

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 3379/2020

In the matter between:

TIMAC AGRO SOUTH-AFRICA (PTY) LTD¹
[REG. NR: 2011/005705/07]

Plaintiff/Applicant

and

THEUNIS LODEWYK ADRIAAN NEL²

Defendant/Respondent

Coram: Opperman, J

Date of hearing: 15 April 2021

Delivered: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 3 May 2021. The date and time for hand-down is deemed to be 3 May 2021 at 15h00.

Summary: National Credit Act - Jurisdiction - Summons issued in High Court

JUDGMENT

[1] It is now trite law that litigation born from agreements that falls within the ambit of National Credit Act 34 of 2005 (NCA) should be instituted in the Magistrate's Court having jurisdiction in terms of section 172(2) of the NCA read with sections 29(1)(e) of the Magistrate's Court Act 32 of 1944, section 34 of the Constitution of the

¹ "Timac".

² "Nel".

Republic of South Africa, 1996 and section 9 of the Constitution; the so-called equality-right.³

- [2] The above dictum is sound, supported and precedent *in casu*. In addition, I would add that the High Court is obliged to consider each matter that comes before it carefully on the issue so as to prevent illegal process that causes uncertainty in law and process; and law that is applied inconsistently and contradictorily. It is central in a constitutional state and democratic economy that aim for reasonable certainty so that parties can go about their business knowing the rules of the game; constitutional integrity is vital.⁴ It is vital to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry...⁵
- [3] Jolwana, J in the Gqirana-judgment in his dissenting judgment went as far as to rule that the common law must be developed to the extent that all civil actions and/or applications in respect of which the Magistrate's Court and the High Court has concurrent jurisdiction should henceforth be instituted in the Magistrate's Court having jurisdiction unless leave was granted by the High Court to have a matter adjudicated in the High Court. He found that there to be no basis restricting the scope of such order to the NCA orders as was done in the majority judgment. *This is indicative of the seriousness with which Courts must regard the issue.*
- [4] It goes without saying that the High has concurrent jurisdiction in NCA matters but that cases of this kind will only be entertained in this forum in exceptional circumstances. The right to access to justice and legal certainty on process as envisaged in the Constitution and the NCA, overshadows and overrules the common law practise that should more than one court have jurisdiction, the Plaintiff or Applicant as *dominus litis*, has the right to choose in which forum to institute proceedings. *Summons in NCA matters should be issued in the Magistrate's Court but for the existence of exceptional circumstances and the permission of the High Court.*

³ Nedbank Ltd v Gqirana No and another, and similar matters 2019 (6) SA 139 (ECG) at paragraphs [73] to [76].

⁴ Justice Ackermann in Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) SA 984 (CC) at paragraph [26].

⁵ Section 3 of the NCA.

- [5] Exceptional circumstances will differ from case to case and have not been defined as yet in our case law. Refusal to hear a matter in the High Court may also be based on an abuse of process that is again case specific and goes to the inherent jurisdiction of the High Court to regulate and protect its own process.
- [6] Lowe, J and Hartle, J stated at paragraphs [35] and [36] of the Gqirana matter that in order to determine whether there has been an abuse of process, the Court will enquire as to whether the act was done with the predominant intention to harm or prejudice the other party, and whether the act served no appreciable or legitimate interest of the acting party. The nature of an abuse of process does not, ordinarily at least, lend itself to a blanket rule to pre-emptively prevent abuse across all matters.
- [7] I want to add to the submission of Lowe and Hartle that the issue of summons must be in accordance with the prevailing law and not be based on a whim and a shot in the dark as is the case in the matter that lie before me. There is not any reason to be found for this case to be in the High Court nor was any averred in the papers or arguments that served before Court.
- [8] That said, the High Court can also not allow for it to be held hostage by situations where litigation has been instituted jurisdictionally illegitimately in the High Court. Enough time has lapsed since the law on the issue has been declared. Arguments that the matters are already serving in the High Court and that it will have costs implications if transferred to the Magistrate's Court cannot be tolerated if the facts of the case do not permit it; neither can arguments that the Court must remedy the situation of the incorrect choice of jurisdiction with an appropriate costs order, nor that the High Court is a better option to adjudicate complicated matters with expert witnesses and that the Magistrate's Court is more geared for debt collection than trials and hearings of cases of this nature. This is a fallacy and will lead to an abuse of process.⁶

⁶ Counsel for Timac referred the Court to the judgments in this division namely; Firststrand Bank Limited v Horing and another (2134/2017) [2017] ZAFSHC 142 (31 August 2017) and Oos Vrystaat Kaap Bedryf Beperk v Cilliers (1521/2017) [2018] ZAFSHC 168 (23 October 2018) but the facts and circumstances must be distinguished from those *in casu*. This case is also in the beginning stage of the litigation process. The cases of Gqirana, Thobejane and Mostert dictates otherwise on the facts of this case. In the case of Firststrand

[9] I will refrain from going into the detail of Counsel for Timac’s arguments on the above so as to give him the benefit of the doubt that his arguments were not presented in bad faith. Suffice to conclude that none of his arguments convinced that they legally issued summons in this Court. The matter in hand is straightforward. I will return to the finding later after some background facts were shown to support the conclusion. If parties have doubts or requests as to the quality of the handling of these matters in the Magistrate’s Courts the Heads of Courts in the province or district may be consulted; the solution does not lie in skirting of the law.

[10] In *Nedbank Ltd v Thobejane* and similar matters 2019 (1) SA 594 (GP) at [91] the above was confirmed with a solution to the process to be followed to invoke the concurrent jurisdiction of the High Court:

In our view the solution pertaining to matters that fall within the jurisdiction of the magistrate’s courts is that such matters should be issued in the magistrate’s courts. If a party is of the view that a matter that falls within the jurisdiction of the magistrate’s court should 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 reasonable grounds.* Only after leave have been granted may summons be issued in the High Court. (Accentuation added)

[11] Notwithstanding the fact that there is an express election of the Magistrate’s Court’s jurisdiction irrespective of the amount of the claim in the credit agreement *in casu*, the Plaintiff/Applicant issued summons in the High Court. I pause to point out that it is imperative to realise from the onset that conduct under the NCA applies *ex lege* and not according to the will of the parties.⁷ *JW Scholtz et al* warned:⁸

Bank Limited v Horing and another the Court advised the Plaintiff to “transfer” the matter to the Magistrate’s Court.

⁷ *Mlanjana Trading CC and Others v Nedbank Limited; In re: Nedbank Limited v Mlanjana Trading CC and Others* [2017] ZAFSHC, *Nkata v Firstrand Bank Limited and Others* 2016 (4) SA 257 (CC).

⁸ Guide to The National Credit Act, Last Updated: July 2020 - SI 12, LexisNexis on 30 April 2021 at 4.1 Introduction and section 90 of the NCA: Unlawful provisions of credit agreement. - (1) A credit agreement must not contain an unlawful provision.

(2) A provision of a credit agreement is unlawful if;

(k) it expresses, on behalf of the consumer—

(vi) A consent to jurisdiction of

(aa) the High Court, if the magistrates’ court has concurrent jurisdiction; or

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

The parties to a credit agreement to which the Act applies may not agree to waive any rights or obligations imposed by the Act. Neither may the parties agree that the credit provider be absolved from any of his obligations or duties in terms of the Act; nor that the credit provider may do anything that is unlawful in terms of the Act. Any such provision will be void as from the date that it is purported to take effect.

- [12] To reiterate; reading of the recent judgments on the issue of jurisdiction and the NCA convinces that the High Court is not obliged to entertain matters that fall within the jurisdiction of the Magistrate's Court purely on the basis that the High Court has concurrent jurisdiction or it is already on the roll. *The High Court must, to the contrary, consider each matter that comes before it for jurisdiction from here on before it continues to hear the main case. This will prevent a practise of illegal process that causes uncertainty in law, and process and law that is applied inconsistently.* A ruling to entertain a matter in the High Court must be convenient in law to the Court, all parties involved and the interest of justice as a whole.
- [13] Only after careful consideration of the existence of exceptional circumstances on a reasonable basis that convinces that the process is not being abused, should these cases be allowed to continue in the High Courts; it is in the interest of justice. If the interest of justice is not being served the Court can *mero moto* transfer the matter to the Court having jurisdiction with appropriate relief that serves the circumstances of the case.
- [14] The case for the Plaintiff/Applicant pivots on the issue of jurisdiction that was taken by the Defendant/Respondent. If the Magistrate's Court is the proper forum in law; legislatively and by precedent in case law, the other issues stand to be adjudicated there.
- [15] It is common cause between the parties that the NCA legislates and rules over the conduct of the litigants *in casu*; it has absolute authority or control over the conduct and litigation of the parties now and had such during the conduct that eventuated in the cause of action. It is common cause that the agreement(s) between the parties are

credit agreements. Timac surmised the cause of action in paragraph “B FACTS NOT IN DISPUTE”:⁹

[5] The Defendant admits:

- a. In paragraph 9.5 of the plea that the Plaintiff sold and delivered fertiliser to him;
- b. In paragraph 9.6 that he received the fertiliser from the Plaintiff and utilised and/or consumed the fertiliser;
- c. That he made payments to the Plaintiff;
- d. That he signed an acknowledgment of debt whilst being represented by an attorney;
- e. That he received the Plaintiff’s notice in terms of section 129(1)(a) of the NCA; and
- f. Elected not to exercise any of his rights mentioned in section 129(1)(a) of the NCA.

[16] Notwithstanding the provisions of the NCA and the law laid down in case law; Timac issued a summons on 9 September 2020 in this Court; the Provincial Division of High Court, Free State. The only averment on jurisdiction was in paragraph 4 of the founding affidavit:¹⁰

4. The Defendant is ordinarily resident within the territorial jurisdiction of the abovementioned Court.

[17] The Defendant’s/Respondent’s Opposing Affidavit warned Timac of the application of the NCA on the litigation on 3 November 2020. Notwithstanding this and the judgments that unambiguously and definitely ordered on the 26 September 2018,¹¹ 30 July 2019¹² and 30 July 2020¹³ that civil actions within the scope of the NCA must be instituted in the Magistrate’s Court having jurisdiction, they issued a Notice of Application for Summary Judgement on the 16th of November 2020 in the High Court of the Provincial Division of the Free State. Their averment on the issue of jurisdiction is the following and does not comply with the law and is a misapprehension of the law as set out above:¹⁴

JURISDICTION

45. In Clause 18.2 of the terms and conditions of the agreement between the Plaintiff and the Defendant, the latter consented to the jurisdiction of the Magistrate’s Court.

46. It is submitted that Clause 18.2 does not oust the jurisdiction of the above-mentioned Court; it contains a consent by the Defendant to the jurisdiction of the magistrate’s Court and it reserves the Plaintiff’s right to approach the High Court.

⁹ Applicant’s Supplementary Heads of Argument at page 2.

¹⁰ COMBINED SUMMONS.

¹¹ The full bench in the Gauteng Division of the High Court, Pretoria in *Nedbank Ltd v Thobejane and similar matters* 2019 (1) SA 594 (GP).

¹² The full bench in the Eastern Cape Division of the High Court, Grahamstown in *Nedbank Ltd v Gqirana No and another, and similar matters* 2019 (6) SA 139 (ECG), [2019] 4 All SA 211 (ECG).

¹³ *FirstRand Bank Ltd v Mostert and another and related matters* [2020] 4 All SA 126 (ML).

¹⁴ INDEX: Application for Summary Judgment at page 15.

47. Clause 18.2 does not contain a consent by the Defendant to the jurisdiction of the High Court while the Magistrate's Court has concurrent jurisdiction for the purpose of section 90(2)(k)(vi)(aa) of the NCA.
48. It is settled law that the High Court has concurrent jurisdiction of any Magistrate's Court in its area of jurisdiction. There is a strong presumption against the ouster or curtailment of the High Court's jurisdiction. There is no express provision in the NCA ousting the High Court's jurisdiction.
49. It is submitted that the defence pertaining to jurisdiction is not a proper defence and does not avail the Defendant.
50. Full legal argument and legal authorities will be presented to the Court at the hearing of this application.

[18] The matter was set down for hearing on 10 December 2020 and thereafter postponed to the opposed roll of 18 March 2021. On 26 February 2021 the Plaintiff's/Applicant's Exception to the Defendant's/Respondent's counterclaims was also postponed to 18 March 2021. It was ordered by agreement between the parties that the Exception to be heard together with the Plaintiff's/Applicant's Application for Summary Judgment. Timac, unapologetically, maintained their stance on jurisdiction in their Particulars of Claim.

[19] On 18 March 2021 condonation was granted to the Plaintiff/Applicant for the late filing of its supplementary heads of argument, the Defendant/Respondent was afforded until 23 March 2021 to deliver supplementary heads of argument, if any, and the Application for Summary Judgment and the Exception to the Defendant's/Respondent's counterclaims were postponed to 15 April 2021 for hearing.

[20] The matter served before me on 15 April 2021 and Mr Du Plessis on behalf of Nel, correctly so, indicated that the Court will first and foremost have to dispose of the *in limine* dispute on jurisdiction on both the Summary Judgment and Exception afore the other issues will become legally relevant in the High Court for adjudication. Mr Swart was amenable to address the issue of jurisdiction first.

[21] The parties agreed during the hearing that the issue of jurisdiction is a separate matter to be adjudicated from the *locus standi* that is reliant on the nature of the agreement; whether it be incidental credit agreements, a credit transaction or a credit

facility. Important is that the effect might be a requirement for registration in terms of section 40 of the NCA.

- [22] I regress to introduce the parties because the NCA place much reliance on the protection of consumers and the rights of credit providers. One of the aims of the NCA is to prevent the proverbial David and Goliath-situation.
- [23] The Plaintiff/Applicant is Timac Agro South Africa (Pty) Ltd a company duly registered and incorporated in terms of the company laws of South Africa with its principal place of business in Centurion, Gauteng.
- [24] The Plaintiff/Applicant is not registered in terms of section 40 of the NCA as a Credit Provider.
- [25] The Defendant/Respondent is Theunis Lodewyk Adriaan Nel, a major farmer residing on the Farm Rietfontein, Wesselsbron, Free State Province.
- [26] Both parties fall within the ambit of section 3 of the NCA as entities to be protected under the NCA.¹⁵

¹⁵ **3. Purpose of Act.**—The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by—

- (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
- (b) ensuring consistent treatment of different credit products and different credit providers;
- (c) promoting responsibility in the credit market by—
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and discouraging reckless credit granting by credit providers and contractual default by consumers;
- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
- (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by—
 - (i) providing consumers with education about credit and consumer rights;
 - (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
- (f) improving consumer credit information and reporting and regulation of credit bureaux;
- (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations; providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

[27] On 13 June 2018 a written agreement was entered into between the parties and Timac sold and delivered goods to Nel between June 2018 until June 2019. Nel breached the agreement in that he failed to pay the full amount due and payable. On 21 January 2020 a demand in terms of section 129(1)(a) of the NCA was delivered to Nel. On 7 February 2020 Nel conceded to the indebtedness and offered to settle through the payment of instalments. On 19 March 2020 the litigants signed an Acknowledgement of Debt. Nel admitted to indebtedness to the amount of R1 582 642.26. He undertook to pay R527 547.42 in three equal instalments on or before 31 May 2020, 30 June 2020 and 31 July 2020. He only paid R225 000.00 on 8 June 2020, R50 000.00 on 30 June 2020 and R50 000.00 on 17 July 2020. He is currently indebted to Timac to the value of R 1 398 220.25.

[28] The prayers of the Plaintiff/Applicant in the original combined summons and Exception are:

Wherefor the Plaintiff requests an order in the following terms:

1. Payment in the amount of R1 398 220.25 (One million three hundred and ninety-eight thousand two hundred and twenty rand and twenty-five cent);
2. Interest on the amount in 1. above at a rate of 2% above prime interest rate per month charged by ABSA BANK LTD (10% *per annum*) from time to time calculated from the date of service of summons;
3. In the alternative to 2. above, interest *a tempore mora* calculated at 10,5% *per annum* from the date of service of summons;
4. In the alternative to 1., 2. and 3. above, that the Defendant pay (sic) the Plaintiff R 1 194 367.65 (One million one hundred and ninety-four thousand three hundred and sixty-seven rand and sixty-five cent);
5. Interest *a tempore mora* on the amount in 4. above calculated at 10,5% *per annum* from the date of service of summons;
6. Cost of suit on an attorney-and-client scale;
7. Further and or alternative relief.

[29] In the Notice of Application for Summary Judgment the prayers were only for:

1. R1 398 220.25 (One million three hundred and ninety-eight thousand two hundred and twenty rand and twenty-five cent);

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

2. Interest on the amount in 1. above at a rate of 2% above prime interest rate per month charged by ABSA BANK LTD (10% *per annum*) from time to time calculated from the date of service of summons;
3. In the alternative to 2. above, interest *a tempore mora* calculated at 10,5% *per annum* from the date of service of summons’;
4. Costs of suit on an attorney-and-client scale;
5. Further and/or alternative relief.

[30] Defendant/Respondent argued for the following:¹⁶

4.2 ... this Court should find that the Plaintiff was neither entitled nor justified in having instituted this action in the High Court, and this Court should dismiss the action and accordingly also the exception with costs. The Plaintiff would be free, if it so chooses, to institute fresh actions in respect of each one of the credit agreements in the appropriate Magistrate’s Court.

[31] The evidence in this case dictates that Timac should have initiated litigation in the Magistrate’s Court. The question that now arises is whether the Court must transfer the matter to the Magistrate’s Court or dismiss the application for Summary Judgement and the Exception and leave the option to proceed with litigation there to the Plaintiff/Applicant? The adjudication of the *locus standi*-issue also remains.

[32] Harms¹⁷ stated with reference to case law that the prescript relevant to the *locus standi* issue to be if a court has jurisdiction in the main proceeding, it also has jurisdiction in any ancillary or interlocutory matter. I have ruled that the jurisdiction lies with the Magistrate’s Court and will it be inappropriate to rule on *locus standi*. It is now the duty of the Magistrate’s Court.

[33] In summary:

1. All but unusual and extraordinary cases falling within the provisions of the NCA must be brought in the Magistrate’s Court as Court of first instance notwithstanding the monetary value of the claim.
2. The concurrency of jurisdiction between the High Court and the Magistrate’s Court remains in place and was not ousted by the NCA.

¹⁶ Defendant’s Heads of Argument dated 11 February 2021 and served on 12 February 2021 at paragraph 4.2.

¹⁷ Civil Procedure in the Superior Courts, Updated: February 2021 - SI 70, at C1.1 Jurisdiction and Powers, LexisNexis on 30 April 2021.

3. Only in the event that there are unusual or extraordinary factual or legal issues raised in the opinion of the High Court, will it be warranted to litigate in the High Court as Court of first instance or adjudication.
4. The Plaintiff/Applicant did not proof exceptional circumstances or lay a reasonable basis for this Court to hear the matters *in casu*.
5. There lies no application for transfer to the Magistrate's Court before this Court
however, the interest of justice permits and demands that the Court *mero moto* transfer the matters to the Magistrate's Court.
6. In light of the above Timac will have to bear the costs of this case to date. The scale to be on attorney-and-client scale as per the contracts between the parties and due to the conduct of Timac.

[34] ORDER

1. The objection to the jurisdiction of this Court to hear the Application for Summary Judgment and Exception is upheld.
2. The Application for Summary Judgment and the Exception are transferred to the Magistrate's Court with jurisdiction.
3. The parties are permitted to file short affidavits; if any, explaining any change in circumstances.
4. This judgment must be made available to the Magistrate's Court.
5. The Applicant/Plaintiff to pay the costs of the case to date on an attorney-and-client scale.

M OPPERMAN, J

APPEARANCES

Counsel for the Plaintiff/Applicant

Advocate D. D. Swart
C/O MDP Attorneys
Dan Pienaar
BLOEMFONTEIN
REF: CURT SALLEY/JWB1/0014
EMAIL ADDRESS: E francois@mdplaw.co.za

Counsel for Defendant/Respondent

Mr H.S.L. du Plessis

C/O Blair Attorneys
32 First Avenue
Westdene
BLOEMFONTEIN
REF: Mr Bruce Blair
EMAIL ADDRESS:
charlene@blairattorneys.co.za