CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 291/21

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Applicant
and	
STANDARD BANK OF SOUTH AFRICA LIMITED	First Respondent
NEDBANK LIMITED	Second Respondent
FIRSTRAND BANK LIMITED	Third Respondent
EZRA MAKIKOLE MPONGO	Fourth Respondent
MYRA GERALDINE WOODITADPERSAD	Fifth Respondent
RADESH WOODITADPERSAD	Sixth Respondent
JOYCE HLUPHEKILE NKWINIKA	Seventh Respondent
KARIN MADIAU SAMANTHA LEMPA	Eighth Respondent
NEELSIE GOEIEMAN	Ninth Respondent
ANGELINE ROSE GOEIEMAN	Tenth Respondent
JULIA MAMPURU THOBEJANE	Eleventh Respondent
AUBREY RAMORABANE SONKO	Twelfth Respondent
ONESIMUS SOLOMON MATOME MALATJI	Thirteenth Respondent
MODIEGI PERTUNIA MALATJI	Fourteenth Respondent
GRACE MMAMTENA MAHLANGU	Fifteenth Respondent

KEY HINRICH LANGBEHN Sixteenth Respondent

PRETORIA SOCIETY OF ADVOCATES Amicus Curiae

Neutral citation: *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others* [2022] ZACC 43

Coram: Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J, Tshiqi J and Unterhalter AJ

Judgment: Madlanga J (unanimous)

Heard on: 19 May 2022

Decided on: 9 December 2022

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The Registrar of this Court must furnish a copy of this judgment to the Minister of Justice and Correctional Services.

JUDGMENT

MADLANGA J (Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Theron J, Tshiqi J and Unterhalter AJ concurring):

Introduction and background

[1] At the heart of this application is whether a High Court may decline to adjudicate a matter over which it and the Magistrates' Courts have concurrent jurisdiction. A related question is whether the main and local seats of a Division of a High Court may each refuse to hear a matter in respect of which the other has concurrent jurisdiction.[1]

[2] The application arises from 13 matters instituted in the Gauteng Division of the High Court. It is brought by the South African Human Rights Commission (SAHRC), which was an amicus curiae before the High Court and Supreme Court of Appeal. The 13 matters concerned the enforcement of payment by the first to third respondents, Standard Bank of South Africa Ltd, Nedbank Ltd and FirstRand Bank Ltd (the banks), against debtors who are all natural persons. The debtors had either taken up mortgages or purchased motor vehicles on credit and had defaulted on repayment. They took no part in the High Court proceedings. The banks sought default judgment and – in the case of mortgages – orders declaring the debtors' residential properties specially executable. It must be noted that in respect of most of these matters, the amounts claimed fell within the Magistrate's Court's jurisdiction.

[3] The matters were set down for hearing before a Full Court of the Gauteng Division of the High Court in terms of a practice directive issued by the

[1] *Nedbank Ltd v Thobejane and Similar Matters* 2019 (1) SA 594 (GP) (High Court judgment) at para 1 sets out the issue thus:

> "This matter raises concerns that are twofold. 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."

What I refer to as a related question in the text is covered by section 27(1) of the Superior Courts Act 10 of 2013. Save for what I say in n 22 below, I do not find it necessary to deal with this beyond what this section provides.

Judge President of that division. The directive required the parties to address the following questions: whether the High Court is obliged to entertain matters that fall within the jurisdiction of the Magistrate's Court purely because the High Court has concurrent jurisdiction; whether the provincial division of a High Court is obliged to entertain matters that fall within the jurisdiction of a local division simply because the provincial division has concurrent jurisdiction; and whether financial institutions ought not to consider costs implications and access to justice concerns of financially distressed people when deciding in which of two courts with concurrent jurisdiction to litigate.[2] Even after set-down, the debtors did not participate. At the High Court's request, the Pretoria Society of Advocates assisted them pro bono.

[4] Three of the matters were subsequently withdrawn because the debts had been settled and another was withdrawn as the amount claimed exceeded the jurisdiction of the Magistrate's Court.

[5] The Full Court held as follows: it is an abuse of process of court to institute in the High Court claims that fall within the jurisdiction of the Magistrate's Court; and the High Court may exercise a discretion to entertain matters over which it has concurrent jurisdiction with the Magistrate's Court.[3]

[6] On appeal, the Supreme Court of Appeal overturned the decision of the Full Court. In its reasoning it highlighted the significance of sections 21 and 27 of the Superior Courts Act,[4] which it described as "critical provisions" of the Act and section 169(1) of the Constitution.[5] Relying on *Agri Wire*,[6] it held that it was obligatory

[2] I have deliberately not itemised a question that required the parties to address the question why the High Court should entertain matters that fall within the jurisdiction of the Magistrates' Court. I think this question is closely bound up with the first two that I have itemised.

[3] High Court judgment above n 1 at paras 82-90.

[4] 10 of 2013.

[5] *Standard Bank of SA Ltd v Thobejane; Standard Bank of SA Ltd v Gqirana N.O.* [2021] ZASCA 92; 2021 (6) SA 403 (SCA) at para16 (Supreme Court of Appeal judgment).

[6] *Agri Wire (Pty) Ltd v Commissioner of the Competition Commission* [2012] ZASCA 134; 2013 (5) SA 484 (SCA).

for the High Court to entertain matters in respect of which it has concurrent jurisdiction with the Magistrate's Court (mandatory jurisdiction principle).

In this Court

[7] The SAHRC now comes before us, not as an amicus curiae (which it was previously), but as an applicant for leave to appeal. We are satisfied that it does have the requisite interest to bring the application. The 13 debtors, who have never participated before any of the Courts below, remain supine. Pursuant to its application, we admitted as amicus curiae the Pretoria Society of Advocates which represented the 13 debtors pro bono at the High Court's request. We are indebted to it for its assistance to this Court.

The SAHRC's submissions

[8] The SAHRC readily conceded that it is not supporting the High Court's holding that it is automatically an abuse of court process to litigate in the High Court matters that fall within the monetary jurisdiction of the Magistrate's' Courts. Consequently, the SAHRC appears to accept that a holding of abuse of process can only come about upon the High Court being satisfied that litigation is, in fact, an abuse of process. What the SAHRC considers an abuse is a litigant routinely litigating in the High Court matters that fall within the jurisdiction of Magistrates' Courts. It submits that the right of access to court dictates that there be a default rule that matters in respect of which the High Court and Magistrate's Court have concurrent jurisdiction must be litigated in the latter Court. According to the SAHRC, just as courts enunciated the common law mandatory jurisdiction principle – a subject to which I return below – they should equally be able to pronounce this default rule. Exceptions to this rule may be instances where the plaintiff or applicant satisfies the High Court that there is a cogent reason why the matter must be entertained by the High Court. Examples of these reasons would include the following: that there is no risk of an infringement of the absent respondent or defendant's right of access to court; that the matter is too complex for adjudication in the Magistrate's Court; or that the Magistrate's Court concerned is dysfunctional.

[9] The SAHRC submits that the Constitution does not impose an obligation on the High Court to hear all matters within its jurisdiction. That is so because section 169(1) of the Constitution provides that the High Court "*may*" (not "must") decide such matters. The SAHRC contends that the word "may" is permissive in respect of the jurisdiction conferred on all Superior Courts by the relevant constitutional provisions, namely section 169(1) (High Court), section 168(3) (Supreme Court of Appeal) and section 167(3) (Constitutional Court). It adds that the permissive nature of "may" in section 169(1) is typified by the fact that this Court – in matters in respect of which it unquestionably has jurisdiction – may decline to entertain them if it is not in the interests of justice to do so; an example being applications for leave to appeal.[7]

[10] In addition, the SAHRC submits that no statute obliges the High Court to exercise its jurisdiction. There being no obligation, the High Court is entitled to decline jurisdiction over matters that may more appropriately be heard by other courts. The SAHRC further submits that the common law mandatory jurisdiction principle introduced in *Goldberg* is pre-constitutional.[8] It is now subject to the Constitution. It also contends that, although *Agri Wire* was decided after the Constitution had taken effect, it did not hold that the principle applies even when a fundamental right is implicated. In addition, the SAHRC submits that the mandatory jurisdiction principle is inconsistent with judicial independence, and thus unconstitutional as it impedes the High Court's rational management and use of judicial resources.

[11] The SAHRC also contends that Magistrates' Courts are generally more accessible than High Courts. There are only 14 High Courts in South Africa, which are mainly located in large urban areas. On the contrary, there are 82 regional Magistrates' Courts and 468 district Magistrates' Courts. The SAHRC submits that distressed debtors who default on their loan agreements generally have limited financial

[7] See *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 10-12.

[8] *Goldberg v Goldberg* 1938 WLD 83.

means, as was the case with the defendants before the High Court in this matter.[9] The limited number of High Courts necessitates that litigants travel long distances and, once at the seat of the court, that they secure and pay for accommodation for the duration of the proceedings, something impecunious litigants – like those involved in this matter – can ill afford.

[12] In illustrating its point about the injustice that the mandatory jurisdiction principle occasions, the SAHRC adverts to the country's province with the largest land mass, the Northern Cape. It makes the point that there are very long distances between some locations within that province and the seat of the High Court in Kimberley. It gives the example of a defendant who advises the High Court: of their willingness to defend; the fact that they cannot afford the travel costs to and from the High Court and costs of accommodation at the seat of the High Court; and that – as there are no such costs at the Magistrate's Court located close to their home – they can defend the action there. The SAHRC also avers that, unlike Magistrates' Courts, the High Court does not have designated interpreters for civil matters. It submits that all these violate the right of access to court of impecunious litigants, a right protected by section 34 of the Constitution.[10] The SAHRC submits that the applicant or plaintiff's entitlement – as *dominus litis* – to choose a forum is at variance with the right of access to court and thus cannot stand.

[13] Lastly, the SAHRC makes a few submissions concerning the issue of congestion of High Court rolls by matters falling within the jurisdiction of Magistrates' Courts and related issues like access to court, and the need to address these issues by practice

[9] In support, the SAHRC draws attention to the fact that in some cases the arrears were relatively small amounts. The fact that – despite the real risk of each defendant losing their most valuable asset, a home – they had failed to pay was indicative of their parlous financial circumstances. The highest amount of arrears was R20 782.10 and the lowest was R7 772.18.

[10] Section 34 of the Constitution provides that—

> "[e]veryone 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."

directives issued by Judges President. It argues that the issuing of the practice directives should be possible in terms of the inherent jurisdiction enjoyed by the High Court to protect its own process.[11] According to the SAHRC, the practice directives could differ based on the "particular concerns" of the various Divisions of the High Court. For example, in some Divisions the question of the overburdening of rolls may be the most important consideration. In others the issue may be the Northern Cape-type access to court concern. The nub of the argument is that the Supreme Court of Appeal judgment precludes the issuance of the practice directives by Judges President. The argument continues that this is so because, according to the Supreme Court of Appeal, a High Court is obliged to hear everything.

Standard Bank's submissions

[14] Standard Bank argues that the SAHRC's conclusion that an impecunious litigant may be denied access to court as a result of their adversary litigating in the High Court, instead of the Magistrate's Court, depends on evidentiary matter, which the SAHRC never proffered. That, despite the SAHRC's promise to tender such evidence when it sought admission as amicus curiae before the High Court. This bank submits that evidence it presented in the High Court points in the opposite direction. It refers to evidence that sought to establish that it chooses to litigate in the High Court in order to advance efficiency, consistency, and cost savings in the administration of justice. According to it, this promotes – rather than impedes – the right of access to court. Standard Bank contends that, contrary to the SAHRC's submission, observance of the mandatory jurisdiction rule is not only consistent with judicial independence, it, in fact, promotes such independence. It also argues that – properly interpreted – the Full Court's order is in conflict with the scheme of jurisdictional demarcation under the Constitution.

[11] Section 173 of the Constitution provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

Nedbank's submissions

[15] Nedbank points out that for more than a century the law has been that the High Court cannot decline to exercise jurisdiction merely because Magistrates' Courts share concurrent jurisdiction with it.[12] What it may do – where a litigant has succeeded in proceedings instituted in the High Court when they could have litigated in the Magistrate's Court – is to award costs on the Magistrate's Court's scale. Nedbank then submits that the common law rule has not been altered by the Constitution; not by section 34 or section 173 of the Constitution, which are the sections that bear relevance to the issue. In addressing section 34, it argues – relying on *Mukaddam*[13] – that section 34 guarantees someone a right of access to court, which does not translate into guaranteeing a right of access to a *particular* court. It does concede that in a given case a defendant may be able to persuade a court that their right of access to court is being imperilled because they are required to defend the case in the High Court instead of the Magistrate's Court. Coming to section 173, Nedbank contends that this section is a non-starter because it amounts to no more than a constitutional codification of inherent jurisdiction. As such, section 173 could not – on its own – have altered the pre-constitutional common law position.

[16] Nedbank challenges what it calls the creation by the Full Court of a rule that it is always an abuse of process of court for a litigant to litigate in the High Court if the Magistrate's Court has concurrent jurisdiction. It does this for two reasons. First, whether a procedural step is an abuse of process of court turns on evidence, of which not a scintilla was tendered by the SAHRC. Second, the Constitution has not changed the age-old common law rule referred to earlier.

[17] Nedbank submits that the reliance by the SAHRC on "may" in section 169(1) of the Constitution cannot take it far. This section does not deal with the jurisdiction of a

[12] Supreme Court of Appeal judgment above n 5 at para 26 citing *Koch v Realty Corporation of South Africa* 1918 TPD 356 at 359.

[13] *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) at para 1.

particular High Court. It deals with the jurisdiction of the High Court as a constitutional institution which is a composite whole. If you ask the question, does the High Court have jurisdiction over a person, the answer will be that the question is meaningless. Nedbank says the answer to the question is provided by section 21 of the Superior Courts Act, not section 169 of the Constitution. Section 21 specifies which High Court has jurisdiction over what person. It argues, therefore, that in accordance with the principle of subsidiarity, you "cannot cut through the lower-level legislation", the Superior Courts Act, and advance an argument pegged to higher-level law, the Constitution.

[18] Nedbank takes issue with the idea that costs are less when litigants litigate in the Magistrates' Courts than when they litigate in the High Court. It avers that costs are often less in the High Court. A stance shared by Nedbank and the other banks is that efficiencies enjoyed in litigating in the High Court result in significant savings on costs. Nedbank goes so far as to aver that there is some dysfunctionality in Magistrates' Courts.

[19] Lastly, Nedbank indicates that it disagrees with the other two banks on the implications of rule 39(22) of the Uniform Rules of Court.[14] The view of the other banks is that rule 39(22) constitutes the sum-total of the manner in which a matter may be transferred from the High Court to the Magistrates' Court. According to the other banks, absent consent by the parties, there can be no transfer to the Magistrate's Court in terms of the rule. Nedbank contends that what the determinant should be is the interests of justice. As I understand the contention, the interests of justice criterion cannot be constrained by, or subjected to, the wording of rule 39(22). To make its point, Nedbank borrows from the SAHRC's example of a litigant from a remote area in the Northern Cape who is forced to defend an action in Kimberley, the seat of the

[14] Rule 39(22) provides:

> "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 cause transferred to the magistrate's court: Provided that the matter is one within the jurisdiction of the latter court whether by way of consent or otherwise."

High Court. Nedbank accepts that in that instance it would be competent for the High Court to transfer the matter to the Magistrate's Court.

FirstRand Bank's submissions

[20] In certain respects, the submissions of FirstRand Bank overlap with some of the submissions by the other banks. I will highlight a few of its submissions. It submits that the legislative framework that permits concurrent jurisdiction in our law and the mandatory jurisdiction principle, which is consonant with the imperatives of the Constitution, facilitates the widest possible pool for the exercise of the right of access to courts. Relying on *Bester*,[15] it argues against denying litigants court access because of congested rolls that hamper the proper functioning of courts.[16] Rather, a solution for such congestion must be found elsewhere.[17]

[21] FirstRand Bank concludes that the default rule advocated by the SAHRC would serve to limit the myriad of courts to which plaintiffs and defendants have access. It submits that the proposed rule by the SAHRC accordingly constitutes a limitation of the section 34 right. FirstRand Bank contends that the *dominus litis* principle is consistent with section 34.

The Pretoria Society of Advocates' submissions

[22] The upshot of the Pretoria Society of Advocates' submissions is that the approach adopted by the High Court in the present matter constitutes a limitation of access to court.

Jurisdiction and leave to appeal

[23] The issues raised above are certainly of a constitutional nature, and I need say no more. Thus, our constitutional jurisdiction is engaged. I must mention that in the Supreme Court of Appeal, the appeal in this matter was heard simultaneously with an

[15] *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W).

[16] Id at 820I.

[17] Id.

appeal emanating from the Eastern Cape Division of the High Court. Plainly – like the Gauteng Division – that High Court is also experiencing a deluge of civil claims in respect of which Magistrates' Courts have concurrent jurisdiction. I am sure that the Gauteng and the Eastern Cape Divisions of the High Court are not outliers. Other Divisions are likely in the same boat. Most definitely, this makes it imperative for us to pronounce on this issue for High Courts to know how to handle the difficult position they are faced with. Also, the SAHRC raises some cogent arguments, which do have reasonable prospects of success. Thus, it is in the interests of justice that leave to appeal be granted.

The mandatory jurisdiction principle

[24] An issue that bears relevance to the mandatory jurisdiction principle is the meaning of section 169(1) of the Constitution and the implications of that section to the issue at hand. Does it mean that the High Court is at liberty not to entertain matters falling within its jurisdiction? As indicated above, the SAHRC answers this question in the affirmative. At the centre of its proposition was the idea that the word "may" tells us that the section is permissive:[18] the High Court "may", not "must". And, as I said, the SAHRC contends that this interpretation is true of the provisions conferring jurisdiction on all Superior Courts. That means "may" in the sections conferring jurisdiction on the High Court (section 169(1)), the Supreme Court of Appeal (section 168(3)) and the Constitutional Court (section 167(3)) affords these Courts a discretion. This contention must also apply to section 170 of the Constitution, which provides that, amongst others, Magistrates' Courts "may decide any matter determined by an Act of Parliament". One wonders what court, other than the

[18] Section 169(1) provides:

> "The High Court of South Africa may decide—
>
> (a) any constitutional matter except a matter that—
>
> (i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or
> (ii) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and
> (b) any other matter not assigned to another court by an Act of Parliament."

Supreme Court of Appeal, could hear appeals that fall to be determined by it, if it could exercise a discretion and refuse to entertain them.

[25] What of the matters falling within the Constitutional Court's exclusive jurisdiction in terms of section 167(4) of the Constitution? This section provides that "[o]nly the Constitutional Court *may*", and it then itemises what falls under the exclusive jurisdiction of this Court. If the SAHRC's argument is correct, "may" in section 167(4) must mean the same thing as "may" in section 167(3). This then raises the question: how would a dispute falling within the exclusive jurisdiction of this Court ever be determined if – through the exercise of discretion – this Court could refuse to entertain such dispute? One could come up with permutations applicable to the other Courts that enjoy jurisdiction under the Constitution.

[26] These are not only imponderables; they point to the unpersuasive nature of the SAHRC's interpretation. Thus, the SAHRC's argument founded on "may" does not gain traction. How then must we interpret section 169(1)? That section serves to confer a power on the High Court to entertain matters falling under the categories set out in paragraphs (a) and (b) of the section.[19] Paragraph (a) concerns constitutional matters. Paragraph (b) is about non-constitutional matters ("any other matters"). As Nedbank submitted, this is open-ended. It tells us nothing about persons over which and in respect of what physical area of the country a particular Division of the High Court has jurisdiction. As Makgoka JA says in a concurring judgment in *Mhlongo* (*Mhlongo* concurrence), the point of reference for determining whether the court has jurisdiction is "s[ection] 21 of the Superior Courts Act, which regulates the jurisdiction of the various divisions of the High Court over persons and in relation to matters".[20]

[19] In *Van Rooyen v S (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 at para 181 this Court held that "may" conferred a power coupled with a duty to exercise it. That decision was applied by this Court in *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) at paras 15-6.

[20] *Mhlongo v Mokoena N.O.* [2022] ZASCA 78; 2022 (6) SA 129 (SCA) at para 19. See also section 21 of the Superior Courts Act, which provides:

[27] The imponderables serve to show that it is unsurprising that, as far back as 1938, Schreiner J adopted the position that—

> "[o]n principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction . . . . But apart from such cases and apart from the exercise of the Court's inherent jurisdiction to refuse to entertain proceedings which amount to an abuse of its process . . . . I think that there is no power to refuse to hear a matter which is within the Court's jurisdiction. The discretion which the Court has in regard to costs provides a powerful deterrent against the bringing of proceedings in the Supreme Court which might more conveniently have been brought in the Magistrate's Court."[21]

[28] Likewise, in *Agri Wire*, the Supreme Court of Appeal held that "our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction".[22]

"(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—

(a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;
(b) to review the proceedings of all such courts;
(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

(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.

(3) Subject to section 28 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983), any Division may issue an order for attachment of property to confirm jurisdiction."

[21] *Goldberg* above n 8 at 85-6.

[22] *Agri Wire* above n 6 at para 19. More fully this part of the judgment says "[s]ave in admiralty matters, our law does not recognise the doctrine of *forum non conveniens*, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction". In the text, I have deliberately left out the first part of the quote because I think some qualification is necessary. I do not believe that we can be as categorical as *Agri Wire* is on the non-recognition of the doctrine of *forum non conveniens* outside of admiralty matters. The exception of admiralty matters that *Agri Wire* recognises is provided for in section 7(1)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983. This section provides:

> "A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court in the Republic or any other court or any

[29] The assumption of jurisdiction should not be confused with the manner in which a court decides to exercise its jurisdiction. There is no discretionary power to decline the assumption of jurisdiction over a matter within the jurisdiction of a court. But how a court decides to exercise the jurisdiction it enjoys is a separate issue. That issue includes considerations as to whether in exceptional circumstances jurisdiction is not exercised by reason of, for example, abuse of process or the stay of proceedings pending some other form of dispute resolution, or on grounds of comity. In certain special circumstances, a South African court may take the view that considerations of comity dictate that a matter is best left for adjudication by a foreign court, which has a closer connection to the matter.

[30] What of the SAHRC's attempt at showing the existence of the discretion it is advocating by relying on the fact that this Court may dismiss an application for leave to appeal on the basis that it is not in the interests of justice to grant leave? That is a bad example because this Court actually does entertain the application for leave to appeal. In doing so, it then refuses leave in accordance with an applicable rule of substantive

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> arbitrator, tribunal or body elsewhere will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court or by such arbitrator, tribunal or body."

So, a South African admiralty court may decline to exercise jurisdiction even in instances where another South African admiralty court will exercise jurisdiction and it is more appropriate that the proceedings be adjudicated by that other court. In terms of the section, *forum non conveniens* also applies intra-nationally. Interestingly, section 27(1)(b) of the Superior Courts Act provides for a similar species of *forum non conveniens* (or should I say *forum conveniens*). This section provides:

> "If any proceedings have been instituted in a Division [of the High Court] or at a seat of a Division, and it appears to the court that such proceedings—
>
> (b) would be more conveniently or more appropriately heard or determined—
> (i) at another seat of that Division; or
> (ii) by another Division,
>
> that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be."

A similarly worded provision, which was applicable when *Agri Wire* was decided, was section 9(1) of the now repealed Supreme Court Act 59 of 1959. Also worth noting is the fact that there are many instances which do not involve a denial of jurisdiction but an exercise of jurisdiction. One example is a stay pending an arbitration or mediation. Another is where, in special circumstances and outside of admiralty matters, a South African court, considers, on grounds of comity, a foreign court to have a closer connection to the matter (see, for example *Bid Industrial Holdings (Pty) Ltd v Strang* [2007] ZASCA 144; 2008 (3) SA 355 (SCA) at para 59).

law which is to the effect that leave is not granted if the interests of justice do not dictate that it be granted. That outcome is the conclusion of the process of entertaining an application for leave to appeal. So, the Court does not refuse to exercise its jurisdiction. It does the opposite: it exercises its jurisdiction. And, having done so, it dismisses the application. That is a decision reached on the merits of the application in accordance with what may properly be considered in determining such an application. What this Court does not get to entertain is the appeal. That, of course, is the natural consequence of the refusal of leave. So, the SAHRC's argument in this regard must fail.

[31] Does the right of access to court alter this approach? Subject to what I will say shortly, I do not think so. *Mukaddam* says "the guarantee in section 34 of the Constitution does not include the choice of . . . forum in which access to courts is to be exercised".[23] I must say though that this statement of law is stated in general terms and could not have been intended to be absolute. For although it is for the plaintiff – and not the defendant – to choose the court, the defendant may nevertheless be able to point out to the court that it will not be able to provide meaningful access to court, a right guaranteed in the Constitution. Indeed, even *Goldberg*, the leading case on this subject in the pre-constitutional era, was not absolutist in its formulation of the principle. It had a qualification. Here it is: "*in general* a court is bound to entertain proceedings that fall within its jurisdiction".[24] (Emphasis added.) The words "in general" are an indication that there are exceptions to the rule. Indeed, the Court mentioned an exception, which is that in the exercise of its inherent jurisdiction, the High Court may refuse to entertain proceedings which amount to an abuse of its process.

[32] Surely, this is but one example. There may be others which – depending on their nature – may also warrant a departure from the mandatory jurisdiction principle. One that readily comes to mind is a situation where, without a doubt, a defendant will effectively be denied access to court if they are forced to defend an action in a faraway

[23] *Mukaddam* above n 13 at para 28.

[24] *Goldberg* above n 8 at 85.

High Court where – because of the distance and attendant costs – they are unable to defend it, whereas they would be able to defend it in the nearby Magistrate's Court. Of relevance in this regard is the Kimberley example posited by the SAHRC. A development of the common law mandatory jurisdiction rule (not the creation of a new rule that is at odds with it) must be cognisant of this additional exception. That is, it must be within the High Court's power to refuse to entertain a matter of this nature and to insist that it be litigated in the Magistrate's Court that enjoys concurrent jurisdiction. This approach is consonant with section 8 of the Constitution, which provides that the Bill of Rights (the right of access to court under section 34, in this instance) "binds the legislature, the executive, the judiciary and all organs of state".

[33] As I said, the SAHRC does not agree with the Full Court that litigating in the High Court where one could have litigated in the Magistrate's Court automatically constitutes an abuse of the process of court. This point is well-made. The SAHRC submits, instead, that the High Court must be satisfied in each instance that the litigation in issue is, indeed, an abuse of process or constitutes an infringement of the right of access to court, in which event it may then not entertain the matter.[25] Obviously, that case-by-case approach cannot satisfy the SAHRC, which is plainly opposed to the idea of matters falling within the jurisdiction of the Magistrate' Court being routinely litigated in the High Court.

[34] The SAHRC then makes the submission that the High Court's exercise of discretion must create a default rule to the effect that all matters falling within the concurrent jurisdiction of the High Court and Magistrate's Court must be litigated in the latter Court. The exception is that if a litigant wants to bring a case that falls within the jurisdiction of the Magistrate's Court before the High Court and it is unopposed, the litigant must persuade the High Court that there is a justification why that Court should

[25] In *Bester* above n 15 at 813A the Court held that an abuse of process could be said, in general terms, to occur when a court process "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". A collection of authorities on, and a few examples of what constitutes an, abuse of process are to be found in *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* [2004] ZASCA 6; 2004 (6) SA 66 (SCA) at para 50.

hear the case. The SAHRC justifies the creation of this default rule on the basis that a case involving an unrepresented defendant, this being a common feature in bank debt collection matters, "does not lend itself to a case-by-case judicial discretion".

[35] I do not quite see how courts can create such a rule. The SAHRC submits that just like courts created the mandatory jurisdiction principle, which is a common law rule, they can also create the default rule. This misses the point. The law affords the High Court the power to entertain matters in respect of which the Magistrate's Court also has jurisdiction. All that the mandatory jurisdiction principle says is that the High Court cannot run away from matters that fall within its jurisdiction. If a matter over which it has jurisdiction is brought before it, it must exercise that jurisdiction. Of course, that is subject to the exceptions that are recognised by the principle itself. By contrast, the effect of the proposed default rule is the creation of a substantive rule of jurisdiction to the effect that the High Court will ordinarily defer to the Magistrate's Court unless there is good reason to accept jurisdiction. That, when the law affords it unqualified concurrent jurisdiction.

[36] A constant refrain in the argument of the SAHRC has been the risk to the institutional efficiency of the High Court, as well as to the access to justice guarantees in section 34. Both concerns are valid. This notwithstanding, the question of jurisdiction cannot be moderated by those concerns beyond what I suggest in this judgment. A court either has jurisdiction or it does not and that question is answered by reference, in this instance, to section 21 of the Superior Courts Act. Absent a constitutional challenge to section 21, the division of labour mandated by the Legislature between courts in respect of their jurisdiction must be honoured. For these reasons, the default position advocated by the SAHRC is not possible.

The rule 39(22) argument

[37] It was suggested by Nedbank that rule 39(22) provides a mechanism for the transfer of matters from the High Court to the Magistrates' Courts in the interests of justice. On this basis, Nedbank submits that there is no need to interfere with the

mandatory jurisdiction principle. This argument is unsustainable as rule 39(22) contemplates only a transfer from the High Court to the Magistrates' Court if the parties have consented to the transfer. It does not involve the exercise of any judicial discretion. It is an entitlement, if the requirements set by the rule are met: "[b]y consent the parties to a trial shall be entitled . . . to have the cause transferred". In the absence of consent, the rule is of no assistance to a party who seeks to have a cause transferred to a Magistrate's Court, nor does it provide a legitimate escape route for overburdened Divisions of the High Court.

Practice directives by Judges President

[38] As indicated, the SAHRC argues that, but for the Supreme Court of Appeal judgment, the problem at hand could be addressed by the issuance of practice directives by Judges President. A court's inherent power in terms of section 173 of the Constitution to protect and regulate its process does not include a power to effect changes to legislation or the Constitution. In the context of what is at issue, this judgment explains the substantive legal rules on jurisdiction. Judges President may only issue practice directives that accord with those rules. The *Mhlongo* concurrence says:

> "Axiomatically, [a court] cannot use the section 173 power to oust jurisdiction which it ordinarily has. The same applies with equal force to the right of access to courts guaranteed in section 34. The section has no place to the enquiry as to whether or not a court has jurisdiction. No reasons of equity could ever clothe a court with jurisdiction it does not have."[26]

Harms says inherent jurisdiction "does not include the power, for the sake of convenience, to refuse to hear a litigant or entertain proceedings in a matter within its jurisdiction and properly before the court".[27]

[26] *Mhlongo* above n 20 at para 20.

[27] Harms *Civil Procedure in the Superior Courts* 3rd ed (LexisNexis Butterworths, Durban 2016) at A3.3.

[39] In sum, the SAHRC's submissions on this issue do not assist.

Rationale for the Full Court set-down

[40] The High Court judgment says the consequence of setting down in the High Court matters in respect of which Magistrates' Courts have jurisdiction 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."[28]

[41] The High Court then says this and the fact that impecunious litigants who are forced to travel long distances at huge expense to defend the actions in the High Court or "opt" for not defending because they cannot afford to, thus being denied access to court, are what motivated the Judge President to issue the practice directive.[29] Plainly, the difficulties highlighted by the High Court have serious adverse consequences for the administration of justice in the High Court. And these difficulties are not new. Some 38 years ago, Coetzee DJP had this to say in *Shiba*:

> "[A] number of Judges in this Local Division alone . . . 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 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

[28] High Court judgment above n 1 at para 2.

[29] Id at para 5.

> 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."[30]

[42] As the High Court judgment in the instant matter shows, the problem has become worse. Therefore, although our final decision does not accept that of the High Court, we cannot make light of the real problem that Court has highlighted. In the main, that is the problem of clogging up High Court rolls with matters falling within the jurisdiction of the Magistrate's Court. Also, as I said when considering whether leave to appeal should be granted, the Gauteng Division and the Eastern Cape Division, another Division where the central issue in this matter has been considered, are not outliers. So, we have a huge problem on our hands; a problem which – as the High Court says in this matter – manifests in inordinate delays in the hearing and finalisation of matters in the High Court. That, of course, is a blot on the administration of justice.

[43] Also, as typified by the matters which are the subject of these proceedings, many of the cases falling within the jurisdiction of Magistrates' Courts which are litigated by banks in the High Court involve foreclosures. Rule 46A(2)(b) of the Uniform Rules of Court provides that "[a] court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted". These factors must surely involve in part a consideration of the defendant's personal, family and other circumstances. Where a defendant is not present at court, it is only the information from the bank that is available and the task required by rule 46A becomes more difficult, if not impossible. How does a court make the assessment in the absence of the party who will be most affected by the proposed order? To most people their home is their most valuable asset. And yet indications are that geography and money

[30] *Standard Bank of South Africa v Shiba*, *Standard Bank v Van den Berg* 1984 (1) SA 153 (W) at 156F-157A.

do prevent some defendants from attending court (and this is an unfortunate reality in our country) to fight for the retention of their homes.

[44] Some legislative steps that appear to bear relevance to these concerns are afoot. A Lower Courts Bill[31] has been published for public comment. Section 22(4) of the Bill appears broadly to make provision for what the SAHRC submitted should be enunciated by courts as a default position. And I use "appears" advisedly because I do not want to pronounce on the implications of the section prematurely. The section provides:

> "If a plaintiff is of the view that an action, the amount of which claim falls within the jurisdiction of a District Court . . . should more appropriately be heard in a Regional Court or a Division of the High Court, that plaintiff must—
>
> (a) apply to the Regional Court or the Division of the High Court in which it is intended to institute the action, and according to the applicable rules in respect of applications in that court, for leave to institute the action in that court; and
>
> (b) set out reasonable grounds why the action should be heard in that court."

[45] I do not purport to be exhaustive on the provisions of the Bill that may be of relevance to the concerns expressed by the Full Court. Notwithstanding these legislative steps, I think it proper that this judgment be brought to the attention of the Minister of Justice and Correctional Services in case he finds some of the pronouncements that this Court makes of relevance to the legislative process.

[46] In conclusion, the appeal must fail.

Costs

[47] The banks indicated that they are not asking for costs against the SAHRC. So, no costs order will be made.

[31] Lower Courts Bill (X-2022), 29 April 2022. Available at https://pmg.org.za/bill/1079/.

Order

[48] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The Registrar of this Court must furnish a copy of this judgment to the Minister of Justice and Correctional Services.

For the Applicant:	M Chaskalson SC, E Webber and L Makapela instructed by Legal Resources Centre
For the First Respondent:	K Hofmyer SC and P Ngcongo instructed by Edward Nathan Sonnebergs Incorporated
For the Second Respondent:	A Crockrell SC and N Luthuli instructed by Cliffe Decker Hofmeyr Incorporated
For the Third Respondent:	P G Cilliers SC and A P Ellis instructed by Petzer, Du Toit and Ramulifho Attorneys
For the Amicus Curiae:	A Louw SC, S Davies and S van der Walt instructed by Pretoria Society of Advocates