IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES/NO.

OF INTEREST TO OTHER JUDGES: YES/NO.

REVISED.

16-9-18
DATE

SIGNATURE

IN THE MATTERS:

NEDBANK LIMITED vs THOBEJANE	84041/15
FIRSTRAND BANK LIMITED vs MALATJIE AND ANOTHER	93088/15
THE STANDARD BANK OF SOUTH AFRICA vs MPONGO	99562/15
ABSA BANK LIMITED vs VAN DER MERWE AND ANOTHER	36/16
FIRST RAND BANK LIMITED vs MAHLANGU	736/16
THE STANDARD BANK OF SOUTH AFRICA vs WOODITADPERSAD AND ANOTHER	1114/16
NEDBANK LIMTED vs SONKO	1429/16
THE STANDARD BANK OF SOUTH AFRICA LIMITED vs NKWINIKA	3429/16
FIRSTRAND BANK LIMITED vs LANGBEHN AND ANOTHER	3595/16
THE STANDARD BANK OF SOUTH AFRICA vs LEMPE	6996/16
THE STANDARD BANK OF SOUTH AFRICA vs GOEIEMAN AND ANOTHER	16228/16
ABSA BANK LIMITED vs IGWILO AND ANOTHER	29736/1
ABSA BANK LIMITED vs PILLAY AND ANOTHER	30302/16

JUDGMENT

TOLMAY, J (with LEDWABA DJP and MOTHLE J concurring)

INTRODUCTION

[1] This matter raises concerns that are two-fold. The first is the ever increasing tendency by litigants, mainly banks and other commercial institutions, to enrol in the High Court, foreclosure applications with amounts falling within the jurisdiction of the Magistrates' Courts. Secondly, litigants taking advantage of concurrent jurisdiction between the Gauteng Division, Pretoria and the Gauteng Local Division, Johannesburg, by enrolling matters in Pretoria even where it involves parties located within the jurisdiction of the Gauteng Local Division, Johannesburg.

[2] The consequence is that, the court roll in the Gauteng Division, Pretoria, is congested resulting in matters which legitimately belong to the High Court being edged-out and their adjudication delayed. Further, it increases the workload for Judges causing a delay in handing down judgments and the waiting period for dates of hearing. This results in the adage "justice delayed is justice denied" becoming a sad reality in this Division.

[3] The aforesaid raised concern for two reasons. The first being that, especially in matters brought by financial institutions, often impecunious defendants or respondents will have to travel in person from distances far away from the Court, to appear and oppose these

matters, in other instances being unable to appear in person, due to the prohibitive transport and other related costs.

[4] This is of concern as the possibility arises that these people are denied proper access to justice. The second concern was that these matters, which could easily have been dealt with, within the jurisdiction of other courts caused enormous congestion of the rolls and results in delays in matters where parties have no choice, but to institute action in this Court.

[5] The scenario referred to above resulted in that Court identifying applications, which were postponed as a result of a directive issued to address these concerns. The directive reads as follows:

"*The parties are called upon to address the following questions*

a. *Why the High Court should entertain matters that fall within the jurisdiction of the Magistrates' Courts;*
b. *Is the High Court 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'*
c. *Is the Provincial division of the High Court obliged to entertain matters that fall within the jurisdiction of a Local Division on the basis that the Provincial division has concurrent jurisdiction;*

d. *Is there not an obligation on financial institutions to consider the cost implication and access to justice of financially distressed people when a particular forum is considered?"*

[6] In the end, because of the importance of these matters the Judge President constituted a full court to consider the issues raised in the directive. In all the matters the applicants were financial institutions (the banks) and through a process of case management, they were given an opportunity to file affidavits in an attempt to answer the questions posed.

[7] Initially there were 13 (thirteen) applications before the Full Court, the matter of **Standard Bank of South Africa v Nkwinika**[1] did not fall within the jurisdiction of the Magistrate Court and was withdrawn. During the hearing we were informed that in three matters, the cases were withdrawn because the client discharged the debt. The relevant details of the remaining eight of the applications are the following:

CASE NAME	TOTAL AMOUNT CLAIMED (excludes interest and insurance premiums)	TOTAL ARREARS	COSTS SOUGHT
Standard Bank of South Africa Limited v Ezra Makikole Mpongo	R227 436.09	R13 777.84	Attorney and client scale
Standard Bank of South Africa Limited v Karin	R 218 324.73	R20 782.10	Attorney and client scale

[1] Case no 3429/16 (unreported)

Madiau Samantha Lempe			
Standard Bank Of South Africa Limited v Radesh and Myra Geraldien Wooditadpersad	R 95 129.64	R 7 772.18	Attorney and client scale
Standard Bank Of South Africa Limited v Neelsie and Angeline Rose Goeieman	R161 430.23	R 9 533.86	Attorney and client scale
ABSA Bank Limited v Anayo Prince and Portia Nomandla Igwilo	R121 906.57	R12 928.63	Attorney and own client scale
ABSA Bank Limited v Jagathisan and Thirunadevi Pillay	R125 009.47	R20 200.78	Attorney and own client scale
Nedbank Limited v Aubrey Ramorabane Sonko	R255 245.56	R13 586.64	Attorney and client scale
Nedbank Limited v Julia Mampuru Thobejane	R125 700.27	R9 662.82	Costs on the magistrates Court scale

THE BACKGROUND AND ARGUMENTS RAISED

[8] Appearing before the Full Court, were the financial institutions that brought the default applications. The Pretoria Society of Advocates was requested to assist the unrepresented Defendants and did comply with the request. The South African Human Rights Commission (SAHRC) and the Department of Justice and Constitutional Development (the Minister) requested and were granted leave to be admitted as *amici curiae*. The court is grateful for their assistance.

[9] At the hearing, the Banks' main argument was that the High Court is obligated to entertain all matters once the Court is seized with jurisdiction. In support of this contention they relied on section 21 of the Superior Courts Act, no 10 of 2013 (Superior Courts Act). The SAHRC and the Minister did not support this argument and argued that constitutional imperatives support the contention that the High Court is not obliged to deal with these matters.

[10] The Banks stated various reasons why they rather choose to institute actions in the High Court. They also conceded that in foreclosure matters and even in credit agreement matters, where vehicles are involved, they as a matter of course, institute actions in the High Court. These matters not only fall within the Magistrates' Courts jurisdiction, but are often for paltry amounts. The following were stated as reasons, why they choose not to institute actions in the Magistrates' Courts:

a) There are inordinate delays;

b) They experience problems in obtaining dates of hearing;

c) There is no uniform approach pertaining to the granting of orders;

d) Unnecessary queries are raised;

e) There exists a general reluctance to declare immovable property specially executable;

f) Section 66(4) of the Magistrates' Courts Act[2] poses a problem as attachments lapse after a year;

[2] Act 32 of 1944 (as amended)

g) Administration and staff at the Magistrates' Courts are not efficient;

h) Delays occur due to unavailability of stenographers and recordings machines;

i) It is not always less expensive to litigate there;

j) They will have to appoint correspondent attorneys, which will result in additional costs; and

k) Due to the depreciation in the value of motor vehicles, they need swift and effective action.

[11] The SAHRC submitted that the rights of distressed debtors are affected. It raised the following arguments in this regard:

11.1 Distressed debtors who default on their loan agreements, and against whom legal proceedings are brought, generally have limited financial means. This much was apparent from the 13 applications that this case concerns. The applications were brought by banks that sought default judgment against the debtor, as well as an order declaring each debtor's home specially executable. In most of those applications, the amounts in arrears were relatively small, yet the debtors had been unable to pay it, despite of the threat of losing their houses.

11.2 In light of the limited financial means of the distressed debtors, many will not be able to afford legal representation and will have

little option, but to represent themselves in legal proceedings. This involves travelling to court to file papers and to appear in person for the hearing. However, most distressed debtors have a restricted budget for travel and accommodation as well as legal costs. If the matter is set down in a distant High Court, the cost of travel to the court and accommodation for the duration of the hearing may be prohibitive. In such circumstances, the debtors will be unable to defend the application or action brought against them. By contrast, if the matter is set down in Magistrates' Courts (which are greater in number and are generally closer (geographically) the cost of travel to file papers and to appear in court will be significantly lower and accommodation may be unnecessary. In addition, the debtor will not have to take additional leave (paid or unpaid) from work in order to travel to court.

11.3 Even if a debtor is able to afford legal representation to defend the proceedings initiated by a bank or creditor (or if the debtor incurs further debt to employ a legal representative), the costs will be significantly higher if the matter is set down in the High Court, rather than the closest Magistrate Court. If the debtor engages the services of a local attorney, he or she will be required to pay for a correspondent attorney to file papers and oppose the matter in the High Court. Unless that attorney has a right of appearance in the High Court, the debtor will also have

to pay for an advocate to appear for him or her. Given the debtor's limited means, the costs of defending a matter in the High Court may be prohibitive.

11.4 In the context of the applications before us, it was argued that, the Magistrates' Courts are more accessible than High Courts in a number of respects. It is a well-known fact that Magistrates' Courts are more accessible due to their number and geographical location. There are fourteen High Courts in South Africa, all of which are situated in large urban centres. By contrast, there are eighty two Regional Magistrates' Courts and four hundred and sixty eight District Magistrates' Courts. The Department of Justice and Correctional Services ("the Department") is in the process of rationalising the territorial jurisdiction of the Magistrates' Courts to ensure that magisterial districts are aligned with municipal districts. This will ensure that Magistrates' Courts are geographically accessible to the persons living in each municipal area.

[12] The Minister of Justice submitted that there are no designated interpreters in the High Courts and warns that this may have the effect of denying the respondent or defendant his or her right to a fair hearing. By contrast, there are four hundred and fifty senior court interpreters, seventy nine principal court interpreters and one thousand

one hundred and twenty five court interpreters designated for assisting the Regional and District Courts across the Provinces.

[13] It was further submitted in regard to the significance of the role of interpreters, that their presence in court assists the litigants in understanding the language used in the proceedings consequently, the proceedings become less intimidating. This objective will not be achieved in the Pretoria High Court, where casual interpreters charge a fee of approximately R2000 to provide this service.

[14] The one important factor when considering access to justice is access for litigants, but the other is the fact that the High Court, due to lack of resources may soon be unable to provide proper access to justice, it would be foolhardy and irresponsible to wait until the system collapses, before steps are taken. In order to understand the context of this statement one needs to consider the statistics relevant to this Court.

[15] In a broader context this division has seen an immense increase in the issuing of new matters over the years. The following statistics illustrate this point:

YEAR	NUMBER OF CASES
2012	74 310
2013	76 960

2014	89 960
2015	103 745
2016	98 091
2017	86 638

[16] The available statistics for the Gauteng Local Division, Johannesburg are as follows:

YEAR	NUMBER OF CASES
2012	48 349
2013	47 520
2014	45 820
2015	44 629
2016	45 099
2017	49 879

[17] Apart from the matters issued, we set out the total numbers of all matters enrolled in the Gauteng High Court, Pretoria for 2013 up to 2017, excluding 2012 and 2015, as the statistics were not available.

YEAR	NUMBER OF CASES
2012	unavailable
2013	18 569
2014	38 367

2015	unavailable
2016	59 751
2017	110 433

[18] The Gauteng High Court, Pretoria has approximately 40 permanent Judges and 23 Acting Judges. In Johannesburg there are approximately 38 permanent Judges and 24 Acting Judges.

[19] Every Judge will sit in court almost every day of the week, except where he or she is allocated for appeals or unopposed motions, but even then, the so called 'free days' are used for preparation. Judges in this Division do not have time to write judgments, this must be done after hours, weekends and during recess. This results in, inordinate delays in delivering judgments obviously this is an untenable situation that needs to be addressed in the interest of justice.

[20] It must also be taken into account that Judges move to other duties every week, with the result that apart from the preparation required for the unopposed rolls, they must start preparing for their duties for the coming weeks. It should be noted that this Division has only 4 law researches assisting Judges with legal research.

[21] Judges also have to attend Rule 46 chamber applications and the normal weekly quota of reviews, petitions, surrogacy applications, case management duties and pre-trials in RAF matters.

[22] It should be noted that in terms of the new Uniform Rule 46A, it now takes more time to peruse and prepare for trial in foreclosure applications, especially where a warrant of execution is sought. Despite the high number of unopposed motions the waiting period for a date for the matter to be heard is about 4 to 5 months. The matters which fall within the jurisdiction of the Magistrates' Courts contribute to the high number of unopposed motions and long waiting periods for dates and hearings.

[23] The number of Judges is disproportionate to the workload. The establishment of the Polokwane High Court Division has yet to make an impact in reducing the workload as most cases from this Division are already pending in the Gauteng Division, Pretoria. The Mpumalanga division has yet to be proclaimed and so no impact on the enormous case load of the Gauteng Division, Pretoria, has been made as yet and in all probability the impact will be negligible, as Gauteng remains the most important centre of commercial activity and the head office of all the National Government Departments.

[24] Due to the aforementioned fact most matters against government departments and parastatal are issued in this Division. For example, the Road Accident's Funds headquarters is situated in Pretoria, as a consequence, many RAF matters are instituted in the Pretoria High Court, despite the fact that the cause of action may have occurred in the jurisdictions of other High Courts. The Road Accident Fund has

other principle places of business such as Kwa-Zulu Natal and Cape Town which allows jurisdiction for litigation, but often some matters that could conveniently be heard in those divisions are issued in Pretoria.

[25] In 2015 and 2016 there was an ever increasing enrolment of unopposed matters that resulted in unbearable unopposed motion court rolls, sometimes about 80 matters were enrolled before a single Judge on a single day. Obviously it was impossible for Judges to prepare properly and consequently the roll has now been limited to a maximum of 60 matters per Judge per day. At least 720 unopposed applications can be enrolled per week. It must be remembered that it is of the utmost importance that Judges be given sufficient time to prepare for the unopposed roll, as the duty to safeguard the rights of undefended defendants rests on the presiding Judge. The Pretoria High Court has more matters on the unopposed role than the Johannesburg High Court. During the recess period, 3 courts in Pretoria High Court and 2 courts in Johannesburg High Court are in operation hearing unopposed matters.

[26] In this division there is an average of 150-160 civil trials daily, which means that each week there are approximately 800 trials enrolled. There is an average of 8-10 Judges allocated to the civil trial court every week. The reality of this situation is that between 10–15 matters are postponed per day, due to non-availability of Judges. This causes

a congestion of the trial rolls and the litigants are prejudiced in that they will have to pay extra legal fees, because their matters cannot proceed on the allocated date of hearing. On average 20 matters per day issued in this Court fall within the monetary jurisdiction of the Magistrates' Courts.

[27] The problem of congested rolls presented itself as far back as 1984. Coetzee DJP lamented the ever increasing workload in **Standard Bank v Shiba**[3] **(Shiba)** observing that the effect of inflation was to "insidiously transfer" the debt collecting function of the Magistrates Court to the then Supreme Court. He ruminated:

"In the result a number of Judges in this Local Division alone (my own estimate is four to five) are required to deal with what is in essence magistrate's court work. How long this process can still continue before grave harm is done to the administration of justice in this Division, is anybody's guess. One thing is certain, this does not lie in the too distant future and something will have to be done pretty soon before, locally, its wheels start grinding to a standstill.

For now we have this latest development, which has great potential seriously to exacerbate these problems. If left unchecked, it could become one of the last straws. It becomes a question of weighing up the desirability of keeping open the Supreme Court's doors for all causes at

[3] Standard Bank of South Africa v Shiba, Standard Bank v Van Den Berg 1984(1) SA 153

all times, which is something that every Judge strains to the utmost to maintain, against the danger of fouling up the cogs of this very machine which must be kept in reasonable running order if it is to fulfil properly its function of performing very essential public work. Those of my Colleagues with whom I have been able to discuss this question are unanimous that it is imperative to do something drastic to stop this deliberate policy, which (unwittingly I believe) is calculated to accelerate greatly the rate of the erosion which is continuously and progressively being caused by the forces of inflation.[4]

[28] The problems relayed in this matter are accordingly not new. It is a fact that the magnitude of the challenges faced by this Court has increased exponentially. What is also of importance is that we now live in a constitutional democracy which must impact on and inform the approach that Courts should follow to address these challenges in order to improve access to justice.

[29] In the light of the aforesaid it is clear that the tendency of Banks and other litigants' to institute actions in High Courts as a matter of course poses a threat on two levels, *to wit*, (i) the right of access to justice of impecunious litigants, (ii) the sustainability of burdening this division of the High Court with matters that could have been instituted in other Courts.

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[4] Shiba 156 G – 157 A

ACCESS TO COURT

[30] The concerns or issues raised in this matter have a bearing on the constitutional right of access to court. Section 34 of the Constitution[5] deals with this right. It reads as follows:

"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."

[31] When commenting on the nature of this right in ***Barkhuizen v Napier***,[6] Ngcobo J stated that:

> *".... Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court.... Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy."* [7] [Court's emphasis]

[32] In its submissions, Absa bank argued that where two or more courts are given concurrent jurisdiction under the Superior Courts' Act, any

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[5] Constitution of South Africa, 1996
[6] *Barkhuizen v Napier* 2007 (5) SA 323 (CC)
[7] *Barkhuizen* at para 31

limitation of the right of access to any one of those courts entails a limitation upon its right of access to courts as contemplated in section 34 of the Constitution. In our view this submission misconstrues the nature of the right. The right does not entitle a person to access a particular court or tribunal. Rather, the right entitles everyone to have their dispute resolved in a fair hearing before "a court" or another independent and impartial tribunal.

[33] In order to consider the constitutional right of access to justice one should defer to the Constitution to establish the role, functions and powers of the Court. This should also be seen and interpreted with due regard to the Bill of Rights, and specifically with section 36 of the Constitution, which states that the rights in the Bill of Rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society. Section 165 of the Constitution establishes that the judicial authority of the Republic of South Africa vests in the Courts. Section 169 of the Constitution sets out the powers of the High Court. Section 171 provides for Court procedures and determines that all Courts function in terms of national legislation and their rules and procedures must be provided for in terms of national legislation. Section 173 gives an inherent power to *inter alia* High Courts to protect and regulate their own process and to develop the common law, taking into account the interest of justice.

[34] Jurisdiction of the Courts, established by the Constitution is provided for in the Superior Courts Act[8]. Section 21 of the aforesaid Act reads as follows:

"Persons over whom and matters in relation to which Divisions have jurisdiction

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.

[35] An analysis of the case law, set out hereunder, will demonstrate that the approach, when concurrent jurisdiction is applicable, is that once seized with jurisdiction a Court needs to reconsider whether it is obliged to hear the matter. Different views were expressed pertaining to a litigant's right to approach the Court of her choice.

[36] In ***Koch v Realty of Corporation of South Africa***[9] ***(Koch)*** a Full Court of the then Transvaal Provincial Division recognised that the High Court and Magistrates Court had concurrent jurisdiction over matters that fell within the territorial jurisdiction of both courts and were

[8] Act 10 of 2013
[9] Koch v Realty of Corporation of South Africa 1918 TPD 356

within the monetary jurisdiction of the Magistrates' Courts, where complex cases were involved it was '*the policy of the law*' that they be dealt with by the High Court. [10]

[37] In ***Goldberg v Goldberg***[11] Schreiner J after reviewing various authorities held that as a matter of principle '*in general a court is bound to entertain proceedings that fall within its jurisdiction*' and could decline to do so only where a statute provided otherwise or in '*the exercise of the Court's inherent jurisdiction to refuse to entertain proceedings which amount to an abuse of its processes*'.[12]

[37] Despite the concern that was raised in the ***Shiba*** matter,[13] previously referred to, the Full Court did not agree that the approach followed in that case was the correct one. In ***Standard Credit Corporation Ltd v Bester and others***[14] ***(Bester)*** it was concluded as follows:

"...courts should be extremely wary of closing their doors to any litigant entitled to approach a particular court. The doors of courts should at all times be open to litigants falling within their jurisdiction. If congested rolls tend to hamper the proper functioning of the courts then the solution should be found elsewhere, but not by refusing to hear a litigant or to entertain proceedings in a matter within the court's jurisdiction and properly before the court".[15]

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[10] *Koch*, at 359
[11] Goldberg v Goldberg 1938 WLD 83
[12] Goldberg, *supra*, at 85
[13] Supra (par 26 of this judgment)
[14] Standard Credit Corporation Ltd v Bester and others 1987 (1) SA 812 (W) at 820I
[15] Bester at 820 I

[39] *In* ***Sealandair Shipping and Forwarding v Slash Clothing Co (Pty) Ltd***[16] ***(Sealandair)*** in the Witwatersrand Local Division (as it then was) Coetzee DJP expressed his disagreement with the decision of the Full Court in the ***Bester*** matter, but considered himself bound by it. The Court approached the case on the basis that the Court should only refuse to entertain the Plaintiff's claim if the institution of its action amounted to an abuse of process of the Court.

[40] In ***Bester***[17] the learned Judge considered what was meant by "*abuse of process*":

> "*It would be unwise to endeavour to formulate an all-encompassing definition of 'abuse of process', because that would encroach upon the exercise of the discretion of a court. In general terms, however, an abuse of the process of the court can be said to take place when its procedure is used by a litigant for a purpose for which it was not intended or designed, to the prejudice or potential prejudice of the other party to the proceedings....plaintiff cannot without more be said to be abusing the process of this Court and should be entitled to judgment in each application with costs on the appropriate scale of the magistrate's court.*"[18] [Court's emphasis]

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[16] Sealandair Shipping and Forwarding v Slash Clothing Co (Pty) Ltd 1987 (2) SA 635 (W)
[17] *Supra*, fn 14.
[18] Bester p 820 A and G

[41] In ***Mofokeng v General Accident Versekering Bpk***[19] the Witwatersrand Local Division (as it then was) again found it necessary to pronounce on the issue, and criticised the approach by the court in the ***Sealandair*** matter. The court confirmed the position in ***Bester*** and stated that "abuse of process" is not a discretionary matter, but rather a factual issue which must be considered in the light of all relevant facts and circumstances and that the existence or not of an abuse of process of Court is merely one of the factors, which the Court must take into consideration in the exercise of its wide discretion as regards to costs.

[42] Our Courts have also long recognised that, where more than one court has jurisdiction in a matter, the plaintiff, as *dominus litus*, has the right to choose the Court in which it wants to institute its action. This principle was recently reaffirmed in ***Moosa NO v Moosa***[20]. In our view, however, the access to court should also take into consideration the rights of defendants or respondents. The plaintiff's rights should not dictate the choice of court at the expense of access to justice.

[43] It would seem that the SCA has confirmed the principle in ***Bester*** in ***Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission, and Others***[21] ***(Agri Wire)*** in that the SCA held that:

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[19] Mofokeng v General Accident Versekering Bpk 1990 (2) SA 712 (W)
[20] Moosa NO v Moosa 2014 JDR 2194 GP at par 19 (101)
[21] Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission, and Others 2013 (5) SA 484 SCA

"Save in admiralty matters, our law does not recognise the doctrine of forum non convenience, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction".[22]

[44] The *dictum* in ***Agri Wire***[23] appears to have been overstated as in particular, the SCA earlier recognised in ***Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party)***[24] applied the doctrine of *forum non convenience* in deciding whether or not to exercise jurisdiction over foreign defendants and further stated that "...appropriateness and convenience are elastic concepts which can be developed case by case."

[45] Furthermore, with reference to the ***Agri Wire***[25] matter, one must take note that in that instance the Court dealt with the doctrine of *forum non convenience,* the question of access to justice was not considered. It must be noted that this case is not concerned with the doctrine of *forum non convenience.* It deals with the constitutional duty of High Courts to regulate its processes and to promote access to justice. This would be achieved by having due regard to applicable legal principles, the rights of the litigants and the constitutional duty to ensure access to

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[22] Agri Wire p 493 par E - F
[23] *Supra* fn 22
[24] Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party) 2008 (3) SA 355 (SCA) at paras 55 to 59
[25] *Supra* fn 22.

justice. This would also prevent certain courts being over burdened with matters that can be conveniently dealt with by other courts.

[46] The advent of the Constitution has introduced access to justice as a primary consideration. This in our view calls for a new approach where High Courts are regulating its process with regard to access to justice.

[47] This principle came to the fore in the unreported judgment of the Gauteng Local Division in ***Kintetsu World Express South Africa (Pty) Ltd v LDC Consultants CC***[26] ***(Kintetsu)*** where Monama J held as follows:

"The division of the courts exist for a good reason. The litigants are entitled to have reasonable access to justice as provided for in the Constitution of the Republic of South Africa. The litigants are entitled to access justice at reasonable costs. The costs of litigation in the high court are prohibitive. The litigants cannot circumvent the need [for] inexpensive justice [by] refusing to approach an appropriate regional court for their relief on the basis that such courts are ineffective. The continued utilization of the said court will increase their efficiency, if indeed such inefficiency does exist.

I could have dealt with the matter and award the costs on the regional civil court scale. However, the facts of the cases do not justify such approach. This approach does not amount to the closing of the doors to

[26] Kinetsu World Express South Africa (Pty) Ltd v LDC Consultants CC, Aveng Trident Steel (Pty) Ltd v Steel Plate and Piping (Pty) Ltd; Trident Speciality Steel v Patricia Nomambele Ngobozane (11741/13, 13043/13, 14213/13) [2013] ZAGPJHC 241 (2 October 2013)

the litigant. In order to give an effect to these increased jurisdictions, the court must insist that the regional civil courts are utilised. These are not appropriate cases where the costs of the magistrate court will address the flagrant disregard of the rules and the Act. There is a distinct division between the court and their jurisdiction. The litigants are not [at] large to convert the high court to the regional civil court. Such conversion amount[s] to an abuse.

The high court must be seen to be discouraging the litigants who bring the matter that properly belong to the regional civil court. A prudent litigant is expected to determine any limitation upon the litigation prior to the institution of a claim. If they fail to do so then they do so at their own risk".[27] [Court's emphasis]

[48] In ***FNB v Lukhele***[28] ***(Lukhele)*** the court, in support of the principle in the ***Kintetsu*** case, stated as follows pertaining to the different seats of Court:

"... It would be fair to conclude that the arrangements which existed for so many years long before the Superior Courts Act and thereafter, had brought about hardship to many litigants who were denied easy and reasonable access to our courts until the establishment of the two circuit courts. Accepting that this is so, one must also accept that, the High Court of South Africa which consists of divisions in each province as

[27] Kintetsu, par 16, 17 & 18
[28] First National Bank v. Lukhele and 7 other cases, unreported judgment of the Gauteng Division, Mpumalanga, [2016] ZAGPPHC 616, dated 16 May 2016

envisaged in subsection (1) of section 6 of the Act, is to ensure that our people have access to courts and that the interest of justice is enhanced by bringing courts for adjudication of matters closer to the people.

...

The determination of an area or areas of a Local seat of the Division can only be aimed at ensuring that access to courts and attainment of justice is achieved when courts are brought closer to the people."[29]

[49] An analysis of the cases referred to reveals the following important observations. The general approach was that once seized with jurisdiction a court was obliged to hear a matter. The overburdening of the High Court with matters that belong strictly speaking in the Magistrates' Courts, although acknowledged, was expected to be addressed on a policy level and the refusal to hear such matters was not regarded as an appropriate solution to the problem. The right to access to justice, as already stated, of litigants was not considered nor the sustainability of burdening High Courts, with limited resources, with matters that could have been instituted in other Courts.

[50] An analysis of the law as applied through the years, illustrates how changing times and values impact on how the Courts approach the question of an appropriate forum. Courts have not yet extensively considered the principle of access to justice through the prism of the Constitution, which obliges Courts, not only to approach the question

[29] Lukhele par 12 & 14

of access from the view point of a plaintiff, but to acknowledge the existence of competing rights and obligations. Accordingly the right to access to justice, must in accordance with constitutional principles, be seen in a broader context and the rights of impecunious debtors must also be taken into consideration as well as the roles and functions of the different Courts.

[51] The Courts are empowered to grant costs on a Magistrates Courts scale if the monetary value falls within that jurisdiction. The Banks however submitted that even if the High Court awards costs on the Magistrates' Courts scale they will still litigate in the High Court because it is convenient for the reasons already alluded to.[30] Their submission clearly disregards the fact that the defendants or respondents right of access to court is negatively affected.

[52] It is obvious that the approach followed by the Banks could potentially result in an abuse of process. As far as abuse of process is concerned the Banks argued that whatever the scope of abuse of process may entail, the mere fact that the claim may involve a routine collection of outstanding debts owed to a creditor, does not bring it within the meaning of the phrase "abuse of process". We beg to differ, if impecunious litigants are denied proper access to justice, or the High Court is incapable of dealing properly and effectively with its workload, due to this practice, it must constitute abuse.

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[30] *Supra*, at paragraph 10 of this judgment

ACCESS TO JUSTICE AS INTERPRETED INTERNATIONALLY

[53] An analysis of foreign law is helpful as it points towards an approach regarding access to justice which is in line with our constitutional values. The SACHR provided a helpful analysis of international law in their heads of argument, of which we made liberal and extensive use in this judgment. Analysis of international law indicates a collective international awareness that access to justice is imperative to ensure the proper application of the rule of law. In ***S v Makwanyane***[31], the Constitutional Court emphasized the value of international and foreign law to constitutional interpretation.[32]

[54] While a Court will give greater weight to binding international law instruments, our courts also have regard to non-binding international instruments in interpreting a right in the Bill of Rights. In ***Grootboom***,[33] the Constitutional Court stated that such instruments provide a framework in which the Bill of Rights can be evaluated and understood.

[55] Sources of non-binding or "soft" international law are important in that they reflect collective and authoritative (albeit not binding) interpretations of State commitments and legal obligations. They may

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[31] 30 1995(3) SA 391 (CC).
[32] Makwanyane, p 413, par 34 & par 35 and the Interim Constitution of the Republic of South Africa 200 of 1993.
[33] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 45 (CC) at para 26.

also reflect the development of new norms of customary international law.[34]

[56] In various jurisdictions around the world access to justice has been considered and confirmed. It was correctly found that the constitutional right of access to justice is inherent to the rule of law.[35]

[57] The Canadian Courts have also made a number of statements that give content to the right of access to justice:

57.1 In ***B.C.G.E.U. v. British Columbia (Attorney General)***,[36] the Canadian Supreme Court emphasized the critical importance of access to courts. It stated that access to courts makes it possible to benefit from other constitutional rights and guarantees. Dickerson CJ noted, in the main, that:

> "...*Of what value are the rights and freedoms guaranteed by the Charter (Canadian Charter of Rights and Freedoms) if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them? How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the Charter if court access is hindered, impeded or denied?*

[34] S v Makwanyane at p 413 para 35; Government of the Republic of South Africa v Grootboom at pa 64, 65 paras 26 – 30, 45; Glenister v President of the Republic of South Africa and Others 2011 (3) SA 346 (CC) at p 373 - 379paras 88 – 103
[35] R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51
[36] [1988] 2 S.C.R. 214

...

There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."[37] [Court's emphasis]

57.2 In ***R v Domm***,[38] the Court of Appeal for Ontario held that the rule of law requires that "*the law must provide individuals with meaningful access to independent courts with the power to enforce the law...*"

57.3 In ***Hryniak v Mauldin***,[39] the Supreme Court of Canada stated that individuals must have effective and accessible means of enforcing their rights. Access to courts must be timely and affordable. In this respect, the Court held:

"Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is

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[37] Ibid, Judgment of Dickson C.J. and Lamer, Wilson, La Forest and L'Heureux-Dubé JJ at para 24 and 25.
[38] R. v. Domm, 1996 CanLII 1331 (ON CA), section 4.
[39] Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87 ("*Hryniak*").

threatened... Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system."[40]

[58] In our country the problem is even more persistent, because of poverty and social economic inequality. As a result there is an even bigger obligation on our Courts to ensure access to justice to everyone. Legal costs are totally unaffordable even to the middle class. What is the point of having a progressive Constitution when it is impossible for citizens to approach the Courts due to financial constraints? Paying only lip service to the rule of law is meaningless, when it is impossible to effectively apply it to the advantage of litigants seeking access to justice.

[59] The importance of the right to access to justice in Africa is illustrated by the fact that the principle is enshrined in article 7(1) of the African Charter on Human and People's Rights ("African Charter"), 1986.

[60] In 2003, the African Commission on Human and People's Rights ("the Commission") submitted a report highlighting the principles and guidelines to be followed to ensure the right to a fair trial and legal assistance in Africa. The Commission set out certain general principles applicable to all legal proceedings. Importantly, the Commission noted

[40] Hryniak at para 1 and 2.

that States shall ensure that access to judicial services is not impeded by the distance to the location of judicial institutions.

[61] The importance of access to justice was confirmed in the American Convention of Human Rights.[41] The right to access to courts was also recognised by the European convention on Human Rights[42] and confirmed by the European Courts of Human Rights.[43]

[62] The European Courts of Human Rights interpreted Article 6, *inter alia*, as follows:

> *"The right of access to courts to be practical and effective.[44] For the right to be effective, an individual must "have a clear, practical opportunity to challenge an act that is an interference with his rights".[45] The nature of this right may be impaired, inter alia, by the prohibitive cost of the proceeding in view of the individual's financial capacity (such as excessive court fees)[46] or by the existence of procedural bars preventing or limiting the possibilities of applying to a court."*

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[41] See section 8(1) of the American Convention on Human Rights 1969. See also I/A Court H.R., *Case of Cantos v Argentina.* Judgment of November 28, 2002. Series C No. 97 ("Case of Cantos").
[42] Section 6 of the European Convention on Human Rights, 1953.
[43] Běleš and Others v. the Czech Republic (ECHR) at para 49, Golder v. the United Kingdom (ECHR) at para 36, Bellet v. France (ECHR) at para 36-38, Kreuz v. Poland (ECHR) at para 60-67, Fayed v. the United Kingdom (ECHR) at para 65; Sabeh El Leil v. France [GC] at para 46, Nideröst-Huber v. Switzerland, (ECHR) at para 30, H. v. Belgium (ECHR) at para 53 and Feldbrugge v the Netherlands (ECHR) at para 44.
[44] Bellet v France (ECHR) at para 38.
[45] Bellet v France (ECHR) at para 36.
[46] Kreuz v Poland (ECHR) at para 60-67

[63] It is enlightening to note that access to justice as well as the economic and social challenges that go with it is not unique to our country. The internationally accepted principles and policies that should be followed to ensure that access to justice for all is guaranteed, resounds with the spirit and objectives of our Constitution. The question the Court has to rightfully ask, is what purpose would the rule of law and the Constitution serve if only the affluent could afford to bring their cases to a Court, put differently, would the rule of law and the Constitution serve its purpose if indigent persons could not bring their cases to Court due to the prohibitive costs or high costs of legal representation.

[64] All of the aforesaid bring us back to our Constitution and the obligations that arise from it. Section 7(2) of the Constitution requires that the state must "*respect, protect, promote and fulfil the rights in the Bill 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 access to justice is attainable and affordable to people from all walks of life. Therefore the Court has a duty, in this case, to guard against a regal court system that negatively impacts impecunious litigants from accessing justice.

HOW SHOULD ACCESS TO JUSTICE BE ATTAINED

[65] The appropriate approach should always be to refer back to the Constitution. Section 173 of the Constitution states that the 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.

[66] The banks argued that the Constitutional Court has set limits to the exercise of this inherent power. *In* ***Phillips and others v National Director of Public Prosecutions***[47] it was held that "*...ordinarily the power in section 173 to protect and regulate relates to the process of court and arises when there is a legislative lacuna in the process*".[48]

[67] The Banks further argued that the Court's inherent power to protect and regulate its own process and to develop the common law having regard to the interest of justice[49] should be exercised with caution[50]. It was further submitted that it is generally confined to regulating the process where a legislative lacuna exists[51] and does not entitle a Court to ignore statutory provisions nor to create rights that did not exist in the first place[52].

[68] We disagree with the above submissions and our view is based on what was said in ***South African Broadcasting Corp v National Director of Public Prosecutions and Others:***[53]

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[47] Phillips and Others v National Director of Public Prosecution 2006(1) SA 505 (CC)
[48] *Phillips p 521 par 48.*
[49] Section 173 of the Constitution.
[50] S v. Penington & Another 1997 (4) SA 1076 (CC); Phillips, Supra, p 521
[51] Parbhoo & Others v. Getz NO & Another 1997 (4) SA 1095 (CC); Oosthuizen v. Road Accident Fund 2011 (6) SA 31 (SCA), at 38C – D.
[52] Phillips, supra, p 521 par 48.
[53] 2007 (1) SA 523 CC.

"In my view it must be added that the power conferred on the High Courts, Supreme Court of Appeal and this Court in section 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction. However, the inherent power to regulate and control process and to preserve what is in the interests of justice does not translate into judicial authority to impinge on a right that has otherwise vested or has been conferred by the Constitution.

In our constitutional scheme a right entrenched in the Bill of Rights is certainly not absolute. Nor do we subscribe to a hierarchy of entrenched freedoms and fundamental rights. A right may be limited, but only in terms of a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom or by any other provision of the Constitution. [Courts emphasis]

[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 interest 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 for any litigant

and to ensure a sustainable and effective system. Although it was stated in ***Phillips***[54] 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.

[70] The question that needs to be answered is how the Court should ensure that access to justice is attained having regard to the issues before us. The Banks submitted this could only be achieved by amending the applicable legislation. If we understand the argument correctly it entails that legislation will have to be amended to exclude concurrent jurisdiction of the High Court in certain matters. However in our view there is an alternative appropriate approach. We are of the view that it is not advisable to interfere or limit the jurisdiction of the High Court. There are other means by which our courts can assure access to justice and ensure a fully functioning Court system, without closing any door for litigants. 'The policy of the law' that was mentioned in ***Koch's*** case[55] that complex matters were to be dealt

[54] Supra at para 65
[55] At paragraph 30 of this judgment.

with by the High Court will still allow such matters, involving novel legal and constitutional issues to be dealt with by the High Court.

[71] We seriously considered whether a practice directive regulating the issues raised in this matter would not be ideal as was done in the Limpopo High Court.[56] Makgoba JP dealt with the issue and he issued a directive that Attorneys must apply for a transfer of matters falling under the jurisdictional amount of the Magistrates' Courts from the High Court to the Magistrates' Courts by way of application in terms of Rule 39(22) of the High Court Rules read with Rule 50(9) and (10) of the Magistrates' Courts Rules.

[72] Section 8 (3) (b) of the Superior Courts Act states that a directive should be issued by the Chief Justice regarding any matter affecting the dignity, accessibility, effectiveness efficiency or functioning of the High Court, therefore we concluded that a practice directive is not the appropriate approach to address the problems alluded to in this judgment. We are of the view that this is a matter that warrants a court order to promote access to justice and uniformity in administering justice in an orderly and effective manner.

[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

[56] Directive of Judge President Makgoba on the 17 May 2018

people. This intention, of bringing justice to the people is reflected in the Preamble to the Magistrates' Courts Act, which reads as follows:

"IT IS CONSEQUENTLY THE PURPOSE of this Act, as an interim measure, pending the further rationalisation 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 certain 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."*

[74] If a litigant bypasses the Magistrates' Courts such litigant is actually defying the attempt by the legislature to bring justice to the people. The legislature also proceeded to provide the necessary resources to the Magistrates' Courts, as was set out earlier in this judgment. The legislature went further, section 29(1)(e) of the Magistrates' Courts Act provides Magistrates' Courts with unlimited jurisdiction relating to actions arising out of any credit agreement as defined by section 1 of the National Credit Ac[57] (the NCA Act). Importantly, section 90(2)(vi) of the NCA states that a provision of a credit agreement is unlawful if it contains a consent to the jurisdiction of the High Court, if a Magistrates

[57] Act 34 of 2005

Court has concurrent jurisdiction. This is indicative of the legislature's intention to ensure access to justice.

[75] In ***Firstrand Bank Ltd v Maleke***[58] and three similar cases it was held that:

"*... in certain circumstances it may be very appropriate to refer a matter to the magistrates' (sic) court. This is particularly so where the amount claimed is within the jurisdiction of the magistrates' (sic) 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 (sic) court. It would therefore not be foreign or contrary to the provisions of purpose of the Act if a High Court terminates the proceedings and refer a matter to magistrates' (sic) court in appropriate cases.*"[59]

[76] In our view it is an abuse of process to allow a matter which can be decided in the Magistrates' Courts, a Local Division of the High Court to be heard in the Provincial Division simply because it has concurrent jurisdiction. Cost orders to discharge such matters being brought to this Court does not promote access to justice.

[77] The attempts by the legislature to provide for access to justice enforces the argument that a process by which the appropriate forum

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[58] First National Bank Ltd v Maleke 2010 (1) SA 143. The Civil Practice of the Magistrates' Courts in South Africa, Van Loggerenberg et al, Service 11 2016 (at footnote 1)
[59] Maleke at 159 A - B

is avoided, as the Banks and other litigants do, must constitute abuse and must allow for a Court to exercise its inherent powers to regulate its own processes as set out.

[78] It is an abuse of the rules to approach this Court in instances where there is a denial of access to justice and the consequent delay of litigation, which is otherwise intended for this Court.

[79] 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 litus* and can choose any forum 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.

[80] In a country, such as ours, with limited resources it is equally untenable to argue that the State must merely supply sufficient resources to the High Court. Although it is obliged to enable the Court to function properly, which unfortunately, does not happen, but that is a matter for another day, it must be appreciated that as a country we

have certain financial constraints. At this point in our development as a democracy we can safely assume that our country is experiencing an economic crisis and that the basic needs of the majority of our people are not met. The reasons for this state of affairs are manifold, but the argument that money should be taken out of the national fiscus to sustain financial institutions, or any other litigants preferred choice of forum is to say unpalatable and unconstitutional, especially in the light of the fact that other Courts, which are more accessible, are available.

[81] In our view the mere fact that the Banks, irrespective of the monetary value of claims institute actions in the High Court in the manner, already alluded to, constitutes abuse as envisaged in the authorities referred to. The legislature has taken steps to ensure access to justice, as set out above. Lamenting about perceived inefficiency of the Magistrates' Courts does not constitute a valid reason to approach the High Court as Court of first instance. The inefficiency, if it exists, must be addressed on another level. The Banks must also adjust their thinking. Are panels of attorneys the only way to go? Should smaller firms in smaller towns not be given the opportunity to do work for the Banks? No correspondents need be appointed if this happens. This could also address issues like briefing patterns and transformation. A paradigm shift is required for all concerned, as we go about giving life to the principles contained in the Constitution.

IS TRANSFER *MERO MOTU* BY THE COURT TO ANOTHER FORUM A LEGALLY SOUND SOLUTION?

[82] The question now arises how the Courts should deal with the problem. Section 6 of the Supreme Court Act 59 of 1959 expressly provides that the Provincial divisions shall exercise concurrent jurisdiction[60] in the areas of jurisdiction of the Local Divisions. However no similar provision is found in the Superior Court Act.

[83] Section 27(1)(b) of the Superior Courts Act empowers a High Court on application, and after hearing all parties, to transfer a matter to another division, if it appears to it that it would be more convenient, or appropriate for the matter to be heard or determined in that division.

[84] Although the language of section 27(1)(b) envisages that a transfer may be made *"upon application by any party thereto and after hearing all other parties thereto"*, it was held in ***Thembani Wholesalers (Proprietary) Limited v September and another***[61] that the court may also order transfer *mero motu*.

[85] In ***Nongovu NO v Road Accident Fund***[62] ***(Nongovu)*** the court held as follows:

"Solomon J in Walters Brick Industries Ltd v Henkes 1938 WLD 4 alluded to the circumstances that need to be considered in an

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[60] *Government Gazette* number 39601, 15 January 2016.
[61] 2014 (5) SA 51 (ECG) para 13
[62] 2007 (1) SA 59 (T)

application for change of venue. These are the convenience of the parties, the convenience of the court and the general disposition of the litigation. A court, in the instant matter the CPD, must itself have jurisdiction before it can transfer proceedings to another court. (Welgemoed and another NNO v The Master 1976 (1) SA 513 (T)). This requirement has been met since the cause of action arose within the area of jurisdiction of this Court, as well as the fact that the defendant was located at that time within the area of jurisdiction of this Division when the accident occurred. An application for a change of venue must also satisfy the court that there is a balance of convenience in favour of removing the matter".[63]

[86] Transfers from the High Court to the Magistrates' Courts are governed by Uniform Rule of Court 39(22). It provides as follows:

> *"By consent the parties to a trial shall be entitled, at any time before trial, on written application to a Judge through the registrar to have the case transferred to the Magistrate's Court: Provided that the matter is one within the jurisdiction of the latter court by way of consent or otherwise."*

[87] Uniform Rule 39(22) allows parties to have a matter, by consent, transferred to a Magistrate's Court which has jurisdiction. The Rule requires a party to make an application for such a transfer and for the

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[63] Nongovu para 13 - 14

other parties to consent to such transfer. The presiding Judge is not bound by the consent of the parties and must be satisfied that the transfer is in the interests of justice.

[88] On the face of it, the application of Rule 39(22) is limited to circumstances where the parties have consented to have a matter transferred to a Magistrates Court. Where there is no consent, it has been held in ***Veto v Ibhayi City Council***[64] that the High Court may utilise its inherent jurisdiction to transfer a matter to a Magistrate Court if that would be in the interests of justice.

[89] It would seem then that there is authority that the Court may *mero motu* transfer a matter to another and in the light of the principles pertaining to access to justice such an approach must be encouraged. Considering the rights of access to justice of the litigants, and adequate available resources, and taking into consideration the applicable legal principles, we are of the view that the High Court is entitled to *mero motu* issue a declarator to transfer a matter to more appropriate forum and that could include either the Local and/or Provincial Division.

[90] As stated the one possibility then seems to be that the High Court may transfer matters to the appropriate Magistrate Court or Local Division of the High Court for the reasons already alluded to. However this may not solve the problem as the practise of instituting action in the High

[64] 1990(4) SA 93 (SE)

Court, when inappropriate should be discouraged and a mere transfer of matters may further overburdens that High Court or may result in an unreasonable dumping of matters in the Magistrates' Courts which may put its systems under undue pressure.

CONCLUSION

[91] In our view the solution pertaining to matters that falls 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 Division can *mero motu* transfer a matter to the other court, if it is in the interest of justice to do so. Lastly, there is an obligation, not only on financial institutions, but 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 more appropriate forum, the Court hearing the matter may *mero motu* transfer the matter to that Court.

[94] Of the 13 applications initially brought the Banks are only proceeding with 4 matters. These applications will be set down before a Judge and should be determined by that Judge on a date to be arranged with the Deputy Judge President. The applicants may file supplementary papers as circumstances may have changed due to the lapse of time.

[95] In light of the fact that the Banks instituted action prior to this judgment and due to the considerable delay caused by these proceedings we are of the view that this should be arranged expeditiously.

[96] Consequently the following order:

(1) To promote access to justice as from the 2 February 2019 civil actions and/or applications, where the monetary value claimed is within the jurisdiction of the Magistrates' Courts should be instituted in the Magistrates' Court having the jurisdiction, unless the High Court has granted leave to hear

the matter in the High Court.

(2) It is declared that a High Court is entitled to transfer a matter mero motu to another court, i.e. Magistrates' Courts and/or Local and Provincial Divisions, if it is in the interest of justice to do so.

(3) The 4 (four) applications under case numbers 3429/2016, 6996/2012, 29736/2016 and 30302/2016 would be heard on a date to be arranged with the Deputy Judge President.

(4) No cost order is awarded.[65]

R G TOLMAY
JUDGE OF THE HIGH COURT

I agree

A P LEDWABA
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree:

S P MOTHLE
JUDGE OF THE HIGH COURT

[65] Having regard to the Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC).

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