



**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

CASE NUMBER: A620/2012

6/5/2013

In the matter between:

KOPANO BUS SERVICE CC

APPELLANT

And

MATSIMELA LYDIA MARUMA

RESPONDENT

JUDGMENT

RATSHIBVUMO AJ:

1. This is an appeal against a decision by a magistrate who dismissed a special plea raised by the appellant against the respondent's action. The respondent, as plaintiff, had instituted action against the appellant, as defendant, following bodily injuries sustained when she was in the process of alighting from a bus driven by the appellant's employee. The driver closed the door before she had completely alighted, which pushed her to the ground, during which she sustained injuries. For the

sake of convenience, I refer to the parties as the plaintiff and the defendant, respectively.

2. The defendant raised a special plea that the plaintiff's action was barred by s 21 of the Road Accident Fund, Act 56 of 1996, which provides,

"No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie—

- (a) against the owner or driver of a motor vehicle; or
- (b) against the employer of the driver."

The defendant pleaded that, in those circumstances, the plaintiff lacked *locus standi* to institute the action. The learned magistrate dismissed the special plea without considering its merits, on the basis that the point should have been raised by way of an exception. The appeal is against that ruling. The crisp issue before us is therefore whether a statutory bar can competently be raised by way of a special plea and if not so raised, whether the court is entitled to ignore it for that reason.

3. Although the learned magistrate did not consider the merits of the special plea for the reasons stated above, he devoted much focus in his judgment criticising the defendant's allegation that the plaintiff lacked *locus standi*. This was an irrelevant side issue. The pertinent issue before court was the defendant's plea that the plaintiff's action was statutorily barred. I now turn to consider the relevant principles that should have informed the learned magistrate's judgment. The difference between a special plea and exception is that whereas a special plea raises some special defence, not apparent *ex facie* the claim and which either destroys or postpones the operation of the cause of action; exception has the same result but it is usually raised if the defence is apparent from the claim.¹

¹ See *Brown v Vlok* 1925 AD 56 and *Viljoen v Federated Trust Ltd* 1971 2 All SA 107 (O)

4. From an overview of the authorities, it is clear that it is competent for a statutory bar to be raised by way of a special plea. In *Sanan v Eskom Holdings Ltd*², the defendant raised a statutory bar, by way of an exception. The plaintiff contended that the point should have been raised by way of a special plea. While the court accepted that proposition in principle, it considered the merits of the exception as it accepted that there was overlapping between usage of exceptions and special pleas.³ The court referred to several authorities in which a statutory bar was raised either by way of exception or by special plea without criticism by the courts since it did not render the defence fatal.⁴
5. Whether there is merits in the special plea raised is a different question altogether. The court would have to interpret if the conduct by the defendant's employee amounted to driving or not and also whether the plaintiff was a passenger (being conveyed) or not. There are enough authorities that can guide the court in this regard.⁵ The appeal is not before us on merits of the special plea, but on the order by the magistrate dismissing it.
6. It follows therefore that the learned magistrate misdirected himself in taking a narrow view of the issue before him, and in the process ignoring the relevant. The appeal should succeed.
7. In the result the following order is made:

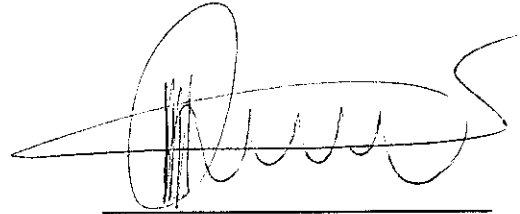
² 2010 (6) SA 638 (GSJ).

³ This could be blamed on writers like *Voet*. In *Voet* "AD PANDECTAES" 46.1, exceptions are discussed in great detail. It appears, however, that *Voet* termed as exceptions, both "exceptions" in the way we understand it as well as "special defences" or "special pleas". In several places he refers to exceptions in the wider sense of the word as if it did not matter whether it is an "exception" in the true sense of the word or a "special plea" – See *Sanan v Eskom Holdings Ltd supra* at p 643.

⁴ See also *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC).

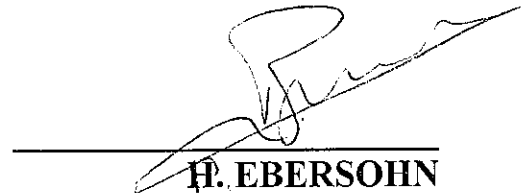
⁵ See for example *Wells and Another v Shield Insurance Co Ltd and Others* [1965] 3 All SA 132 (C), *AA Mutual v Sibothobotho* 1981 4 SA 593 (A) and *Aetna Insurance v Minister of Justice* 1960 3 SA 273 (A)

1. The appeal is upheld with costs.



T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree,



H. EBERSOHN
ACTING JUDGE OF THE HIGH COURT

25 April 2013

Date Heard: 23 April 2013

Judgment Delivered: 06 May 2013

For the Appellant: Adv. R Raubenheimer
Instructed by: De Bruin Oberholzer Inc
Polokwane

Du Plessis & Eksteen ING/INC
Pretoria

For the Respondent: Adv. M Mohale
Instructed by: Ratshoene Attorneys