits that Section 127 of the National Credit Act is not applicable to the Applicant's claim."*

Taking into account the view I hold, she is wrong. She proceeds to argue that FRB therefore '*does not agree with the contention the NCA provides for the Magistrate's Court to be the court of first adjudication'*. Without providing any reasons for the submission. FRB's main argument is that its claim exceeds the Magistrates' Courts monetary jurisdictional limit of R 400 000.00. FRB's final submission[20] is addressed in the judgment, but I need to mention that the question posed to the parties was obviously misunderstood by Ms Van der Hoven as it is not whether the *MCA is unconstitutional nor whether the NCA falls short of the constitutionality test at all*.

[20] *"In so far as the Constitution of the Republic of South Africa and the National Credit Act may be interpreted to imply that it would not be in the interest of justice to institute these proceedings in the High Court, it is for the Constitutional Court to declare the relevant provisions of the Magistrate's Court Act unconstitutional or for the legislature to amend the relevant legislation. The Applicant cannot act in contravention of existing legislation not is it competent for this court to make orders that are in contravention of or are contradictory to current legislation."* [Own emphasis]

THE NCA AND JUDGMENT IN NEDBANK LTD v GQIRANA NO AND ANOTHER, AND SIMILAR MATTERS[21]

[20] The judgment by the full court of the North Gauteng Court [22] in *Nedbank Ltd v Thobejane and similar matters* the Court found that matters falling within the monetary jurisdictional limits of the Magistrates' Courts must be instituted in those courts unless the High Court, on application, grants leave to a litigant to approach the High Court as Court of first instance, is the subject of an appeal to the Supreme Court of Appeal. The pertinent question raised in that case was, as I understand not extended or limited to actions and applications under the NCA.[23]

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[21] 2019 (6) SA 139 (ECG)

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

[23] *"[91] In our view the solution pertaining to matters that fall within the jurisdiction of the magistrates' courts is that such matters should be issued in the magistrates' courts. If a party is of the view that a matter that falls within the jurisdiction of the magistrates' courts should more appropriately be heard in this division, an application must be issued setting out reasonable grounds why the matter should be heard in this division. Inefficiency of the other court, real or perceived, and the convenience of the plaintiff alone will, however, not constitute such reasonable grounds. Only after leave has been granted may the summons be issued in the High Court.*

[92] To answer the questions posed in the directive, in our view the High Court is not obliged to entertain matters that fall within the jurisdiction of the magistrates' courts purely on the basis that the High Court may have concurrent jurisdiction. Furthermore, both the local and provincial I division can mero motu transfer a matter to the other court, if it is in the interests of justice to do so. Lastly, there is an obligation, not only on financial institutions, but also on all litigants, to consider the question of access to justice when actions or applications are issued, and the courts have a duty to ensure that access to justice is ensured by exercising appropriate judicial oversight.

[93] Regarding matters where the local and/or provincial division is the more appropriate forum, the court hearing the matter may mero motu transfer the matter to that court."[Own emphasis]

[21] In the *Gqirana-matter* the full Court of the Eastern Cape Provincial Division was also called upon to decide similar questions put to it as those that the Judge President of the Gauteng Division put to the full Court in the *Thobejane-matter*. The Court came to the conclusion that:

> "*[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.*"[24] [Own emphasis]

[22] I am in agreement with the *Gqirana-judgment* and the matters before me is also limited to NCA matters as can be gleaned from the brief discussion earlier in the judgment. Before I turn to deal with the *Gqirana-matter*, I need to make a few brief remarks about section 34 of the Constitution, as it has a direct bearing on the discussion whether a plaintiff or respondent may issue a process in terms of the NCA out of the High Courts.

[24] Gcirana, supra, at para 73.

THE CONTENT AND INTERPRETATION OF SECTION 34 OF THE CONSTITUTION AND THE ISSUE OF EQUALITY/ ACCESS TO THE COURT AND JUSTICE

[23] While the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum is a fundamental principle of the law, and a fundamental right so important that it is *entrenched in the Constitution,*[25] this right *does not include* a litigants' *choice of procedure or forum* in which access to courts is to be exercised[26].

[22] The main argument against the view that all matters arising from the NCA should be instituted in the Magistrates' Courts is that there is a strong presumption against ousting the High Court's jurisdiction[27] as well as the fact that the NCA does not *expressly* state that the Magistrates' Courts have exclusive jurisdiction in such matters. While

[25] Constitution, section 34.
[26] See paragraph 1 above and note 4.
[27] Lenz Township Company (Pty) Ltd v Lorentz NO & andere 1961 (2) SA 450 (A) at 455B per Steyn CJ: "*Daar bestaan 'n sterk vermoede teen wetgewende inmenging met die jurisdiksie van Howe, en 'n duidelike bepaling is nodig om daardie vermoede te weerlê."* See also Minister of Law & Order & others v Hurley & another 1986 (3) SA 568 (A) at 584A-B per Rabie CJ: *"It is a well-recognised rule in the interpretation of statutes, it has been stated by this Court, 'that the curtailment of the powers of a Court of law is, in the absence of an express or clear implication to the contrary, not to be presumed'. (Schermbrucker v Klindt NO 1965 (4) SA 606 (A) at 618A, per Botha JA, citing Lenz Township Co (Pty) Ltd v Lorentz NO en Andere 1961 (2) SA 450 (A) at 455 and R v Padsha 1923 AD 281 at 304.) The Court will, therefore, closely examine any provision which appears to curtail or oust the jurisdiction of courts of law."*

the NCA does not expressly state that all NCA related matters must be issued and tried in Magistrates Courts, the presumption cannot be applied to provide jurisdiction to the High Court where it does not have in terms of an Act of parliament.[28]

[23] In our country the problem is even deeper rooted because of poverty and social and economic inequality resulting from an abusive *apartheid* history. As a result there is an even bigger obligation on our courts to ensure access to justice (and therefore to the courts) to everyone that is not only affordable, but the process of attending the court proceedings must be within the means of the debt stricken consumer. 'Legal costs are totally unaffordable even to the middleclass. What is the point of having a progressive Constitution when it is impossible for citizens to approach the courts due to financial constraints? It is paying only lip service to the rule of law when it is impossible to effectively apply it to the advantage of litigants seeking access to justice. [29] Section 7(2) of the Constitution requires that the state must 'respect, protect, promote and fulfil the rights in the Bills of Rights. Section 8(1) of the Constitution makes it clear that the Bill of Rights also binds the judiciary. Consequently, the court has an obligation to ensure that

[28] Oosthuizen v Road Accident Fund 2011 (6) SA 31 (SCA) at para [17].
[29] Thobejane, *supra*, par 58.

access to justice is attainable and affordable to people from all walks of life. Therefore, the court always has a duty, to guard against a regal court system that negatively impacts impecunious litigants in accessing justice.'[30]

[24] If it is accepted that the right to access to courts, as protected in the Bill of Rights (section 34) of the Constitution does not include a right to choose a specific forum, reading the NCA (and all other statutes) through the prism of the Constitution would lead to an interpretation that the legislator intended the Magistrates' Courts to be the only courts if *first instance* in such matters. By coming to that conclusion, it can never be argued that the door of the High Courts have been closed to the citizens of the country. Should a party be aggrieved by a judgment by a Magistrate, he or she may appeal to the High Court. Such a litigant does not even have to apply for leave to appeal before he or she note an appeal, as it is a right given to an aggrieved party in terms of the MCA[31].

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[30] Ibid, para 64.

[31] Magistrates' Courts Act, supra, section:

83 Appeal from magistrate's court

Subject to the provisions of section 82, a party to any civil suit or proceeding in a court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal against —

(a) any judgment of the nature described in section 48;

(b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs;

(c) any decision overruling an exception, when the parties concerned consent to such an appeal before proceeding further in an action or when it is appealed from in conjunction with the principal case, or when it includes an order as to costs.

[25] Nedbank's argues that it is of utmost importance to keep the differences between the processes of granting default judgment between the Magistrates' Court and High Court in mind. In terms of rule 31 of the Uniform Rules of Court, the presiding Judge has not only the discretion after hearing evidence, to grant or refuse default judgment but *also to make such order as it deems fit*, and his exercising of a discretion makes the refusal of default judgment not appealable. In the event of an application for default judgment in the Magistrates' Court, the refusal of default judgment is appealable. No leave to appeal is required as the aggrieved party has the right to appeal to the High Court. Nedbank argues that as a result of this right to appeal, any potential saving in legal costs that a consumer might incur through litigation in the Magistrates' Court, which is denied, will be surpassed tenfold by an appeal to the High Court, and that the appeals will cause more litigation for the High Courts. This is not correct, as will be dealt with later in this judgment. Rule 43 A of the rules in terms of the MCA gives a Magistrate wide-ranging discretion when dealing with execution against a debtor's primary residence when judgment and an order to have a bonded property declared specifically executable serves before him or her.

[26] In terms of the judgment of the full court (Gauteng) in *Mokebe*[32] the Court had the following to say about judgments sought where the plaintiff also seeks to rely on the security it holds in the form of a mortgage bond over the property:

> *"[17] We are, however, of the view that it is obligatory for a mortgagee seeking execution to find a cause of action based on execution to allege and prove its entitlement to the money judgment which, in turn, is a necessary averment in order to sustain the action to obtain an order for execution. Coetzee J said in Barclays Nasionale Bank that when the mortgagor is sued it is really both actions that are instituted: the personal action aims at recovery of the debt and the other for utilising the property to pay the debt.*
>
> *[23] It was argued that rules 46 and 46A anticipate the possibility, though not necessarily, of a money judgment preceding an order of executability. However, the submission that rule 46(1) (a) (i) presupposes that a money judgment may be obtained separately from, and prior to, an order of executability cannot be upheld. The very fact that both the money judgment and the order for executability are given at the same time is not in conflict with the rule which requires certain steps against movables prior to execution against the immovable property. It is purely a prior procedural step before a writ against the immovable property is issued. It is a step separate from the monetary judgment and the order declaring the immovable property executable.*
>
> *[29] There is, therefore, a duty on banks to bring their entire case, including the money judgment, based on a mortgage bond, in one proceeding*

[32] Absa Bank Ltd v Mokebe and related cases 2018 (6) SA 492 (GJ)

simultaneously. Should the matter require postponement for whatever reason, the entire matter falls to be postponed and piecemeal adjudication is not competent."[33]

[27] In terms of Rule 43 A of the rules in terms of the MCA, the law relating to the execution against residential immovable property have now been codified. I do not agree with the objection that Nedbank's counsel raises to the effect that only a High Court may refuse judgments, and that leave to appeal will be needed by the consumer if he or she feels aggrieved and wishes to appeal the High Court's order. The Magistrate hearing an application for judgment and an application in terms of rule 43 A is given wide powers, including an overriding discretion to postpone a matter. In terms of the rule a Magistrate considering an application to execute against the residential property of a debtor may:

"*(d) order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment*

(e) set a reserve price;

(f) postpone the application on such terms as it may consider appropriate;

(g) refuse the application if it has no merit;

(h) make an appropriate order as to costs, including a punitive order against a party who delays the finalisation of an application under this rule; or

(i) make any other appropriate order." [Own emphasis]

[33] Mokebe, *supra*, paras 17, 23 and 29.

[28] Those matters referred to in paragraph 26 of this judgment must be brought before a Magistrate in a single application for default judgment and the Court must adjudicate it according to the rule 43A. The wide discretion given to the Magistrate in rule 43 A mirrors the discretion and powers a High Court has in those matters. Mr Jacobsz's argument in that regard is therefore not sound.

[29] It seemed to me that Nedbank understands the Court's main aim to be the '*lightening of the workload*' in the High Court, and argues that it will likely have exactly the opposite result in that two judges of the relevant Division will have to hear the appeal from a Magistrates' Court in the event that the Magistrate refuses judgment. Firstly, I am of the view that the assumption that there will be a drastic increase in appeals is not supported by any facts and is mere speculation. Why would the appeals increase drastically? The assumption is based on a misconception that the Magistracy is not competent in NCA matters and somehow lacks training. That is clearly wrong and not based on any facts. Secondly, the High Court's concern is not based on "*lightening the workload*" of judges or the registrar. It has always been about the access to courts for consumers in dire straits who places their last hope and trust in the judicial system. Most normal credit agreements litigation that does <u>*not*</u> rely on security in the form of mortgage bonds

registered over residences are handled by the Registrar of the Court in terms of rule 31 (5) of the Uniform Rules. Such matters are rarely dealt with by judicial officers, unless the registrar for some reason, in terms of rule 31 (5) refers the matter to open Court.

[30] It is accepted that when the legislator drafted the NCA it was aware of the fact that they are enacting it that will have a direct effect on the normal citizens. It is submitted that the well-known common-law presumption in respect of the interpretation of statutes, namely that the legislature does not intend to enact invalid or purposeless provisions, applies to the NCA.[34] Why was the relevant sections providing the Magistrates' Courts jurisdiction to entertain matters arising from the NCA, irrespective of the monetary limitation in the MCA the enacted? It was done with the sole intention of bringing all NCA matters under the jurisdiction of the Magistrates Courts as court of first instance. If that was not the purpose, the stipulations in both the MCA and NCA are superfluous.

[31] When financial institutions, and other credit providers, decide to enforce the agreements, and instruct its attorneys to do so by suing out of the High Court, it determines where the defendant will have

[34] (Steyn, Uitleg van Wette, (1981), pages 119 to 124.

to attend Court if he or she wants to defend the matter. Be it on the merits of the case or simply due to the fact that the judgment, if granted by the Court, might lead to the sale in execution of their homes (in foreclosure matters) leaving them and their families homeless and destitute. Having chosen, for example to issue summons out of Middelburg – Local Seat – and the defendant resides in Lekwa (Standerton), he or she will have to travel about 145 kilometres to attend the Court in Middelburg. More than likely when the plaintiff's attorney or counsel is made aware of the fact that the defendant is in attendance, it will lead to a postponement of the matter to obtain instructions from the plaintiff. The already financially distressed defendant is then forced to travel the distance to Court and back in order to avoid losing his or her family home. An expense that they can ill afford at that stage.

[32] Had summons been issued out of the Magistrates' Court the same defendant could walk to the Court building and back to his home. A feat impossible in the example in the previous paragraph. If he makes use of attorneys services, he would only have to instruct one set of attorneys in Lekwa to assist him in Court, whereas if the action was sued out of the High Court in Middelburg, and he needed the assistance of an attorney, he or she would most probably have had to make use of two sets of attorneys. The access to Court is made

almost impossible to the defendants. As I have already indicated earlier, almost every town has a Magistrates' Court that serves the community within which it is situated. The lamenting by the banks (although not in *casu*) of the perceived i*nefficiency* of the Magistrates' Courts is in my view more perceived than real. How would these judicial officers whom the legislator trusted to apply the necessary judicial oversight ever gain experience in NCA-matters if not entrusted therewith? I will return to this aspect later. Smaller legal firms from the previously disadvantaged portion of our population in smaller towns should be given the opportunity to do work for the credit providers. This will also address issues like transformation and provide a healthy contribution to the development of the countryside.

[33] The High Court has always discouraged plaintiffs from approaching it with a matter that can be dealt with in the magistrate's court at less expense to the litigants.[35] Rule 69(3) of the Uniform Rules of the High Court provides that, except where the defendant is awarded costs, the civil magistrates' courts tariff of maximum fees for advocates between party and party will apply where the amount or value of the claim falls within the jurisdiction of the magistrate's

[35] Standard Credit Corporation Ltd v Bester 1987 (1) SA 812 (W); Mofokeng v General Accident Versekering Bpk 1990 2 SA 712 (W) at page 717 and Cilliers, Law of costs (2007) 2-23.

court, unless the court directs otherwise. From this it seems as if defendants are protected from plaintiffs approaching the High Courts in order to get higher scale of fees awarded. This might appear to be so, but in reality this seldom happens as a result of the consent by a defendant in the loan agreement to accept liability for plaintiff's legal fees on a scale as between attorney and client. As discussed, it is apparent that the cost-aspect, although an important factor, is not the most important deterrent to access to justice by the normal citizens of our country. The location of the seats of the High Courts are a very important contributor. I am not even going to dwell on the atmosphere in the High Court that is very intimidating to lay persons.

[34] 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 prevent or hinder the possibility of access to justice. The position that a plaintiff is *dominus litis* and can choose any forum that suits

him/her is at best outdated[36]. It loses sight of the deep seated inequalities in our society and the constitutional imperative of access to justice[37].

[35] 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 basis that they are *dominus litis*. This principle is outdated and smacks of litigious arrogance by those who still believe therein, and apply the principle. If the common law is developed in this regard neither will the law making powers of the legislature be usurped nor will the plaintiff prejudiced in a manner that offends the provisions of section 34[38]. 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.[39] The right to equality[40] is also important and is promoted in the same breath. The full Court in *Cqirana* came to the conclusion that the common law *need not be developed* in deciding the question as to whether matters falling within the ambit of the NCA must be adjudicated in Magistrates' Courts as courts of

[36] Lukhele, supra.
[37] Thobejane, supra, at para [79].
[38] Of the Constitution.
[39] Cqirana, supra, at para 88.
[40] Section 9 of the Constitution.

first instance. I am of the view that it was correctly decided and will turn to discuss this now.

THE NATIONAL CREDIT ACT AND THE MAGISTRATES' COURTS JURISDICTION.

[36] In order to determine the purpose of the NCA the preamble to the Act, inter alia, states that the purpose is:

> *"To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt-reorganisation in cases of over-indebtedness . . . to establish national norms and standards and relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit"*

[33] Section 2 provides that the NCA must be interpreted in a manner that gives effect to the purposes as set out in section 3(5) thereof, which stipulates:-

"3 Purpose of Act

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:-

(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;

(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)…..

i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."[Own emphasis]

[34] That the NCA aims to protect consumers is evident from the measures introduced by the legislature to prevent consumers from taking up credit that they cannot afford[41].

[35] The NCA, in section 90, regulates provisions that will be regarded as unlawful in credit agreements. A provision of a credit agreement is unlawful if-

"*90 (2) (k) it expresses, on behalf of the consumer-*

(i) an authorisation for any person acting on behalf of the credit provider to enter any premises for the purposes of taking possession of goods to which the credit agreement relates;

(iii) an undertaking to sign in advance any documentation relating to enforcement of the agreement, irrespective of whether such documentation is complete or incomplete at the time it is signed;

(v) a limitation of the credit provider's liability for an action contemplated in subparagraph (iv); or

(vi) a consent to the jurisdiction of-

(aa) the High Court, if the magistrate's court has concurrent jurisdiction; or

[41] See sections 80 to 84 of the NCA.

(bb) ***any court*** *seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept;"* [Own emphasis]

In *Absa Bank v Myburg*[42] , Bertelsman J, referring to various decisions to the effect that the task of the interpreter of a statutory stipulation is to ascertain the meaning of the language in the particular context of the statute in which it appears, concluded as follows with respect to section 90 (2) (k) (vi):

> *"If the section [s 90(2)(k)(vi)] is read in the context of the Act as a whole, however, and in particular with reference to sections 2 and 3 thereof, it is clear that the Legislature intended to prevent the institution of an action in the High Court in circumstances such as the present"*

The court suggested that section 90(2)(k)(vi) must actually be read "*as declaring unlawful 'the practice of instituting action in the High Court to enforce the credit provider's rights in terms of a credit agreement while a magistrate's court has concurrent jurisdiction'* "

[36] As stated in First *Rand Bank Limited v Maleke and Three Similar Cases* [43] ("*Maleke*"):

"The [National Credit] Act is further designed to render assistance and protection to the previously disadvantaged section of our population who may wish to enter

[42] JOL 21210 (T).
[43] 2010 (1) SA 143 (GSJ) at 148 B to149 B.

the property market. The Act levels the playing field between a relatively indigent and unsophisticated consumer and a moneyed and 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 2009 (3) SA 340 (T)." [Own emphasis]

[37] In *Metcash Trading Ltd v Commissioner, South African Revenue Services and another*[44] the Constitutional Court held that if the legislature intended to deprive the High Court of jurisdiction it would have to do so expressly *or by necessary implication*.

> *"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*

[44] 2001 (1) SA 1109 CC para 43.

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.""*

[38] Only Parliament has the competence to assign a matter to a Court other than the High Court and if this has not been done then the High Court has constitutional jurisdiction to determine any matter in terms of the Superior Courts Act.

[39] Whilst a Full Bench in *Nedbank Ltd v Mateman and Another*[45] overruled Maleke on the issue of the validity of a debtor's submission to High Court jurisdiction in an NCA agreement this did not, as Lowe J understood it in *Gqirana*, curtail the High Court's jurisdiction to decline to hear a NCA case as set out in *Maleke*. As I read, and understand The Mateman-case, and the question by the Registrar to the court did not include the question whether the High Court is prevented from hearing matters in terms of the NCA. The Magistrates' Court matters were brought in via the proverbial "*back door*" by the Registrar. He stated:

[45] Nedbank Ltd v Mateman & another; Nedbank Ltd v Stringer & another [2008] JOL 21191 (T).

"2. *In die verlede het baie prokureursfirmas in hierdie hof gelitigeer in plaas van om in die Witwatersrand Plaaslike Afdeling te litigeer waar die sake eintlik hoort. Daar word uitsluitlik hier gepraat van aansoeke om verstek vonnisse ig reël 31(5). Die situasie het so hande uitgeruk dat ongeveer drie (3) weke gelede het hierdie kantoor al 42 000 plus sake uitgereik terwyl die Witwatersrand Plaaslike Afdeling op daardie stadium 16 000 sake uitgereik het.*

3. *Die werklading in hierdie kantoor, as gevolg van die konkurrente jurisdiksie het so verhoog dat die Transvaalse Provinsiale Afdeling vinnig besig is om in dieselfde posisie gedruk te word as die Witwatersrand Plaaslike Afdeling. Dieselfde geld ook vir die sake wat tuishoort in die Landdroshof.*

8. *Die interpretasie van artikels 90 en 127 is dus* ***waaroor die dispuut gaan****. Soos wat die Hooggeregshofwet tans staan bepaal artikel 6 dat die Witwatersrand Plaaslike Afdeling en Transvaalse Provinsiale Afdeling konkurrente jurisdiksie het, maar dit is ons oorwoë mening dat dit nie beteken dat die een hof al die werk van die ander hof moet oorneem en sodoende die regspleging in hierdie howe tot stilstand gaan kom nie.*[46]" [Own emphasis]

[40] My understanding of the Registrar's question, with reference to the Magistrates' Court matters, was that matters that "*belong*" in the Magistrates' Courts should be issued in those Courts. It had to do with the wider question that The Court in the T*hobejane* matter was

[46] Mateman, supra, page 3 to 4.

faced with and not the much "*narrower*" enquiry in this Court and before the full Court in the *Gcirana*-matter. The question before the Court in *Mateman* was therefore, in my view, not as it was understood by the Court, but limited to the concurrent jurisdiction of the Gauteng Division and the erstwhile "*Local Division*" in Johannesburg in relation to NCA matters[47].

[41] The provisions of Section 29(1) (e) of the MCA, read with Section 172(2) of the NCA, provides that the Magistrates' Courts have jurisdiction over <u>*all NCA matters whatever monetary sum claimed might be*</u>. The section reads as follows:

> *"(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."*

[47] Now known as the Local Seat.

[42] 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 will be rare indeed and only arise where difficult and complex issues of law, and possibly fact, arise, and with prior permission by the High Court. This implicates Section 34 of the Constitution, and the issue of equality.[48]

[43] Section 29(1) (e) of the Magistrates' Court Act, read with Sections 1, 3 and 90(2) (k) (vi) (aa) of the NCA, providing Magistrates' Courts with unlimited jurisdiction in NCA matters, is a clear indication by the Legislature of its intention to bring justice, and the courts closer to the people by ensuring access to justice generally, and more so to financially stricken people and the previously disadvantaged. The Constitution enjoins all Courts to interpret legislation in accordance with the spirit, purport and objects of the Bill of Rights as per section

[48] Gqirana, supra, paras 38 and 39.

39 (2) of the Constitution[49]. This must be done in a purposive manner. The Bill of Rights and Section 34 must not to be seen in isolation, but in context which includes the history of human rights abuse in South Africa. This often calls for a *generous interpretation to ensure that individuals secure the full protection of the Bill of Rights*.[50]

[44] This was clearly recognised in the MCA and NCA in respect of NCA matters. NCA matters (and also matters that belong in Magistrates' Courts) being brought in the High Court, in my view defeats the section 34 right of access to justice and the section 9 equality right. The legislature created specific methods and processes to afford the previously disadvantaged and financially deprived and distressed people with specific means of access to the Magistrates' Courts as the appropriate forum. Not only is it a cheaper forum to litigate in, but as stated earlier, almost every town in Mpumalanga has its own Magistrate's Court/office.

[49] In ex parte Minister of Safety and Security: In Re: S v Walters 2002 (7) BCLR 633 (CC); Gcada v Minister of Safety and Security [2009] 12 BCLR 1145 (CC); 2010 (1) BCLR 35 (CC) [58] – [62].
[50] Gcirara, supra, para 54.

[45] In my view, within the context of NCA litigation and as stated earlier in this judgment, equality of fairness requires no development of the common law but simply a proper application of the Section 34 right with the proper purpose and interpretation of the NCA through the prism of the Constitution.

[46] I am of the view, as held in *Gqirana*, that the intention of the legislator was clear. Most persons in South Africa are from the previously disadvantaged segment of the population and lacks experience in the credit market, as well as access thereto as a direct result of the extremely oppressive practices applied during the apartheid period. The black majority and to a large extent women, were prevented from occupying positions in Government and the private sector by draconian laws and discriminatory policies in the workplace. There was job-reservation for the white part of the populace while the majority of people had to make do with meagre wages, and could not establish any credit records. In consequence, to this oppressed majority, entrance into the credit-market was virtually non-existent, and to a large extent, still is today. The unacceptable state of affairs have not been remedied yet, and the relevance of the NCA and its application to new entrants to the credit-economy is of utmost importance. This, in my view, simply

cannot be ignored when it comes to the fairness requirement of Section 34 relevant to these matters.

[47] If I understand the *Gqirana-judgment* correctly, and apply the *Lukhele-judgment's ratio* to the question I am faced with, there can be no doubt that the NCA and the MCA , with reference to jurisdiction, had in mind that, In as far as NCA-matters are concerned, hat such matters should be issued, and tried in the Magistrates' Courts. By coming to that conclusion, I do not say that out of an application of the Court's inherent powers, but by simply applying the Constitutional values to the NCA and MCA. Why would the legislator expect of a consumer to travel vast distances to a Court that is already an intimidating prospect for the financially stricken person when there is a court on his doorstep? The extreme rural areas of our country are sometimes not even serviced by public transport every day. The consumer will have to travel vast distances to the High Courts, and will most probably not even be in a position to afford over-night accommodation.

[48] Having regard to the so-called "*consent-clauses*" in the agreements between the parties to this matter, and the opposition by credit providers in general, of an inclination by the Court to consider the jurisdictional matter, one wonders why it was even

considered to incorporate the consent to the Magistrates' Courts jurisdiction into the loan agreements, as the banks, as a matter of fact almost exclusively approach the High Court in NCA-matters. Many matters came before me where the loan amount was not even R 30 000, 00. That is simply an abuse of the Court.

[49] Although it was not raised by the applicants in the current matters, it is often stated that the Magistrates Courts do not have the *capacity* to deal with the matters in terms of the NCA. Magistrates' Courts may also declare property especially executable in terms of its rules and after (in relevant matters) having applied the requirements laid down in the rules pertaining to judicial oversight. One must keep in mind that when the role of the judiciary became a *sine qua non* for executing against primary residences, or residences of consumers, the oversight role became applicable to both the High Courts and lower courts alike.

[50] The Magistrates' Courts have been entrusted with judicial oversight in respect of foreclosures for as long as the High Court have been doing so. So too are they responsible to apply judicial oversight in

matters where creditors seeks emolument attachment orders against a debtor's salary.[51]

[51] Nedbank argues that it was never the intention of the legislature, or the judiciary, to oust the jurisdiction of the High Court in respect of matters arising from the NCA, and those arguments can be found in the act itself. Section 86(11), so the argument goes, originally provided that if a credit provider who has given notice to terminate a review as contemplated in section 86(10) of the NCA, "*proceeds to enforce the agreement in terms of Part C of Chapter 6, the magistrates' court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances*". *In terms of the National Credit Amendment Act 19 of 2014, the reference to "Magistrates' Court" has been changed to "court*". Nedbank's counsel, Adv PSAJ Jacobsz, submits in very helpful heads of argument, that this amendment was brought about to give effect to the judgment of *Collett v Firstrand Bank Ltd*[52] where it was held that both the High Court and Magistrates' Court may grant an order for resumption of debt review.

[51] Section 65 J of the Magistrates' Courts Act.
[52] 2011 (4) SA 508 (SCA).

[52] I do not agree in so far as Mr Jacobsz's argument is that *Collett* should be read as to deal with the questions raised in this Court. Neither the High Court nor the SCA in *Collett* was called upon to interpret section 90 of the NCA or section 29 of the MCA. The question whether the Magistrates/Courts have exclusive jurisdiction in NCA matters were also not raised, or argued before those Courts. Collett therefore is no authority for Nedbank's contention. The High Court sitting as a Court of appeal in matters from the Magistrates' or High Court will, if it is of the view that the Magistrate erred, refer the matter to the court a quo to order resumption of the debt review proceedings, or replace the Magistrate's order with such an order.

[53] Further, according to Nedbank, the provisions of section 164(2) of the NCA is also contrary to any intention to oust the jurisdiction of the High Court in respect of matters arising from the NCA. If there was ever an intention that the High Court should not have jurisdiction to hear NCA matters, so goes Mr Jacobsz's argument, the legislature would not have made a pertinent reference to the High Court in this section.

[54] Section 164 of the NCA reads as follows:

"164 Civil actions and jurisdiction

(2) In any action in a civil court, other than a High Court, if a person raises an issue concerning this Act or a credit agreement which the Tribunal-

(a) has previously considered and determined that court-

(i) must not consider the merits of that issue; and

(ii) must apply the determination of the Tribunal with respect to the issue; or

(b) has not previously determined, that court may-

(i) consider the merits of that issue, or

(ii) refer the matter to the Tribunal for consideration and determination."

[55] I am of the view that Mr Jacobsz's interpretation is incorrect. Section 164 (2) of the NCA specifically refers to matters where the Tribunal[53] have had the opportunity to consider a referral to it, or have made a determination of an issue referred to it by a party. The legislator's intention was clearly not to subject matters dealt with by the Tribunal to a "*review*" or "*appeal*" by a Magistrate, but did not want to remove that power from the High Court. That much becomes clear if the wording of section 164 (2) is carefully read, and further if

[53] The National Consumer Tribunal established in terms of section 26 of the NCA.

the content of section 148 of the NCA[54] is considered. In the event that a party to a referral to the Tribunal is aggrieved by a decision of the full panel of the tribunal, the party may approach the High Court to review the decision or appeal against it in terms of section 138, 69 (2) or 73 of the Consumer Protection Act, 2008. A Magistrates' Court is not afforded the jurisdiction to review the Tribunal's findings.

[56] The potential overburdening of the High Court by having to deal with Magistrates' Court matters was not raised by the parties that filed heads of argument. The Judges are appointed to serve the public and have not complained about attending to hearing of matters brought before them in terms of the NCA. It is obvious that the many Magistrates' Courts will be able to render a faster and more effective service to the public and the credit providers than the few High Courts in the country. These facts fell within the legislator's knowledge and contemplation when the NCA was drafted.

[54] 148 Appeals and reviews
(1) A participant in a hearing before a single member of the Tribunal may appeal a decision by that member to a full panel of the Tribunal.
(2) Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may-
(a) apply to the High Court to review the decision of the Tribunal in that matter; or
(b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138 or section 69 (2) (b) or 73 of the Consumer Protection Act, 2008, as the case may be.

[57] To give proper effect to the Section 34 right of access to justice and the equality right cannot be achieved on the issue of Magistrates' Court matters (*relevant to the NCA only*) 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.[55]

[58] I am therefore convinced by the view of Lowe J concluding as follows in *Gcirana*:

> "*[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*

[55] Gqirana, supra, para 65.

application of the legislative intention and not the creation of some new substantive legal principle.

[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 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."

[59] I am of the view that it would unnecessarily burden the parties in matters currently before the High Courts to re-issue their applications and actions in the Magistrate's Courts. So too will unnecessary legal costs be caused if I order that existing NCA-matters should be transferred to the Magistrates' Courts. Nothing prevents the parties to transfer their matters to the relevant lower courts, but that will also be an unnecessary financial burden in the

form of legal costs which will inadvertently end up by being paid by the consumer.

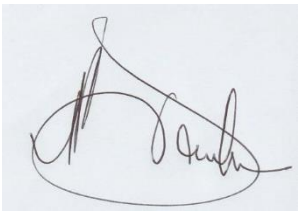
[60] **ORDER:**

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 2020, 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. All existing applications and actions, including those in this matter, must be finalised in the High Court as if it were properly instituted in that Court.

3. The Registrar is directed to enrol the matters in paragraph [10.1] to [10.3] of this judgment on the first available date on the unopposed roll for finalisation.

3. No costs are awarded.



HF BRAUCKMANN.

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

REPRESENTATIVE FOR FIRSTRAND BANK: Ms M VD Hoven

INSTRUCTED BY: Seymore Du Toit & Basson Attorneys; MIRELLE VAN DER HOVEN<mvanderhoven@sdblaw.co.za>

REPRESENTATIVE FOR NEDBANK: Adv PSAJ Jacobsz

INSTRUCTED BY: Hack Stupel & Ross; Barry Jones <Jonesb@hsr.co.za>

REPRESENTATIVE FOR STANDARD BANK: No Appearance

INSTRUCTED BY: Findlay & Niemeyer Inc;

Litigation1@findlay.co.za; bertusventer@bertusventer.co.za

REPRESENTATIVE FOR DEFENDANTS/RESPONDENTS: No Appearance

<u>DATE OF HEARING</u>: NO PHYSICAL HEARING AS ALL RELEVANT PARTIES CONSENTED TO HAVING MATTER DISPOSED OF ON HEADS OF ARGUMENT DUE TO COVID-19.

<u>DATE OF JUDGMENT:</u> 30 JULY 2020. (HANDED DOWN VIA EMAIL DUE TO COVID – 19)

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