THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 283/2024

In the matter between:

WATERBERG BOULEVARD (PTY) LTD **APPLICANT**

and

SMULHOEKIE TUISNYWERHEID (PTY) LTD **FIRST RESPONDENT**

LOUIS PETRUS BOSHOFF **SECOND RESPONDENT**

Neutral citation: *Waterberg Boulevard (Pty) Ltd v Smulhoekie Tuisnywerheid (Pty) Ltd and Another* (283/2024) [2025] ZASCA 167 (4 November 2025)

Coram: Mbatha ADP and Hughes, Weiner, Molefe and Unterhalter JJA

Heard: 25 August 2025

Delivered: 4 November 2025.

Summary: Civil Law – Magistrates' Courts Act 32 of 1944 – Whether a claim for arrear rental is a claim for specific performance in terms of s 46 – monetary jurisdiction of the magistrates' court – landlord's duty to mitigate damages – whether pre-trial agreements are binding to the court.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Naude-Odendaal and Kganyago JJ sitting as court of appeal):

1. Special leave to appeal is granted.
2. The appeal is upheld with costs.
3. The respondents are to pay the costs of the appeal jointly and severally, the one paying the other to be absolved.
4. The high court order is set aside and replaced with the following order:

   1.'The appeal is upheld with costs on scale B. The respondents are to pay the costs jointly and severally, the one paying the other to be absolved.

   2. The magistrates' court order granted on 25 April 2023 under case number 108/2020, is hereby set aside and replaced with the following order:

   'The defendants are ordered to pay to the plaintiff:

   (a) R442 493.00 jointly and severally, the one paying the other to be absolved;

   (b) interest *a tempora morae* on the aforementioned amount from the date of judgment, 25 April 2023 to date of payment;

   (c) costs of suit on attorney and client scale.''

JUDGMENT

Mbatha ADP (Hughes, Weiner, Molefe and Unterhalter JJA concurring):

Introduction

[1] This matter requires the determination of various issues. First, whether the application for special leave to appeal, referred to oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act) should be granted. Second, whether a claim for arrear rental constitutes a claim for specific performance in terms of s 46(2)*(c)* of the Magistrates' Courts Act 32 of 1944 (the MCA). Third, whether the lessor had a duty to mitigate damages in terms of the lease. Last, whether

the monetary claim by the applicant, Waterberg Boulevard (Pty) Ltd (Waterberg) falls within the monetary jurisdiction of the magistrates' courts.

Factual Background

[2] On or about 15 March 2016, Waterberg entered into a written lease agreement with the first respondent, Smulhoekie Tuisnywerheid (Pty) Ltd (Smulhoekie), in terms of which Smulhoekie leased business premises from Waterberg for a period of three years. The second respondent Mr Louis Petrus Boshoff (Mr Boshoff), who represented Smulhoekie, simultaneously bound himself as a surety for the debts of Smulhoekie in favour of Waterberg. Rental for the premises was fixed at R17 100 per month, escalating over the following two years. Smulhoekie was also liable for the payment of electricity, water and other sundry charges.

[3] Upon signing the agreement, Smulhoekie took occupation and began trading on the premises. However, as of October 2016, the business closed down due to poor performance. This unfortunate state of affairs was communicated to Mr Nico Van Heerden (Mr Van Heerden), a representative of Waterberg. According to Mr Boshoff, he was requested to identify a suitable tenant, who could take over the remaining portion of the lease. A few months later, Mr Bilal Hassim (Mr Hassim) was introduced to Mr Ettian Fourie (Mr Fourie), a representative of Waterberg, as a potential prospective tenant to replace Smulhoekie. Mr Boshoff stated further that, Mr Hassim undertook also to settle the arrear rental owing by Smulhoekie to Waterberg.

[4] A few months later, Waterberg proceeded by way of action in the Magistrates' Court for the District of Bela-Bela (the magistrates' court) to seek the recovery of arrear rental for the period from April 2016 to October 2016. The matter served before Magistrate M Montana (the magistrate), under case number 207/2017 (the first MC action). Smulhoekie and Mr Boshoff defended the action and also filed a counterclaim. The court found in favour of Waterberg. Smulhoekie and Mr Boshoff appealed against the judgment and order of the magistrates' court. The appeal came before the Limpopo Division of the High Court, Polokwane (the high court). The high court, *per* Semenya AJP and Diamond AJ, dismissed the appeal on the basis that Waterberg's claim fell within the monetary jurisdiction of the magistrates' court. In addition, it found that Waterberg had no duty to mitigate damages.

[5] Upon the expiration of the lease agreement, Waterberg issued a new summons out of the same magistrates' court, under case number 108/2020, against Smulhoekie and Mr Boshoff, claiming arrear rental in a total amounting to R 478 061.28 (the second MC action). The amount claimed was later reduced to R 442 493.33. Waterberg also sought interest *a tempora morae* on the said amount and costs of suit on an attorney and client scale.

The Magistrates' Court case no 108/2020 (the second MC action)

[6] I turn to consider the judgment of the magistrates' court, under case number 108/2020, which is the subject of the application before us. The magistrates' court (*per* Mr Ponnan) dismissed a point *in limine* raised by the respondents in terms of s 46(2)*(c)*(*i*) of the MCA. Smulhoekie and Mr Boshoff contended that the magistrates' court lacked jurisdiction to determine the matter as the claim by Waterberg was a claim for specific performance, without an alternative claim for damages; and that the claim also exceeded the monetary jurisdiction of the court, which is fixed at R200 000. Although the magistrates' court dismissed the *point in limine,* it found in favour of Smulhoekie and Mr Boshoff, on the basis that Waterberg failed to mitigate its damages in terms of the law. This led to Waterberg's appeal to the high court.

[7] This appeal too served before the high court, Polokwane, (*per* Naude-Odendaal and Kganyago JJ). First, the high court found that the question whether damages should be mitigated was not rendered *res judicata* by the existence of a judgment between the parties *per* Semenya AJP and Diamond AJ in respect of the first MC action. This issue was not pursued before this Court. Second, that the parties were not bound by the admissions and agreements made at the pre-trial conference. Third, on the question whether the claim by Waterberg was for specific performance or not, it found that although the magistrates' court came to the correct conclusion, its finding was based on the wrong premise of law. It held that Waterberg's claim was one sounding in money, rather than a claim for specific performance. Despite having reached this conclusion, it found that since there was no alternative claim for damages by Waterberg, the magistrate ought to have upheld the point *in limine* raised in terms of s 46(1)*(c)* of the MCA and dismissed the action. Last, it found that the claim for R442 493.00 exceeded the prescribed monetary jurisdiction of the magistrates' court;

as a result, the magistrates' court lacked jurisdiction to entertain the claim. Consequently, it dismissed the appeal by Waterberg with costs.

Before this Court

[8] Before this Court, the main questions are: (a) whether the claim for arrear rental is a claim for specific performance; and if so, whether such a claim is beyond the jurisdiction of the magistrates' court; (b) whether the magistrates' court exceeded its statutory jurisdiction by considering a claim for specific performance without an alternative claim for damages; (c) the binding nature of the pre-trial minutes; and whether on the facts of this case there was a duty upon the lessor to mitigate its damages. Waterberg contends that the high court failed to appreciate that its claim fell outside of the exception listed in s 46 of the MCA. In addition, its claim was for monetary payment which fell within the jurisdiction of the magistrates' court. On that score, there was no need on the part of Waterberg to plead damages in the alternative. It argued further that the high court erred in finding that it had a duty to accept Mr Hassim as a substitute tenant to mitigate its damages. By doing so, it argued that the high court disregarded the principles of *pacta sunt servanda* and that there was nothing unfair, unreasonable, or unjust with the lease agreement. On the other hand, Smulhoekie and Mr Boshoff argued that the high court did not err in its findings, and the appeal ought to be dismissed with costs.

Special leave

[9] The initial question to be decided by this Court is whether Waterberg has met the threshold of s 16(1)*(b)* of the Superior Courts Act. Section 16(1)*(b)* provides as follows:

'Subject to section 15(1), the Constitution and any other law-

(a)…

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal.'

The law is trite as to what an applicant needs to show to reach the jurisdictional threshold of s 16(1)*(b).* The yardstick as set out in *Westinghouse Brake & Equipment*

(Pty) Ltd v Bilger Engineering (Pty) Ltd[1] (*Westinghouse*) finds application to this provision, where Corbett JA expressed himself as follows:

'I have no doubt that the terms "special leave" and "leave" were chosen with deliberation by the lawgiver and that they were intended to denote different concepts. It may be accepted that the normal criterion of reasonable prospects of success applies to both the "special leave" of s 20 (4) *(a)* and the "leave" of s 20 (4) *(b)* (and in this connection I agree with ELOFF J, when he held, in the case of *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T), that the criterion of appealability adopted *in Magnum National Life Assurance Co Ltd v South African Bank of Athens Ltd* 1985 (4) SA 365 (W) was clearly wrong). In my view, however, the word "special" in the former subsection denotes that some additional factor or criterion was to play a part in the granting of special leave. The contrary view would give no content to the word "special" and would thus run counter to the general rule in the construction of statutes.'

[10] I find that Waterberg has met the threshold set out in *Westinghouse* and should be granted special leave to appeal. Waterberg raises questions of law and has demonstrated prospects of success that are sufficiently strong that refusing special leave could result in a denial of justice. The matter is also of significance to the public and the parties.[2] There are two conflicting judgments from the high court on two similar questions of law.

Specific performance and jurisdiction of the magistrates' court

[11] The magistrates' court is a creature of statute. In that regard, specific performance is regulated by s 46. Section 46(2), in relevant part, provides that:

'A court shall have no jurisdiction in matters-

(a) …

(b) …

(c) in which is sought specific performance without an alternative of payment of damages, except in-

(i) the rendering of an account in respect of which the claim does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*.'

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[1] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) 555 (A) at 561 C-F.

[2] *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA) para 8.

The maximum amount applicable is presently R200 000.[3]

[12] Section 46 is a statutory provision that limits the jurisdiction of the magistrates' court. In order to claim specific performance in the magistrates' court, such a claim must be made with an alternative claim for damages, save for an exception, not relevant to this case. In the event that it does not satisfy the aforesaid requirements, such a claim may be made in the high court, which has concurrent jurisdiction with the magistrates' court. The parties may confer jurisdiction upon the magistrates' court, by consenting to it in writing. This position is regulated by the provisions of s 45(1). Section 45 confers jurisdiction upon the magistrates' court over matters which would otherwise be beyond its jurisdiction, if the parties consent in writing to the court's jurisdiction. In most cases, consent to the jurisdiction of the magistrates' court is often embodied in a contract between the parties. It is essential to highlight the court's statement in *Daljosaphat Restorations (Pty) Ltd v KasteelHof CC*.[4] It held that the conferral of jurisdiction by agreement cannot be made by litigants who are not persons in respect of whom the magistrates' courts enjoy jurisdiction, in the first place, in terms of s 28.

[13] It is therefore imperative that, though the parties may consent to jurisdiction, the relevant magistrates' court must also have jurisdiction in terms of s 28 of the MCA over the persons concerned. Section 28 embodies the following:

'(1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other-

(a) any person who resides, carries on business or is employed within the district or regional division;

(b) any partnership which has business premises situated or any member whereof resides within the district or regional division;

(c) any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself or herself;

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[3] GN 217, Government Gazette 37477, 27 March 2014: Determination of monetary jurisdiction for causes of action in respect of courts for districts.

[4] *Daljosaphat Restorations (Pty) Ltd v KasteelHof CC* [2006] ZAWCHC 26; 2006 (6) SA 91 (C) para 35.

(d) any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional division;

(e) any party to interpleader proceedings, if-

(i) the execution creditor and every claimant to the subject-matter of the proceedings reside, carry on business, or are employed within the district or regional division; or

(ii) the subject-matter of the proceedings has been attached by process of the court; or

(iii) such proceedings are taken under section 69(2) and the person therein referred to as the "third party" resides, carries on business, or is employed within the district or regional division; or

(iv) all the parties consent to the jurisdiction of the court;

(f) any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court;

(g) any person who owns immovable property within the district or regional division in actions in respect of such property or in respect of mortgage bonds thereon…'

[14] Section 45[5] should therefore be read together with s 28 when the court determines whether it has the necessary jurisdiction to hear a matter. In *Pfeiffer v First National Bank of Southern Africa Ltd*,[6] this Court determined that the words appearing in s 45(1), being 'otherwise beyond its jurisdiction', have reference to the amount being claimed. Therefore, these words allow a creditor to bring a monetary claim, which is above the magisterial jurisdictional amount, before the magistrates' court, if consented to by the parties. Should there be no clause which expressly excluded the concurrent jurisdiction of the high court, the claimants would be within their rights to institute an action in either the magistrates' court or the high court.

[15] A consent in writing to the jurisdiction of the magistrates' court should be in writing as prescribed in s 45(1). In this matter, consent to jurisdiction of the magistrates' court was embodied in clause 43 of the lease agreement, which provides as follows:

'…The landlord's domicilium is the address indicated on the title page of this agreement; provided that the landlord may at any time, by written notice to the tenant, amend its domicilium, the amendment to become effective as soon as the said written notice has been

[5] Section 45(1) provides: '(1) Subject to the provisions of section 46, the parties may consent *in writing* to the jurisdiction of either the court for the district or the court for the regional division to determine any action or proceedings otherwise beyond its jurisdiction in terms of section 29 (1).' (Emphasis added.)

[6] *Pfeiffer v First National Bank of Southern Africa Ltd* 1998 (3) SA 1018 (SCA); [1998] 3 All SA 397 (A).

posted to the tenant by prepaid registered mail. Although the landlord will not be obliged to do so, it will be entitled to institute any action arising out of this agreement in the *Pretoria Magistrate's Court* and in that event, the said court will have jurisdiction in that matter.' (Emphasis added.)

[16] Waterberg instituted all the actions in Bela-Bela, rather than in Pretoria, as expressly stated in the lease agreement. The reference to Pretoria as a court of choice for the parties is not fatal to Waterberg's case for several reasons. First, the issuing of summons in Bela-Bela did not oust the jurisdiction of the magistrates' court, as s 45 requires only that the consent be in writing. It does not require that the parties choose a specific court. Second, a summons issued in the wrong forum would generally attract a special plea relating to the lack of jurisdiction or the parties could transfer the action by consent to the correct forum. Last, the consent to the magistrates' court jurisdiction should also comply with the requirements of s 28, as stated above. Waterberg, in its particulars of claim, described Smulhoekie's principal place of business as being in Bela-Bela, that the cause of action arose within the jurisdiction of the magistrates' court in Bela-Bela and that Mr Boshoff is resident within the jurisdiction of the Bela-Bela court. These factors conferred jurisdiction on the Bela-Bela court in terms of s 28. In that regard, the Pretoria magistrates' court would not have had jurisdiction over the parties.

[17] I briefly reiterate the relevant principles relating to specific performance. A party seeking an order for specific performance in terms of a contract should allege and prove non-performance of the contract. It is trite that every party to a binding contract who is ready to carry out its obligations under it has the right to demand from the other party performance of their obligation in terms of the contract.[7] In this matter, Waterberg instituted a claim for arrear rental, without seeking a claim for specific performance of the contract. In the law of contract specific performance can be understood in three senses: a claim for the payment of money (*ad pecuniam solvendam*), a claim for the performance of a positive act (*ad factum praestandum*); or a claim to enforce a negative obligation, for example, a restraint of trade.

[7] *Farmers' Co-operative Society v Berry* 1912 AD 343 at 350.

[18] It is apposite that I give a brief history of s 46(2)*(c)*, which is relevant to the interpretation of the words 'specific performance'. The issue at hand is whether the phrase 'specific performance' should be confined to specific performance of an obligation, that is, a contractual obligation. And whether there should be a distinction between a claim *ad pecuniam solvendam* (claims sounding in money) and a claim *ad factum praestandum* (claims for the performance of a specific act). Section 44(2)*(c)* of the Magistrates' Courts Act 32 of 1917 (the old MCA), provided that the magistrates' court shall have no jurisdiction over a matter in which is sought 'the specific performance of an act' (daadwerklike vervulling van een verbitenis), without an alternative claim for damages.

[19] The provision was interpreted differently by different provincial divisions of the supreme courts. In *Sydney Clow & Co Ltd v Herzberg*[8] (*Sydney Clow*), in considering the meaning of the words 'specific performance', the court placed reliance on the use of the words 'of an act' after the words 'specific performance'. It found that specific performance, properly interpreted, was not confined to specific performance of an obligation and that it included the claim for the return of property in a vindicatory action. In coming to this conclusion, it relied on the signed English version of the old MCA. The Dutch version of s 44 in relation to the caveat stated that '…waarinverbinteis zonder even alternaeis voor schadevergoeding genorden word'.[9] Section 44 of the old MCA also enumerated instances where the magistrates' court would not have jurisdiction, where specific performance was sought without an alternative claim for damages. The learned authors of *Jones & Buckle*, The Civil Practice of the Magistrates' Court, Volume 1[10] (Jones & Buckle) have expressed doubts that the interpretation offered in *Sydney Clow* would be applicable to the current legislation.

[20] In s 46(2)*(c)* of the current MCA, the words 'of an act' are omitted and in the signed version, which is in Afrikaans, the words 'daadwerklike vervulling' appear without reference to any 'verbintenis'. This is a factor which Jones & Buckle opines that the interpretation of the words 'specific performance' in *Sydney Clow* may no

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[8] *Sydney Clow & Co Ltd v Herzberg* 1938 TPD 201.
[9] This translates to 'obligations that, by their nature, have no equivalent remedy in damages if they are not performed'.
[10] Jones and Buckle: *The Civil Practice of the Magistrates' Courts in South Africa* 10th edition (2017) at 306.

longer be applicable to the current MCA. In *Maisel v Camberleigh Court (Pty) Ltd,*[11] (*Maisel*) the court found that the words specific performance should be given their well-known meaning of specific performance of a contract on the basis that it appears inapt to describe a claim for statutory or other obligation as a claim for specific performance. In *Olivier v Stoop*[12] (*Olivier*), the court found that the words specific performance relates to the specific performance of a contractual obligation. And, that the magistrates' court has jurisdiction to order that a liquidator be appointed.

[21] Conversely, *Zinman v Miller*[13] (*Zinman*) held as follows:

'The reference to "specific performance" in s 46(2)*(c)* is a reference in my opinion to claims in which a plaintiff seeks ordinary relief of a final nature based on the obligation, in terms of which the defendant is bound to render specific performance'.

It went on to state that 'it is immaterial for the purposes of this case whether the obligation arises from contract, delict or statute and it is therefore unnecessary to decide whether the words "specific performance" in the section are restricted to performance of a contract'. In *Carpet Contracts (Pty) Ltd v Grobler*[14] (*Carpet Contracts*), following the decision in *Zinman* the court found that even an obligation arising from delict could give rise to a claim for specific performance. This is in line with the view expressed in Jones & Buckle that the omission of the words 'of an act' and 'van een verbintenis' in s 46(2)*(c)* would resolve the conflict between the English and Dutch versions in the old MCA, to empower the magistrate's court to compel a person to perform an act.

[22] However, in *Carpet Contracts,*[15] the court held that a claim by a seller for payment of the contract price is a claim for specific performance of a contractual obligation. Therefore, in the absence of an alternative claim for damages, the magistrates' court lacked jurisdiction to entertain the matter. In addition, it found that there was no distinction between a claim *ad factum praestandum* and a claim *ad pecuniam solvendam* and that both claims, depending on the circumstances, may be claims for specific performance. Conversely, in *Tuckers Land and Development*

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[11] *Maisel v Camberleigh Court (Pty) Ltd* 1953 (4) SA 371 (C) at 379H.
[12] *Olivier v Stoop* 1978 (1) SA 196 (T) at 201B and 202C-D.
[13] *Zinman v Miller* 1956 (3) SA 8 (T) at 12D- E.
[14] *Carpet Contracts (Pty) Ltd v Grobler* 1975 (2) 436 at 439 (T).
[15] Ibid at 442C-D.

Corporation (Edms) Bpk v van Zyl,[16] (*Tuckers*), the court made a distinction between claims *ad pecuniam solvendam* and claims *ad factum praestandum*. It did not follow the finding in *Carpet Contracts*. It found that orders sounding in money, regardless of the cause of action, are not for the purposes of s 46(2)*(c)* orders for specific performance. The learned authors in Jones & Buckle are of the view that this is a correct approach. They opine that the reasoning of the court in *Tuckers* is sound as it is based on the history of the section and practice which has arisen thereunder. In that regard, they conclude that when the legislature placed orders for specific performance without an alternative claim for damages, beyond the jurisdiction of the magistrates' courts, it had in mind not orders for specific performance, but orders for specific performance *ad factum praestandum* as contrasted with orders *ad pecuniam solvendam*. The case before us is not the type of matter where the court has to exercise a discretion whether to grant an order for specific performance or consider an alternative claim for damages. The discretion is exercised in cases where to order specific performance is to require a defendant to do a positive act. If the discretion is exercised against such an order, damages is the alternative remedy. That reasoning does not apply in the case of a money claim.

[23] I, therefore, conclude by finding that the individual claims for arrear rental by Waterberg were claims sounding in money and not claims for specific performance within the meaning of s 46(2)*(c)*. The magistrates' court has jurisdiction to entertain such monetary claims, without an alternative claim for damages. Waterberg also categorised its action as a claim for specific performance. The high court failed to appreciate the distinction between orders *ad factum praestandum* (claims for specific performance of an act) and *pecuniam solvendam* (claims for the payment of a sum of money) as found in *Tuckers*. In *Tuckers* the court made the following analogy '…to order the payment of a salary due is not an order for specific performance ad faciendum [to be done] …'[17] It explained further that these are not orders for specific performance in form or nature. And found that, orders sounding in money, regardless of the cause of action are not for purposes of s 46 orders for specific performance.

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[16] *Tuckers Land and Development Corporation (Edms) Bpk v van Zyl* 1977 (3) SA 1041 (T) at 1045 D.
[17] Ibid at 1049 F-G.

[24] In the particulars of claim, the claims for rental were tabulated as follows:

'3. In terms of the said agreement, the first defendant would pay rental to the plaintiff as follows:

3.1 From 15 April 2016 to 31 March 2017, an amount of R17 100.00….

3.2 From 1 April 2017 to 31 March 2018, and an amount of R18 468.00…

3.3 From 1 April 2018 to 31 March 2019, an amount of R19 945.44….'

The amounts above totalled R478 061.28, which exceeds the prescribed statutory limit of R200 000.

[25] Section 43(1) of the MCA allows for the combination of two or more claims in a single summons, even if they are based on different causes of action. Therefore, each year's rental claim would be considered as a separate cause of action, as they did not exceed the jurisdictional limit of R200 000. The monetary jurisdiction of the magistrates' court is regulated by s 29 which provides as follows:

'(1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act No. 34 of 2005), a court in respect of causes of action, shall have jurisdiction in –

(g) actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette.'

The provision stipulates that the total amount of the claims individually should not exceed R200 000. Waterberg's claim for the amount of R442 493.28 does exceed the prescribed monetary jurisdiction of the magistrates' court but the individual claims do not. Properly construed, this means that different claims with a total value in excess of the magistrates' court money jurisdiction determined by the Minister, can be claimed in one action, as long as each claim falls under a separate cause of action. The claims of Waterberg have been pleaded separately and they all fall within the jurisdiction of magistrates' court. Had the claims not been separated, Waterberg would still be entitled to its full claim as the parties consented in writing to the jurisdiction of the magistrates' court in terms of clause 43 of the lease agreement. I therefore find that the magistrates' court did not exceed its statutory jurisdiction by considering Waterberg's claim, although with a caveat, that the claim was not for specific performance requiring damages to be pleaded in the alternative.

The binding nature of pre-trial agreements

[26] Rule 22A of the Magistrates' Court Rules mandates that the parties should meet for a pre-trial conference, which ultimately culminates in a minute signed by both parties. The purpose of this rule is to encourage pre-trial engagement, enhancing judicial case management and promoting efficient preparation for the hearing. Incorrect legal concessions made by the parties during the process are not binding on the court. The court was correct in finding that a wrong concession on a question of law was not binding on it, going as it did to a question of jurisdiction over which a court always retains the power to decide.

Duty to mitigate damages

[27] I find that the high court misdirected itself by finding that Waterberg had a duty to mitigate damages. First, the lease agreement remained in force as Smulhoekie and Mr Boshoff failed to cancel it. Second, the relationship between the parties was regulated by the terms of the written lease agreement, rather than any other law, as determined by the high court. Clause 9.2.3 of the lease agreement provides:

'In the event of the cancellation of the lease-

9.2.3 the tenant notwithstanding any stipulation to the contrary, shall remain liable for all rental and other monies due until the end of the term of lease or until a new tenant that is acceptable to the landlord is found and commences paying rental in respect of the premises, whichever is earlier.' (Emphasis added.)

The wording of clause 9.2.3, properly construed, regulates the mitigation of damages, in the event of the cancellation of the lease. The lease was never cancelled. No duty on the part of Waterberg could arise to mitigate damages.

[28] Accordingly, for the reasons above, I find in favour of Waterberg. The appeal should be upheld with costs.

[29] I make the following orders:

1. Special leave to appeal is granted.
2. The appeal is upheld with costs.
3. The respondents are to pay the costs of the appeal jointly and severally, the one paying the other to be absolved.
4. The high court order is set aside and replaced with the following order:

1. ‘The appeal is upheld with costs on scale B. The respondents are to pay the costs jointly and severally, the one paying the other to be absolved.

2. The magistrates’ court order granted on 25 April 2023 under case number 108/2020, is hereby set aside and replaced with the following order:

‘The defendants are ordered to pay to the plaintiff:

(a) R442 493.00 jointly and severally, the one paying the other to be absolved;

(b) interest *a tempora morae* on the aforementioned amount from the date of judgment, 25 April 2023 to date of payment;

(c) costs of suit on attorney and client scale.’’

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Y T MBATHA

ACTING DEPUTY PRESIDENT OF APPEAL

Appearances

For the applicant:	M Bresler
Instructed by:	Riekert Terblanche Attorneys, Bela-Bela
	Hendre Conradie Inc., Bloemfontein
For the respondents:	D Fine
Instructed by:	Boshoff Inc., Pretoria
	Honey Attorneys, Bloemfontein.