THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 258/10

In the matter between:

ANDRE VERNON OOSTHUIZEN **Appellant**

and

ROAD ACCIDENT FUND **Respondent**

Neutral citation: ***Oosthuizen v Road Accident Fund*** **(258/10) [2011] ZASCA 118 (06 July 2011)**

Coram: Navsa, Cloete, Cachalia, Bosielo and Majiedt JJA

Heard: **16 May 2011**

Delivered: **06 July 2011**

Summary: Road Accident Fund – Claim for damages – Plaintiff issued summons in the magistrates' court – Claim found to exceed the monetary jurisdiction of the magistrates' court – Plaintiff unable to withdraw case from the magistrates' court and issue fresh summons in the high court as claim had prescribed – Plaintiff applied to have case transferred from the magistrates' court to the high court having jurisdiction – No statutory provision authorising such transfer – Section 173 of the Constitution of the Republic of South Africa, 1996 not applicable.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Louw J sitting as a court of first instance):

1. The appeal is dismissed with costs.

JUDGMENT

BOSIELO JA (Navsa, Cloete, Cachalia and Majiedt JJA concurring)

[1] This is an appeal with the leave of the court below against a judgment of the North Gauteng High Court (Louw J) dismissing the appellant's application to have his civil case transferred from the magistrates' court for the district of Pretoria to the North Gauteng High Court.

[2] The facts of this matter are largely common cause and can be conveniently summed up as follows. The appellant (Oosthuizen) allegedly sustained serious bodily injuries as a result of a motor collision which took place on 1 March 2003. A year later in March 2004 the appellant, through his attorneys, Klinkenberg Inc (KI) issued summons against the respondent (the Fund) in the Pretoria Magistrates' Court. The Fund is a statutory insurer established in terms of s 2 of the Road Accident Fund Act 56 of 1996.

It is not clear from the papers what the quantum of the appellant's original claim was in the magistrates' court.

[3] Whilst investigating this claim further, the appellant's attorneys obtained a medico-legal report from Dr Swartz, an Orthopaedic Surgeon, during May 2004. He estimated the appellant's future medical expenses to be in the region of R133 000. On 17 August 2004 the appellant obtained another medical report from Dr Langenegger, a maxilo facial and oral surgeon, who estimated the appellant's future medical costs in relation to his facial and oral injuries to be in excess of R100 000. Evidently these two reports put the appellant's claim beyond the jurisdiction of the magistrates' court. Additional medical reports were obtained from Dr Stanojevic, a radiologist, on 4 May 2004 and Jancke Jonas, an occupational therapist, on 27 June 2007. Importantly all these reports showed the nature of the appellant's injuries and their sequelae to be more serious than initially diagnosed.

[4] During December 2004, Mr Klinkenberg (Klinkenberg), the deponent to the appellant's founding affidavit, was appointed to take over this matter as the appellant's attorney of record from one Grové. This is because Grové, the appellant's previous attorney, had left the employ of KI during December 2004.Thus KI continued to represent the appellant through Klinkenberg, the substituted attorney who is one of its directors. Klinkenberg states that he discovered from reading the pleadings and medical reports that the quantum of the appellant's claim far exceeded the jurisdiction of the

magistrates' court, which is R100 000. However, he does not state when exactly he made this crucial discovery.

[5] Notwithstanding the various medical reports showing the appellant's claim to be in excess of the jurisdiction of the magistrates' court the appellant persisted in his claim in that court, amending his particulars of claim on 7 April 2005 to increase the monetary extent of damages allegedly sustained to a total of R99 000. This amendment was effected approximately one year after the receipt by the appellant of Dr Swartz's report. It is not clear what happened in the interim ─ the affidavit by Klinkenberg appears to be deliberately vague in this regard ─ except that on 25 June 2008, Klinkenberg wrote a letter to the Fund advising it that further medical reports which he had received revealed that the appellant's claim exceeded the jurisdiction of the magistrates' court and enquiring whether it would consent to a transfer of the case to the high court. As there was no response to this request, the appellant launched an application in the North Gauteng High Court for the transfer of the case to that court.

[6] The Fund opposed the application first, on the basis that the appellant, as *dominis litis,* had chosen the magistrates' court as the court where he wished to litigate and should therefore bear the consequences of that decision, including the consequence that any claim beyond that which had already been instituted had prescribed. Second, that already on 7 May 2005, the time of the amendment to the pleadings in the magistrates' court, referred to above, the appellant knew or should

have known that his claim exceeded the jurisdiction of that court. His attorneys at that stage ought to have attempted to reach an agreement with the Fund in respect of any future litigation or, alternatively, ought to have instituted action on his behalf in the high court. Furthermore, the Fund pointed out that there was no statutory provision, nor a rule of either the magistrates' court or the high court that permitted a transfer at a plaintiff's request from the magistrates' court to the high court. Finally, the Fund contended that for the high court to come to the appellant's relief would have the substantive and unjust result of breathing life into a claim that had already prescribed.

[7] As stated above, the high court found in favour of the Fund. Louw J stated that a call on him to exercise the high court's inherent jurisdiction to come to the appellant's assistance was misplaced. He agreed with the Fund's contention that inherent jurisdiction was usually exercised by a high court to regulate its procedure and not to do what he was called upon to do in this case. The learned judge warned against the exercise of inherent jurisdiction in the manner suggested on behalf of the appellant, stating that it could become an unruly horse. He also agreed with the submissions made on behalf of the Fund referred to in the preceding paragraph and consequently ruled against the appellant. He rejected conclusions to the contrary in the same division of the high court.[1]

[1] See *Dhlamini v Padongelukfonds* 2010 JDR 0006 (GNP) and *Chantella Alicia Strydom v Road Accident Fund* Case No 71249/2010, delivered on 25 March 2011. In *Mokoena Rebecca v Road Accident Fund* Case No 57115/10 delivered on 8 February 2011, Sapire AJ refused an application for a transfer from the magistrates' court to the high court and rejected the conclusion reached in *Dhlamini*, holding that it was clearly wrong.

[8] The question in this appeal is whether the court below was correct in its reasoning and conclusion. Because of the contrary decisions referred to in the preceding paragraph this judgment is of importance beyond the instant case.

[9] I consider it necessary to examine the applicable statutory regime. Section 50(1) of the Magistrates' Court Act 32 of 1944 allows for a defendant to request a transfer of a case from a magistrates' court to a high court having jurisdiction. It provides as follows:

'50 Removal of actions from court to provincial or local division

(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 the applicant objects to the action being tried by the court or any magistrate's court;

(c) the applicant shall give such security as the court may determine and approve, for payment of the amount claimed and such further amount to be determined by the court not exceeding the amount determined by the Minister from time to time by notice in the *Gazette,* for costs already incurred in the action and which may be incurred in the said provincial or local division.'

[10] There is no statutory equivalent for the plaintiff for an obvious reason. A plaintiff chooses the forum in which to litigate and must bear the consequences of doing so. A plaintiff, having instituted an action in the magistrates' court is, of course, free to change

tack by abandoning the action in the lower court and commencing proceedings in a high court with attendant costs implications.

[11] It is the lack of statutory or any other authority that drove the appellant to contend for the exercise of the inherent jurisdiction of the high court to rescue the situation. As will become apparent this is a call more for the benefit of the appellant's attorney than for him personally. It was contended on behalf of the appellant that a failure to order a transfer of the action from the magistrates' court to the high court would result in grave injustice to the appellant and that this would be against constitutional norms. The injustice, it was contended, flowed from the fact that although the appellant had a substantive right to claim damages from the Fund the appellant is presently precluded from pursuing it in the high court because of the statutory oversight to cater for a transfer from the magistrates' court at a plaintiff's instance. Reliance was also placed on the expression *ubi jus ibi remedium* (where there is a right there is a remedy). This contention appears to me to be a variation of what is set out in the preceding sentence, namely that although the appellant has the right to claim damages, he is precluded from enforcing it because there is no statutory procedure by which he can pursue the claim in the high court.

[12] Before us counsel for the appellant did not seek to challenge the constitutionality of the legislation (including the rules) dealing with the transfer of cases from the magistrates' court to the high court. He could in any event not do so as no notice of

such challenge was given to the relevant Minister and was not even raised in the court below; nor was it foreshadowed in the affidavits filed on behalf of the appellant. Instead appellant's counsel submitted in general terms that constitutional values, including the right of access to courts as provided for in s 34 of the Constitution of the Republic of South Africa, 1996, ought to have propelled the court below to have exercised its discretion in favour of the appellant.

[13] Our courts derive their power from the Constitution and the statutes that regulate them.[2] Historically the supreme court (now the high court), in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. That power is now enshrined in s 173 of the Constitution. Citing I H Jacob *Current Legal Problems*, Freedman C J M adopted the following definition of 'inherent jurisdiction':[3]

'. . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.'

[14] Jerold Taitz succinctly describes the inherent jurisdiction of the high court as follows in his book *The Inherent Jurisdiction of the Supreme Court* (1985) pp 8-9:

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[2] 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'.
[3] *Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd* 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, *Current Legal Problems* (1970) p 51.

'. . .This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court.'

[15] The inherent jurisdiction of the high court has long been acknowledged and applied by our courts.[4] The font of this power was said to be the common law. However with the advent of the new Constitution the inherent jurisdiction of the courts has now been subsumed under s 173 of the Constitution. This section provides that:

'Inherent power

173. The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[16] Save for a general assertion on behalf of the appellant that a grave injustice would result if the high court were not to be compelled to come to his rescue and a general reliance on the expression '*ubi jus ibi remedium*', we were not told, nor was the high court, in which specific manner the common law should be developed, nor what aspect thereof required to be developed. It appears that the appellant was ultimately contending that the high court is entitled and indeed, in the present circumstances, compelled to come to the appellant's assistance by exercising its inherent jurisdiction to regulate its own process.

[4] Ritchie v Andrews (1881-1882) 2 EDL 254; *Conolly v Ferguson* 1909 TS 195.

[17] A court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In this regard see *National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd*[5] where this Court stated that:

'While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute". . . .'

[18] Section 173 does not give any of the courts mentioned therein, including the high court, carte blanche to meddle or interfere in the affairs of inferior courts. Historically, the high courts have always had supervisory powers over the magistrates' courts by way of for example review in terms of s 24 of the Supreme Court Act 59 of 1959 and s 304 of the Criminal Procedure Act 51 of 1977. Moreover, a high court may only act in respect of matters over which it already has jurisdiction. A high court can therefore not stray beyond the compass of s 173 by assuming powers it does not have.

[19] Courts have exercised their inherent jurisdiction when justice required them to do so. In this regard the following dictum by Botha J in *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis & another*[6] should be noted.

'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.

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[5] *National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd* 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F.

[6] *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis & another* 1979 (2) SA 457 (W) at 462H-463B.

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.'

This dictum must be read alongside what has been stated above. A high court can only act as described in this dictum when it already has jurisdiction over the case.

[20] It follows that a high court can only exercise its inherent jurisdiction in relation to the regulation of its own process when confronted with a case over which it already has jurisdiction and when faced with procedures and rules of the court which do not provide a mechanism to deal with an instant problem. A court will, in that case, be entitled to fashion the means to deal with the problem to enable it to do justice between the parties.

[21] This brings me to the point where it is necessary to deal with the appellant's general submission that the 'interests of justice' required of the high court to use its inherent jurisdiction to order a transfer of the case to the high court. In this regard the submission appears to be that in appropriate circumstances a court was obliged to create a remedy for the appellant where none exists.

[22] It was submitted that there was a discrimination of sorts between plaintiff and defendant reflected in s 50(1) of the Magistrates' Court Act, which impacts negatively on the appellant's entitlement to have his case adjudicated. It was contended on behalf of the appellant that constitutional norms dictated that a litigant in the circumstances of the appellant should not be left destitute. These submissions ignore the fact that it is a plaintiff who chooses the forum in which to litigate and not a defendant. In the present case the appellant was legally represented and fully informed about all the implications of the injuries sustained by him. The appellant's attorneys, even when they became aware of the full extent of his claim, nevertheless persisted in the path that led them to the application to the high court, which is the subject of the present appeal. They ought to have switched forums when it became clear that they should do so to protect his interests.

[23] Counsel for the Fund contended that to allow a transfer of the case in the prevailing circumstances would be more than overcoming a procedural hurdle, as submitted by the appellant, but would be akin to breathing new life into a claim that has been extinguished by prescription. Put differently, the contention that the respondent requests no more than procedural intervention is fallacious. Acceding to the respondent's request would have a substantive effect, namely the revival of a prescribed claim. Claims against the Fund are understandably time bound. There are statutorily prescribed prescription periods. The Fund, like any other litigant, is entitled to

raise a defence based on prescription.[7] The appellant seeks to deprive the Fund of such a lawful defence in circumstances in which his attorneys have been remiss.

[24] As conceded by counsel on appellant's behalf, the appellant is not without remedy. He has a right to institute a claim for compensation against his attorneys for the difference between what might be recovered through the magistrates' court and the full extent of his loss. In these circumstances, I fail to see how it can be in the interests of justice for the high court to come to the appellant's assistance on the basis suggested by him. Indeed, the contrary is true.

[25] The appellant's access to court was not impeded by some lacuna in the law. His attorneys chose the wrong forum and persisted therein when it was clear on the available evidence that a change of forum was imperative.

[26] A high court may not use its inherent jurisdiction to create a right.[8] The appellant's reliance on the expression '*ubi jus ibi remedium*' is misplaced. The appellant had a right to institute action in the appropriate forum to the full extent of his claim. Prescription has extinguished part of his claim. For that consequence his attorneys are to blame. As pointed out above, he has a remedy in that regard.

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[7] In *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) the Constitutional Court confirmed the constitutionality of the three-year prescription period provided for by s 23(1) of the Road Accident Fund Act 56 of 1996.

[8] In S Peté, D Hulme, M du Plessis, R Palmer and O Sibanda *Civil Procedure; A Practical Guide* 2 ed (2011) p 91.

[27] In the circumstances of the present case, I share the reservations of the court below that allowing the exercise of inherent jurisdiction in the manner suggested, opens the door to uncertainty and potential chaos. If there is a case in which it is necessary to fashion a constitutionally acceptable remedy because of the interests of justice, this is not it.

[28] For these reasons, the appeal is dismissed with costs.

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L O Bosielo
Judge of Appeal

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