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# DISPUTE RESOLUTION ALERT

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### Fish cannot sometimes be fowl: Part 2

In the first part of this alert, titled Fish cannot sometimes be fowl: [Part 1](#), we discussed the Supreme Court of Appeal's (SCA) analysis of whether the High Court could refuse to entertain a matter that fell within the jurisdiction of the Magistrate's Court, which the SCA found the High Court could not do in the cases of *The Standard Bank of SA Ltd and Others v Thobejane and Others* (38/2019 & 47/2019) and *The Standard Bank of SA Ltd v Gqirana N.O and Another* (999/2019) [2021] ZASCA 92 (25 June 2021). In this alert, we discuss the SCA's analysis of the application of the National Credit Act 34 of 2005 (NCA) to the concurrent jurisdiction of the Magistrate's Court and the High Court.

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## Fish cannot sometimes be fowl: Part 2

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In the case of *Nedbank Ltd v Gqirana N O and Another*, and similar matters [2019] (6) SA 139 (ECG); [2019] 4 All SA 211 (ECG), in coming to the conclusion that the Magistrate's Court has exclusive jurisdiction to deal with matters that fall within its monetary jurisdiction, the *court a quo* considered section 3 of the NCA, which outlines the purpose of the NCA as being 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. It considered this section together with section 90 of the NCA, which canvasses unlawful provisions in credit agreements, including a clause consenting to the exclusive jurisdiction of the High Court if the Magistrate's Court has concurrent jurisdiction.

The *court a quo* was of the view that section 3 of the NCA seeks to balance the inequities arising from unequal bargaining power between large credit providers and credit applicants. Further, the provisions of section 3 of the NCA are intertwined with section 34 of the Constitution which provides for the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. The *court a quo* found that this is a fundamental right and that inequality in bargaining power goes against this principle.

The *court a quo* also considered section 29 of the Magistrates' Courts Act 32 of 1944 which provides that the Magistrate's Court has jurisdiction in actions in which the NCA applies in instances where these matters fall within the monetary threshold of the Magistrate's Court's jurisdiction.

Further, the *court a quo* found that section 90 of the NCA did not expressly ouster the jurisdiction of the High Court. However, it found that there was a general implied ouster of such jurisdiction. Based on these considerations, it found that a litigator could not issue summons in the High Court for a debt that could be recovered in the Magistrate's Court as this would be contrary to the purpose of the NCA in terms of section 3 of the NCA read together with section 34 of the Constitution, save for instances where difficult principles of law or fact require decision, in which case a hearing in the High Court will be more appropriate.

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## Fish cannot sometimes be fowl: Part 2...continued

The SCA found that the mere fact that a statute vests jurisdiction in one court is not sufficient to create an implication that the jurisdiction of another court is thereby ousted.

### SCA finding

The SCA disagreed with this incoherence as it stated that “*fish cannot sometimes be fowl*”. In so doing, the SCA found that an ouster in jurisdiction cannot generally exist and not exist in every instance. Further, the SCA found that the mere fact that a statute vests jurisdiction in one court is not sufficient to create an implication that the jurisdiction of another court is thereby ousted. In fact, the court found that there is a strong presumption against the implication that the inherent jurisdiction of the High Court to grant appropriate or other ancillary relief is excluded.

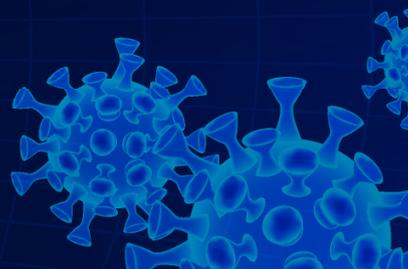
In any case, the SCA found that section 29 of the Magistrates’ Courts Act is premised on the High Court having concurrent jurisdiction with the Magistrate’s Court. This also applies to section 90 of the NCA, wrongly relied on by the *court a quo*, which expressly recognises that the High Court has jurisdiction, concurrent with the Magistrate’s Court.

Therefore, the SCA correctly found that the High Court, even in terms of the NCA has concurrent jurisdiction with the Magistrate’s Court in matters which fall within its territorial jurisdiction. The judgment is, however, the subject of an appeal at the Constitutional Court.

*Eugene Bester and Nomlayo Mabhena*

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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