

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

- (1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

/07/2022

SIGNATURE

DATE

CASE NO: 269/2019

In the matter between:

PNM SHORT HAULIERS (PTY) LTD

Applicant

and

IZUSA CARRIERS CC

First Respondent

MUSA NHUBUNGA

Second Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This is an application brought in terms of Uniform Rules of Court 11 read with Section 173 of the Constitution of the Republic of South Africa ("the Constitution"). Reference to rule or rules shall mean Uniform Rules of Court and Section 173 shall mean Section 173 of the Constitution. The Applicant ("PMN Short Hauliers") seeks to consolidate two Court actions, one issued out of this Court on 25 January 2019 under Case No. 269/2019 and the other, initiated on 27 March 2019 in the Magistrate's Court for the Magisterial District of Mkhondo bearing Case No. 65/19.

[2] The upshot of the consolidation, if granted, will be that the action shall henceforth proceed as one before this Court under Case No. 269/2019. The case sued out in this Court involves the Second Respondent ("Nhubunga") as Plaintiff and PNM Short Hauliers as Defendant. The Magistrate's Court case, on the other hand, concerns the First Respondent (Izusa Carriers") as Plaintiff and PNM Short Hauliers as Defendant.

[3] The application has been inspired by essentially three factors. Firstly, that both actions concern the same collision. Secondly, that the probabilities are that the same witnesses, including expert witnesses, will be required to give testimony and be cross-examined. Thirdly, other than the Nhubunga, the parties are exactly the same. Additionally, the same legal representatives are involved in both actions and effectually, aside from the involvement of Nhubunga in this Court action, who may well be required to provide witnesses in the Magistrate's Court action, the two trials are virtually indistinguishable.

[4] The application is opposed by Izusa Carriers. Nhubunga has delivered a notice to abide the decision of this Court on the application. Izusa Carriers opposes the application on the grounds that it will suffer great prejudice as it has had to abandon part of its claim to bring the action within the financial jurisdiction of the District Court. If PNM Short Hauliers Succeeds in the relief it seeks, Izusa Carriers will be required to litigate in a Court

whose financial jurisdiction threshold is far higher than that of the district Court where it has chosen to conduct this litigation. Izusa Carriers asserts further that it will be harshly prejudiced were this matter to be removed from the district Court to this Court as it will incur even more gratuitous costs because litigating in the High Court is a costly and a protracted process.

FACTUAL MATRIX

[5] Following a motor vehicle collision, on 21 April 2018 on the road Travelling from Lydenburg to Sabie, between Nhubunga's motor vehicle, DL 50 KR GP, and motor vehicle belonging to Izusa Carriers, FXD 416 MP, Nhubunga issued summons out of this Court on 25 January 2019 against Izusa Carriers claiming payment of damages in the amount of R685 892.45, costs and interest occasioned by the negligent driving of the driver of Izusa Carriers ("the High Court Action"). Izusa Carriers defended the High Court action and proceeded to issue a third party notice against PNM Short Haulers wherein it holds the driver of the latter to have been the sole cause of the damages of Nhubunga arising from the collision.

[6] Izusa Carriers claimed in the third party notice that it has a right of recourse against PNM Short Haulers for any amount that may be awarded against it. On 27 March 2019, Izusa Carriers followed on the third party notice by instituting an action against PNM Short Haulers in the Magistrate's Court for the Magisterial District of Mkhondo held at Mkhondo under case number 65/2019 (*"the Magistrate's Court action"*).

[7] In the Magistrate's Court action, Izusa Carriers contends that it was the negligent driving of the driver of the vehicle belonging to PNM Short Haulers' that caused its damages in the amount of **R227 377.54**. To bring the claim within the financial jurisdiction of the Magistrate's Court, Izusa Carriers alleges that it had to abandon an amount of **R27 377.54**. Litigating in the High Court will as such, argues Izusa Carriers, prejudice it as it will be compelled to conduct the litigation in a Court whose monetary jurisdiction is higher but for a lower amount that could easily have been run in the Magistrate's Court.

ISSUES

[8] The matter raised in this application is purely legal in nature and it concerns consolidation of cases envisaged in Rule 11 and whether or not this Court can invoke Section 173 pertaining to this Court's inherent power to protect and regulate its own process, and to develop the common law, taking into account the interests of justice. I note that PNM Short Haulers has also mentioned as part of the issues for determination the question of convenience, avoidance of multiplicity of actions, attendant costs and the prejudice that Izusa Carriers claims will suffer if the case were to be removed from the Magistrate's Court. The approach that I take is that a determination of whether or not to invoke Section 173 may, depending on the Court's finding, be dispositive of the whole case. For that reason, it has to be sensible to attend to it before entertainment of any other issues.

LEGAL FRAMEWORK

LEGISLATIVE PROVISIONS

[9] Rule 11 and Section 173 of the Constitution are central to the controversy between the parties. As such, it is practical that the starting point be a citation of the provisions of the Rule and the Section. Firstly, the provisions of Rule 11 state that:

"Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon –

(a) *the said actions shall proceed as one action;*

(b) *the provisions of rule 10 shall mutatis mutandis apply with regard to the action so consolidated; and*

- (c) *the court may make any order which to it seems meet with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions."*

[10] Secondly, Section 173 of the Constitution is headed: Inherent power, and it provides that:

"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[11] Also significant are the provisions of Section 169(1) of the Constitution, which deal with matters that can be heard by the High Court. The section provides that:

"(1) The High Court of South Africa may decide—

any constitutional matter except a matter that—

(I) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a); or

(II) is assigned by an Act of Parliament to another court of a status similar to the High Court of South Africa; and

(b) any other matter not assigned to another court by an Act of Parliament."

Section 170 of the Constitution stipulates that a Magistrates' Court may decide any matter determined by a statute.

[12] In relation to 'court procedures', Section 171 of the Constitution provides that: *"All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation"*. The national legislation referenced in the Constitution relevant to these proceedings is the Superior Courts Act, 10 of 2013 and the Magistrates' Court Act, 34 of 1944.

[13] Section 21 of the Superior Courts Act provides:

- “(1) *A Division [of the High Court] has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—*
- (a) *to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;*
 - (b) *to review the proceedings of all such courts;*
 - (c) *in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.*
- (2) *A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice, becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.”*

[14] The applicable Sections in the Magistrates' Court Act are 29(1) and 50(1). Section 29(1) is headed '*Jurisdiction in respect of causes of action*'. It provides:

- “(1) *Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court in respect of causes of action, shall have jurisdiction in—*
- (a) *actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette;*
 - (b) *actions of ejectment against the occupier of any premises or land within the district or regional division: Provided that, where the right of occupation of any such premises or land is in dispute between the parties, such right does not exceed the amount*

determined by the Minister from time to time by notice in the Gazette in clear value to the occupier;

- (c) actions for the determination of a right of way, notwithstanding the provisions of section 46;*
- (d) actions on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette;*
- (e) actions on or arising out of any credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005);*
- (f) actions in terms of section 16 (1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette;*
- (fA) actions, including an application for liquidation, in terms of the Close Corporations Act, 1984 (Act 69 of 1984);*
- (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."*

[15] Section 50(1) is headed '*Removal of actions from court to provincial or local division*'. It provides:

- "(1) Any action in which the amount of the claim exceeds the amount determined by the Minister from time to time by notice in the Gazette, exclusive of interest and costs, may, upon application to the court by the defendant, or if there is more than one defendant, by any defendant, be removed to the provincial or local division having jurisdiction where the court is held, subject to the following provisions-*

- (a) *notice of intention to make such application shall be given to the plaintiff, and to other defendants (if any) before the date on which the action is set down for hearing;*
- (b) *the notice shall state that the applicant objects to the action being tried by the court or any magistrate's court;*

...
Upon compliance by the applicant with those provisions, all proceedings in the action in the court shall be stayed, and the action and all proceedings therein, shall, if the plaintiff so requires, be as to the defendant or defendants, forthwith removed from the court into the provincial or local division aforesaid having jurisdiction. Upon the removal, the summons in the court shall, as to the defendant or defendants, stand as the summons in the division to which the action is removed, the return date thereof being the date of the order of removal in an action other than one founded on a liquid document, and, in an action founded on a liquid document, being such convenient day on which the said division sits for the hearing of provisional sentence cases, as the court may order: Provided that the plaintiff in the action may, instead of requiring the action to be so removed, issue a fresh summons against the defendant or defendants in any competent court and the costs already incurred by the parties to the action shall be costs in the cause."

[16] Rule 39(22) provides that:

"By consent the parties to a trial shall be entitled, at any time, before trial, on written application to a judge through the registrar, to have the cause transferred to the magistrate's court; Provided that the matter is one within the jurisdiction of the latter court whether by way of consent or otherwise."

CASE AUTHORITY

[17] If an Applicant has exercised his right to choose a forum where to litigate, it ought to be axiomatic that his or her consent should be sought where the case is to be transferred from the High Court to the Magistrate's Court as provided in Rule

39(22). This was recognised in the case of *Marth v Collier*¹ at 509 where the Court said:

*"The granting of an order for the transfer of legal proceedings from the Supreme Court to the Magistrates' Court, in the absence of a Plaintiff's consent, would clearly infringe upon the latter's substantive right to choose the forum in which he or she wishes to institute proceedings. As little as our courts have the inherent power to create substantive law do they have the power, in the absence of statutory - or common law authorisation or legal precedent. . . to make orders which infringe upon the substantive rights of litigants or others, such as the right of a Plaintiff, as dominus litis, to decide in which of concurrent fora he or she wishes to enforce his or her rights."*²

[18] The Constitutional Court in *South African Broadcasting Corp Ltd v National Director of Public Prosecution and others*³ warned that the inherent power of the Superior Courts in Section 173 of the Constitution is not to be invoked at whim and stated:

"The power conferred on the High Court, Supreme Court of Appeal and this court in Section 173 is not an unbounded additional instrument to limit or deny vested or retrenched rights. The power in Section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, or orderly an effective manner. Said otherwise it is the authority to prevent any possible abuse process and to allow a court to act effectively within its jurisdiction."

[51] As under the common law, this court's power to regulate its own process under Section 173 must be exercised sparingly having taken into account interest of justice in a manner consistent with the constitution. Departing from our ordinary procedures, and entertaining a matter that was not properly brought before this Court but with whose issues we are nevertheless seized, should be done sparingly and only in exceptional circumstances."

ANALYSIS

¹ [1996] 3 All SA 506 (C)

² See also *Moosa v Moosa* 2014 JDR 2194 (GP) para 19

³ 2007 (2) BCLR 167 (CC)

[19] PNM Short Haulers argument is centered around the provisions of Rule 11. It has contended that the purpose of the Rule is to avoid multiplicity of actions and payment of resultant legal costs. Thus, where it appears to a Court that it will be convenient to all the parties involved, the Court and witnesses, consolidation of cases will be favourably considered. Where one of the parties is likely to be prejudiced by the consolidation, a Court will in all probabilities refuse it.

[20] PNM Haulers states that both actions involve the same collision, in all likelihood, the same witnesses, other than the Plaintiff in the High Court action, the parties are exactly the same, the same legal representatives are involved in both actions and the two trials are, with a few exceptions, virtually identical. It does not assist to discuss the requirements of consolidation in circumstances where it is sought to merge two cases emanating from two different Courts within the same jurisdiction. The issue of consolidation should, in my opinion, be foreshadowed by a determination of the appropriateness of the invocation of Section 173 of the Constitution.

[21] According to the South African Broadcasting Corporation case *supra*, it is manifest that Section 173 finds application only in specific instances. These are:

21.1 It must be used with due regard to the observance of existing rules and procedures;

21.2 It must not be employed to limit or deny existing rights; and

21.3 It is used by Superior Courts to dispense justice effectively.

[22] The first issue to determine is as such, whether or not there are existing rules and procedures, legislative or at common law, designed to take care of this situation that ought to be respected. PNM Short Haulers argues that legislation clearly provides for transfer of a case from the High Court to the Magistrate's Court but no similar legislative provisions

have been provided for the reverse to occur. Understood in this manner, continues PNM Short Haulers, there is a *lacuna* justifying this Court to invoke Section 173 of the Constitution to develop the law to close the *lacuna*.

[23] At first glance the argument of PNM Short Haulers appears valid because Section 50(1) of the Magistrate's Court Act 34 of 1944 refers to a situation where the financial jurisdiction exceeds that of the Magistrate's Court. It is evident that Section 50(1) of the Magistrate's Court Act is not relevant in these circumstances and cannot assist PNM Short Haulers. Secondly, Rule 39(22) concerns a transfer from the High Court to the Magistrate's Court and therefore bears no pertinence to these proceedings.

[24] However, while Rule 39(22) may not be of any help to PNM Short Haulers, it is clear that no case can be transferred from the High Court to the Magistrate's Court or vice versa without the consent of an Applicant, Izusa Carriers in this instance. The right of an Applicant to choose the forum in which he or she wants to litigate takes preeminence, is guaranteed and cannot be taken at whim. This application seems to be nothing less than an attempt by PNM Short Haulers to appropriate that right from Izusa Carriers. See the Moosa case *supra* even though it applies to a transfer from the High Court to the Magistrate's Court.

[25] Is there a *lacuna* warranting the invocation of Section 173 as PNM Short Haulers would have this Court believe? Izusa Carriers has argued that there exists no *lacuna* to be addressed by the invocation of Section 173. This is so because PNM Short Haulers could have filed a plea of *lis pendens* alleging that there is already a High Court action pending that stems from the same cause of action dealing with the same subject matter between the same parties.

[26] PNM Short Haulers therefore could have sought an order for the transference alternatively, stay of proceedings in the Magistrate's Court action pending the adjudication of the matter in the High Court. I am mindful that the High Court case involves PNM Short

Haulers and Nhubunga while the Magistrate's Court case concerns Izusa Carriers and PNM Short Haulers. As such, the parties are not exactly the same.

[27] The above said, *lis pendens* still finds application because the cause of actions is similar and the subject matter is the same. Besides, all three parties could have found themselves before the High Court albeit without flouting the rules and procedures about which the South African Broadcasting Corporation case warns us⁴. The inappropriateness of Section 173 notwithstanding, PNM Short Haulers raised the Section 173 argument belatedly in its replying affidavit when it is in fact trite that it should have been brought up in its founding papers.

[28] I agree that applying basic principles of motion proceedings, neither the founding or replying affidavit contains a factual foundation establishing exceptional circumstances why this Court should invoke Section 173 to fill in a non-existing *lacuna*. The availability of *lis pendens* to PNM Short Haulers means that there are adequate rules and procedures that cover the *lacuna*⁵. The existence of a *lacuna* argument is therefore illusory and is rejected.

[29] Will the invocation of Section 173 result in the denial or limitation of existing rights of Izusa Carriers? The answer is indubitably in the affirmative. I have already discussed and mentioned the cases of Marth and Moosa *supra* where the substantive right of an Applicant to choose a forum to litigate was recognised. entertaining the imploration of PNM Short Haulers to invoke Section 173 in these circumstances will amount to the divestment of the substantive rights of Izusa Carriers. I am not persuaded to invoke Section 173 in a situation where doing so will go against several legislative provisions.

[30] Section 173 itself makes it manifest that 'the Constitutional Court, Supreme Court of Appeal and the High Court have the inherent power to protect and regulate their own

⁴, See also *State v Thunzi* CCT 81/09 [2010] ZACC 12 at Paragraph 49 and *Mlonzi v Minister for Justice and Constitutional Development*

⁵ 2015 (2) SACR 341 (CC) para 33, See, *Molaudzi v The State* 2015 (8) BCLR (CC)

process, and to develop a common law, taking into account interest of justice.' It follows that the inherent power that the High Court possesses cannot be used to protect and regulate the processes of another Court. The Constitution in Sections 169 and 170 clearly set out matters that can be decided by the High Court and Magistrate's Court respectively. The High Court operates within the precincts defined by the Superior Courts Act in particular, Section 21 while the Magistrate's Court within the Magistrate's Court Act. See, Paragraphs 12 and 13 *supra*.

[31] PNM Short Hauliers has strongly contended that the decision of *Qwelane v Minister of Justice and Constitutional Development* ⁶ is 'on all fours' with the facts in this matter. That statement could not be further from the truth. Without even discussing the intricacies of that case, it should suffice to state that the transfer from the Equality Court to the High Court was with the permission of the Applicant in that matter. Accordingly, there were no rules and procedures that were not observed in the process. It is also notable that it happened within the provisions of Rule 39(22) and the Marth case *supra*. In the circumstances, it cannot be authority for PNM Short Hauliers's proposition that it is permissible to consolidate two matters emanating from two different courts within the same jurisdiction without observance of applicable rules and procedures.

CONCLUSION

[32] From the foregoing, the following is discernable:

- 32.1 Consolidation in terms of Rule 11 applies to cases already before the High Court and not of matters between the Magistrate's Court and the High court within the same jurisdiction;
- 32.2 If a case from the Magistrate's Court is to be consolidated with a High Court case, it must be preceded by proper observance of rules and procedures. In this instance, Izusa Carriers was supposed to have given consent for the

⁶ 2015 (2) SA 493 (GJ)

matter to be transferred to the High Court where consolidation was expected to occur;

- 32.3 The substantive right of Isuzu Carriers to elect the forum in which to litigate is paramount and cannot be usurped willy nilly;
- 32.4 PNM Short Hauliers has failed to demonstrate that a *lacuna* exists warranting this Court's intervention by the invocation of Section 173; and
- 32.5 A Court can only intervene if the existing rules and procedures are not adequate to cover a particular situation. In this respect, it is plain that *lis pendens* was available to PNM Short Hauliers.

COSTS

[33] There is no doubt that PNM Short Hauliers must pay the cost of Isuzu Carriers. The question is really whether or not such costs should be at the scale as between attorney and client. I note Isuzu Carriers' assertion that the application was defective from the onset and that it was consequently stillborn. The issue concerning absence of a *lacuna* was not an obvious one. As such, it cannot be said that PNM Short Hauliers should or ought to have known that this application was a non-starter. For that reason, I do not believe that punitive costs are warranted.

ORDER

[34] In the result I make the following order:

The application is dismissed with costs.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 11 July 2022 at 10:00.

APPEARANCES:

Counsel for the Applicant:
Instructed by:

Adv JP Pretorius
Tatham Wilkens Inc
C/O Kruger & Partners Inc

Counsel for the Respondent:
Instructed by:

Adv Herman Fourie
Bothas Attorneys

Date of Judgment:

11 July 2022