REPORTABLE

/SG

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 6 DECEMBER 2007

CASE NO: 36472/2007

In the matter between:

NEDBANK LTD	PLAINTIFF
And	
IVAN GODFREY MATEMAN	1ST DEFENDANT
JULIANA GWYNETH CORDELIA MATEMAN	2ND DEFENDANT

CASE NO: 37792/2007

NEDBANK LTD	PLAINTIFF
And	
DANIEL THOMAS STRINGER	1ST DEFENDANT
HELENA BEATRIZ DRY	2ND DEFENDANT

JUDGMENT

VAN DER MERWE, J

In case number 36472/2007 (the Mateman case) the plaintiff issued summons out of this court against the defendants (IG and JGC Mateman)

for payment of the sum of R19 353.70 together with interest and costs as well as for an order declaring an immovable property situated in Brakpan, executable. In case number 37792/2007 (the Stringer case) the same plaintiff issued summons also out of this court, against the defendants (DT Stringer and HB Dry) for payment of the sum of R922 410.41 together with interest and costs as well as for an order declaring a property situated in Boksburg, executable.

After proper service of the summonses the defendants in both matters failed to defend the actions. Applications for default judgments were placed before the registrar of this court in terms of rule 31(5)(a) of the Rules of the Court. For reasons that will become clear later herein, the registrar referred both matters to the court in terms of rule 31(5)(b)(vi).

In a letter addressed to the society of advocates, Pretoria, asking for pro amico assistance, the registrar formulated his reasons for referring the matters to the court, *inter alia* as follows:

> "1. Met die inwerkingtreding van die nuwe 'National Credit Act' (34/2005), het die bepalings van artikels

90 en 127 van die Wet onder die aandag van die Griffiers gekom.

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

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

4. Die Griffiers is van mening dat dit nou tyd geword het dat artikels

90 en 127 streng toegepas moet word om die verdeling van werk weer te versprei dat elke hof sy regverdige deel van die werk doen.

5. ...
6. ...
7. ...

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

9. ...
10. ..."

Because of the importance of the matters a full court was constituted to deal with the matters.

In terms of the registrar's letter referred to above it appears that the question the registrar of this court wants to be determined, is whether he has jurisdiction to deal with applications for default judgment governed by the National Credit Act, 34 of 2005 (the NCA) in cases where the defendants are resident or employed or the subject property is situated in the jurisdiction of another court, whether a high court with concurrent jurisdiction or the magistrate's court.

Put differently, the registrar's question is: does the NCA oust the

jurisdiction of the high court, and therefore also the jurisdiction of the registrar, to deal with applications for default judgment falling under the NCA or is the high court's jurisdiction partly ousted, and if so, to what extend?

As the question concerns the jurisdiction of the high court in terms of a particular Act, the jurisdiction of the high court, and therefore that of its registrar in terms of rule 31(5) of the Rules of Court, in general, need to be considered briefly.

Section 169 of the Constitution of the Republic of South Africa, 108 of 1996,entrenches the jurisdiction of the high court to decide any constitutional matter except a matter that only the constitutional court may decide on or one that is assigned by an Act of Parliament to another court of similar status to the high court and any other matter not assigned to another court by any Act of Parliament.

Sections 19(1) and 19(3) of the Supreme Court Act, 59 of 1959 (the SCA) provide as follows:

"1(a) A provincial or local division shall have jurisdiction over all

persons residing or being in or 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 shall, subject to the provisions of sub-section (2), in addition to any powers or jurisdiction which may be vested in it by law, have power-

(i) to hear and determine appeals from all inferior courts within its area of jurisdiction;

(ii) to review the proceedings of all such courts;

(iii) 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 such determination;

(b) A provincial or local division shall also have 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 provincial or local division has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the person resides or is within the area of jurisdiction of any other provincial or local division.
>
> 2. …
> 3. The provisions of this section shall not be construed as in any way limiting the powers of a provincial or local division as existing at the commencement of this Act, or as depriving any such division of any jurisdiction which could lawfully be exercised by it at such commencement."

The Transvaal Provincial and the Witwatersrand Local Divisions have concurrent jurisdiction, which is created by section 6 of the SCA. It is settled law that the high court has concurrent jurisdiction with any magistrate's court in its area of jurisdiction. See *Standard Credit Corporation Ltd v Bester*, 1987 1 SA 812 (W).

It is, however, also settled law that a plaintiff runs a risk if he/she sues in the high court on a claim justiciable in the magistrate's court of only being allowed to recover costs on the magistrate's court scale.

Registrars are appointed in terms of section 34 of the SCA in particular "for the administration of justice or the execution of the powers and authorities of the said court". [Section 34(1)(a)] The area of jurisdiction of a registrar coincides with the area of jurisdiction of the division of the high court for which he/she is appointed. In terms of an amendment to the Rules of Court introduced as rule 31(5) on 10 January 1994, registrars were empowered to deal with applications for default judgment in respect of claims for a debt or a liquidated demand.

Rule 31(5)(b) provides as follows:

> "(b) The registrar may –
>
> (i) grant judgment as requested;
>
> (ii) grant judgment for part of the claim only or on amended terms;
>
> (iii) refuse judgment wholly or in part;
> (iv) postpone the application for judgment on such terms as he may consider just;

(v) request or receive oral or written submissions;
(vi) require that the matter be set down for hearing in open court."

The costs involved in applications brought before the registrar are limited as follows in terms of rule 31(5)(e):

> "(e) The registrar shall grant judgment for costs in an amount of R200 plus the sheriff's fees if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court and, in other cases, unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs from the Court, R650 plus the sheriff's fees."

As the registrar's concern involves the ousting of the high court's jurisdiction in terms of the NCA it is necessary to consider the question of such ousting in general terms first.

It is common cause between counsel before us (and correctly so), that there is a strong presumption against the ouster or curtailment of the high court's jurisdiction. See *inter alia Lenz Township Company (Pty)*

Ltd v Lorentz, NO en Andere 1961 2 SA 450 (A) at 455B per STEYN CJ:

> "Daar bestaan 'n sterk vermoede teen wetgewende inmenging met die jurisdiksie van Howe, en 'n duidelike bepaling is nodig om daardie vermoede te weerlê."

See also *Minister of Law and Order and Others v Hurley and Another* 1986 3 SA 568 (A) at 584A-B per RABIE CJ:

> "It is a well recognised rule in the interpretation of statutes, it has been stated by this Court, 'that the curtailment of the powers of a Court of law is, in the absence of an express or clear implication to the contrary, not to be presumed'. (*Schermbrucker v Klindt NO* 1965 (4) 606 (A) at 618A, *per* BOTHA JA, citing *Lenz Township Co (Pty) Ltd v Lorentz NO en Andere* 1961 (2) SA 450 (A) at 455 and *R v Padsha* 1923 AD 281 at 304.) The Court will, therefore, closely examine any provision which appears to curtail or oust the jurisdiction of courts of law."

See too *Millman and Another NNO v Pieterse and Others* 1997 1

SA 784 (C) at 788G-J:

> "There is a strong presumption against the ouster or curtailment of the Court's jurisdiction. See *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 584A-C. The mere fact that the Legislature has created an extra-judicial remedy is not conclusive of the question whether the Court's power has been restricted. It is in every case necessary to consider all the circumstances and then to determine whether a necessary implication arises that the Court's jurisdiction is either wholly excluded or at least deferred until the domestic or extra-judicial remedies have been exhausted. See *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 502-3.
>
> The Act contains no express provision ousting the Court's jurisdiction to hear actions for the expungement of claims admitted to proof at creditors' meetings. Can it be said that an intention to imply such an exclusion clearly emerges from the Act?"

There need not be express words in a statute ousting the jurisdiction of the high court but then the inference that the jurisdiction is ousted must be clear and unequivocal. See *Reid-Daily v Hickman and*

Others 1981 2 SA 315 (ZAD) at 318F-G:

> "The question is therefore whether such an ouster of jurisdiction arises by necessary implication. There are many cases which state the proposition that legislation will not lightly be construed as taking away the jurisdiction of the Court. Perhaps the most authoritative recent statement of this canon of construction is that of the House of Lords in *Pyx Granite Co Ltd v Ministry of Housing and Local Government and Others* 1960 AC 260. Viscount SIMONDS at 286 put it thus:
>
> > 'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words.'
>
> This does not mean that there must necessarily be express words but, where there are no express words, the inference that the Court's jurisdiction is ousted must be clear and unequivocal, *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 503."

It is further common cause between counsel before us that there is no express provision in the NCA ousting this court's jurisdiction, and therefore also that of its registrar, to deal with applications for default judgment governed by the NCA.

In considering the provisions of the NCA the following dictum per SMALBERGER JA in *S v Toms; S v Bruce* 1990 2 SA 802 (A) at 807H to 808A is kept in mind:

> "The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. One does so by attributing to the words of a statute their ordinary, literal, grammatical meaning. Where the language of a statute, so viewed, is clear and unambiguous effect must be given thereto, unless to do so
>
> 'would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking

into account …'

(*per* Innes CJ in *R v Venter* 1907 TS 910 at 915). (See also *Shenker v The Master and Another* 1936 AD 136 at 142; *Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the MV Fade Transporter* 1987 (2) SA 583 (A) at 596G-H.) The words used in an Act must therefore be viewed in the broader context of such Act as a whole (Steyn *Die Uitleg van Wette* 5th ed at 137; *Jaga v Dönges NO and Another*; *Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662G). When the language of a statute is not clear and unambiguous one may resort to other canons of construction in order to determine the Legislature's intention."

The registrar's concern, as appears from the letter referred to above, is founded on sections 90 and 127, more particularly sections 90(2)(k)(vi)(aa), (bb) and section 127(8) of the NCA. In considering these sections, the registrar has declined to grant default judgment under rule 31(5)(a) for claims that could otherwise either have been brought in the Witwatersrand Local Division or the magistrate's court.

Section 3(7) of the NCA provides as follows:

> "(7) Except as specifically set out in, or necessarily implied by, this Act, the provisions of this Act are not to be construed as
>
> (a) limiting, amending, repealing or otherwise altering any provision of any other Act;
>
> (b) exempting any person from any duty or obligation imposed by any other Act; or
>
> (c) prohibiting any person from complying with any provision of another Act."

As stated, it is common cause that the high court's jurisdiction and that of its registrar is not specifically ousted in terms of the NCA. As set out earlier herein, and as is confirmed by the provisions of section 3(7) of the NCA, the question that remains is whether such jurisdiction is ousted by necessary implication.

Section 90 of the NCA deals with "unlawful provisions of credit agreement".

Section 90(1) provides that "a credit agreement must not contain an unlawful provision". Section 9(2) then sets out fifteen main and a

number of subcategories of provisions that are declared unlawful. Section 90(3) provides that "in any credit agreement a provision that is unlawful in terms of this section is void as from the date that the provision purported to take effect".

Section 90(4) incorporates the principle "*ut res magis valeat quam pereat*" in its provisions that read as follows:

> "(4) In any matter before it respecting a credit agreement that contains a provision contemplated in subsection (2), the court must –
>
> (a) sever that unlawful provision from the agreement, or alter it to the extent required to render it lawful, if it is reasonable to do so having regard to the agreement as a whole; or
>
> (b) declare the entire agreement unlawful as from the date that the agreement, or amended agreement, took effect,
>
> and make any further order that is just and reasonable in the circumstances to give effect to the principles of section 89 (5) with respect to that unlawful provision,

or entire agreement, as the case may be."

[The provisions of section 89(5) are not relevant for present purposes.]

Section 90(2)(k)(vi) provides as follows:

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

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

(vi) a consent to the jurisdiction of –

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

(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 registrar's concern relates to subsection (aa) in the Mateman case when viewed against clause 13 of the plaintiff's standard form covering mortgage bond. In the Mateman case the defendants are resident in Brakpan where the property subject to the bond is also situated. The amount of the claim is within the jurisdiction of the

magistrate's court (R100 00-00).

Clause 13 reads as follows:

> "13 Jurisdiction
>
> The Mortgagor consents in terms of Section 45 of Act 32 of 1944 to the Bank taking any legal proceedings for enforcing any of its rights under this bond for recovery of moneys secured under this bond, in the Magistrate's Court for any district having jurisdiction in respect of the Mortgagor by virtue of section 28(1) of the aforesaid Act. The Bank is nevertheless, at its option, entitled to institute proceedings in any division of the High Court of South Africa which has jurisdiction."

The question is, does clause 13 contain a consent by the consumer to the jurisdiction of the high court while the magistrate's court has concurrent jurisdiction? The answer must be in the negative. Clause 13 contains a consent to the magistrate's court jurisdiction. The plaintiff merely reserves its right to approach the high court. Clause 13 is

therefore not an unlawful provision as it does not contravene the provisions of section 92(k)(vi)(aa) of the NCA. Even if clause 13 were to be classified as an unlawful provision, it could easily be severed from the rest of the agreement as provided for in section 90(4) of the NCA.

The only remaining question that will be dealt with below is whether in terms of the NCA the high court has retained its jurisdiction in matters where the magistrate court has concurrent jurisdiction. In respect of matters governed by the NCA the magistrate's court now has an unlimited monetary jurisdiction. See section 172(2) of the NCA and section 29(1)(e) of the Magistrate's Court Act, 32 of 1944.

The registrar's concern relates to subsection (bb) in the Stringer case. In that case the defendants are resident and the subject property is situated in Boksburg within the area of jurisdiction of the Witwatersrand Local Division. Because of the concurrent jurisdiction of the Transvaal Provincial Division, both divisions will have jurisdiction together with the magistrate's court, unless the two high courts' jurisdiction is ousted by the NCA.

The same clause 13 in the covering mortgage bond referred to

earlier is applicable. The question now is, does clause 13 express on behalf of the defendants a consent to the jurisdiction of "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"?

Again the answer must be in the negative. The defendants consented to the jurisdiction of the magistrate's court and to no other court. Again the plaintiff merely reserves its right to approach the high court. Just as in respect of subsection (aa), clause 13 is not an unlawful provision. It does not contravene subsection (bb). In the event of it being found to be unlawful it could be severed from the rest of the agreement in terms of section 90(4) of the NCA.

In my judgment section 90 of the NCA does not affect the jurisdiction of the high court. The high courts retain their jurisdiction in terms of the SCA as set out earlier herein. Section 90 was intended to outlaw forum shopping in credit agreements. To extend its scope and purview to the overall jurisdiction of the high court beyond mere clauses in credit agreements is to accord the section a meaning which it neither has nor was ever intended to have.

Section 127 of the NCA deals with the surrender of goods. Section 127(8) on which the registrar relies for his contention that the high court's jurisdiction has been ousted provides as follows:

> "(8) If a consumer –
>
> (a) fails to pay an amount demanded in terms of subsection (7) within 10 business days after receiving a demand notice, the credit provider may commence proceedings in terms of the Magistrates' Courts Act for judgment enforcing the credit agreement; or
>
> (b) pays the amount demanded after receiving a demand notice at any time before judgment is obtained under paragraph (a), the agreement is terminated upon remittance of that amount."

Very helpful heads of argument were filed by counsel appearing for the plaintiff and the *amici curiae* appearing for the registrar. In both sets of heads counsel dealt in detail with the provisions of section 127 of the NCA. Counsel for the registrar correctly conceded that section 127 deals with a new right granted to a consumer, namely to surrender goods under a credit agreement. The mechanism of how to surrender the goods

is set out in section 127. The section does not deal, and was not intended to deal, with the jurisdiction of the high court or the ousting thereof. Counsel for the registrar very properly, and correctly so in my judgment, did not support the registrar's contention in respect of section 127 of the NCA.

In argument on behalf of the registrar, counsel relied on a judgment of BERTELSMANN J in the matter of *Absa Bank Ltd v Jean Pierre Myburgh*, case number 31827/2007 apparently delivered on 7 November 2007. It seems that that matter found its way to court instead of being kept in abeyance pending this judgment. The registrar in that matter refused to grant default judgment and the application then found its way to court. BERTELSMANN J found as follows in paragraph 58 of his unreported judgment:

> "The registrar consequently correctly refused to grant default judgment. The question now arises what order the court should make. As there is no precedent to rely on, I believe that the fairest order is the following:
>
> 1. The matter is transferred to the magistrate's court in

Barberton;

2. …
3. …"

In the course of his judgment the learned judge referred to the purpose of the NCA. Before us counsel for the registrar also referred in detail to the purpose of the NCA.

The preamble to the Act provides as follows:

> "To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980; and to provide for related incidental matters."

Section 2(1) of the NCA provides as follows:

> "The Act must be interpreted in a manner that gives effect to the purposes set out in section 3."

Section 3 then deals with the purpose of the Act. The purposes are set out in detail. All the purposes so set out are laudable purposes to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers. Not a single purpose, however, is indicative of the fact that the jurisdiction of the high court is intended to be ousted.

The fact that BERTELSMANN J dealt with the matter on the basis that it was transferred to the magistrate's court in Barberton is indicative of the fact that he accepted that he had jurisdiction to deal with the matter. Otherwise he should have struck the matter from the roll.

As can be seen from the registrar's letter referred to above, he complains about the number of actions issued out of the Transvaal Provincial Division whereas they could have been dealt with in the

Witwatersrand Local Division. As also pointed out above the Transvaal Provincial Division and the Witwatersrand Local Division have concurrent jurisdiction in terms of section 6 of the SCA. That is something that this court cannot change. If it is a matter of concern to the registrar and if it is something that affects the efficient functioning of this court, it is a matter of policy which should be dealt with by the department of justice and constitutional development. Once a court has jurisdiction to entertain a matter it cannot refuse to do so unless the action amounts to an abuse of the process of the court. See *Standard Credit Corporation Ltd* case *supra*. Any abuse of the process of the court in the matters before us was disavowed.

The plaintiff in both matters before us did not ask for costs occasioned by the appearance before the full court.

In case number 36472/2007 (the *Mateman* case) the following orders are made:

1. Judgment is granted against the first and second defendants jointly and severally, the one paying the other to be absolved in terms of prayers 1, 2 and 3 of the notice of application.

2. The defendants are ordered to pay the costs of suit jointly

and severally on the magistrate's court scale.

In case number 37792/2007 (the *Stringer* case) the following orders are made:

1. Judgment is granted against the first and second defendants jointly and severally, the one paying the other to be absolved in terms of prayers 1, 2 and 3 of the notice of application.

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W J VAN DER MERWE
JUDGE OF THE HIGH COURT

I agree

B R DU PLESSIS
JUDGE OF THE HIGH COURT

I agree

L J L VISSER
ACTING JUDGE OF THE HIGH COURT

Heard on: 6 NOVEMBER
For the Appellant: Adv N A CASSIM SC AND N J TEE
Instructed by: Messrs FINDLEY & NIEMEYER
For the Respondent: Adv E ELLIS SC AND N VAN DEN HEEVER
Date of Judgment: 7 DECEMBER 2007