

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
DATE	

Case No: 2023-003529

In the matter between:

NEDBANK LIMITED

Applicant

and

ABRAHAMS, CELESTE FELICIA

Respondent

AND

Case No: 2023-031890

In the matter between:

NEDBANK LIMITED

Applicant

and

MALINGA, ZIBUSENI

Respondent

AND

Case No: 2023-039182

In the matter between:

NEDBANK LIMITED

Applicant

and

NKUNA, KGOMOTSO

Respondent

AND

Case No: 2023-039212

In the matter between:

NEDBANK LIMITED

Applicant

and

MOSHANE, PULE ELIAS

Respondent

AND

Case No: 2023-051021

In the matter between:

NEDBANK LIMITED

Applicant

and

NDZONDA, NOBUNTU ROSE

Respondent

AND

Case No: 2023-053164

In the matter between:

NEDBANK LIMITED

Applicant

and

CHOUNYANE, ANDREW

Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court files.

Gilbert AJ:

1. In each of these applications the applicant as credit provider seeks to recover the shortfall that arose under instalment agreements falling within the ambit of the National Credit Act, 2005 (“the NCA”) after the goods have been voluntarily surrendered by the consumer.¹

¹ Section 131 of the NCA provides that *inter alia* sections 127(2) to (9) of the NCA apply, read with the changes required by the context, if a court makes an attachment order in relation to the goods i.e. where the goods are not voluntarily surrendered. As in none of the present applications a court has made an attachment order, this judgment does not consider the issue of jurisdiction in relation to those matters.

2. These claims fall squarely within the ambit of section 127(8)(a) of the NCA. No argument was offered to the contrary.
3. Sections 127(1) to (7) provides for the surrender by a consumer of the goods, for the sale by the credit provider of the goods after complying with various requirements, for the crediting of the sale proceeds of the surrendered goods to the outstanding balance under the credit agreement, and for the credit provider, after providing for various other debits and credits and otherwise complying with other statutory requirements, to then demand payment from the consumer of the shortfall under the credit agreement calculated in accordance with those subsections.
4. Section 127(8) provides, and the emphasis is mine, that:

“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.”*

5. These applications were enrolled before me as unopposed matters as none of the respondents had opposed. When the matters were called, I raised with counsel my concern that it appeared from *obiter* remarks made by the

Supreme Court of Appeal in *Standard Bank of South Africa Limited and Others v Mpongo and Others* 2021 (6) SA 403 (SCA) in paragraph 81 that section 127(8)(a) may be one of those instances in the NCA where the magistrates' courts have exclusive jurisdiction. There are also academic writings that advance this position.²

6. Counsel then appearing for the applicant submitted that the full court of this Division in *Nedbank Limited v Mateman and Others; Nedbank Limited v Stringer and Another* 2008 (4) SA 276 (T) had already decided that this court has concurrent jurisdiction with the magistrates' courts, including in relation to claims in terms of section 127(8)(a). I expressed reservations. As neither I nor counsel then appearing had considered the issue closely, I adjourned the applications to enable the applicant to make written submissions.
7. Subsequently, the applicant appointed new attorneys and counsel.
8. The Banking Association of South Africa ("BASA") subsequently sought leave to be admitted as an *amicus curiae* given the importance of the issue to the banking industry in general. BASA was admitted and instructed its own legal team.

² C van Heerden 'Perspectives on Jurisdiction in terms of the National Credit Act 34 of 2005' 2008 TSAR (4) 840 at 844, 845; Scholtz *Guide to the National Credit Act* (LexisNexis) Service Issue 15 (July 2023) in para 20.2. Kelly-Louw *Consumer Credit Regulation in South Africa* (Juta) 2012 at p 517, refers to Van Heerden and an earlier service issue of Scholtz, and proffers tentatively at p460 that "[i]t seems that the Act has specifically reserved this function for the magistrates' courts".

9. Both the applicant and BASA filed written submissions and subsequently made oral submissions. I am indebted to them and their counsel.
10. The applicant persisted that this issue had already been decided by the full court of this Division in *Mateman*, and that is that the High Court does have jurisdiction to determine claims falling within section 127(8). BASA also so submitted. Of course, if that is so, I am as a single judge bound by *Mateman*.
11. The full court decision of *Mateman* arose out of the frustration of the registrar of the then Transvaal Provincial Division in Pretoria that the registrar's office was being overloaded with default judgment applications where it appeared that certain of those applications fell within the jurisdiction of the Witwatersrand Local Division (with which the Transvaal Provincial Division had concurrent jurisdiction) and the magistrates' courts. The registrar sought to bring the matter to a head by referring two default judgment applications to open court in terms of Uniform Rule 31(5)(b)(vi) and by addressing a letter to the Society of Advocates, Pretoria asking for *pro amico* assistance. It appears from the letter that the registrar was of the view that based upon its interpretation of sections 90(2)(k)(vi) and 127 of the NCA the then Transvaal Provincial Division (and by implication its registrar) could justifiably refuse to entertain those default judgment applications where the matters could, or possibly should, according to the registrar, have been brought in the then Witwatersrand Local Division or the magistrates' courts, as the case may be.
12. A full court was constituted to deal with the matter.

13. The full court at 279A-C interpreted the issue as one of jurisdiction, and particularly whether the NCA ousted the jurisdiction of the High Court, and therefore also of the registrar, to grant default judgment applications.
14. The full court held at 284G that section 90(2)(k)(vi) of the NCA, which outlaws certain consents to jurisdiction by a consumer, did not constitute an ousting of the High Court's jurisdiction as section 90 of the NCA did not affect the jurisdiction of the High Court. It followed, the full court found at 286B-D, that as the High Court had jurisdiction, the registrar was obliged to continue to consider default judgments that came before it.
15. Van der Merwe J during the course of his judgment for the full court referred to section 127(8) and said as follows at 285B:

"The mechanism of how to surrender the goods is set out in s127. 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 terms of section 127 of the NCA".

16. It appears that the registrar's contention was that either section 127(8)(a) constituted an ouster of the High Court's jurisdiction and therefore absolved the registrar from considering default judgments for claims upon that section, or that both the High Court and magistrates' courts have jurisdiction and that the High Court must direct that the matters instead go to the magistrates' courts.

17. While what was said by Van Der Merwe J can be understood to be that section 127(8)(a) does not oust the High Court's jurisdiction and so, it must follow, that section 127(8)(a) does not confer exclusive jurisdiction on the magistrates' courts, that was not an issue before the full court in relation to the actual matters before it.
18. The two matters that were referred to the full court did not relate to shortfalls under credit agreements falling within the ambit of section 127(8) where goods had been voluntarily surrendered. The matters were for judgment in terms of credit agreements where orders were sought declaring immovable property executable. Those were not claims that fall within the ambit of section 127(8). It was unnecessary for the full court to make any findings in relation to section 127(8) in order to reach its decision that the High Court had concurrent jurisdiction in relation to the two matters before it, and so that the High Court was obliged to hear such matters. It follows that the full court's statements in relation to section 127(8) are *obiter*.³
19. So too the judgment of Bertelsmann J in *ABSA Bank Ltd v Myburgh* 2009 (3) SA 340 (T), referred to, but not followed, during the course of *Mateman*, was not concerned with a claim falling within the ambit of section 127(8) in that no averments were made that the goods had been voluntarily surrendered, or repossessed.⁴

³ *Pretoria City Council v Levinson* 1949 (3) SA 305 (AD) at 317; *R v Crause* 1959 (1) SA 272 (A) at 281B/C.

⁴ It appears from paragraph 14 of the judgment that the claim was for the outstanding instalments under the credit agreement.

20. The subsequent judgments that refer to *Mateman* with approval, do so in relation to its *rationes decidendi* that where a High Court has jurisdiction, it cannot decline to exercise that jurisdiction⁵ and that there is no general ouster of the High Court's jurisdiction in the NCA, affirming that there is a strong presumption against the ouster of the High Court's jurisdiction and that an inference of ouster of jurisdiction must be clear and unequivocal.⁶
21. As I do not find *Mateman* binding upon me, it is necessary to consider whether section 127(8)(a) confers exclusive jurisdiction on the magistrates' courts. Of course, what was said in *Mateman*, albeit not binding, is of strong persuasive value. With respect, *Mateman* is not closely reasoned in relation to its statements in relation to section 127(8)(a),⁷ in contrast to its reasoning in relation to why section 90 of the NCA does not oust the High Court's jurisdiction. And, as stated and referred to further below, there is the *obiter* statement by the Supreme Court of Appeal in *Mpongo* at paragraph 81, which is an *obiter* of higher precedent and considerably more recent, that goes the other way.
22. What *Mateman* does affirm, with reference to various authorities, and as re-affirmed, again, in *Mpongo*, is that there is a strong presumption against the

⁵ Such as in *Mpongo* at para 43. It is now settled that where a court has jurisdiction, it cannot decline to exercise that jurisdiction because another court also has jurisdiction: *Mpongo* as subsequently affirmed on appeal to the Constitutional Court in *South African Human Rights Commission v Standard Bank of South Africa Limited and Others* 2023 (3) SA 36 (CC) ("SAHRC").

⁶ Such as in *Mpongo* at para 77 and 78, citing *Mateman* at 284F-G.

⁷ Scholtz above in para 12.13 points out that the full court did not examine the provisions of section 127 in detail.

ouster or curtailment of the High Court's jurisdiction and such ouster must be clearly stated or must arise by necessary implication.

23. Sutherland AJA, as he was then, writing for the Supreme Court of Appeal in *Mpongo* remarks in paragraph 81 that section 127(8)(a) is an instance where *"the NCA expressly stipulates that the magistrates' court to the exclusion of any other court"*. In my view, section 127(8)(a) does not *expressly* oust the jurisdiction of the High Court. As the statement is *obiter* and as Sutherland AJA did not consider section 127(8)(a) any further – unsurprising as the appeal did not concern section 127 - I prefer rather to approach the matter on the basis whether section 127(8)(a) by necessary implication excludes the jurisdiction of the High Court.

24. Whether such an ouster is necessarily implied is reinforced by section 2(7) of the NCA, which provides that:

"(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."

25. The *'inevitable point of departure is the language of the provision itself'*, which is to be read in the context of the statute as a whole and having regard to the

purpose of the provision.⁸ The importance of the words used in a statute has been stressed by the SCA.⁹

26. The words "*in terms of the Magistrates' Courts Act*" were inserted in section 127(8)(a) by the legislature to serve a purpose, as otherwise they would be superfluous. It is a well-established canon of construction that, if at all possible, no clause, sentence or word in a statute should be regarded as superfluous, void or insignificant, for the legislature is presumed to have chosen its words carefully.
27. The following was said by the then Appellate Division in *S v Weinberg* 1979 (3) SA 89 (A) at 98E-H:

"I think that the starting point in considering this argument is to emphasize the general well-known principle that, if possible, a statutory provision must be construed in such a way that effect is given to every word or phrase in it: or putting the same principle negatively, which is more appropriate here:

"a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant..."

per COCKBURN CJ in The Queen v Bishop of Oxford (1879) 4 QB 245 at 261. F This dictum was adopted by KOTZÉ JA in Attorney-General, Transvaal v Additional Magistrate for Johannesburg 1924 AD 421 at 436. The reason is, of course, that the lawgiver, it must be supposed, will choose its words carefully in order to express its intention correctly,

⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 604D.

⁹ *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011 (3) SA 148 (SCA), para 25 to 30, cited in footnote 16 to *Endumeni*.

and it will therefore not use any words that are superfluous, meaningless, or otherwise otiose (see Steyn Die Uitleg van Wette 3rd ed at 16)...

It is true, however, that occasionally and contrary to the above general principle, Courts have, in construing a statutory provision, treated a word or phrase therein as being superfluous, meaningless, or otherwise otiose or as having been included therein erroneously, and they have in consequence ignored it in giving due effect to the manifest intention of the lawgiver... But, because of the very nature and object of the technique, it is obvious from the above authorities that it can only be used as a last resort in construing the provision in question (see especially the Attorney General case supra at 436)"

28. What then is the purpose of the insertion of the phrase "*in terms of the Magistrates' Courts Act*"? Put differently, what function does the phrase perform?
29. The purpose of the phrase is to deal with jurisdiction. No other purpose or function suggests itself, nor did counsel offer any other.
30. The issue is how the phrase deals with jurisdiction.
31. Typically, the function of such a phrase would be to confer jurisdiction on a court that such court does not otherwise have. But in this instance the magistrates' courts already have jurisdiction to determine claims falling under section 127(8)(a) and so that cannot be the purpose of the phrase.

32. Section 29(1)(e) of the Magistrates' Courts Act provides that:

"1. Subject to the provisions of this Act and the National Credit Act, 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."

33. There is no monetary limit to the jurisdiction of the magistrates' courts in respect of causes of action arising out of the NCA,¹⁰ in contrast to several other causes of action listed in section 29 of the Magistrates' Courts Act.

34. The authors in *Jones & Buckle: Civil Practice of the Magistrate's Courts in South Africa*¹¹ describes what was a divergence between the English and Afrikaans texts of section 29(1)(e). The English text did not contain any monetary limit, but that the Afrikaans text did. This explains why texts of the Magistrates' Courts Act that have been reproduced in some publications incorrectly attribute a monetary limit to section 29(1)(e), and which may lead to the incorrect conclusion that section 127(8)(a) is conferring jurisdiction on the magistrates' courts that they do not otherwise have. The authors describe that a subsequent amendment of the Magistrates' Courts Act, with effect from 22 January 2014, aligned the Afrikaans text with the English text, i.e. that there

¹⁰ *FirstRand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ) at 159A.

¹¹ 10th Edition, vol 1, Revision Service 27 (2023) at p 140.

is no monetary limit to the magistrates' courts' jurisdiction over causes of actions falling within the NCA.

35. BASA in its heads of argument submitted that section 127(8)(a) was necessary to expand the jurisdiction of the magistrates' courts because section 46(2)(c) of the Magistrates' Courts Act would otherwise place beyond the jurisdiction of the magistrates' courts matters in which specific performance is sought without an alternative claim for payment of damages. A claim for the recovery of a shortfall in terms of section 127(8)(a) is not a claim for a specific performance as envisaged under section 46(2)(c) of the Magistrates' Courts Act but is a claim for recovery of a sum of money. The limitation in section 46(2)(c) does not apply.
36. Accordingly, the magistrates' courts do not require section 127(8)(a) of the NCA to confer upon them jurisdiction in relation to proceedings seeking to recover shortfalls in terms of that section as they already have that jurisdiction.
37. An interpretation that the phrase '*in terms of the Magistrates' Courts Act*' does no more than affirm the jurisdiction that the magistrates' courts already has, concurrently with the High Court, would offend the canon of construction against superfluity.
38. On the other hand, the interpretation that the phrase "*in the terms of the Magistrates' Courts Act*" confers exclusive jurisdiction upon the magistrates' courts gives the phrase purpose. The purpose, or function, of the phrase is to exclude the jurisdiction of the High Court.

39. In my view, this is the correct interpretation.
40. In order to avoid superfluity – and as appears below there is no reason why an interpretation that results in superfluity should be preferred – by necessary implication section 127(8)(a)¹² ousts the jurisdiction of the High Court.
41. This interpretation is supported by a reading of the provision in the context of the statute as a whole, and having regard to the purpose of the provision.
42. Where the NCA refers to ‘the court’ elsewhere in the NCA, such as in section 130 in dealing with debt procedures where ‘the court’ is approached by the credit provider to enforce a credit agreement, the reference includes the High Court and magistrates’ courts. This is consistent with the finding in *Mpongo* in paragraph 75 that the courts have concurrent jurisdiction, as also the earlier decision of *Mateman*.
43. In contrast, the legislature chose to use different wording in section 127(8)(a). The legislature did not refer to ‘the court’. The distinction is deliberate.¹³ The legislature, if it intended that either the High Court and the magistrates’ courts could be approached by the credit provider, would have used language consistent with that used in, for example, section 130. Section 127(8)(a) would have read that the credit provider “*may commence proceedings in court for judgment enforcing the credit agreement*” and not “*the credit provider may*

¹² It is section 127(8)(a) that necessarily implies the exclusion of the jurisdiction of the High Court, not section 29(1)(e) of the Magistrates’ Courts Act.

¹³ *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W) at para 15, in discussing section 86(7)(c) of the NCA, which refers to ‘the Magistrates’ Court’ rather than to ‘the court’.

commence proceedings in terms of the Magistrates' Courts Act for judgment enforcing the agreement".

44. It is not surprising that Sutherland AJA in *Mpongo* identified section 127(8)(a), albeit *obiter*, as an instance where the High Court's jurisdiction was excluded. While *Mpongo* overturned the decision of the full court of the *Eastern Cape Division in Nedbank Ltd v Gqirana NO and Another, and Similar Matters* 2019 (6) SA 139 (ECG) that the NCA necessarily implicitly ousted the jurisdiction of the High Court, that was in relation to an general ouster of the High Court's jurisdiction in relation to all NCA matters based on a reading of the statute as a whole,¹⁴ and not in relation to section 127(8)(a) and its specific wording in respect of claims for shortfalls on credit agreement falling within the ambit of that section.
45. This difference in phraseology also demonstrates that the phrase is not to be disregarded as inadvertent superfluity affirming the jurisdiction that the magistrates' courts already have. If the function of the phrase was simply to affirm the jurisdiction of the magistrates' courts, and without ousting the jurisdiction of the High Court, then it would be expected that the same affirmation appears consistently throughout the NCA.
46. The use of the word 'may' in section 127(8)(a), which is generally, but not always, indicative of permissiveness in contrast to, for example, 'shall', which is generally peremptory, inclines towards an interpretation that the section is affirming the creditor provider's option to go to the magistrates' courts, in

¹⁴ See paragraph 75.6 of *Gqirana*, described as the nub of the finding of the full court in paragraph 67 of *Mpongo*.

addition to the High Court i.e. the credit provider ‘may’, not ‘must’, proceed in the magistrates’ courts. But in my view this is one of those instances where although ‘may’ is used, its direction is peremptory. In this regard, I adopt the reasoning of Constitutional Court’s in paragraphs 24 to 36 of *SAHRC*, which found that the use of the word ‘may’ in section 169 of the Constitution in describing what matters a High Court ‘may’ decide is not permissive but peremptory, rejecting an argument that the use of the word ‘may’ confers upon the High Court a discretion to decline to exercise its jurisdiction to hear a matter.

47. Section 3 of the NCA sets out its purposes. Section 2 requires the NCA to be interpreted in a manner that gives effect to those purposes.
48. The full court in *Mateman* found at 285I-J that none of the purposes set out in section 3 of the NCA indicated that the jurisdiction of the High Court was intended to be ousted.¹⁵ In *Mpongo* and then on further appeal in *SAHRC* the appeal courts rejected the proposition that the purpose of the NCA would be undermined if it was found that the High Court has concurrent jurisdiction with the magistrates’ courts, or if it was found that the High Court did not have a discretion to decline to exercise that jurisdiction. But what those judgments did not find is that the purposes of the NCA would be defeated if it was found that magistrates’ courts did have exclusive jurisdiction.
49. To the contrary, the judgments accepted that it may be that the objectives would nevertheless be satisfied if the High Court’s jurisdiction was excluded.

¹⁵ In contrast to what Bertelsmann J held in *Myburgh*, such as in paragraph 51.

Sutherland AJA in *Mpongo* listed certain instances where the magistrates' courts would have exclusive jurisdiction. Sutherland J, sitting as he then was in an earlier full court of this Division in *Janse Van Vuuren v Roets and Others and Similar Matter* 2019 (6) SA 506 (GJ) did not shy away from a finding that the High Court did not have jurisdiction. While the court was dealing with different provisions in the NCA, a finding that the High Court does not have jurisdiction is not necessarily something to be avoided.

50. Madlanga J for the Constitutional Court in *SAHRC* in paragraph 36 recognised that the legislature may mandate a division of labour between courts in respect of their jurisdiction and that mandate must be honoured, absent a constitutional challenge.
51. In my view, section 127(8)(a) is one of those instances where the legislature has mandated a division of labour between the courts and that when it comes to claims for recovery of a shortfall in terms of that section, those must be pursued in the magistrates' courts.
52. The question does arise why the legislature may intend that claims in terms of section 127(8) should be pursued in the magistrates' courts exclusively, in contrast to other claims generally under the NCA. Van Heerden¹⁶ in discussing jurisdiction in relation to the NCA makes the point that this is not odd in the context of voluntary surrender. The consumer surrenders the goods without court intervention, and which decreases the legal costs. Consistent with the intention to decrease legal costs would be to require litigation in relation to the

¹⁶ Above, at p845.

shortfall to be pursued in the magistrates' courts. As the goods would already have been sold, and the sale proceeds allocated to the outstanding balance, the resultant lower quantum of the claim also redounds towards the magistrates' courts determining the matter, rather than the High Court.

53. The interpretation that the magistrates' courts have exclusive jurisdiction in relation to claims in terms of section 127(8) would address to some extent what is recognised by Madlanga J in *SAHRC* in paragraph 42 as the "*huge problem*" arising from the clogging up of High Court rolls with matters falling within the jurisdiction of the magistrates' courts, and is consistent with the further remarks made in paragraphs 40 to 45 of that judgment.
54. The Supreme Court of Appeal in *Mpongo* could not go in that direction in relation to the particular matters before it. So too the Constitutional Court on further appeal in *SAHRC*. As the particular Division of the High Court in those matters had concurrent jurisdiction, the High Court was required in terms of the mandatory jurisdiction principle to hear those matters. This is in contrast to where the legislature has specified that a particular court has exclusive jurisdiction, such as in respect of section 127(8)(a) of the NCA.
55. There does not appear to be a constitutional imperative, at least not on the facts before me, that militates against an interpretation that the magistrates courts' have exclusive jurisdiction in relation to claims in terms of section 127(8)(a) of the NCA. The parties did not advance any facts why such an interpretation would be contrary to the purpose of the NCA, or prejudicial to the banking industry. The facts would have to have been in the affidavits

delivered by the parties. The applicant bank in each of their applications went no further than the basic averments pleaded in relation to a cause of action for a shortfall in terms of section 127(8)(a). BASA in their only affidavit, being that in support of being admitted as an *amicus*, did not advance any facts. The Supreme Court of Appeal in *Mpongo* emphasised in paragraphs 11 to 14 that material facts needed to be adduced to support arguments presented about litigation dynamics and constitutional values that may be implicated, such as section 34 of the Constitution. In any event, neither the applicant nor BASA advanced any such arguments in their submissions.

56. As this court does not have jurisdiction to hear the applications, the appropriate order is to strike the applications from the roll.¹⁷

57. The applications are struck from the roll, with no order as to costs.

¹⁷ To dismiss the applications, as would be to grant the applications, is appropriate where a court has jurisdiction: *Mateman* at 286A.



B M GILBERT

Acting Judge of the High Court

Gauteng Division, Johannesburg

Date of first hearing:

06 September 2023

Date of second hearing:

29 November 2023

Date of judgment:

12 January 2024

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