CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 323/22

In the matter between:

SABOATH GENERAL TRADERS (PTY) LIMITED t/a SAUSAGE SALOON	First Applicant
BANDLA MNGONYAMA	Second Applicant
and	
MTHATHA MALL (PTY) LIMITED	Respondent

Neutral citation:	*Saboath General Traders (Pty) Ltd t/a Sausage Saloon and Another v Mthatha Mall (Pty) Ltd* [2023] ZACC 43
Coram:	Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Rogers J, Theron J and Van Zyl AJ
Judgments:	Majiedt J (majority): [1] to [39] Zondo CJ (dissenting): [40] to [67]
Decided on:	12 December 2023
Summary:	Ouster of jurisdiction of Magistrate's Court in lease agreement — interests of justice and leave to appeal

ORDER

On appeal from the High Court of South Africa, Eastern Cape Division, Mthatha, the following order is made:

1. Leave to appeal is refused with costs.
2. The matter is remitted to the Magistrate's Court for further hearing.

JUDGMENT

MAJIEDT J (Maya DCJ, Kollapen J, Madlanga J, Mathopo J, Rogers J, Theron J, Van Zyl AJ concurring):

Introduction and background

[1] The crisp issue in this case is whether a jurisdiction clause in a lease agreement between the parties had the effect of ousting the jurisdiction of the Mthatha Magistrate's Court (Magistrate's Court). That Court and the High Court of South Africa, Eastern Cape Division, Mthatha (High Court), on appeal to it, answered the question in the negative. The Supreme Court of Appeal refused special leave to appeal on the basis that the requirements for special leave had not been met. The applicants now seek leave to appeal in this Court and an order upholding the appeal, setting aside the High Court order and replacing it with an order upholding the special plea of no jurisdiction. This matter has been decided without an oral hearing.

[2] The first applicant, Saboath General Traders (Pty) Ltd, trading as Sausage Saloon, is a company duly registered in terms of the Companies Act[1] with its principal place of business at Shop 127, B T Ngebs Mall, Errol Spring Avenue, Mthatha, Eastern Cape (the premises). It was the tenant in terms of the lease mentioned below. The second applicant, Mr Bandla Mngonyama, an adult male businessman, stood surety for Saboath and is the co-principal debtor for the obligations of Saboath under the lease in terms of a deed of suretyship.

[3] The respondent, Mthatha Mall (Pty) Ltd, is a duly registered company in terms of the Companies Act, with its chosen *domicilium citandi et executandi* (nominated address for service of legal documents) at Billion Property Group (Pty) Ltd, 150 Bryanston Drive, Bryanston, Johannesburg.

[4] On 9 February 2017, the parties concluded a lease agreement in respect of the premises. Clause 31 of the agreement, which deals with jurisdiction and is at the heart of this matter, records:

> "[T]he parties and the sureties hereby unconditionally and irrevocably consent, without limitation, to the jurisdiction of the High Court of South Africa, Eastern Cape Division, Mthatha in relation to all matters arising from this agreement."

[5] On 12 November 2018, the respondent instituted an action in the Magistrate's Court against the applicants suing for arrear rental in the sum of R101 173.99. The applicants filed a special plea, contending that clause 31 ousted the Magistrate's Court's jurisdiction. The Magistrate's Court dismissed this special plea with costs. It held that, on a proper interpretation of clause 31, its jurisdiction was not ousted by that clause. While the parties, according to the Magistrate's Court, are free to consent to a different forum in terms of section 45 of the Magistrates' Courts Act,[2]

[1] 71 of 2008.

[2] 32 of 1944.

the intention to oust the jurisdiction of the original court must be clear and unambiguous. Aggrieved, the applicants approached the High Court on appeal.

[6] On 22 July 2022, the High Court, in an *ex tempore* (at the time) judgment, dismissed the appeal with costs. The High Court agreed with the Magistrate's Court's interpretation of clause 31, that the parties had merely consented to the High Court's jurisdiction, but that clause 31 had not ousted the Magistrate's Court's jurisdiction. The High Court, relying on *Foize*,[3] held that "parties to a contract cannot exclude the jurisdiction of a court by their own agreement". As stated, the Supreme Court of Appeal refused special leave.

[7] By direction of the Chief Justice, the parties were asked to file the relevant parts of the record and written submissions on these issues:

(a) What aspects should be taken into account when interpreting jurisdiction clauses in agreements between private parties? What are the indicators that parties wanted to agree on the exclusive jurisdiction of a court (thereby ousting the jurisdiction of other courts) and what are indicators that parties wanted to agree on the concurrent jurisdiction of a court (without ousting the jurisdiction of other courts)?

(b) Does the law allow private parties to agree on the exclusive jurisdiction of particular domestic courts within South Africa or is such an agreement invalid, in light of the Supreme Court of Appeal's decision in *Foize*, as well as other applicable legislation and case law?

Condonation

[8] There is an application for condonation for the late filing of the application. The delay is attributed to the applicants' correspondent attorneys in Bloemfontein who only forwarded the Supreme Court of Appeal's order on 24 October 2022, more than a month

[3] *Foize Africa (Pty) Ltd v Foize Beheer BV* [2012] ZASCA 123; 2013 (3) SA 91 (SCA) at para 21.

after the order was made. The applicants say that they then had to seek legal advice from senior counsel regarding the present application.

[9] The respondent opposes the application for condonation on the basis that the Supreme Court of Appeal's order did not contain any substantive reasons beyond the normal order of dismissal. According to the respondent, all the substantive reasons had already been before the applicants when the High Court judgment was handed down in July 2022. Moreover, says the respondent, the applicants had also applied for condonation in the Supreme Court of Appeal. They do not provide a confirmatory affidavit from the attorney in Bloemfontein who had forwarded the judgment late. The respondent contends that neglect by the attorney cannot absolve a litigant in all instances.

[10] The delay is not excessive and the explanation is adequate. The respondent's objections are of no substance, as the applicants could not proceed without having had sight of that order. The lodging of a condonation application in the Supreme Court of Appeal has no bearing on the present condonation application before this Court. Condonation ought to be granted.

Parties' submissions

Applicants' submissions

[11] In seeking leave to appeal in this Court, the applicants submit that this Court's constitutional and extended jurisdiction is engaged. The alleged constitutional issue is that the Magistrate's Court and the High Court, in not applying clause 31, disregarded the principle of *pacta sunt servanda* (agreements must be kept), which "gives effect to the central constitutional values of freedom and dignity". The applicants take issue with these two courts' reasoning that, had the parties intended exclusive jurisdiction, they would have employed words like "alone" or "exclusively". This, the applicants submit, amounts to "contract[ing] on behalf of the parties". This would only be permissible where the agreement is ambiguous or runs counter to public policy.

[12] The applicants submit that "the importance of the legal principle of *pacta sunt servanda* in judicial control of the contracts entered into by parties freely and consciously" is an arguable point of law of general importance.

[13] With regard to the interests of justice, the applicants claim good prospects of success. They submit that the High Court misdirected itself in not applying clause 31 and that this Court should settle an alleged conflict between the High Court's judgment and the Supreme Court of Appeal's ruling in *Foize*.

[14] On the merits, the applicants contend that the High Court failed to honour the parties' agreement in clause 31. Instead of interpreting and applying the clause, the High Court had contracted on behalf of the parties, which is only allowed where an agreement is ambiguous or violates public policy. Under the principle *of expressio unius est exclusio alterius* (the inclusion of one excludes the other), the express reference to the High Court in clause 31 must be understood to exclude the Magistrate's Court. They contend that *Foize* is distinguishable, because that case dealt with a jurisdiction clause in favour of foreign courts and was, moreover, concerned with an interdictory remedy.

[15] The applicants respond to the first question raised in the directions, regarding the aspects to be taken into account when interpreting jurisdiction agreements between private parties and the relevant indicators, by pointing to the fact that the parties plainly wanted to agree on the exclusive jurisdiction of a court. The applicants point out that our law permits parties to a contract to agree to the jurisdiction of a particular court in disputes arising out of their contract. They may agree to the exclusive jurisdiction of their chosen court, thereby ousting the jurisdiction of other courts. They may also agree on the concurrent jurisdiction of the court without necessarily ousting the jurisdiction of other courts. In the present instance, the parties and the sureties had unconditionally and irrevocably consented, without limitation, to the jurisdiction of the High Court in relation to all matters arising from the agreement.

[16] The applicants emphasise the use of the words "unconditionally" and "irrevocably" to argue that the parties' consent to the jurisdiction of the High Court unequivocally ousts the Magistrate's Court's jurisdiction. In their written submissions the applicants make this statement, to which I shall presently return:

> "Accordingly, whilst the parties in this matter may have, as appears from the wording of the clause, intended to agree to the exclusive jurisdiction of the High Court in respect of their disputes arising out of the contract, both courts still, in law, enjoy concurrent jurisdiction in the matter".

[17] Shortly thereafter, though, the applicants reiterate that the parties, on a proper interpretation of clause 31, intended to clothe the High Court with exclusive jurisdiction over their disputes arising out of the contract.

[18] Regarding the second question, the applicants draw a distinction between foreign jurisdiction or arbitration clauses that do not exclude the court's jurisdiction and domestic courts which are by law vested with the authority to hear matters falling within their territorial and monetary jurisdiction. Citing *Standard Bank*,[4] the applicants submit that the law does not prohibit the High Court from hearing matters that fall within the jurisdiction of the Magistrate's Court. It may also not refuse to hear such matters. A High Court is constitutionally obliged to hear such matters once they are brought before it. It follows, therefore, that there is no legal bar to the High Court exercising jurisdiction over matters falling within the jurisdiction of the Magistrate's Court.

[19] In the absence of a clear proscription in law, argue the applicants, private individuals may agree to exclude the jurisdiction of a Magistrates' Court in favour of a High Court. This is so because private persons, unlike public bodies, are entitled to do

[4] *South African Human Rights Commission v Standard Bank of South Africa* [2022] ZACC 43; 2023 (3) SA 36 (CC); 2023 (3) BCLR 296 (CC).

anything they choose which the law does not prohibit.[5] They may contract on any terms that are lawful and not *contra bonos mores* (against public values).

[20] Lastly, the applicants contend that the sanctity of contracts must be upheld, and here the parties were entitled to agree to the exclusive jurisdiction of a domestic court – such agreements are not inherently invalid. They may only be invalid if the parties agree to clothe a court with jurisdiction that it would, in law, not have or where they are found to be contrary to public policy.

Respondent's submissions

[21] The respondent preliminarily appeared to take issue with the fact that the date of the oath on the founding affidavit[6] predates the date of dismissal of the petition for leave to appeal by the Supreme Court of Appeal,[7] which would violate regulation 4 of the Regulations Governing the Administering of an Oath or Affirmation[8] and rule 11 of the Constitutional Court's Rules. This aspect, however, was not pressed by the respondent.

[22] The respondent does not expressly dispute this Court's jurisdiction. It contends that there has been no violation of the freedom to contract, since the two Courts did not disregard or alter clause 31, but applied it on the basis of their correct interpretation of the provision. On the contrary, enforcing clause 31 could infringe the respondent's right of access to courts in section 34 of the Constitution. Allowing parties to choose a specific court could, moreover, lead to "forum shopping". As the case is essentially concerned with the interpretation of clause 31, it has no general importance outside of the parties.

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[5] The applicants invoke *Minister of Water and Sanitation v Lotter N.O.; Minister of Water and Sanitation v Wiid; Minister of Water and Sanitation v South African Association for Water Users Associations* [2023] ZACC 9; 2023 (4) SA 434 (CC); 2023 (6) BCLR 763 (CC) at para 36.

[6] 17 August 2022.

[7] 7 October 2022.

[8] Regulations Governing the Administering of an Oath or Affirmation, GN R774 *GG* 8169, 23 April 1982. The respondent erroneously refers to "rule 4 of the Justices of the Peace and Commissioners of Oaths Act".

[23] The respondent argues that the application has no prospects of success, because the applicants' case has already been dismissed by a total of five judicial officers in three courts. The application serves only to delay justice and payment by the applicants. The respondent has an interest that the matter be finalised.

[24] On the merits, the respondent agrees with the previous courts' interpretation of clause 31 as not ousting the Magistrate's Court's jurisdiction. The respondent argues that *Foize* is indeed applicable to the present case. That judgment correctly held that parties to a contract cannot exclude the jurisdiction of a court by their own agreement. The respondent also points to the doctrine of prorogation, by which parties may agree to vest or extend a court's jurisdiction by way of consent. But, the doctrine does not encompass excluding a court's jurisdiction that has been conferred upon it by law.

[25] The respondent contends further that the words "unconditionally" and "irrevocably" cannot convert the ordinary grammatical meaning of the word "consent" in clause 31 from being permissive to peremptory. Therefore, read as a whole, the clause extends jurisdiction but does not confer exclusive jurisdiction on any single court. It simply means that, should action be instituted by either party in the High Court, the other may not object to the jurisdiction of that Court.

[26] A further indicator that the parties intended to agree to concurrent jurisdiction, according to the respondent, is the deed of suretyship signed by Mr Mngonyama, the second applicant. There, the second applicant agreed in clause 4 to the concurrent jurisdiction of the High Court and any Magistrates' Court having jurisdiction over the person of the second applicant. Yet another indicator is that, as held by the High Court, there is an incongruity between the special plea averring exclusive jurisdiction and the previous plea of the applicants containing the averment that the lease had been concluded at Bedfordview in Gauteng. This would result in the relevant Magistrate's Court under which Bedfordview falls, having had the requisite jurisdiction.

[27] Lastly, the respondent points out that, if the special plea is good in law, the respondent would have to forgo the benefit of the enforcement of its tacit hypothec in the event of the first applicant falling in arrears with its rental payments. In that event (which has now materialised), the respondent would not be able to utilise a rent interdict summons under section 31 of the Magistrates' Court Act[9] or the attachment of assets under section 32 of that Act.[10]

Jurisdiction and interests of justice

[28] In order for this Court to entertain a matter it must meet two requirements. First, it must engage this Court's jurisdiction. For a matter to engage this Court's jurisdiction it must raise a constitutional issue or an arguable point of law of general public

[9] Section 31 reads:

> "(1) When a summons is issued in which is claimed the rent of any premises, the plaintiff may include in such summons a notice prohibiting any person from removing any of the furniture or other effects thereon which are subject to the plaintiff's hypothec for rent until an order relative thereto has been made by the court.
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> (2) The messenger shall, if required by the plaintiff and at such plaintiff's expense, make an inventory of such furniture or effects.
>
> (3) Such notice shall operate to interdict any person having knowledge thereof from removing any such furniture or effects.
>
> (4) Any person affected by such notice may apply to the court to have the same set aside."

[10] Section 32 provides:

> "(1) Upon an affidavit by or on behalf of the landlord of any premises situate within the district, that an amount of any rent not exceeding the jurisdiction of the court is due and in arrear in regard to the said premises, and that the said rent has been demanded in writing for the space of seven days and upwards, or, if not so demanded, that the deponent believes that the tenant is about to remove the movable property upon the said premises, in order to avoid the payment of such rent, and upon security being given to the satisfaction of the clerk to the court to pay all damages, costs and charges which the tenant of such premises, or any other person, may sustain or incur by reason of the attachment hereinafter mentioned, if the said attachment be thereafter set aside, the court may, upon application, issue an order to the messenger requiring him to attach so much of the movable property upon the premises in question and subject to the landlord's hypothec for rent as may be sufficient to satisfy the amount of such rent, together with the costs of such application and of any action for the said rent.
>
> (2) Any person affected by such order may apply to have it set aside.
>
> (3) A respondent whose property has been so attached may by notice in writing to the clerk of the court admit that such property is subject to the landlord's hypothec for an amount to be specified in such notice and may consent that such property (other than property protected from seizure by the provisions of section sixty-seven) be sold in satisfaction of such amount and costs; and such notice shall have the same effect as a consent to judgment for the amount specified."

importance which ought to be considered by this Court. The second requirement is that the interests of justice must warrant that leave to appeal be granted.

[29] There are two aspects of the matter that could engage this Court's jurisdiction:

(a) The applicants plead that a violation of *pacta sunt servanda* would entail a violation of constitutional rights and hence be a constitutional matter.

(b) The question how jurisdiction agreements should be interpreted – namely as stipulating concurrent or exclusive jurisdiction – and whether exclusive jurisdiction clauses for domestic courts are generally permissible – in contrast to exclusive jurisdiction for foreign courts as in *Foize* – could constitute a point of law of general public importance.

[30] While these are strictly speaking two questions, they both concern jurisdiction agreements and can thus be treated as one for this matter.

[31] The applicants plead that the High Court failed to enforce clause 31 in violation of *pacta sunt servanda* and that this amounts to a constitutional matter. A constitutional matter could potentially arise where a court refuses to enforce a private agreement without proper reason and in contravention of *pacta sunt servanda*.

[32] In my view, however, the principle should only apply where a court determines the will of the parties, but then refuses to enforce it. This would happen in cases where the agreement is incompatible with public policy or the Bill of Rights.[11] Freedom of contract is not implicated, on the other hand, where a court interprets an agreement in a way with which one of the parties disagrees and then enforces it. In this case, the court does not overrule the parties' freedom of contract, but, on the contrary, gives effect to it. Otherwise, every time a court allegedly misinterpreted a contractual agreement, a party could claim that this violated *pacta sunt servanda*, thus engaging our constitutional jurisdiction. In effect, virtually every contractual dispute could amount

[11] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 30.

to a constitutional issue. This cannot be so. The interpretation of a contract is not, without more, a constitutional matter. This is only the case where "the claim advanced [requires] the consideration and application of some constitutional rule or principle in the process of deciding the matter."[12] This is not the case in matters requiring the simple interpretation of private agreements.

[33] The applicants' allegations fall under this second category which does not give rise to a constitutional matter. It is clear from the applicants' pleadings that the High Court did not disregard or substitute clause 31, but instead sought to enforce it by finding its true meaning through interpretation. The applicants have pleaded that the High Court violated *pacta sunt servanda* through its "failure to enforce the jurisdictional clause" and that the High Court instead contracted on behalf of the parties. However, it becomes clear from the applicants' submissions that the High Court did not disregard or substitute clause 31, but instead sought to enforce it by finding its true meaning. The applicants' papers make it clear that the Magistrate's Court likewise reached its conclusion "upon the interpretation" of clause 31. The applicants thus do not plead a case where an agreement was set aside or substituted, but rather take issue with the interpretational findings of the lower courts.

[34] As was made plain in *Fredericks*, whether an applicant's case has merit has no bearing on whether the claim raises a constitutional matter. Thus, the strength of the merits does not determine jurisdiction.[13] Plainly, on the applicants' pleadings, the High Court did not ignore clause 31, but instead interpreted it. Even though the applicants claim that *pacta sunt servanda* was infringed, their pleadings do not support this claim. In the end, this amounts to the couching of a non-constitutional matter in constitutional terms.[14]

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[12] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 38.

[13] *Fredericks v MEC for Education and Training Eastern Cape* [2001] ZACC 6; 2002 (2) SA 693; 2002 (2) BCLR 113 at para 11.

[14] *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 40.

[35] I will assume for present purposes that there is a point of law here. That point of law must be arguable, that is, there must be "some degree of merit in the argument".[15] It is a requirement that there must be some prospects of success.[16] In the present instance, even assuming that ouster clauses are permissible, the Magistrate's Court and the High Court were correct, in my view, in finding that, on a proper interpretation of clause 31, there was merely a consent to the High Court's jurisdiction, not a purported ouster of the Magistrate's Court's jurisdiction. On the plain meaning of the wording of the clause and on a purposive reading of clause 31, in the context of the deed of lease as a whole and clause 4 of the related deed of suretyship, the parties intended to consent to the jurisdiction of the High Court. That does not equate, on any reading of that clause, to the exclusivity of the High Court's jurisdiction and the exclusion of the jurisdiction of the Magistrate's Court. There are thus no prospects of success at all and the point of law cannot be said to be arguable.

[36] Furthermore, this matter also does not raise an issue of general public importance. As stated, not every question of contractual interpretation raises an arguable point of law, or one of general public importance. The interpretation of this particular jurisdiction clause does not appear to me to extend beyond the parties' interest. While jurisdiction clauses in contracts are not uncommon, there is nothing in the present instance that demonstrates widespread use of the wording of this particular jurisdiction clause. What is relevant for the adjudication of the dispute are matters which are unique to these parties – the context of the deed of lease as a whole and the related deed of suretyship.

[37] It is well-established that this Court "will consider a law point, however interesting, arguable or important, only if the interests of justice require it to do so".[17] As was the case in *Tiekiedraai*, the contractual interpretation before the

[15] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 21.

[16] Id at para 22.

[17] *Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 (7) BCLR 850 (CC) at para 12.

Magistrate's Court and the High Court does not raise an arguable point of law of general public importance. That is because the sole issue in respect of the relevant clause 31 is the interpretation of its specific wording. No issues of general or wider importance flows from that particular wording. There is no evidence at all that this lease had been a standard form document in widespread use, affecting a large number of consumers.[18]

[38] For these reasons, I conclude that this matter does not engage our constitutional or extended general jurisdiction. Leave to appeal must therefore be refused. This is a purely commercial dispute and costs must follow the outcome. The Magistrate's Court's dismissal of the special plea remains extant. The matter must be remitted to that Court for the further hearing of the action.

Order

[39] I make the following order:

1. Leave to appeal is refused with costs.
2. The matter is remitted to the Magistrate's Court for further hearing.

ZONDO CJ

Introduction

[40] I have had the opportunity of reading the judgment (first judgment) prepared by my Colleague, Majiedt J, in this matter. He concludes that this Court does not have jurisdiction to entertain this matter and dismisses the application with costs. I am unable to agree with this conclusion and outcome. In my view, this Court has jurisdiction in this matter.

[18] Id at para 13.

The parties

[41] The applicants in this matter are Saboath General Traders (Pty) Ltd (Saboath) trading as Sausage Saloon and Mr Bandla Mngonyama (Mr Mngonyama). The respondent is Mthatha Mall (Pty) Limited (Mthatha Mall). Mthatha Mall is a private company which is the owner of a shopping centre known as BT Ngebs Mall, situated in Mthatha in the Eastern Cape.

The facts

[42] On or about 8 February 2017 Saboath entered into a written lease with Mthatha Mall for the letting of business premises for the purpose of running a Sausage Saloon out of a portion of the Mthatha Mall. The leased premises were Shop 127, BT Ngebs Mall, Errol Spring Avenue, Mthatha, Eastern Cape. The lease was for a period of three years. On the same day Mr Mngonyama concluded a suretyship agreement with Mthatha Mall in which he bound himself as surety and co-principal debtor for the obligations incurred by Saboath to Mthatha Mall under the lease.

[43] For purposes of this matter only clause 31 of the lease is material. Clause 31 reads as follows:

> "[T]he parties and the sureties hereby unconditionally and irrevocably consent, without limitation, to the jurisdiction of the High Court of South Africa, Eastern Cape Division, Mthatha in relation to all matters arising from this agreement."

As far as the suretyship agreement is concerned, clause 4 may have relevance. Clause 4 reads:

> "The Lessor shall be entitled, without limitation and at its option to institute any legal proceedings which may arise out of or in connection with this suretyship in the High Court of South Africa, Eastern Cape Division, Mthatha *or in any Magistrate's Court* having jurisdiction in respect of the surety's person, notwithstanding the fact that the claim or

> value of the matter in dispute might exceed the jurisdiction of the Magistrate's Court in respect to the cause of action." (Emphasis added.)

Litigation History

[44] It would seem that at some stage Saboath failed to pay the required rental. Mthatha Mall then instituted an action against Saboath in the Magistrate's Court, Mthatha, Eastern Cape, for the recovery of arrear rental. Saboath filed a special plea to the effect that through clause 31 of the lease the parties had stripped the Magistrate's Court of its jurisdiction to adjudicate any matter arising out of the lease. Mthatha Mall insisted that clause 31 did not deprive the Magistrate's Court of its jurisdiction.

[45] After hearing argument, the Magistrate's Court dismissed the special plea with costs. It held that clause 31 did not oust its jurisdiction. Saboath appealed to the High Court against the judgment and order of the Magistrate's Court. The High Court held that clause 31 did not oust the Magistrate's Court's jurisdiction and dismissed the appeal with costs.

In this Court

Jurisdiction

[46] The issue in this matter is whether the Magistrate's Court, Mthatha, has jurisdiction to adjudicate Mthatha Mall's claim against Saboath. Whenever the issue is whether a court or tribunal has jurisdiction in respect of a certain matter or has the power to do a certain thing or to perform a certain function, that is a constitutional issue. In *Senwes*[19] the issue concerned the nature and scope of the public power conferred on the Competition Tribunal by the Competition Act.[20] This Court had this to say about whether this Court had jurisdiction:

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[19] *Competition Commission of South Africa v Senwes Limited* [2012] ZACC 6; 2012 (7) BCLR 667 (CC) (*Senwes*).

[20] 89 of 1998. See also *Senwes* above n 19 at para 11.

> "[16] As stated earlier, the Commission seeks leave to appeal against the judgment of the Supreme Court of Appeal. *There can be no doubt that this matter raises a constitutional issue. As is apparent from the above, the Supreme Court of Appeal's order is based on the finding that the Tribunal, in adjudicating the margin squeeze abuse, had exceeded its statutory powers and thereby violated the principle of legality which forms part of the rule of law.*
>
> [17] *The question whether the Tribunal had exceeded its statutory power in entertaining the margin squeeze abuse concerns one of the most important principles in the control of public power in our constitutional order, the principle of legality*."[21] (Emphasis added.)

[47] In *Yara*[22] I wrote one of the three judgments produced by this Court. Mogoeng CJ, Jafta J and Nkabinde J concurred in my judgment. Froneman J wrote the second judgment. Skweyiya J and van der Westhuizen J concurred in Froneman J's judgment. The third judgment was that of Cameron J and Yacoob J in which Moseneke DCJ concurred. I had the following to say in my judgment:

> "If the Commission is granted leave to appeal the issues that will arise for determination relate to the extent of the power of the Tribunal, if it has such power, to grant leave for the amendment of a referral of complaints to it. In *Senwes* this Court held that a dispute on whether the Tribunal went beyond its powers raises a constitutional issue. I am of the opinion that an issue concerning the power of the Tribunal to grant or refuse an amendment in regard to complaints referred to it in terms of the Act is a constitutional issue. Accordingly, this Court has jurisdiction."[23]

[21] Id at paras 16-7.

[22] *Competition Commission v Yara South Africa (Pty) Ltd* [2012] ZACC 14; 2012 (9) BCLR 923 (CC).

[23] Id at para 13.

[48] In his judgment Froneman J agreed with my judgment that leave to appeal should not be granted.[24] This meant that he also agreed with my judgment on jurisdiction. If there was any doubt about this, he dispelled such doubt later in his judgment when he said:

> "The dissenting judgment [by Cameron J and Yacoob J] finds overriding justification for jumping this hurdle on the basis that the issue at stake concerns the public powers of the [Competition] Commission and not its expert function of promoting competition. *It is true that the constitutional issue at stake is the public powers of the Commission,* but I disagree that this issue does not also 'lie at the complex intersection of law and economics', where the views of the [Competition Appeal Court] are admittedly important."[25] (Emphasis added.)

[49] In their judgment, Cameron J and Yacoob J had this to say:

> "[46] This is an application by the Competition Commission for leave to appeal against a decision of the Competition Appeal Court, which overturned an order of the Competition Tribunal (Tribunal). *Both the Competition Appeal Court and the Tribunal had to consider whether the Tribunal had the power to grant an amendment to a complaint referral to include two entities that were not identified as respondents in the initiating complaint, even though the affidavit which formed part of the initiating complaint expressly mentioned them both. The Tribunal held that it did have that power while the Competition Appeal Court held that it did not.*
>
> [47] We have had the benefit of reading the judgments prepared by Zondo AJ (the main judgment) and by Froneman J. *We agree that this Court has jurisdiction to entertain the appeal, since the scope and exercise of the Commission's powers of investigation and referral of complaints of anti-competitive conduct under the Competition Act (Act) plainly raise constitutional issues*. But we differ from the main

[24] Id at para 74.

[25] Id at para 79.

> judgment in that we conclude that leave to appeal should be granted."[26] (Emphasis added.)

[50] In *Tasima*[27] Jafta J said:

> "*This matter concerns constitutional issues of considerable importance. These include the scope of judicial authority exercised by courts.* In particular whether a court may decline to decide a counter-application for the review of administrative action where there is a court order directing that the administrative action be implemented."[28] (Emphasis added.)

Although Jafta J's judgment was a minority judgment, Khampepe J's judgment, which was the majority judgment, agreed with Jafta J's judgment that leave to appeal should be granted without giving reasons different from those that were given by Jafta J for granting leave. This Court cannot grant leave unless it has jurisdiction in a matter. The majority had no issue with Jafta J's judgment on jurisdiction.

[51] It is clear from the excerpt from Jafta J's judgment above that a question whether or not a matter falls within the scope of the judicial authority exercised by a particular court is a constitutional issue. In the present case the question is whether or not the Magistrate's Court has jurisdiction to decide the claim instituted by the applicant in that court. That is the same question as the question whether that matter fell within the judicial authority exercised by the Magistrate's Court. It is a constitutional issue.

[52] Another basis for this Court's jurisdiction is that in terms of section 34 of the Constitution the respondent has a right to take the dispute between itself and the applicant to the Magistrate's Court for that court to decide it. The applicant contends that the respondent may not take the dispute to the Magistrate's Court because of clause

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[26] Id at paras 46-7.

[27] *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC).

[28] Id at para 2.

31 of the lease. The respondent contends that clause 31 has not taken away its right to take the matter to the Magistrate's Court. In *Crompton*[29] this Court said:

> "*We are called upon to consider the scope of the High Court's jurisdiction to refuse a stay when section 12B is implicated. A challenge to the High Court's jurisdiction based on the principle of legality, paired with the purported limitation of the section 34 right to access an appropriate or 'specialist' tribunal or forum, raises constitutional issues.*"[30] (Emphasis added.)

[53] In the present case we are called upon to consider the scope of the Magistrate's Court's jurisdiction to agree to determine a matter when the parties have a clause such as clause 31 in their agreement. A challenge to the Magistrate's Court's jurisdiction implicates the principle of legality. In this case the applicant seeks to prevent the respondent from having the dispute decided by the Magistrate's Court as part of its exercise of its right entrenched in section 34 of the Constitution. The matter raises a constitutional issue.

[54] In *Fedsure*[31] this Court said through Chaskalson P:

> "[58] It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.

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[29] *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* [2021] ZACC 24; 2021 BCLR 1203 (CC); 2022 (1) SA 317 (CC) (*Crompton*).

[30] Id at para 20.

[31] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

> [59] *There is of course no doubt that the common law principles of ultra vires remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by the constitutional principle of legality.* In relation to 'administrative action' the principle of legality is enshrined in section 24(a). In relation to legislation and to executive acts that do not constitute 'administrative action', the principle of legality is necessarily implicit in the Constitution. *Therefore, the question whether the various local governments acted intra vires in this case remains a constitutional question.*"[32] (Emphasis added.)

Obviously a court that decides a matter that falls outside its jurisdiction acts ultra vires.

[55] In *Pharmaceutical Manufacturers*[33] Chaskalson P had this to say on behalf of this Court in regard to the principle of legality:

> "[18] In effect the finding of the Full Bench was that the President had acted unlawfully in bringing the [South African Medicines and Medical Devices Regulatory Authority] Act [132 of 1998] into force and that his decision to do so should accordingly be set aside. The first question, which the Full Bench was not called upon to decide, is whether this is a finding on a constitutional matter. There can be no doubt that it is.
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> [19] Section 2 of the Constitution lays the foundation for the control of public power. It provides:
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> > 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'
>
> Consistent with this, section 44(4) of the Constitution provides that in the exercise of its legislative authority Parliament 'must act in accordance with, and within the limits of, the Constitution.' The same

[32] Id at para 58-9.

[33] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC).

> applies to members of the Cabinet who are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. They too are required to act in accordance with the Constitution.
>
> [20] *The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law. The question whether the President acted intra vires or ultra vires in bringing the Act into force when he did, is accordingly a constitutional matter. The finding that he acted ultra vires is a finding that he acted in a manner that was inconsistent with the Constitution*."[34] (Emphasis added.)

[56] The rule of law – from which we get the principle of legality – is binding not only on the Legislature and the Executive but also on the Judiciary. In terms of the principle of legality no court may perform functions falling outside of its jurisdiction. If it did so, it would be acting in breach of the principle of legality. Accordingly, in so far as the issue before this Court is whether the Magistrate's Court has jurisdiction to entertain this matter, that is a question that raises the principle of legality and is a constitutional matter and this Court has jurisdiction.

[57] In *Former Way Trade*[35] there were two parties to a lease relating to a petrol filling station. The Petroleum Products Act[36] was applicable to the relationship between the parties. Section 12B of that Act conferred power on the Controller of Petroleum Products to refer a dispute concerning an unfair and unreasonable contractual practice to an arbitration in terms of section 12B. It would appear that the section 12B arbitrator had extensive powers to correct or remedy any unfair or unreasonable contractual practice. The lessor notified the lessee that it would not be renewing or extending the franchise agreement between the parties. The lessee referred a dispute to

[34] Id at paras 18-20.

[35] *Former Way Trade and Invest (Pty) Limited v Bright Idea Projects (Pty) Limited* [2021] ZACC 33; 2021 JDR 2223 (CC); 2021 (12) BCLR 1388 (CC) (*Former Way Trade*).

[36] 120 of 1977.

the Controller. The lessor then instituted eviction proceedings against the lessee in the High Court.

[58] The lessee contended that the provisions of section 34 of the Constitution read with the decision of this Court in the *Business Zone* case,[37] create the principle that, when a licensed retailer has initiated the procedure in terms of section 12B of the Petroleum Products Act, the jurisdiction of the High Court to hear the eviction application is ousted. The lessee argued that, since it had already initiated the referral to the Controller by the time the lessor instituted eviction proceedings, the High Court had no authority to entertain the eviction application.

[59] The lessee had an alternative argument. The alternative argument was that, if the position was that the jurisdiction of the High Court to entertain the lessor's eviction application had not been ousted, then the position was that the High Court's discretion to stay the proceedings was very narrow when a section 12B referral had been made. The lessee contended that in fact a court in such a situation was compelled to grant a stay of the eviction proceedings and a refusal to do so was unconstitutional to the extent that it undermined the section 34 right of the lessee to access a specialist forum or tribunal.

[60] With regard to this Court's jurisdiction on the basis of a constitutional matter, this Court said:

> "Of course, these issues have now been dealt with by this Court in *Crompton*. However, at the time that this matter was set down, and when the High Court and Supreme Court of Appeal in the present instance made their decisions, the issues raised had not yet been determined. Accordingly, a challenge of the High Court's discretion to stay proceedings, based on the principle of legality, paired with the purported limitation of the section 34 right to access an appropriate or

[37] *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited* [2017] ZACC 2; 2017 JDR 0259 (CC); 2017 (6) BCLR 773 (CC) (*Business Zone*).

> "specialist" tribunal or forum, raise constitutional issues. Therefore, this Court's jurisdiction is engaged.[38]

[61] This Court said this at the level of deciding whether there was a constitutional issue in the matter in which case it would have jurisdiction. It was not deciding whether or not the lessee's contention about the limitation of the section 34 right was good. It considered the merits or demerits of that contention later when it considered whether the High Court and the Supreme Court of Appeal had wrongly refused to stay the proceedings. At that stage this Court concluded that the lessee's contention was without merit. It effectively held that the discretion of the High Court to stay proceedings when a referral to the Controller had been initiated was a discretion in the true sense that the High Court was required to exercise judicially.

[62] In fact this Court had this to say:

> "[51] Having concluded that the High Court is not obliged to stay proceedings where there is a referral in terms of section 12B, but has a discretion to refuse the stay of proceedings, and that in this matter it exercised that discretion judicially, an incidental issue arises. As mentioned earlier, the applicant takes issue with section 6(2) of the Arbitration Act. The discretion to refuse to grant a stay of proceedings, so the argument goes, conflicts with the right to access specialist tribunals as provided for in section 34 of the Constitution.
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> [52] It cannot be overstated that the right of access to courts and specialist tribunals is the cornerstone of ensuring fairness and justice in the resolution of disputes. The section 12B process is one such process and any curtailment to accessing it cannot be done capriciously. Can it then be said that the refusal to exercise a discretion in favour of granting a stay to enable a party to pursue proceedings in terms of section 12B is unconstitutional?
>
> [53] In my view, the applicant has failed to make out a case for the unconstitutionality of section 6(2) of the Arbitration Act. The right to

[38] *Former Way Trade* above n 35 at para 35.

> access the High Court under section 34 of the Constitution remains intact. Each application for a stay must be determined on its own merits. That is what happened in this case. Therefore, a refusal for a stay cannot be said to be in conflict with section 34."[39]

[63] In *Crompton* this Court had made the same decision on jurisdiction. It said:

> "[17] The applicant submits that this matter raises a constitutional issue in that the High Court did not apply the law as set out by this Court in *Business Zone*. Further, in its submissions, the applicant argues that its section 34 constitutional right to access a specialist tribunal or forum (in the form of the section 12B arbitration) is limited when the High Court hears a matter notwithstanding a referral to the Controller having been instituted. It adds that it would be in the interests of justice to hear this matter, as it affects not only its interests but those of the entire petroleum retail and wholesale industry.
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> . . .
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> [19] This Court is empowered to decide matters of a constitutional nature, and any other matter that raises an arguable point of law of general public importance that ought to be considered by it. In addition, it must also be in the interests of justice to grant leave.
>
> [20] This Court must determine the effect of a statutory provision, section 12B of the Petroleum Products Act, on an application to stay High Court proceedings pursuant to a request for a referral in terms of section 12B. We are called upon to consider the scope of the High Court's jurisdiction to refuse a stay when section 12B is implicated. A challenge to the High Court's jurisdiction based on the principle of legality, paired with the purported limitation of the section 34 right to access an appropriate or 'specialist' tribunal or forum, raises constitutional issues."[40]

[39] Id at paras 51-3.

[40] *Crompton* above n 29 at paras 17-20.

[64] If one takes what was said both in *Crompton* and in *Former Way Trade* and fits it into the present case it would amount to the lessee in this case and defendant in the Magistrate's Court action saying to the Magistrate's Court:

> "If you refuse to stay these proceedings to allow the parties to proceed with the matter in the High Court, Mthatha, you will have undermined my section 34 right to have this dispute adjudicated by the High Court with all the benefits that come with the adjudication of a matter by the High Court."

[65] In the present case, it is, of course, the lessee who objected to the Magistrate's Court's jurisdiction and it is that lessee who argues that the lessor was precluded from instituting proceedings in the Magistrate's Court as it was required by clause 31 of the lease to institute proceedings in the High Court, Mthatha. The lessee is saying that, if the Magistrate's Court entertained the matter and decided it, that would have undermined its section 34 right to have the dispute decided by the High Court. Given the approach that this Court took when a similar argument was raised in the context of jurisdiction in both *Crompton* and *Former Way Trade*, this Court would have to hold that that contention raises a constitutional issue and, therefore, engages this Court's jurisdiction. I say we should so hold.

Leave to appeal

[66] If leave to appeal is granted, the issue that this Court will be required to determine is whether clause 31 of the lease ousted the jurisdiction of the Magistrate's Court with the result that the Magistrate's Court cannot decide the Mthatha Mall's claim. Clause 31 has been quoted above.[41] It is not necessary to quote it again. There can simply be no doubt that this clause does not say that the Magistrate's Court will not have jurisdiction in matters arising out of the lease nor does the clause say that the High Court is the only court that would have jurisdiction in matters arising out of the lease. The effect of clause 31 is nothing more than that, if either party instituted proceedings

[41] See para 43 above.

in the High Court against the other arising out of the lease, the latter could not object on the basis that the High Court had no jurisdiction.

[67] There are no reasonable prospects that the appeal will be successful if we were to grant leave to appeal. In my view it is in the interests of justice that leave to appeal be refused with costs.

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