

Victory for debtors as judges rule that cases must be referred to lower courts

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The Pretoria High Court struck another blow on behalf of distressed debtors last week. A full bench of three judges ruled that magistrates' courts should be the first port of call for financial institutions seeking judgment against their clients, where matters fall within the lower courts' monetary jurisdiction.



The Pretoria High Court has ruled that banks must take action against distressed debtors in magistrates' courts, not high courts.
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This follows the ruling two weeks ago by a full bench of the Johannesburg High Court. That court ruled that repossessed homes must be sold with reserve prices at sheriffs' auctions. This is to stop homes from being sold for a fraction of their market value.

Banks frequently go to the high courts for judgment against defaulting clients, even when relatively small amounts of money are owed.

The Judge President of the Pretoria High Court convened a full bench to decide whether the high court should entertain cases that should be heard by the lower courts just because both courts have jurisdiction under the law. He also asked the court to consider whether there is "an obligation on financial institutions to consider the cost implication and access to justice of financially distressed people" in deciding which court to use.

Why banks prefer suing in the high courts

A key reason why banks prefer suing in the high courts is to keep up pressure on a defaulting client. Armed with a high court judgment against a client in arrears, banks are able to keep alive the threat of sale in execution order, even if the borrower catches up on arrears. If they default a second time, the bank can sell the person's home without again having to approach the court. This is less likely to happen in a magistrates' court, where the order expires after a year.

The Pretoria High Court ruled that if banks brought their cases to the high courts when the lower courts had proper jurisdiction, the high courts could kick the cases down to the lower court. This would save legal fees for the debtor.



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How the case arose

The case arose when 13 matters – reduced to eight after several defendants settled their arrears or the cases were withdrawn – came before the Pretoria High Court. The applicants were banks. The banks wanted default judgments against debtors and orders declaring that their homes could be sold in execution (on auction).

In each case, the application was brought in the high court, despite the fact that it fell within the monetary jurisdiction of the magistrates' court. In all the matters, the arrears on the loans were quite low amounts but the home owners stood to lose their homes and had to defend the default judgment in the high court, instead of in the magistrates' court closest to their home. The arrear amounts owing by the eight defendants varied from R7,700 to R20,000. The total loan amounts being claimed by the banks varied from R95,000 to R255,000.

Debtors prejudiced by having to travel to courts far from where they live

The Human Rights Commission (SAHRC) argued that distressed debtors could not afford legal representation, and were further prejudiced by the costs of travel and accommodation when cases were brought to the Pretoria High Court, while the debtor lived in Johannesburg. The Commission argued that these costs would be substantially lower if the case was heard in a magistrates' court closer to where the debtor lived. There are 14 high courts in SA, as against 82 regional magistrates' courts and 468 district magistrates' courts.

"Is there not an obligation on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular forum is considered?" asked the SAHRC in its founding affidavit.

The SAHRC argued that magistrates' courts are more accessible to the poor, because they are closer, less expensive and have interpreters. It also argued that the right to access courts is infringed in cases where there is a risk that the respondent will be unable to defend his or her case because of financial, geographical or other barriers.

The Minister of Justice also submitted evidence, pointing out that there are no designated interpreters in the high courts, and this could impair a defendant's right to a fair hearing. In contrast there are more than 1,650 interpreters in the lower courts across the country.

The Legal Resources Centre represented the SAHRC as a friend of the court and offered a constitutional and international perspective on the right to access courts. The LRC argued that “measures must be taken to reduce the economic, social and geographical barriers that prevent a respondent’s access to court” as required under the Constitution.

“This judgment is far reaching and incredibly important in affirming the right to access to justice,” said the LRC in a statement. “We are pleased that the Court found in favour of impoverished clients who are burdened by the current system which allows for cases to be taken straight to the High Court, which may be geographically further, more expensive and not have designated interpreters available.”

This article was originally published on [GroundUp](#). This is the first of two articles on this case. The second article will deal with the backlog in the courts caused by these kinds of cases. It will be published on Thursday.

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