THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no. 1059/2020

In the matter between:

TMT SERVICES & SUPPLIES (PTY) LTD
t/a TRAFFIC MANAGEMENT TECHNOLOGIES **APPELLANT**

and

THE MEC: DEPARTMENT OF TRANSPORT,
PROVINCE OF KWAZULU-NATAL **FIRST RESPONDENT**

THE PREMIER, PROVINCE OF KWAZULU-NATAL **SECOND RESPONDENT**

THE MEC: DEPARTMENT OF THE TREASURY,
PROVINCE OF KWAZULU-NATAL **THIRD RESPONDENT**

THE HEAD OF DEPARTMENT: DEPARTMENT OF
TRANSPORT, PROVINCE OF KWAZULU-NATAL **FOURTH RESPONDENT**

MTM KZN TRAFFIX (PTY) LTD **FIFTH RESPONDENT**

Neutral citation: *TMT Services & Supplies (Pty) Ltd t/a Traffic Management Technologies v MEC: Department of Transport, Province of KwaZulu-Natal and Others* (Case no. 1059/2020) [2022] ZASCA 27 (15 March 2022)

Coram: Saldulker, Schippers, Plasket and Hughes JJA and Matojane AJA

Heard: 28 February 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representative via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 10:00 am on 15 March 2022 .

Summary: Promotion of Administrative Justice Act 3 of 2000 (the PAJA) – jurisdiction of courts to review administrative action – definition of 'court' in s 1 of the PAJA determines exclusively which courts have jurisdiction – s 21(1) of the Superior Courts Act 10 of 2013 does not apply.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Ndita J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

'The point in limine to the effect that the court lacks jurisdiction to hear the application is dismissed with costs.'

3 The matter is remitted to the court below.

JUDGMENT

Plasket JA (Saldulker, Schippers and Hughes JJA and Matojane AJA concurring)

[1] In 2017 the Department of Transport in the KwaZulu-Natal provincial government published Tender ZNB1366/17T entitled 'Supply of Integrated Traffic Contravention Management Systems to Road Traffic Inspectorate'. Bidders were invited to tender for a five-year contract comprising of five components for managing road traffic contraventions in the province, namely an integrated camera network, a traffic contravention management system, a common interface of the various systems, a fines and recovery system and a skills transfer component.

[2] Four entities responded to the tender. The appellant, TMT Services & Supplies (Pty) Ltd, which traded as Traffic Management Technologies (TMT), was excluded at an early stage of the process. The tender was awarded by the fourth respondent, the Head of the Department of Transport in the KwaZulu-Natal provincial government (the HOD), to the fifth respondent, MTM KZN Traffix (Pty) Ltd (Traffix). This decision was taken on review by one of the other unsuccessful bidders, but the application was later withdrawn. Thereafter, TMT launched a review application for the same relief.

[3] MTM launched its application in the Western Cape High Court, Cape Town (the Western Cape court). The respondents who opposed the application[1] took a number of points in limine. One was that the Western Cape court did not have jurisdiction to determine the review. This was the only issue dealt with by that court. Ndita J dismissed TMT's application with costs on the basis that it had 'failed to establish that this court has jurisdiction to hear and determine the review application'.

[1] Three of the five cited respondents opposed the application. They were the first respondent, the MEC for Transport in the KwaZulu-Natal provincial government, the HOD and Traffix. They are also the only respondents to take part in this appeal.

[4] The parties agree that the learned judge's words do not accurately reflect the true basis upon which she dismissed the application. It is clear from the judgment that she accepted that the Western Cape court had jurisdiction, but she declined to exercise it. The sole issue for determination in this appeal is whether she was correct in declining to exercise jurisdiction.

The facts

[5] TMT is domiciled and ordinarily resident in Cape Town, within the territorial jurisdiction of the Western Cape court. The first to fourth respondents are functionaries of the KwaZulu-Natal provincial government. All have their principal place of administration in KwaZulu-Natal, within the territorial jurisdiction of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the KwaZulu-Natal court). Traffix is domiciled and ordinarily resident in KwaZulu-Natal.

[6] The tender was published by the Department of Transport in the KwaZulu-Natal provincial government (the department). It invited bids for a contract in which the successful bidder would be required to provide services to the department in respect of traffic management in the province. The tender was regulated by the KwaZulu-Natal Supply Chain Management Policy Framework. The KwaZulu-Natal Bid Appeals Tribunal had jurisdiction in respect of the tender process. A condition of the contract required the successful bidder's project team to be based in Pietermaritzburg, the capital of KwaZulu-Natal.

The statutory scheme

[7] The basis upon which TMT claimed that the Western Cape court had jurisdiction was the definition of a court in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). A decision to award a tender is an administrative action as defined in the PAJA.[2] The result of that was spelled out by O'Regan J in *Bato Star*

[2] *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) para 21; *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] ZASCA 90; 2008 (2) SA 638 (SCA) para 19; *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 45.

Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others[3] as follows:

'The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.'

[8] Generally speaking, an applicant for judicial review of administrative action 'cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common law' because that would 'defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation'.[4]

[9] The PAJA gives effect to s 33(1) and (2) of the Constitution – the fundamental rights to administrative action that is lawful, reasonable and procedurally fair, and to reasons for adverse administrative actions.[5] It does so by, inter alia, defining administrative action; defining procedural fairness; creating a mechanism for obtaining reasons; empowering courts to review administrative action; and providing for the granting of remedies consequent upon an administrative action having been found wanting. Chaskalson CJ, in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae)*,[6] held that the PAJA 'was passed to give effect to the rights contained in s 33', that it 'was clearly intended to be, and in substance is, a codification of these rights' and that it 'was required to cover the field and purports to do so'.

See too Cora Hoexter and Glenn Penfold *Administrative Law in South Africa* (3 ed) (2021) at 258-262 (Hoexter and Penfold).

[3] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 25.

[4] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) para 96.

[5] Constitution, s 33(3). See too the preamble of the PAJA.

[6] Note 4 para 95.

[10] I believe it is fair to say that the heart of the PAJA comprises of s 6 and s 8 – the power to review administrative action and to grant an appropriate remedy. That, after all, is the principal way in which it gives concrete effect to the fundamental rights to lawful, reasonable and procedurally fair administrative action.

[11] Section 6(1) provides that '[a]ny person may institute proceedings in a court . . . for the judicial review of an administrative action'. Section 6(2) then codifies the grounds upon which a court may review administrative action. The effect is that administrative actions as defined in the PAJA are subject to review, in terms of s 6(1), by a court on the basis of the grounds of review codified in s 6(2).[7] Section 8 deals with the remedies that may be awarded when administrative action is reviewed and found to be either unlawful, unreasonable or procedurally unfair. Section 8(1) provides that the 'court . . . in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable', including mandatory and prohibitory interdicts, the setting aside of administrative action, declarators and, in exceptional circumstances, substituting or varying administrative action and even directing the payment of compensation.

[12] A 'court' is identified in s 6 and s 8 as the institution that has the power to review administrative action and to grant remedies when administrative action has been found to be irregular.[8] Section 1 of the PAJA defines a court as follows:

'*(a)* the Constitutional Court acting in terms of section 167(6)*(a)* of the Constitution; or

(b) (i) a High Court or another court of similar status; or

(ii) a Magistrate's Court for any district or for any regional division established by the Minister for the purposes of adjudicating civil disputes in terms of section 2 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), either generally or in respect of a specified class of administrative actions, designated by the Minister by notice in the Gazette and presided over by a magistrate, an additional

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[7] *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* 2014 (4) SA 148 (ECP) para 58.

[8] In both s 6 and s 8 reference is also made to a 'tribunal', defined in s 1 as 'any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act'. Provision is thus made in the PAJA for the possibility, in the future, of the establishment of specialist administrative tribunals to hear reviews either instead of, or in addition to, courts. There appear to be no plans at present for the creation of such tribunals. See Hoexter and Penfold at 711.

magistrate or a magistrate of a regional division established for the purposes of adjudicating civil disputes, as the case may be, designated in terms of section 9A;

within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced.'

[13] The definition of a court in the PAJA identifies the courts that have the power to review administrative action and the circumstances in which the Constitutional Court,[9] a high court, or a court of similar status,[10] and a magistrates' court, may exercise that jurisdiction. This definition, Hoexter and Penfold say, 'contemplates wide territorial jurisdiction for the high court, courts of similar status to it and designated magistrates' courts.[11]

[14] In the case of review proceedings in a high court, as in this matter, the following high courts have jurisdiction: (a) the high court within whose area of jurisdiction the administrative action 'occurred'; (b) the high court within whose area of jurisdiction the administrator who took the administrative action has their 'principal place of administration'; (c) the high court within whose area of jurisdiction the person whose rights have been affected by the administrative action 'is domiciled or ordinarily resident'; and (d) the high court within whose area of jurisdiction 'the adverse effect of the administrative action was, is or will be experienced'.[12]

[15] It was argued on behalf of the respondents that s 1 of the PAJA must be read with s 21(1) of the Superior Courts Act 10 of 2013. This section provides:

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[9] Section 167(6)*(a)* of the Constitution enables the Constitutional Court to grant direct access to it, when to do so is in the interests of justice. In such an instance, it will be the court of first (and last) instance. The definition vests it with jurisdiction to review administrative action in this capacity. Rule 18 of the Constitutional Court's rules regulates applications for direct access.

[10] The Labour Court created by s 151 of the Labour Relations Act 66 of 1995, and the Land Claims Court, created by s 22 of the Restitution of Land Rights Act 22 of 1994, are courts of similar status to the high court. See s 151(2) of the Labour Relations Act and s 22(2) of the Restitution of Land Rights Act which expressly make these courts specialized equivalents of the high court.

[11] Hoexter and Penfold at 710, fn 86.

[12] *Director-General, Department of Home Affairs and Others v De Saude Attorneys and Another* [2019] ZASCA 46; [2019] 2 All SA 665 (SCA) para 37.

'(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.'

The issues

[16] Four issues will be discussed below. They are the ambit and effect of the definition of a court in the PAJA; the principles that apply when more than one court has jurisdiction; whether an abuse of process was committed by TMT when it instituted its review application in the Western Cape court; and whether s 6 of the PAJA vests a discretion in a court to decline to exercise jurisdiction to review administrative action.

The definition of a court in the PAJA

[17] The argument that the definition of a court in the PAJA had to be read with s 21(1) of the Superior Courts Act, and limited the operation of the former, found favour with the court below. Its judgment effectively grafted additional requirements onto the jurisdictional factors in the definition. Those were considerations of 'convenience, effectiveness and common sense' that, the court below held, were 'still relevant'. I do not understand how s 21(1) affects the question to be answered in this matter. All it does, is to confirm that a high court has a general jurisdiction to deal with all matters arising within its area of jurisdiction, and the courts have held that in applying its provisions, they should be guided by considerations of convenience and common sense.[13]

[18] The court below found support, in some of the judgments cited by it, for the inclusion of considerations of 'convenience, effectiveness and common sense' in order to *restrict* the application of the definition of a court in the PAJA. I note that the decision

[13] See, in particular, *Estate Agents Board v Lek* 1979 (3) SA 1048 (A) at 1067C-E.

of this court in *Director-General, Department of Home Affairs and Others v De Saude Attorneys and Another*[14] was not referred to by the court below. That case made no mention of s 21(1) of the Superior Courts Act and upheld the jurisdiction of the court below on the basis of the PAJA exclusively, including on the basis that the respondents had 'their offices within the area of jurisdiction' of the Western Cape court.[15]

[19] The issue was also considered in *Maleka v Health Professions Council of SA and Another*.[16] The applicant lived and practised as a medical practitioner in Queenstown in the Eastern Cape. His name was removed from the register of medical practitioners by the first respondent. He took that administrative decision on review to the Eastern Cape high court in Grahamstown. It was argued by the first respondent that the definition of a court in the PAJA was subject to the common law. That meant, in terms of *Jasat v Interim Medical and Dental Council*,[17] a case that pre-dated the coming into force of the PAJA, that the court with jurisdiction was that which had jurisdiction in respect of the place where the register was held – in Pretoria – and not the court with jurisdiction in respect of where the applicant resided and practised – in Grahamstown.

[20] Jones J concluded:[18]

'The argument on behalf of the first respondent is that the Promotion of Administrative [Justice] Act is no more than a codification of the common law, that it does not intend to extend the common law, and that its provisions should be interpreted in harmony with the common law. Hence, I should interpret its provisions relating to jurisdiction so as to be in line with the common law decisions on jurisdiction. If I do that I must interpret the definition of "court" in section 1 restrictively by reading into the definition a proviso to the effect that a court with jurisdiction is a court of ordinary residence or a court where the effect of the administrative [action] is experienced, provided that there is also a common law *ratio* for jurisdiction. I cannot believe that such an interpretation is permissible. It is not part of the wording and does not arise from it by necessary implication. In my view the intention of the Act is to give wide, not

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[14] Note 12.
[15] See, in particular, paras 37 and 64.
[16] *Maleka v Health Professions Council of SA and Another* [2005] 4 All SA 72 (E).
[17] *Jasat v Interim Medical and Dental Council* 1999 (1) SA 156 (N). *Jasat* had sought to distinguish *Estate Agents Board v Lek* (note 13) but Jones J was not convinced that there was merit in the distinction that was sought to be drawn.
[18] Para 13.

restricted, protection against unfair administrative action, which implies greater, not more restricted, jurisdiction. What is the object of giving a court of ordinary residence jurisdiction if that is not enough for jurisdiction? When the Act was passed the legislature was surely aware of the decision in *Jasat's* case. If so, the conclusion is inevitable that it intended by its wording of the definition of court to give jurisdiction where *Jasat's* case had previously denied it.'

[21] I add but one observation. In *Bato Star*, O'Regan J said that because the PAJA gives effect to s 33 of the Constitution, matters concerning its interpretation and application 'will of course be constitutional matters'.[19] In *S v Zuma and Others*,[20] Kentridge AJ made the point that 'constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law'. In my view, the same principle holds true in this instance.

[22] I agree with Jones J's reasoning and with the conclusion arrived at by him that the question of jurisdiction in respect of the judicial review of administrative action is to be determined with reference to the definition of a court in s 1 of the PAJA exclusively. To the extent that the cases cited by the court below relied on factors additional to those in the PAJA, those decisions are, in my view, not correct.[21]

[23] There is nothing in the language, context or purpose of the definition of a court in the PAJA that justifies the inclusion of additional factors relevant to jurisdiction, particularly with a view to restricting the jurisdiction of the courts mentioned in the section. This is so for the following reasons.

[24] First, the definition vests jurisdiction in the courts mentioned in unqualified terms. Had s 21(1) of the Superior Courts Act (or its predecessor, s 19 of the Supreme Court Act 59 of 1959) been intended to apply in addition, one could reasonably have expected the legislature to have said so.

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[19] Note 3 para 25.
[20] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) para 15.
[21] See in particular, *Mahony NO and Others v Member of the Executive Council for Health and Social Development, Eastern Cape and Others* WCHC case no.1444/15 unreported; *Johnson and Others v Minister of Home Affairs and Others* [2014] ZAWCHC 101.

[25] Secondly, the definition of a court in the PAJA relates to jurisdiction in one specific, specialised and limited area of law – the judicial review of administrative action. It is a self-contained definition for that purpose and the grafting on of other, general, jurisdictional requirements is at odds with this purpose.

[26] Thirdly, the extended approach to judicial review jurisdiction that the respondents contend for is, to borrow a term from *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[22] one that leads to 'insensible and unbusinesslike results': it would introduce intolerable uncertainty where there was otherwise none, because whenever a party relied on domicile or ordinary residence, or the location of the effect of the administrative action, for jurisdiction, they would open up a dispute as to the suitability of their choice of forum that could lead to them being non-suited despite the clear terms of the PAJA. In other words, an applicant for judicial review relying on these bases for jurisdiction would have no way of knowing in advance whether a court would or would not exercise jurisdiction.

[27] Finally, the purpose of the PAJA must be taken into account. It is primarily to give effect to the fundamental rights, contained in s 33 of the Constitution, to lawful, reasonable and procedurally fair administrative action and to reasons for adverse administrative action. A broad, inclusive and unqualified jurisdiction regime promotes this purpose and the fundamental right of access to court,[23] while the approach contended for by the respondents restricts it. If one considers the origin of the ordinary residence or domicile, and location of the adverse effect, grounds for jurisdiction, namely *Estate Agents Board v Lek*,[24] they were expressly intended to give effect, through s 19 of the Supreme Court Act ironically, to effective access to court. Trollip JA stated that as the 'inhibitory effect' of the board's decision 'hit respondent in Cape Town where he is resident and has his business' and because he was ordinarily resident within the area of jurisdiction of the Western Cape court, it had jurisdiction: it was, after all, the court 'immediately at hand and easily accessible to him and to which he would naturally turn for aid in seeking to have the diminution in his legal capacity

[22] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[23] Constitution, s 34.
[24] Note 13.

or personality remedied'.[25] The PAJA has codified the jurisdictional grounds recognized by *Lek* without qualification.

[28] I conclude therefore that in order to decide which high court has jurisdiction in a review of administrative action in terms of the PAJA, the complete and exclusive answer is to be found in the definition of a court in s 1. Section 21(1) of the Superior Courts Act has no application.

Concurrent jurisdiction

[29] Two divisions of the high court have jurisdiction in this matter. The KwaZulu-Natal court has jurisdiction because the administrative action was taken in KwaZulu-Natal and because the administrative decision-maker has their principal place of administration in KwaZulu-Natal. The Western Cape court has jurisdiction because TMT – the person whose rights were affected by the administrative action – is domiciled and ordinarily resident in the Western Cape.

[30] The question now to be answered is whether, in the light of the fact that two courts had jurisdiction, it was open to the Western Cape court to decline to exercise its jurisdiction. This requires a consideration of the principles that apply when more than one court has jurisdiction. This issue was considered by this court fairly recently in *Standard Bank of South Africa Ltd and Others v Mpongo and Others*.[26] It concerned various issues relating to the concurrent jurisdiction of high courts and magistrates' courts, on the one hand, and of main seats and local seats of divisions of the high court, on the other. In deciding these issues, it relied on and applied general principles relating inter alia to concurrent jurisdiction. The principles that I draw from it apply with equal force to the situation that pertains in this matter, namely the concurrent jurisdiction of two different divisions of the high court.

[31] The first question that arises is who chooses the forum. In *Standard Bank*, Sutherland AJA answered this question as follows:[27]

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[25] At 1067C-E.
[26] *Standard Bank of South Africa Ltd and Others v Mpongo and Others* [2021] ZASCA 92; 2021 (6) SA 403 (SCA).
[27] Para 25.

'Self-evidently, litigation begins by a plaintiff initiating a claim. Axiomatically, it must be the plaintiff who chooses a court of competent jurisdiction in just the same way that a game of cricket must begin by a ball being bowled. The batsman cannot begin. This elementary fact is recognised as a rule of the common law, founded, as it is, on common sense.'

[32] Sutherland AJA affirmed[28] this court's decision in *Makhanya v University of Zululand*,[29] in which Nugent JA stated in relation to the concurrent jurisdiction of the high court and the labour court:

'Some surprise was expressed in *Chirwa* at the notion that a plaintiff might formulate his or her claim in different ways and thereby bring it before a forum of his or her choice but that surprise seems to me to be misplaced. A plaintiff might indeed formulate a claim in whatever way he or she chooses – though it might end up that the claim is bad. But if a claim, as formulated by the claimant, is enforceable in a particular court, then the plaintiff is entitled to bring it before that court. And if there are two courts before which it might be brought then that should not evoke surprise, because that is the nature of concurrent jurisdiction. It might be that the claim, as formulated, is a bad claim, and it will be dismissed for that reason, but that is another matter.'

Nugent JA also explained the mechanics of concurrent jurisdiction when he said that a litigant 'who has a claim that is capable of being considered by either of two courts that have concurrent jurisdiction must necessarily choose in which court to pursue the claim and, once having made that election, will not be able to bring the same claim before the other court'.[30]

[33] In order to cater, inter alia, for any undue prejudice that the choice of forum may have for a defendant or respondent, the Superior Courts Act makes provision for the transfer of matters from one court to another. Section 27(1) provides:

'If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings-

(a) should have been instituted in another Division or at another seat of that Division; or

(b) would be more conveniently or more appropriately heard or determined-

(i) at another seat of that Division; or

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[28] Para 32.

[29] *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) para 34.

[30] Note 29 para 27.

(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.'

[34] In *Standard Bank*, Sutherland AJA considered whether a court that has concurrent jurisdiction with another court could refuse to exercise its jurisdiction. He answered this issue in the negative, stating that it is 'law of long standing that when a High Court has a matter before it that could have been brought in a magistrates' court it has no power to refuse to hear the matter'.[31] It is only in the event of an abuse of process that it may do so.[32] Sutherland AJA[33] also affirmed this court's judgment in *Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commissioner and Others*,[34] in which it was held that '[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'.

[35] From the above, the following propositions apply in this case. First, TMT, as the applicant in the review application, had a choice to either initiate those proceedings in the KwaZulu-Natal court or the Western Cape court. It chose to do so in the Western Cape court, and it was entitled to do so. Secondly, once it chose to proceed in the Western Cape court, that court had no power to refuse to entertain the matter, in the absence of an abuse of process. A third point requires mention too. Questions of convenience do not arise when a high court decides whether it has jurisdiction in terms of the PAJA. If one or more of the four jurisdiction-vesting circumstances are present, the court has jurisdiction. The convenience of the parties can only arise later, in the event of one or more of the respondents applying in terms of s 27(1) of the Superior Courts Act for the transfer of the matter to another court.

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[31] Para 27. See too *Goldberg v Goldberg* 1938 WLD 83 at 85-86; *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) at 817J-819E.
[32] Para 59. See too *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 517.
[33] Para 31.
[34] *Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission and Others* [2012] ZASCA 134; 2013 (5) SA 484 (SCA) para 19.

Abuse of process

[36] It was argued that the Western Cape court had been entitled to decline to exercise jurisdiction because the initiation of the review in that court was an abuse of process on the part of TMT. This issue was also discussed in *Standard Bank*.

[37] Sutherland AJA endorsed[35] what Mahomed CJ had held in *Beinash v Wixley*[36] concerning the nature of an abuse of process. The learned Chief Justice had said:

'What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process". It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.'

What is more, Sutherland AJA held that the mere fact that the banks had instituted proceedings in a high court when they could have done so in magistrates' courts was not an abuse of process, as had been found by one of the courts below;[37] and he added that '[i]n any event, it is difficult to see how litigants can be accused of abusing the process by exercising a choice that the law gives them'.[38]

[38] The court below did not purport to decline to exercise jurisdiction on the basis of an abuse of process on the part of TMT. That is not surprising because the answering papers of all of the respondents are completely silent on the issue. In the result, there is no evidence whatsoever to even suggest that TMT instituted the review proceedings in the Western Cape court for a purpose extraneous to the objective of facilitating the pursuit of the truth. It simply exercised a choice given to it by the law and, as explained above, that cannot, without more, constitute an abuse of process. If any of the respondents are of the view that TMT's choice of forum works a hardship on them, they can apply for the transfer of the matter to the KwaZulu-Natal court in terms of s 27 of the Superior Courts Act.

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[35] Para 47.
[36] *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 734F-H.
[37] Para 44.
[38] Para 48.

Section 6 of the PAJA

[39] Finally, it was argued that s 6 of the PAJA, in providing for the judicial review of administrative action, vested a discretion in a court to exercise that jurisdiction or decline to do so. That discretion, according to this argument, arises from s 6(1), which states that '[a]ny person may institute proceedings in a court . . . for the judicial review of an administrative action', read with s 6(2) which provides that a 'court . . . has the power to judicially review an administrative action'. I have a great deal of difficulty in understanding how this vests in a court the choice of exercising or refusing to exercise jurisdiction granted to it by the definition of a court in the PAJA.

[40] These two provisions mean no more than that when a person chooses to institute review proceedings, the court is empowered to come to that person's assistance if a ground of review is found to exist. This says nothing of jurisdiction. That is dealt with in the definition of a court.

Conclusion

[41] As the Western Cape court had jurisdiction and had no power to decline to exercise that jurisdiction, the appeal must succeed. Neither the remaining points in limine or the merits of the review have been determined. The matter must therefore be remitted to the high court so that the application can be concluded.

[42] I make the following order.

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

'The point in limine to the effect that the court lacks jurisdiction to hear the application is dismissed with costs.'

3 The matter is remitted to the court below.

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C Plasket

Judge of Appeal

APPEARANCES

For the appellant:	L Ackermann (with A Pepler)
Instructed by:	Pepler O'Kennedy, Cape Town Symington & De Kok Inc, Bloemfontein
For the First and Fourth Respondents:	A Cockrell SC (with P Govindasamy)
Instructed by:	Govindasamy Ndzingi & Govindasamy Inc, c/o K B Gangen & Company, Cape Town Matsepe's Inc, Bloemfontein
For the Fifth Respondent:	G van Niekerk SC (with M Potgieter)
Instructed by:	PKX Attorneys c/o Pincus Matz Attorneys, Cape Town Lovius Block Attorneys, Bloemfontein