



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

DATE: 31/08/2009

Case Number: 45258/08

In the matter between:

ANDRE VERNON OOSTHUIZEN

Applicant

And

ROAD ACCIDENT FUND

Respondent

JUDGMENT

LOUW J

[1] The applicant in this case is the plaintiff in a case instituted in the Magistrate's Court for the district of Pretoria, during February 2004. It is not clear to me what the amount was initially claimed in this matter but in terms of an amended particulars of claim, apparently filed during April 2005, the plaintiff who was a pedestrian and was hit by an unidentified motor vehicle, so it is alleged, claimed future medical expenses and general damages in the total amount of R 99 000, 00.

[2] It seems that this amendment was necessitated by a report, dated 4 May 2004, by an orthopaedic surgeon, Dr Swartz, who, in his medico - legal report calculated damages in excess of R 100 000, 00.

[3] Thereafter and on 17 August 2004 another medico-legal report was obtained from a facial and oral surgeon, Langenegger. His calculation in respect of medical costs also amount to close to R 100 000, 00. Thereafter an occupational therapist, Jonas, provided a report on 27 June 2007 which sets out further medical treatment with accompanying expenses which the applicant has to undergo.

[4] Its clear from the above that the applicant's damages considerable exceed the jurisdiction of the Magistrate's Court which is R 100 000, 00. The applicant now seeks transfer of the Magistrate's Court action to this Court. The respondent, who is the defendant in the Pretoria Magistrate's Court, objects to such transfer.

[5] It is argued on behalf of the Road Accident Fund, the defendant / respondent, that it has been clear for a number of years that the applicant's claim exceeds the jurisdiction of the lower court. It further states that the applicant should timeously have terminated the proceedings in the Magistrate's Court and have issued a new summons in the High Court. If that is done now the applicant's claim will be prescribed. The respondent states that the applicant is the author of his own misfortune alternatively the blame falls on the applicant's previous attorney or present attorney of record.

[6] There is no procedural provisional in the Magistrates' or the High Courts' rules or acts for the relief sought by the applicant.

[7] There are the following related provisions:

(1) The Magistrates' Courts Act, 32 of 1944, provides for the transfer of an action or proceeding from one Magistrate's Court to another Magistrate's Court. ¹

(2) The Magistrates' Courts Act provides for the removal of actions from a Magistrate's Court to a division of the High Court, upon application to the Magistrate's Court by the defendant.²

(3) The Uniform Rules of Court provide for the transfer of actions from the High Court to a Magistrate's Court³

¹ See s 35 of the Magistrates' Court's Act, 32 of 1944

² See s 50 of the Magistrates' Court's Act 32 of 1944

³ See Uniform Rule 39(22)

(4) The Supreme Court Act 59 of 1959 (“the Supreme Court Act”), provides for the removal of civil proceedings from one division of the High Court to another division, upon application by any party to such proceedings if such proceedings may be more conveniently or fitly heard or determined by the other division ⁴.

[8] The procedure for “removal” of an action from the Magistrate's Court to the High Court was set out in *Rennie v Bosch* as follows:⁵

“It will be seen, therefore, that the application of the defendant, despite the language of the opening clause of the first paragraph of subsec. 1 of sec. 47, is not properly for removal of the action, but an objection to the trial of the action in a magistrate’s court, the effect of which, if the defendant complies with the conditions set out in the section, is to deprive the magistrate of jurisdiction and to stay further proceedings in his Court. The magistrate, however, possesses no power to remove the action to the Supreme Court unless the plaintiff in the action requires him to make such an order, so that, unless the plaintiff does so require removal or issues fresh summons in the Supreme Court, the action is only indefinitely stayed”

[9] The equivalent of s 47 in Act 32 of 1917 is now s 50 in the Magistrates' Courts Act, 32 of 1944 (“the Act”). There is still no provision in the Act for the relief sought by the applicant herein i.e. the remedy provided for in s 50 of the Act is available only to the defendant in the lower court.

[10] It has been argued that there is a *lacuna* in the Act as it is irrational to provide the s 50 remedy to the defendant but not to the plaintiff. I do not agree. The plaintiff is *dominus litis* and could freely choose in which forum to institute his action. To my mind there are at least three reasons why the defendant might want to transfer an action to the High Court, namely:

- (1) It may want to institute a counterclaim which exceeds the jurisdiction of the Magistrate’s Court.
- (2) It might be of the view that the issues, especially issues of law, are so complicated that it deserves the attention of the High Court.
- (3) It may simply, for its convenience, want to change the forum, i.e. from

⁴ See s 9 of the Supreme Court Act 59 of 1959

⁵ *Rennie v Bosch* 1928 EDL 23 at 25

some distant Magistrate's Court to the North Gauteng High Court, Pretoria.

[11] The applicant argued that this Court has the inherent jurisdiction to regulate its own procedure in the interests of the proper administration of justice. This is a power which the High Courts in South Africa has always had and which has been reconfirmed by the Constitution of the Republic of South Africa.⁶

[12] In regard to the inherent jurisdiction of the High Court counsel for applicant relied on *Ncoweni v Bezuidenhout*⁷ where the following was stated by Gardiner JP:

"The rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the rule one is bound to follow that rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction."

One may further have regard to the well - known dictum of Rumpff CJ in *Republikeinse Publikasies Edms (Bpk) v Afrikaanse Pers Publikasies Edms (Bpk)*⁸ where the following was stated:

"... is dit wenslik om te herhaal wat in die algemeen van toepassing is, nl. dat die Hof nie vir die Reels bestaan maar die Reels vir die Hof."

[13] The applicant further referred to two cases where orders were granted to transfer a High Court case to a Magistrate's Court although the defendant in each case objected i.e. did not consent there to. Rule 39(22) of the Uniform Rules of Court provides:

"By consent the parties to a trial shall be entitled, at any time, before trial, on writing 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."

[4] In both these cases, despite the lack of the defendant's consent, the trials were transferred to a Magistrate's Court. In so doing the respective High Courts acted in terms of their inherent jurisdiction alternatively the maxim *ubi ius ibi remedium*.

⁶ Constitution of Republic of South Africa, 1996, s 173

⁷ 1927 CPD 130

⁸ 1972 (1)SA 773 at 783 A-B

[15] I cannot find assistance for what the applicant in this application seeks in the lastmentioned two cases. The inherent jurisdiction of the High Court means that a High Court is in charge of its *own* procedure. The High Court does not have automatic jurisdiction over proceedings of a lower court falling within its area of jurisdiction. The relationship between such a High Court and Magistrate's Court is regulated by statutes and rules. There is no authority for the submission by the applicant that a High Court may simply remove, grab or take a case from a Magistrate's Court where the defendant in the Magistrate's Court objects there to.

[16] I was also furnished with an unreported judgment by BP Geach AJ.⁹ In that case the plaintiff applied to have her case in the Magistrate's Court transferred to this Court. Other than in the present case, in *Dhlamini* the Road Accident Fund *agreed* to the transfer. These two cases are therefore clearly distinguishable and I do not find support for the applicant's case in the unreported case of *Dhlamini*.

[17] Lastly it should be borne in mind that the inherent jurisdiction of the High Court is a power to be exercise sparingly. It can become an unruly horse to ride. There is no reason to create a new remedy in this case. The applicant, as plaintiff in the lower court, always had the option of instituting his action in this Court. Even after he had instituted the action in the Magistrate's Court and it then became clear that the quantum increased to way beyond the jurisdiction of that court, he could have withdrawn the action in the Magistrate's Court and have instituted proceedings afresh in this Court. That the latter cause of action is now no longer possible, due to prescription, is something for which the plaintiff has only himself or his legal representatives to blame.

[18] In the result I dismissed the application with costs.

A A LOUW

JUDGE OF THE HIGH COURT

ADV FOR APPLICANT: WG PRETORUIS

ATTORNEYS FOR APPLICANT: KLINKENBERG INC ATTORNEYS

⁹ *Dhlamini v Padongelukfonds*, unreported case in this Court dated 16 October 2006, case number 26357/06

ADV FOR RESPONDENT: K KOLLAPEN

ATTORNEYS FOR RESPONDENT: FOURIE & FISMER INC