



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Hulisani Viccel Sithangu v Capricorn District Municipality (593/2022) [2023] ZASCA 151 (14 November 2023)

Today the Supreme Court of Appeal (SCA) granted an application for special leave to appeal. It further dismissed Hulisani Viccel Sithangu's (the applicant) appeal against the full court of the Limpopo Division of the High Court, Polokwane (the full court) with no order as to costs. The trial court found that the applicant had sued the wrong party and dismissed his delictual claim against Capricorn District Municipality (the respondent).

The applicant was involved in a motor vehicle accident on the road between Polokwane and Mankweng, when at about 21h00 and near Dalmada, a Toyota minibus (minibus) he was driving, collided with a cow. He got trapped in the wreckage of his minibus. Firefighters were called to the scene, and they used 'the jaws of life' tool to extricate the applicant from the wreckage. The J88 medico-legal report, completed by a doctor who first examined the applicant after the accident, shows that the applicant sustained multiple fractures on the lower part of his body involving both knees, left and right tibia and fibula, both ankles and an open fracture of the right heel fat pad.

Subsequently, the applicant instituted a delictual claim against the respondent in the trial court claiming damages in the amount of R2 800 000 alleging that the open fracture of his right heel fat pad was caused by the respondent's firefighters when they accidentally cut his fat pad in the process of extricating him from the wreckage. The respondent defended the action and filed a special plea of misjoinder, asserting that the place where the accident occurred, was not within its area of authority or operation, but fell under the Polokwane Local Municipality. Thus, it did not provide firefighting services in that area, and the firefighters who attended the scene would therefore have been employees of the Polokwane Local Municipality (PLM). The respondent thus averred that the PLM should have been sued. Essentially, its defence was that the applicant had sued the wrong party.

Before the trial commenced, the parties agreed in terms of rule 33(4) of the Uniform Rules of Court that the special plea should be adjudicated upon first before the merits of the claim. The trial court made no formal ruling to that effect, but the trial nevertheless proceeded in accordance with the agreement. The trial court heard arguments on the special plea. During the argument, counsel for the respondent amplified the ambit of the respondent's special plea by relying on ss 84 and 85 read with s 83 of the Local Government: Municipal Structures Act (the Structures Act). The respondent argued that, in terms of s 84 of the Structures Act, the Member of the Executive Council for Local Government (the MEC) had, on 7 March 2003, allocated the firefighting services responsibility to the Polokwane Local Municipality as the respondent – a district municipality – did not have staff and firefighting vehicles. The

trial court reserved its ruling on the special plea to the end of the trial on the merits and proceeded to hear evidence.

During the trial, it was common cause that, among other injuries, the applicant sustained the injury to right heel fat pad and a deep laceration to his right foot. The question to be answered related to what caused that injury. At the end of the trial, the trial court dismissed the applicant's special plea and the and claim, holding that the reasons for misjoinder are not only obscure, but fail to disclose the legal or factual basis upon which Polokwane Local Municipality and not the defendant should be imputed with liability in this claim. With regards to the claim, the trial court found that the applicant did not satisfy the threshold of proving the identity of the firemen who attended him on a balance of probabilities.

Not satisfied with the orders of the trial court, the applicant unsuccessfully sought leave to appeal from that court. Thereafter, the applicant successfully petitioned the SCA for leave to appeal and was granted leave to appeal to the full court on a limited basis. Paragraph 3 of the SCA's order granting leave directed as follows: 'The leave to appeal is limited to the following issues: whether the plaintiff proved on a balance of probabilities that an employee/s of the defendant negligently cut into or removed his right heel fat pad.'

The respondent did not seek and obtain leave to cross-appeal against the order of the trial court dismissing the special plea of misjoinder. Therefore, that order was not challenged.

In the full court, there was a debate regarding the interpretation of the SCA's order granting leave to appeal. The applicant submitted that the leave to appeal was limited to the issues identified in the order, and that on a proper construction of the order, the full court did not have authority to go beyond the issues in respect of which leave to appeal was granted. The full court rejected the applicant's construction of the order and proceeded to consider the merits of the appeal. It dismissed the applicant's appeal, holding that the trial court's conclusion on the issue of identity was correct.

In granting special leave to appeal, the SCA reasoned that, since the full court erred in dismissing the appeal on the basis of an issue that was not before it, and without having considered its merits, the application for special leave should be granted.

The issues before the SCA was whether the full court's interpretation of the SCA's order granting leave to appeal was correct. Secondly, whether the injury to the applicant's right heel fat pad was caused by the respondent's firefighters.

In coming to a conclusion on the first issue, the SCA held that the language and the wording of paragraph 3 of the SCA's order granting leave makes it clear that the issue that was before the full court was limited to the question of whether it was the respondent's employees who caused the applicant's injury to the right heel fat pad. The context in which the SCA granted leave to appeal on a limited basis is that the special plea disputing the respondent as the correct defendant had been dismissed by the trial court and that all that remained was to determine whether it was the conduct of the respondent's employees that caused the applicant's injury. The SCA reasoned that it was thus no longer open to the full court on appeal to revisit the issue regarding the identity of the defendant in the trial as that issue was not on appeal before it.

The SCA then concluded that the full court's construction of the SCA's order granting leave to appeal is flawed as it not only failed to read the language of the court order contextually, but also failed to have regard to its purpose. The full court accordingly misdirected itself in approaching the appeal in the manner that it did.

Lastly, having granted special leave to appeal, the SCA held that, in the light of all the evidence, the applicant's evidence that the injury to his right heel fat pad was caused by the firefighters, is improbable and his appeal should fail.