

**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 Myburgh 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)**

1 Introduction

Section 90 of the National Credit Act 34 of 2005 (hereinafter “the NCA”) deals with unlawful provisions in credit agreements. One of these prohibited provisions is a provision in a credit agreement which

“expresses, on behalf of the consumer –

(vi) a consent to the jurisdiction of –

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

(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” (s 90(2)(k)(vi)).

In three unreported decisions, *Absa Bank Ltd v Myburgh* case no 31827/2007 (T); *Nedbank Ltd v Mateman* case no 36472/2007 (T) and *Nedbank v Stringer* case no 37792/2007 (T) (all references to these decisions are to the typed manuscripts), the court had to interpret section 90(2)(k)(vi)(aa) and (bb) of the NCA quoted above. The court had to determine whether section 90, which merely forbids a consent to a specific court’s jurisdiction in certain circumstances, provided by implication for the ousting of such a court’s jurisdiction. In

Myburgh Bertelsmann J concluded that section 90 indeed affected the court’s jurisdiction, while the full bench in *Mateman* and *Stringer* came to the opposite conclusion. The purpose of this note is to analyse and evaluate these conflicting decisions regarding the interpretation of the section in question.

2 Myburgh

2.1 Facts

On 23 January 2007 the defendant, residing in Barberton, Mpumalanga, entered into an instalment sale agreement under the Credit Agreements Act 75 of 1980 (CAA), the predecessor of the NCA. In terms of the agreement the defendant purchased a motorcycle from the seller. On the date of purchase the seller’s right, title and interest was ceded to the plaintiff bank. The defendant paid a deposit and the balance of the purchase price was to be paid in 42 instalments. The motorcycle was delivered to the defendant, but ownership was reserved until the full purchase price had been paid. The defendant fell in arrears and a registered notice demanding payment of the amount of R5 277,87 was sent to the defendant in terms of the CAA. However, the defendant failed to react to the notice and summons against him was issued in the Transvaal Provincial Division (TPD). The agreement between the parties contained a provision to the effect that the parties consented to the jurisdiction of the magistrate’s court with regard to all possible causes of action. On 4 August 2007, that is, after promulgation of the NCA, summons was served upon the defendant’s chosen domicile. The defendant was in default of appearance whereupon the plaintiff approached the registrar of the TPD for default judgment. Relying on sections 90(2)(k)(vi)(aa) and 127(8) of the NCA, read with section 90(2)(k)(vi)(bb), the registrar refused to deal with the matter as he was of the view that the matter fell within the jurisdiction of the magistrate’s court. Accordingly, the registrar referred the matter for argument to the court.

2.2 Purpose of the NCA and the decision in Myburgh

According to Bertelsmann J, the question whether the plaintiff in *Myburgh* was entitled to approach the High Court, depended on the purpose, aim and general scheme of the NCA (4). In order to determine the purpose of the NCA, the court referred to and discussed various provisions of the Act. First of all, the court referred to the preamble to the Act which 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-reorganisation in cases of over-indebtedness . . . to establish national norms and standards and relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit” (4–5).

The court furthermore referred to section 2 which provides that the Act must be interpreted in a manner that gives effect to the purposes as set out in section 3(5). The court quoted the relevant part of section 3:

“The purposes of this Act are to promote . . . a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –

- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
- (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by
 - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux” (5).

The main purpose of the NCA, to protect consumers, is also evident from the measures introduced by the legislature to prevent consumers from taking up credit that they cannot afford (cf Renke, Roestoff and Bekink “New legislative measures in South Africa aimed at combating over-indebtedness – are the new proposals sufficient under the Constitution and law in general?” 2006 *IIR* 91 for a discussion of the Act’s measures aimed at preventing and resolving over-indebtedness). In this regard the court pointed out (5–6) that the Act *inter alia* provides that the credit provider is obliged to take steps to determine the potential consumer’s existing financial means, prospects and obligations and, having regard to that information, objectively assess the financial ability of the consumer to meet his obligations under the proposed credit agreement in a timely manner (cf ss 79–84). The Act furthermore provides for the possibility that a court may declare that a consumer is over-indebted and make an order contemplated in section 87 to relieve the consumer’s over-indebtedness, including an order that one or more of the consumer’s obligations be re-arranged (cf s 85). This may for instance be done by extending the period of the agreement and reducing the instalments payable or by postponing payment dates during a specific period (cf s 86). As pointed out by the court, the magistrate’s court is given the power to effect such re-arrangement schemes (6).

Also relevant according to the court, is the fact that the prohibited provisions in a credit agreement listed by section 90 of the NCA include provisions that are aimed at defeating the Act or which unfairly limit a consumer’s rights or that create unauthorised procedural advantages for credit providers (6).

The court also referred to section 127 of the NCA which *inter alia* provides for the possibility that a consumer may return the goods that are the subject of a credit agreement (7). The credit provider must then notify the consumer within 10 business days of the estimated value of the goods whereafter the consumer has a further 10 business days to decide whether he wants to continue with the agreement or not. If he decides not to continue with the agreement, the credit provider must sell the goods. If the outstanding balance in terms of the agreement is not covered by the proceeds of such a sale, the credit provider may demand payment of the outstanding balance and if the consumer still fails to pay such an amount, the credit provider may commence proceedings in terms of the Magistrates’ Courts Act 32 of 1944 (MCA) for judgment enforcing the credit agreement (cf s 127(8)). According to Bertelsmann J, the proceedings to recover any outstanding balance in terms of subsection (8) are “significantly, especially decreed to be instituted in the lower court, regardless of any jurisdictional limitation regarding the sum involved” (7).

After discussing the provisions of the Act pointing to the purpose of the Act, Bertelsmann J concluded as follows:

“Even a cursory reading of the Act underlines the objects pursued by the Legislature by its promulgation; namely to protect the credit receiving consumer from being exploited by credit providers, to prevent predatory lending practices; to level the playing field between a relatively indigent and unsophisticated consumer and a moneyed and well-advised credit provider and to limit the financial harm that the consumer may suffer if he is unable to perform in terms of a credit agreement he entered into” (7).

Further to the above, the Act, according to the court, also protects the consumer by limiting the costs, including the legal costs, for which a consumer who is in default may be held liable (8). The court pointed out that litigation in the High Court is more expensive than in the magistrate’s court. The defendant in the present matter will furthermore have to incur the additional costs of a correspondent attorney if he wishes to oppose the action as he did not reside within the area of the High Court having jurisdiction over him. Should judgment eventually be granted against the defendant, execution in the High Court is also more expensive. Accordingly the court suggested that the institution of an action in the High Court in respect of a debt that could be recovered in the magistrate’s court is contrary to the express purposes of the Act (8). Referring to various decisions to the effect that the task of the interpreter is to ascertain the meaning of the

language in the particular context of the statute in which it appears, the court concluded as follows:

“If the section [s 90(2)(k)(vi)] is read in the context of the Act as a whole, however, and in particular with reference to sections 2 and 3 thereof, it is clear that the Legislature intended to prevent the institution of an action in the High Court in circumstances such as the present” (9).

Referring to decisions of the Constitutional Court, the court suggested that

“[t]he Act is indubitably aimed at protecting the consumer’s fundamental rights to dignity, equality, non discrimination and fair administrative and trial procedures and must be purposively interpreted for that reason alone . . . The Constitution requires legislation to be interpreted, where possible, in ways which give effect to its founding values” (9–10).

Finally, the court suggested that section 90(2)(k)(vi) must actually be read

“as declaring unlawful ‘the practice of instituting action in the High Court to enforce the credit provider’s rights in terms of a credit agreement while a magistrate’s court has concurrent jurisdiction’” (10).

According to the court the above interpretation is also supported by the express wording of section 127. Therefore the court held that the registrar correctly refused to grant default judgment and ordered that the matter be transferred to the magistrate’s court in Barberton (10).

3 Mateman and Stringer

3.1 Facts

In *Mateman* and *Stringer* the plaintiff issued summons in the TPD against the defendants for payment of the sum of R19 353,70 and R922 410,41 respectively together with interest and costs as well as for an order declaring immovable property situated in Brakpan (in *Mateman*) and Boksburg (in *Stringer*), executable. In both matters the defendants failed to defend the actions, whereupon applications for default judgments were placed before the registrar in terms of rule 31(5)(a) of the Rules of Court. The registrar referred both matters to the court in terms of rule 31(5)(b)(vi). The question the registrar wanted to be determined by the court was

“whether he has jurisdiction to deal with applications for default judgment governed by the National Credit Act . . . 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” (5).

The registrar’s concern, as appears from a letter addressed to the society of advocates, Pretoria, asking for *pro amico* assistance, was founded on section 90(2)(k)(vi)(aa) and (bb) and section 127(8) of the NCA. In considering these sections the registrar declined to grant default judgment under rule 31(5)(a) for claims that could be brought in the Witwatersrand Local Division (WLD) or the magistrate’s court. In *Mateman* the registrar’s concern related to item (aa) of section 90 when viewed against clause 13 of the plaintiff’s standard form covering mortgage bonds. In *Mateman* the defendants were resident in Brakpan where the property subject to the bond was also situated. The amount of the claim was also within the jurisdiction of the magistrate’s court. In *Stringer* the registrar’s concern related to item (bb). The defendants were resident and the subject property was situated in Boksburg within the area of jurisdiction of the WLD. The amount of the claim was also within the jurisdiction of the magistrate’s court as the magistrate’s court now has an unlimited monetary jurisdiction in respect of matters governed by the NCA (cf s 127(2) of the NCA and s 29(1)(e) of the MCA). The same clause 13 was also applicable in this matter. Clause 13 provided as follows:

“13 Jurisdiction

The Mortgager 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 Mortgager 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” (our emphasis – see the discussion in para 4 below).

3.2 Jurisdiction of the High Court

According to the court the registrar’s question referred to above and put differently was:

“[D]oes 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 extent?” (5).

The court then proceeded with a general discussion of the jurisdiction of the High Court and also that of its registrar in terms of rule 31(5) of the Rules of Court (5–10). The court *inter alia* referred to section 19(1)(a) of the Supreme Court Act 59 of 1959 (SCA) which provides as follows:

“A provincial or local division has jurisdiction over all persons residing or being in or in relation to all causes arising . . . within its area of jurisdiction and all other matters of which it may according to law take cognisance . . .”

In terms of section 19(3) the provisions of section 19

“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 court also referred to section 6 of the SCA in terms of which the TPD and the WLD exercise concurrent jurisdiction. With reference to *Standard Credit Corporation Ltd v Bester* 1987 1 SA 812 (W) the court also confirmed the principle that the High Court retains jurisdiction even though a matter falls within the jurisdiction of the magistrate’s court. However, the plaintiff runs the risk of being awarded costs only on magistrate’s court scale if he sues in the High Court on a claim enforceable in the magistrate’s court (8).

3.3 Ousting of the High Court’s jurisdiction

The court first of all pointed out that there is a strong presumption against the legislative ouster or curtailment of the High Court’s jurisdiction (10). In this regard the court referred to various decisions of the Supreme Court of Appeal (eg *Lenz Township Company (Pty) Ltd v Lorenz* NO 1961 2 SA 450 (A) 455B; *Minister of Law and Order v Hurley* 1986 3 SA 568 (A) 584A–B; *Schermbucker v Klindt* NO 1965 4 SA 606 (A) 618A; *R v Padsha* 1923 AD 281 304). In *Schermbucker* the court referred to

“the well recognised rule in the interpretation of statutes that a curtailment of the powers of a court of law is, in the absence of an express provision or clear implication to the contrary, not to be presumed” (618).

The court pointed out that there is no express provision in the NCA ousting the jurisdiction of the High Court, and therefore also that of its registrar (13). In this regard the court referred to the *dictum* of Smalberger JA in *S v Toms; S v Bruce* 1990 2 SA 802 (A) 807H–808A:

“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 the 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) . . . The words used in an Act must therefore be viewed in the broader context of such Act as a whole . . . 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” (14–15).

With reference to section 2(7) of the NCA, the question according to the court was whether the High Court’s jurisdiction was ousted by necessary implication (16). Section 2(7) of the NCA provides as follows (our emphasis):

“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.”

With regard to clause 13 in *Mateman* and the question whether it contravened section 90(2)(k)(vi)(aa), the court held that it did not contain a consent to the jurisdiction of the High Court while the magistrate’s court had concurrent jurisdiction. The court suggested that the plaintiff merely reserved its right to approach the High Court and, even if it could be regarded as an unlawful provision, it could be severed from the agreement as provided for in section 90(4) of the NCA (20).

With regard to *Stringer*, the court followed the same approach. The question according to the court was whether clause 13, with reference to item (bb), expressed a consent to the jurisdiction of “any court seated outside the 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 court concluded that the answer must be in the negative. The court argued as follows:

“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” (21).

With regard to the question whether section 90 ousts the High Court's jurisdiction by necessary implication the court stated as follows:

"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" (22).

The court also referred to the significance of section 127(8) of the NCA in respect of the issue of the ousting of the High Court's jurisdiction. However, the court concluded that section 127 does not deal, and was not intended to deal, with the jurisdiction of the High Court or the ousting thereof as it merely deals with a new right granted to a consumer, namely to surrender goods under a credit agreement (23).

The court finally referred to the purpose of the NCA and the decision by Bertelsmann J in *Myburgh*. After quoting the preamble to the Act as well as sections 2(1) and 3 of the Act, the court simply concluded that the Act does not contain any purpose which points to the fact that the jurisdiction of the High Court is intended to be ousted (26).

With regard to the decision in *Myburgh*, the court suggested that the fact that Bertelsmann J transferred the matter to the magistrate's court in Barberton proved that he accepted that the High Court retained its jurisdiction, otherwise he should have struck the matter from the roll (26).

The court finally ordered that judgment should be granted and that costs should be paid by the defendants on the magistrate's court scale (27).

4 Evaluation

4.1 Section 90(2)(k)(vi)(aa)

As pointed out by the court in *Mateman* and *Stringer*, there is no express provision in the NCA ousting the jurisdiction of the High Court (13). Section 90(2)(k)(vi)(aa) merely forbids a *consent* to the jurisdiction of the High Court in circumstances where the magistrate's court has concurrent jurisdiction. The question according to the court was therefore whether the jurisdiction of the High Court was ousted by necessary implication (16). In *Myburgh*, Bertelsmann J suggested that the answer to this question depended on the purpose, aim and general scheme of the Act (4) and concluded that the legislature indeed intended to prevent the institution of an action in the High Court in circumstances where a magistrate's court has concurrent jurisdiction (9). The court even went so far as to interpret the section to declare the practice of instituting action in the High Court to be unlawful (10).

In *Mateman* and *Stringer* the court ascribed a literal interpretation to section 90. It simply held that the relevant clause of the credit agreement in question did not contravene section 90(2)(k)(vi)(aa) as it did not contain a consent to the High Court's jurisdiction while the magistrate's court has jurisdiction (20). Accordingly the court concluded that section 90 does not affect the High Court's jurisdiction and that its scope of application should be restricted to clauses in credit agreements (22).

As pointed out by Bertelsmann J in *Myburgh*, the wording of item (aa) is unclear at first glance as no consent is required if the plaintiff prefers to institute action in the High Court for a claim enforceable in the lower court (8). If section 90 does not affect the High Court's jurisdiction, the question which in our view arises, is what the purpose of this provision is. It is submitted that the well-known common-law presumption in respect of the interpretation of statutes, that the legislature does not intend to enact invalid or purposeless provisions, applies in the present instance (*Steyn Uitleg van wette* (1981) 119–124; *Du Plessis Re-interpretation of statutes* (2002) 187–191; *De Ville Constitutional and statutory interpretation* (2000) 167; *Botha Statutory interpretation* (2005) 73–74). It is suggested that the following statement by the court in *Esselman v Administrateur SWA* 1974 2 SA 597 (SWA) 599F is appropriate in this regard:

"As uitlegger van 'n wetsbepaling moet die Hof van die veronderstelling uitgaan dat die wetgewer 'n doelmatige en doeldienende bepaling wil maak. Die Hof sal 'n uitleg vermy wat die wetsbepaling verydel en nutteloos maak."

It is submitted that the court in *Mateman* and *Stringer* did not endeavour to determine the actual underlying purpose of section 90 of the NCA. The court merely held that a consumer may not consent to the jurisdiction of the High Court, and that the provision was intended to outlaw forum shopping in credit agreements (22). However, the court did not explain why a consumer may not consent to the jurisdiction of the High Court or why forum shopping is outlawed. It is furthermore submitted that the court's explanation that section 90 was intended to outlaw forum shopping is contradicted by its own decision as the court's granting of the default judgment in actual fact allowed forum shopping to occur. Moreover, although the

court pointed out that section 90 should be viewed in the broader context of the Act as a whole in order to determine whether the High Court's jurisdiction is ousted by necessary implication (11–16), it is submitted that the court did not in actual fact consider this issue. Regarding the purpose of the NCA the court only referred to the preamble and sections 2(1) and 3 of the Act and simply concluded that not a single purpose listed in section 3 was indicative of the fact that the legislature intended the High Court's jurisdiction to be ousted (26).

In our view the purpose of item (aa) is to prevent the consumer from consenting to the jurisdiction of the High Court and thereby consenting to legal costs on High Court scale. It should be noted that a defendant who consents to be bound by the jurisdiction of the forum selected by the plaintiff may as a result be liable for costs on the scale applicable in such a forum (cf *Standard Bank of SA v Pretorius* 1977 4 SA 395 (T) 398 and the interpretation of this decision by Van Zyl J in *Mofokeng v General Accident Versekering Bpk* 1990 2 SA 712 (W) 717; Cilliers *Law of costs* (2007) 2-23). Moreover, although awards of costs are always in the discretion of the court, it is still competent for a court to recognise the parties' freedom of contract and to give effect to an agreement concerning their liability for legal costs arising out of a dispute between them (cf *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 4 SA 1 (A) 14; *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 SA 1045 (SCA) 1055). Furthermore, as pointed out by Bertelsmann J in *Myburgh*, the Act *inter alia* aims to protect the consumer by levelling the playing field between a "relatively indigent and unsophisticated consumer and a moneyed and well-advised credit provider" (8). The legislature in enacting section 90 of the NCA therefore, in all probability, also intended to protect such a consumer, who does not always understand the consequences of the contract he entered into.

We agree with the decision in *Myburgh*, that the legislature in enacting section 90 intended to protect the consumer by *inter alia* limiting the legal costs that he may be held liable for if he is unable to perform in terms of a credit agreement he entered into (8). However, we are of the view that the legislature did not intend the High Court's jurisdiction to be ousted to attain this purpose. As pointed out above, there is substantial authority to be found in the case law in favour of the strong presumption against the ouster of the jurisdiction of a court of law and therefore also of the High Court's jurisdiction (cf also s 19(3) of the SCA quoted above; Erasmus *Superior court practice* (1994) A1-22). In this regard note should also be taken of the provisions of section 165 of the Constitution, which provides for the independence of the judiciary, and section 34 which entrenches the fundamental right of access for individuals to the courts and adjudicative procedures. According to De Ville 177, section 34 contains "a much stronger check on the authority of the legislature and executive with respect to the courts" than the common-law presumption mentioned above (cf also Du Plessis 169–173).

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*). In this regard it should also be noted that rule 69(3) of the Uniform Rules of the High Court currently provides that, except where the defendant is awarded costs, the civil magistrates' courts tariff of maximum fees for advocates between party and party will apply where the amount or value of the claim falls within the jurisdiction of the magistrate's court, unless the court directs otherwise. In our view the consumer is thus indeed protected against the unnecessary use of the more expensive forum. It would seem that Bertelsmann J was concerned about the additional costs (eg the costs of a corresponding attorney) a consumer would have to incur if summons were indeed to be issued in the High Court instead of the magistrate's court. However, as pointed out by Schreiner J in *Goldberg v Goldberg* 1938 WLD 83 85–86 (our emphasis)

"[t]he discretion which the court has in regard to costs provides a powerful deterrent against the bringing of proceedings in the Supreme Court which might more conveniently have been brought in the magistrate's court. Not only may a successful applicant be awarded only magistrate's court costs but he may even be *deprived of his costs and be ordered to pay additional costs* incurred by the respondent by reason of the case having been brought in the Supreme Court. In all normal cases these powers should suffice to protect the respondent against the hardship of being subjected to unnecessarily expensive proceedings".

The question furthermore arises what the position would have been if the case had been one of legal or factual complexity. As pointed out by the court in *Koch v Realty Corporation of South Africa* 1918 TPD 356 359, it was never the policy of the law that difficult and complicated cases should be heard by magistrates. Bertelsmann J in *Myburgh* referred to the possibility of the existence of unusual or extraordinary circumstances that could force the credit provider to approach the High Court, but did not deal with this issue as he was of the opinion that there were no such circumstances *in casu*. However, it should be kept in mind that there could well be instances where credit agreements could lead to disputes of legal and factual complexity or that other circumstances might exist that could force the credit provider to

approach the High Court. It is submitted that this possibility supports the view that it was not the intention of the legislature to oust the jurisdiction of the High Court.

With regard to section 127(8), we are of the opinion that it does not support the interpretation that section 90 amounts to the ousting of the High Court's jurisdiction. As pointed out by the court in *Mateman* and *Stringer*, section 127 does not deal with the jurisdiction of the court or the ousting thereof. It merely deals with a new right granted to the consumer to surrender the goods supplied in terms of the credit agreement (23).

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.

4.2 Section 90(2)(k)(vi)(bb)

Item (bb) also does not expressly oust the jurisdiction of any court. It merely forbids a consent to the jurisdiction of any court seated outside the jurisdiction of a court having concurrent jurisdiction and in which the consumer lives, works or where the goods are kept. In *Myburgh* the court, it is submitted, correctly interpreted item (bb) to forbid a consent to the jurisdiction of a court "that is not closest in distance to the consumer's residence or the locality where the goods supplied in terms of the credit agreement are kept" (6).

It should be noted that the CAA, the predecessor of the NCA, specifically regulated the issue of jurisdiction in section 21, which provided that, with regard to civil proceedings, section 28(1)(d) of the MCA may not apply for the purposes of the Act, unless the credit receiver no longer resided in the Republic. Consequently no jurisdiction existed merely on the ground that "the cause of action arose wholly within the district" of the court (cf s 28(1)(d) MCA). Accordingly, the credit receiver had to be sued in the court in whose area the credit receiver resided, carried on business or worked (cf s 28(1)(a) MCA).

It is important to note that section 90(2)(k)(vi)(bb) forbids a consent to the jurisdiction of *any* court which is seated outside the area in which the consumer lives, works or where the goods are kept. It does not specifically refer to the magistrate's court. In contrast, section 21 of the CAA only applied if the credit receiver was sued in the magistrate's court. A credit receiver could therefore be sued in any division of the High Court having jurisdiction even if he did not reside, carry on business or work within the jurisdiction of the court, provided that the cause of action arose within the area of the court (cf s 19(1)(a) SCA and *Otto Credit law service* (1991) par 81). It would therefore seem that item (bb) also forbids a consent to the jurisdiction of a division of the High Court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer lives, works or where the goods are kept. Applied to the facts in *Stringer*, it would seem that item (bb) prohibits a consent to the jurisdiction of the TPD (which is seated in Pretoria) as the consumers *in casu* were resident and the subject property was situated in Boksburg, within the area of jurisdiction of the WLD.

We agree with *Otto The National Credit Act explained* (2006) 45 fn 47 that the legislature in enacting item (bb) in all probability intended to restrict the credit provider to the court in whose area the consumer lives, works or where the goods are kept. Just as in respect of item (aa), it is submitted that the purpose of item (bb) is to limit the legal costs that a consumer may be held liable for if he is unable to perform in terms of the credit agreement he entered into. As correctly pointed out by Bertelsmann J in *Myburgh*, legal costs are increased if the consumer is sued in a court in whose area the consumer does not reside or in which the goods are not kept (8).

Although we are of the opinion that the legislature did not intend to oust the jurisdiction of the High Court in item (aa), it is submitted that the legislature in enacting item (bb) indeed intended to exclude the jurisdiction of a magistrate's court (and therefore also the application of section 28(1)(d)) as well as the jurisdiction of a division of the High Court that is not closest in distance to the consumer's residence or the place where the goods are kept. On the assumption that the legislature intended to enact an effectual and purposeful provision (cf *Esselman supra*), item (bb) could, in our view, only be interpreted to oust the jurisdiction of a magistrate's court or division of the high court that is not closest in distance to the consumer's residence or the place where the goods are kept. In this regard it should be noted that the presumption against interference with the jurisdiction of a court of law is not applied strictly in cases where legislation purports to exclude the jurisdiction of a court in favour of another court which is on the same level in the hierarchy of courts as the first-mentioned court (eg where the jurisdiction of the High Court is excluded in favour of the Labour Court – cf *De Ville* 177 and authorities cited). It is submitted that the same applies in respect of item (bb) and that it was intended that only the magistrate's court or the division of the High Court that is closest to the consumer's residence, work or place where the goods in terms of the

credit agreement are kept, should have jurisdiction to hear a matter. Accordingly it is submitted that only the WLD and not the TPD in *Stringer* had jurisdiction to deal with the matter.

As pointed out earlier, the court in *Stringer* held that clause 13 did not contravene item (bb) as it merely amounted to a consent to the jurisdiction of the magistrate's court. Even on the court's literal interpretation of section 90, the court has, in our view, erred. In terms of clause 13 the mortgager (*in casu* the consumer and defendant) consented to the jurisdiction of the magistrate's court *for any district* having jurisdiction in respect of the mortgager by virtue of section 28(1) of the MCA (cf clause 13 quoted above). The defendant therefore consented to the jurisdiction of any magistrate's court having jurisdiction in terms of section 28, including a court that has jurisdiction in terms of section 28(1)(d) of the Act, that is a court which is seated outside the area in which the consumer lives, carries on business or works.

5 Concluding remarks

In sum, we are of the opinion that the legislature in enacting section 90(2)(k)(vi)(aa) did not provide by necessary implication for the ousting of the High Court's jurisdiction. On the basis that the purpose of item (aa) is to prevent the consumer from consenting to legal costs on High Court scale, it is submitted that item (aa) is not left ineffective and purposeless. However, with regard to item (bb) it is submitted that this provision would indeed be left useless if it is interpreted not to oust the jurisdiction of the court that is not closest in distance to the consumer's residence, work or the place where the goods are kept.

The two conflicting decisions discussed above are the result of the fact that the legislature has not specifically regulated the issue of jurisdiction in the NCA as its predecessor (cf s 21 of the CAA) has done and it is hoped that the legislature would clarify the uncertainty that currently exists in this regard. It is suggested that the legislature should specifically provide that the High Court exercises concurrent jurisdiction with any magistrate's court in its area of jurisdiction. However, the jurisdiction of any court not closest in distance to the consumer's residence, work or place where the goods are kept, should in our view be expressly excluded.

MELANIE ROESTOFF
HERMIE COETZEE
University of Pretoria