

REPORTABLE

Case numbers: 19167/19

16945/19

16365/19

17242/19

14294/19

21309/18

In the matters between:

STANDARD BANK OF SA LTD

PLAINTIFF

AND

LETLHOGONOLO KEKANA

RESPONDENT

STANDARD BANK OF SA LTD

PLAINTIFF

AND

SANELE MBEDU

RESPONDENT

STANDARD BANK OF SA LTD

PLAINTIFF

AND

THULANI MAYAPHI

RESPONDENT

STANDARD BANK OF SA LTD

PLAINTIFF

AND

SIYAXOLA MBA

RESPONDENT

STANDARD BANK OF SA LTD

PLAINTIFF

AND

DEREK SANDY VAN ZYL

RESPONDENT

STANDARD BANK OF SA LTD

PLAINTIFF

AND

JULIAN ALROY RODGERS

RESPONDENT

HEARD : 29 JANUARY 2020

DELIVERED : 25 MAY 2020

JUDGMENT

THULARE AJ

[1] The six matters are applications for judgment by default. They served before the Registrar of the High Court in which judgment was refused in whole. The Registrar was of the view that the High Court did not have jurisdiction in the matters arising out of the terms of the written agreement between the parties. The matters were set down for hearing in open court. The matter was heard in the unopposed roll. After the hearing but before judgment, the plaintiff filed the notice of withdrawal of action in the second case, that of Mbedu.

[2] The issue is a clear and express choice of court clause in a contract or simply the term of an agreement which provides for a chosen forum.

[3] In the matter of Kekana the applicable term is 25.8 and read as follows:

“25.8 You consent in terms of section 45 of the Magistrate’s Court Act, for purposes of the Bank taking legal steps to enforce any of its rights in terms of this Agreement, to the jurisdiction of any Magistrate’s Court having jurisdiction in the area in which you reside

or work notwithstanding the amount involved. You do not consent to the jurisdiction of the High Court if the Magistrate's Court has concurrent jurisdiction."

[4] In the matters of Mayaphi, Mba and Van Zyl it is term 23.8 and read as follows:

"23.8 This agreement will be governed by and interpreted in accordance with the laws of the Republic of South Africa and you hereby consent in terms of section 45 of the Magistrate's Court Act 32 of 1944 (of) to us taking legal steps to enforce any of our rights in terms of this Agreement, to the jurisdiction of any Magistrate's Court having jurisdiction in the area in which you reside or work, despite the amount involved. You do not consent to the jurisdiction of the High Court if the Magistrate's Court has concurrent jurisdiction."

Clause 23.5 of the agreement in the matter of Rodgers is in similar terms, including the typographical error of the word '(of)' after '1944'.

[5] Kekana who resides in Bloubergstrand and Mba who resides in Milnerton, are the only respondents who reside within the Magisterial district of the Cape with a seat in Cape Town in which the High Court has its main seat. Mayaphi resides in Langa in the district of Wynberg. Van Zyl resides in Sandbaai in the district of Hermanus. Rodgers resides in Diazville in Saldanha in the district of Vredenburg. All are credit agreements related to the purchase of a vehicle. Kekana concluded the agreement in Century City, Mayaphi in Parow, Mba in Khayelitsha, Van Zyl in Hermanus and Rodgers in Ottery. All of them resided within the Regional Division of the Western Cape Magistrates' Courts. Cape Town, Wynberg, Vredenburg and Hermanus.

[6] At the time that the plaintiff issued summons, the amount owing by Kekana to the plaintiff was R50 949-62. The amount owing by Mayaphi was R183 035-47, Mba owed R270 221-96, Van Zyl owed R329 814-33 and Rodgers owed R257 334-28. Kekana and Mayaphi's amounts fell within the jurisdiction of the district courts whilst Mba, Van Zyl and Rodgers amounts fell within the jurisdiction of the Regional Courts.

[7] It was clear to me what the initial concern was of the drafters of the agreement on behalf of Standard Bank of SA Ltd (Standard Bank). This was specifically in relation to two questions. The first was the determination of the forum for resolving disputes related to the agreement, depending on the amount owed at the time. The second, which was also ancillary to the first, was the choice of the law, for instance the rules of court that would govern recovery of the amount or the resolution of a dispute. In my view the mischief that the drafters identified was not pursued in implementation. It did not find support by those who were to apply the terms and give effect to the agreement.

[8] The parties in these agreements determined the forum in relation to Standard Bank of SA Ltd (Standard Bank) taking legal steps to enforce its rights in terms of the agreement. The forum of first instance was any Magistrate's Court having jurisdiction in the area in which the defendant resided or worked, despite the amount involved, if the amount was within the jurisdiction of the magistrates' court. The pre-selection of a forum had its benefits. It provided reasonable predictability as to which of the three courts would have jurisdiction at what point and which law would apply.

[9] The Republic of South Africa has a decentralized judicial system [section 166 of the Constitution of the Republic of South Africa, 1996 (the Constitution)]. All the courts listed in section 166 of the Constitution have significant statutory as well as operational control over their own matters. The section listed the courts in order of their hierarchy, starting with the highest court in the land at (a) (the Constitutional Court) and ending with the lowest at (e) (any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Court). Of significance, for purposes of this judgment, is (c) the High Court of South Africa, which ranks above the Magistrates' Courts at (d). It is also necessary to point out that a court higher in rank has appellate jurisdiction on the lower. Appeals from the Traditional Courts at (e) which exists in terms of the Black Administration Act, 1927, are justiciable in the Magistrates' Courts, whilst appeals from the Magistrates' Courts are heard in the High Court.

[10] The change as regards the appellate jurisdiction appears in the ranks from Magistrates' Courts downward. Decisions of the Small Claims Court (at (e)) whose monetary jurisdiction is R20 000-00 are not appealable in the Magistrates' Courts. In fact, they are not appealable at all and a party may only apply for the review of their proceedings, in the High Court. Magistrates' Courts are divided into the District Courts and the Regional Courts. They are on the same rank. They are similar but not equal and as a result the Regional Courts do not have appellate jurisdiction over decisions made in the Magistrates' Courts. The monetary jurisdictions of the two courts also differ, and the amounts of their jurisdiction are determined by the Minister for Justice.

Currently the monetary jurisdiction of the District Courts is R200 000-00 and the Regional Court is R400 000-00.

[11] Monetary jurisdiction of the High Courts (section 169(1)(b) of the Constitution) and the Magistrates' Courts (section 29 of the Magistrates' Courts Act, 1944) relate to our judicial system (section 166 of the Constitution). It can safely be said that the freely elected representatives of the people, in order to improve the quality of life of all citizens and to free the potential of each person (preamble to the Constitution) envisaged that monetary claims as provided for in the Constitution and the Magistrates' Courts Act, would ordinarily be dealt with in the applicable courts. Two objectives stand out in the preamble as the purpose given, by the freely elected representatives of the people, for the establishment of Magistrates' Courts. It is their geographic distribution throughout the national territory and the enhancement of access to justice.

[12] In my view, this is the ideal which the drafters of contracts for Standard Bank individually and the parties collectively hoped to achieve. I do not understand the terms of the agreement to oust the jurisdiction of the High Court. These were not cases where Standard Bank was deprived of its legal rights generally or prevented from seeking redress at any time in the courts. The jurisdiction of the High Court was delayed to its proper position as a court of appeal in matters justiciable in the Magistrates' Courts in the ordinary course because of the amount involved. Simply put, I understood the clause to mean that Standard Bank committed to the defendants that no right of action in the High Court would accrue until the matter had been determined by a Magistrates Court having jurisdiction on any dispute that may arise between them. In my view, the

choice was made *bona fide*. It reasonably accorded with the general provisions of jurisdiction in relation to the amounts related to the transactions and therefore legal. I understood it to be a consensual processes clause that did not offend public policy as to procedural fairness.

[13] The National Credit Act, 2005 (Act No. 32 of 2005 (the NCA)) is applicable to all these matters. The Magistrates' Courts have court of first instance jurisdiction in such matters, section 29(1)(e) of the Magistrates' Courts Act read with Section 172(2) of the NCA. Section 29(1)(e) of the Magistrates' Courts Act read:

“29 Jurisdiction in respect of cause of action

(1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court, in respect of causes of action, shall have jurisdiction in - ...

(e) actions on or arising out of any credit agreement, as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005).”

In *Nedbank v Gqirana NO and others*, a decision of the Eastern Cape Division of the High Court, Grahamstown, case number 1203/2018 dated 30 July 2019 the following was said in para 37.8, 37.9 and 75.6:

“[37.8] The provisions of Section 29(1)(e) of the Magistrates' Court Act, as read with Section 172(2) of the NCA, provides that the Magistrates' Courts have jurisdiction over all NCA matters whatever monetary sum.

[37.9] It was held by Bertelsmann J in Myburgh (supra) 33 (in my view correctly) that (generally) issuing summons in the High Court for a debt that could be recovered in the Magistrates' Court runs counter to the express purpose of the NCA. ...

[75.6] The provisions of the NCA however, properly interpreted through the prism of the Constitution, creates a specific set of structures and procedures relating to NCA matters

which, read in context and on a generous interpretation by necessary implication, provides for the Magistrate Courts to be the Court of first adjudication of all NCA matters to the exclusion of the High Court as a Court of first adjudication save only in the event that there are unusual or extraordinary factual or legal issues raised which in the opinion of the High Court warrant them being heard first heard in the High Court.”

[14] “Although it is established law that the High Court exercises concurrent jurisdiction with any magistrate’s court in its area of jurisdiction, it should be noted that the High Court has always discouraged plaintiffs from approaching it with a matter that can be dealt with in the magistrate’s court at less expense to the litigants (cf *Standard Credit Corporation Ltd v Bester supra*; *Mofokeng supra*)” [M Roestoff, H Coetzee, University of Pretoria, Journal for Contemporary Roman-Dutch Law/ Tydskrif vir Hedendaagse Romein-Hollandse Reg, Vol 71, No. 4, pp 678-668, *Consent to Jurisdiction – Unlawful provision in a credit agreement in terms of the National Credit Act- Is the jurisdiction of a Court ousted thereby? Absa Bank Ltd v Mybyrgh* unreported case no 31827/2007 (T); *Nedbank Ltd v Mateman* unreported case no 36472/2007 (T); *Nedbank v Stringer* unreported case no 37792/2007 (T)]. The parties intended to delay the jurisdiction of the High Court and intended that the magistrate’s court that is closest to the defendant’s residence or work should have jurisdiction to hear the matter first, where the amount of the debt was within that magistrate’s court’s jurisdiction. The agreement did not change the fact that the High Court exercised concurrent jurisdiction with the magistrate’s court.

[15] To assert the retention of jurisdiction does not mean that the High Court should automatically be a court of first instance where there is concurrent jurisdiction with a magistrate's court. Roestoff and Coetzee (*supra*) said:

“Finally, we agree with the court in *Mateman* and *Stringer* that the fact that the court in *Myburgh* did not strike the matter from the roll, but transferred it to the magistrate's court in Barberton, proved that the court accepted that the High Court retained its jurisdiction.”

Unusual, extraordinary, difficult and complicated cases may force Standard Bank to approach the High Court as a court of first instance [*Koch v Realty Corporation of SA* 1918 TPD 356 at 359; Roestoff and Coetzee *supra*]. The papers do not show that any of the matters is such a case.

[16] Standard Bank had a choice to determine out of which court to sue, as *dominus litis* in the event of its debtor's breach. As in these matters, Standard Bank understood that there would be instances where more than one court had jurisdiction. It made its election as part of the terms of the agreement, exercising its freedom of choice. The defendants entered into the agreements, amongst others informed by the term, with its benefits as to costs and accessibility. The parties agreed to protect the defendant against the unnecessary use of the more expensive forum, that is, the hardship of being subjected to unnecessary and expensive proceedings often far out of town. The parties did not by an express choice of forum evade any mandatory provision of the law. There is no public policy to the contrary. The clause was not exculpatory and did not provide the defendant with any advantage to which in law they would not be entitled. It did not deny Standard Bank of its day in court, including in the High Court if the need arose. It

did not present any grave difficulty and inconvenience for Standard Bank, the defendants or the courts. The agreement should be conclusive and enforceable.

[17] The derogation of a choice of forum is not explained by Standard Bank in the papers. Standard Bank issued papers in the High Court in violation of an agreement between the parties. There was no reason why Standard Bank should not be held to its bargain. In my view, it is the fair and right thing to do. There was no reason why enforcement of this term of the agreement would be inequitable and unjust. It will not be in the interest of justice that an indigent defendant be hauled to the High Court when the matter can be resolved by the Magistrates court, in circumstances where parties have specifically agreed that such matters should start in the Magistrates' Courts.

[18] For these reasons I make the following order:

1. The proceedings in the High Court are terminated and these matters are hereby transferred to the respective Magistrates' Courts having jurisdiction.

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DM THULARE
ACTING JUDGE OF THE HIGH COURT