

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

CASE NUMBER: 24856/2012

In the matter between:

24/8/2012

PRECIOUS ZODWA SHABANGU

Applicant

and

ROAD ACCIDENT FUND

Respondent

F. DIEDERICKS (AJ)

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	☒
(2) OF INTEREST TO OTHER JUDGES: YES/NO	☒
(3) REVISED.	☒
23/08/2012	
DATE	SIGNATURE

- [1] This is an application where Applicant seeks relief that an action which she instituted against Respondent in the Magistrate's Court, district Pietersburg, under case number 1224/2010, be transferred to the High Court of South Africa, North Gauteng. Respondent did not oppose the application.
- [2] Applicant alleges in her Founding Affidavit, read with the annexures attached thereto, that she instituted action, as aforementioned, against Respondent for damages suffered by her due to injuries that she incurred as a result of the negligent driving of a motor vehicle with

registration number AAF 3754. She was apparently a "*fair paying passenger*" in vehicle with registration number AAF 3754 at the time of the accident which occurred on the 25th of November 2005.

[3] At the time of the accident, the Road Accident Fund Act, 1996, Act 56 of 1996 (the "*Old Act*") was applicable and Plaintiff's claim was, according to her, subject to the restriction of recoverable damage as contemplated in Section 18(1)(a) of the Act.

[4] Applicant's claim against Respondent was allegedly therefore, as a passenger "*conveyed for reward*", restricted to an amount of R25,000.00 (special and general damages), plus the cost of recovery of her claim.

[5] Applicant attached medico-legal reports of the following medical experts to her application, i.e. Dr. J. D. Erlank (Plastic and Reconstructive Surgeon), Karen Adams (Clinical Psychologist) and Dr. Daan de Klerk (Neurosurgeon).

[6] It is evident from the contents of these reports that the Applicant suffered serious injuries with subsequent serious *sequelae*.

[7] Applicant now claims an amount of R700,000.00, computed as follows:

- [7.1] Future medical expenses..... R100,000.00;
- [7.2] Loss of earnings/earning capacity..... R300,000.00;

[7.3] General damages.....R300,000.00;
Total.....R700,000.00.

[8] In my view, having regard to the contents of the above reports, the quantum of Applicant's claim, without finding that it is worth R700,000.00, might on trial found to be beyond the jurisdiction of a Magistrate's Court.

[9] Parliament has since passed the Road Accident Amendment Act, 2005, Act 19 of 2005 (the Amendment Act), removing the cap that existed in terms of Section 18 of the provisions of the Act (56/1996), effective 1 August 2012.

[10] The High Court held Section 18(1)(a)(i), 18(1)(b) and 18(2) of the Old Act to be invalid on constitutional grounds by virtue of its discriminatory nature. The invalidity order of the High Court was challenged in the case of **Mvuvu v Minister of Transport** 2011(2) SA 473 (CC).

[11] Having confirmed the invalidity order of the High Court, the Constitutional Court suspended same for 18 months to afford Parliament the opportunity to fix the problem.

[12] The Constitutional Court remarked as follows regarding the fate of Section 18 of the Old Act in the **Mvuvu-case**:

"[53] The considerations mentioned above point to the fact that Parliament is best suited to determine the extent of compensation to which the applicants are entitled. It is regrettable that, when Parliament decided to cure the defect, it left their position unaltered. Nonetheless, I am of the view that the matter must be remitted to Parliament for it to provide relief for the inequality which the old scheme continues to cause. Therefore, I intend to suspend the invalidity order for 18 months to give Parliament the opportunity to fix the problem.

[54] But if Parliament fails to cure the defect within the period stated above, the invalidity order will come into operation with immediate effect and it will operate retrospectively to the date on which the Act came into force. What this means is that the applicants will be entitled to unlimited compensation, as if the cap was never enacted. However, the declaration of invalidity ought not to apply to claims in respect of which a final settlement has been reached, or a final judgment has been granted, before the date of this judgment."

[13] Judgment was delivered by the Constitutional Court in the **Mvuvu-matter** on the 17th of February 2011. The time frame of 18 months for Parliament to cure the above impugned provision expired on the 17th of August 2012.

- [14] The Constitutional Court has however, on application by the Minister of Transport and the Road Accident Fund on 14th August 2012, extended the above time frame for a further six months i.e. to the 16th of February 2013.

THE PLEADINGS (ON MERITS)

- [15] In her Particulars of Claim in the Magistrate's Court (attached as annexure PZS 2 to Applicants founding affidavit), Applicant alleges that two motor vehicles were involved in the accident that took place on the 25th of November 2005.
- [16] The two vehicles involved were motor vehicle with registration number DHG 802 N, driven by P. D. du Preez, referred to as the *"insured vehicle"* and motor vehicle with registration number AAF 3754, driven by G. T. Mbambo, residing at Bulawayo, Zimbabwe.
- [17] Applicant pleads in paragraph 5 of her Particulars of Claim that she was a *"fair paying"* passenger in the latter motor vehicle.
- [18] In paragraph 7 of the Particulars of Claim the grounds of negligence of the *"insured vehicle"* (referring to the vehicle driven by Du Preez) is pleaded. This includes, to mention but one ground of negligence, that: *"he (Du Preez) entered an intersection disregarding a red light"*.

[19] In paragraph 10 of her Particulars of Claim Applicant, relying *inter alia* on the medical report of J. D. Erlank (as aforementioned), claims an amount of R99,800.00 computed as follows:

[19.1]	Future medical expenses.....	R31,800.00;
[19.2]	Surgical treatment.....	R38,800.00;
[19.3]	General damages.....	R68,000.00;
	Total.....	R99,800.00.

[20] Although Applicant only attached her Particulars of Claim to her application, reference is made in paragraph 3 of her Affidavit to the pleadings filed off record.

[21] In these pleadings filed "off record" Defendant's Plea is included.

[22] Defendant in short pleaded a denial of the alleged negligence of the insured driver (Du Preez) and Plaintiff is put to the proof thereof (paragraph 4 of Defendant's Plea).

[23] In the alternative, Defendant pleaded that: *"In the event that the Honourable Court finds that the vehicle in which Plaintiff was a passenger, was the sole cause of the collision, Defendant pleads that the Plaintiff's claim is limited to R25,000.00 special damages."*

APPLICANT'S FOUNDING AFFIDAVIT (ON MERITS)

[24] Applicant, mentions in paragraph 3.1 of her Founding Affidavit, that she persisted with her action on the basis as pleaded above, adding that the action was set down for hearing on numerous occasions in the Magistrate's Court for the district of Pietersburg.

[25] Applicant further mentions in paragraph 3.1 of her Founding Affidavit that the case was postponed on request of Respondent. The reasons advanced by Applicant for such postponements was due to the fact that the **Mvuvu-case** pertaining to constitutionality of limited claims of paying passengers in a motor vehicle was pending.

[26] I have no doubt in my mind that Applicant, from the reading of the pleadings in the Magistrate's Court, never instituted and/or pursued her claim on the basis that it was limited in terms of Section 18 of the Old Act. Applicant did not even foreshadow such possibility as an Alternative in her pleadings.

[27] It is clear from the pleadings that she instituted her claim as an unlimited claim, based on the alleged negligence of the driver of the motor vehicle in which she was not a passenger at all. This, in spite of her having prior knowledge of the fact that the collision occurred as a result of the sole negligence of the motor vehicle in which she was a "fair paying" passenger.

[28] The above is confirmed in the Supporting Affidavit of Applicant's attorney, Martha Christina Steyn. (Annexure "MCS1").

[29] Steyn states as follows in paragraphs 6.1 and 6.2 of her Supporting Affidavit:

"6.1 I am of the respectful opinion that the damages suffered by the Plaintiff and still to be suffered by the Plaintiff exceeds the jurisdiction of the Magistrate's Court and that the action should be transferred to the above Honourable Court for the determination of quantum.

6.2 The Plaintiff was a passenger in a taxi and the Plaintiff can recall that the driver of the taxi disobeyed a red traffic sign and entered the intersection and then collided with another car crossing on a green signal. The sole cause of the accident was due to the negligence of the taxi driver." (Emphasis added)

[30] The contents of the above is obviously in direct contrast to the allegations made by Applicant in her Particulars of Claim as outlined above.

- [31] Applicant did not file a copy of the affidavit that was filed by her or on her behalf in terms of Section 19(f)(i) of the Act at the time that her claim was launched with Respondent.
- [32] Applicant now approaches this Court on the basis that her claim was limited to R25,000.00, thereby seemingly accepting the allegations made by Respondent that the accident was caused by the sole negligence of the driver of the motor vehicle in which she was a "*fair paying*" passenger.
- [33] From the above Applicant now seemingly fears that she is finding herself on a course of possible self-destruction if it is found that the vehicle in which she was a "*fair paying*" passenger was the sole cause of the accident.
- [34] In an effort to remedy the above, Applicant approached this Court for transferal of her case to this Court, in order to proceed on a basis (limitation of her claim in terms of Section 18) which was never the case that she pursued in the Magistrate's Court.
- [35] Adv. S. Cilliers, appearing for Applicant, argues that Applicant's claim falls within the ambit of the Mvuvu-case and that her claim against Respondent subsequently should not be limited to R25,000.00 as before. In that event, so it is argued, Applicant's claim would be beyond the jurisdiction of the Magistrate's Court including the Regional Magistrates court and should therefore be transferred to the High

Court. Advocate Cilliers filed comprehensive heads of arguments, for which I thank her, in support of all submissions made on behalf of her client.

[36] I was referred to the matter of Oosthuizen v Road Accident Fund 2011(6) SA 31 (SCA) and it was argued that the facts *in casu* differs substantially from the facts in the Oosthuizen-case.

[37] It was further argued that the Supreme Court of Appeal (in the Oosthuizen-matter) envisaged that there may be a case or cases in which it would be acceptable to fashion a constitutionally acceptable remedy because of the interest of justice.

[38] The argument went further to submit that Applicant's case is a suitable case to fashion such a constitutionally acceptable remedy in the interest of justice.

[39] In my view it is clear from the judgment in the Oosthuizen-case that, albeit so that High Courts has inherent powers to regulate its own process, these powers does not extent to the assumption of jurisdiction which it does not otherwise have. (Oosthuizen v Road Accident Fund: p. 37 – par. D/E).

[40] It is also clear that Section 173 of the Constitution does not give a High Court jurisdiction to interfere or meddle in the affairs of inferior courts.

[41] It was clearly stated in Oosthuizen's case (p. 37: par. F/G) that a High Court can therefore not stray beyond the compass of Section 173 by assuming powers it does not have.

[42] I was further referred to the dictum of Botha J (as quoted in the Oosthuizen-case) in Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis & Another 1979(2) SA 457 (W) at 462H – 463B, where the learned Judge remarked as follows with regard to the exercise of a Court's inherent power to regulate procedure:

"I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view, to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power, in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the Court will exercise an inherent jurisdiction whenever justice requires that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will only come to the assistance of an applicant outside the provisions of the Rules when the

Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant."

[43] It was, in view of the above dictum, submitted that the High Court has inherent power to regulate its own process, therefore, in the current process before me (the application to transfer), this Court would have inherent jurisdiction to transfer the matter from the Magistrate's Court to the High Court.

[44] In order to fit this application into the "category" of cases that were envisaged as those calling upon a Court to fashion a constitutionally acceptable remedy to litigants in the interest of justice, I was referred to Sections 9 and 34 of the Constitution.

[45] These Sections deals respectively with "*equality before the law*" (Section 9) and "*access to Courts*" (Section 34).

[46] Applicant did not make out a case in her Founding Affidavit to challenge the constitutionality of legislation (including the Rules) dealing with the transfer of cases from the Magistrate's Court to the High Court. To raise this issue in argument without notice to the relevant Minister would to my mind be irregular and I subsequently do not deem it necessary to deal with this issue any further.

[47] The argument that the facts in Applicant's case is clearly distinguishable to those facts in the Oosthuizen-matter is not convincing.

[48] I have already alluded above to the contradicting versions tendered in Applicant's Particulars of Claim compared to the version contained in her Founding Affidavit. In my view Applicants pleadings in the Magistrates court reveals that she finds herself in a much similar situation as did Plaintiff in the Oosthuizen-matter.

[49] It would seem that, as the pleadings are at the moment, Applicant's "*unlimited claim*" could at best be described to be existing in *vacuo*.

[50] For this Court to pursue an approach to Applicant's pleadings in the Magistrate's Court by applying the contents of her Affidavit thereto, would be tantamount to meddling in the affairs of the Magistrate's Court.

[51] Applicant's claim is presently pending in the Magistrate's Court and it is in that forum that she should seek an amendment to her Particulars of Claim, in order to introduce a so-called Section 18 (limited) claim, if advised to do so.

[52] It cannot be overemphasised that litigants should take heed that, to my mind, the Pleadings will determine whether or not a plaintiffs claim falls

within the ambit of the Mvuvu-case and that a mere allegation in the air would not suffice.

[53] I do, however, agree that there might be a case or cases in future in which it might be necessary to fashion a constitutionally acceptable remedy because of the interest of justice, to transfer cases from a Magistrates court to a High court, but I do not regard Applicant's case as the opportune case to consider that possibility.

[54] I deem it necessary, in conclusion, to refer to the current state of affairs regarding Legislation that was anticipated by the Constitutional Court in the Mvuvu –case.

THE ROAD ACCIDENT AMENDMENT BILL 2011

[55] On 15th of August 2011, Parliament published the Road Accident Fund (Transitional Provisions) Amendment Bill of 2011, (the Amendment Bill) for public comments, in Government Gazette 34530 dated 15th of August 2011. (Notice 557/2011).

[56] The Amendment Bill contains Transitional Provisions and seeks to provide for transitional measures in respect of certain categories of third parties whose claims were limited under the Old Act, and to give

effect to the Constitutional Court Judgment of **Mvuvu v Minister of Transport**.

[57] As matters stand at present, the Minister of Transport has given notice of his intention to introduce the Road Accident Fund (Transitional Provisions) Bill, 2012 in Parliament during the year 2012. (See General Notice 487 of 2012, Government Gazette No. 35426 dated 6 June 2012). At date of this judgement, this has not as yet transpired.

[58] I do not deem it necessary to comment on the content of the Transitional Provisions Bill, save to say that in reading the Bill, it is conspicuous that Parliament regrettably failed to include a section providing for the transferral of cases from the Magistrates courts to the High courts while this was an opportune time to do so. The Road Accident Fund raised the issue of shortage of funds in the **Mvuvu-case**. In my view the inclusion of such a provision could have effectively saved the Road Accident Fund substantial costs if matters could be transferred to a High court in terms of the Act, instead of litigants having to issue summons afresh. Especially in those cases where pleadings have already closed.

[59] Section 50(1) of the Magistrate's Courts Act 32 of 1944 provides for the transfer of a case from the Magistrate's Court to a High Court, only at the instance of a Defendant.

[60] Section 35(1) of the Magistrate's Courts Act 32 of 1944 (as amended) provides for the transferral of a case from the District Magistrates Court to the Regional Magistrates Court, but not to a High Court.

[61] Reference is specifically made to the above in order to caution litigants to carefully consider the quantum of damages of plaintiffs. In doing so, this might stem an unnecessary flow of litigation to this court which could otherwise have been proceeded with in a Regional Division of the Magistrates court which now has jurisdiction to hear cases with a quantum up to R300, 000.00.

[62] Compliance to the above will not only contribute towards the enhancement of the performance of courts in South Africa in general but will also ensure that litigants have access to courts in their close proximity which will, to that end, eliminate high travelling cost to and from High courts.

[63] Failure to take this caution to heart may be met with an appropriate cost order.

[64] Accordingly, Applicant's application for the transferal of her action instituted in the Magistrate's Court, district Pietersburg, under case number 1224/2010 is refused.

[65] No cost order is made.

SIGNED AT PRETORIA ON THIS THE 23rd DAY OF AUGUST 2012



F. DIEDERICKS (AJ)

For the plaintiffs: Kampherbeek, Twine &
Pogrand, Polkwane

Adv. S Cilliers

For the defendants: Mothle Jamma
Sabdia Inc

Heard on: 8/6/2012

Date of Judgment: 24/8/2012