REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

24/6/16

CASE NO.A769/2015

24/6/2016

In the matter between:

C KGOALE	**FIRST APPELLANT**
C DEGENAAR	**SECOND APPELLANT**

and

ROAD ACCIDENT FUND	**FIRST RESPONDENT**
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**SECOND RESPONDENT**
THE MINISTER OF TRANSPORT	**THIRD RESPONDENT**

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] This appeal is pursuant to the refusal of an application for the transfer of an action issued in the magistrates' court to the High Court, as a result of the expected *quantum* of the trial exceeding the jurisdiction of both the district and regional courts. The appellants are now appealing that decision and, in the main, attacking the constitutional validity of s 50 (1) of the Magistrates' Courts Act 32 of 1944, as amended ("the Act") in its current form.

[2] The appeal is before us with leave of the court below.

[3] Subsequent to lodging the appeal, the appellants applied and were granted leave to join the second and third respondents to the appeal. The appellants also applied and were granted leave to consolidate their respective appeals under the present case number A769/2015.

BACKGROUND

[4] In order to place the matter in proper context it is necessary to state the factual matrix to the application in the court below.

[5] The first appellant ("Mr Kgoale") and the second appellant ("Ms Degenaar") were involved in separate motor vehicle collisions. Mr Kgoale's collision was with an unidentified driver. They each issued summons in the magistrates' court Pretoria against the first respondent ("the Fund") claiming compensation for damages suffered as a result of injuries sustained during such motor vehicle collision, in terms of the Road Accident Fund Act 56 of 1996 ("the Road Accident Fund Act").

[6] In preparation for trial and during medico-legal consultations it became apparent that the damages suffered by both appellants were significantly more serious and of such an extent that the potential damages claim would exceed the monetary jurisdiction of the magistrates' court. It, therefore, necessitated that the cases be transferred to the High Court. This required that the appellants withdraw their respective cases from the magistrate's court and issue fresh summonses in the High Court. However, due to the threat of prescription, the actions could not just be withdrawn in the magistrate's court and reissued in the High Court. It, thus, resulted in the appellants having to approach the Fund for its consent to do so and for the Fund to undertake to waive its right to plead prescription. In respect of Mr Kgoale the Fund in a letter dated 25 May 2015 refused to grant the undertaking and, in respect of Ms Degenaar no undertaking was provided. Consequently, in separate cases in the magistrates' court Pretoria, the appellants, applied for the referral of their respective matters to the Gauteng Division of the High Court, Pretoria.

THE JUDGMENT OF THE COURT BELOW

[7] The crux of the appellants case in the court below was that the sections of the Act which allows for transfer of cases from the magistrates' court, namely s 50 (1) of the Act to the High Court and s 35 (1) of the Act to the regional magistrates' court, were constitutionally invalid, in that they unjustly infringe the constitutional rights of a plaintiff to access the court and of equality before the law.

[8] When giving its reasons for judgment in the matter of Mr Kgoale, the court below, made the following findings:

> "4. . . . the section [s 50 (1) of the Act] provides for an application by the defendant, rather than the plaintiff. It is not the defendant [in this instance] who requires the relief sought. The plaintiff seeks relief of requiring the court to order the removal and transfer to the High Court having jurisdiction. Accordingly, a Magistrate Court does not possess the power to remove and transfer the action to the High Court unless the defendant in the action requires it to make such an order."

and at

"9. The limitation placed on the plaintiff's right of access to bring such an application [in terms of s 50 (1) of the Act] may constitute a limitation to the constitutional right of access to justice and access to courts. The limitation placed on the magistrate's discretion to consider such an application by a plaintiff may therefore become necessary. The testing of the constitutionality of legislation, in particular the Magistrates' Courts Act clearly falls outside the ambit of the magistrate's powers. A magistrate court was created by statute, derives its power from a statute that created it and other legislation and has no power other than that conferred by statutes. In accordance with sections 166 & 170 of the Constitution [the Constitution of South Africa Act 108 of 1996 ("the Constitution")] read with section 110 of the Magistrates' Court Act, the magistrates' court may not enquire into or rule on the constitutionality of any legislation."

[9] In respect of Ms Degenaar, the court below, in its reasons for judgment, expressed itself as follows:

". . . The order granted was at the request of the appellant himself after he had recognised exactly what the law says, particularly section 50 (1) of the Magistrates' Court Act 32 of 1944. . . . On the issues pertaining to the constitutionality of the provisions, all I can say is that I am a creature of Statute, bound by the law as it is enacted . . ."

[10] Based on the said findings, the court below found itself constrained by the provisions of the Act and the Constitution to can exercise its discretion and come to the assistance of the appellants for the relief they sought and as such dismissed their respective applications with costs.

[11] It is my view that the court below acted correctly in dismissing the appellants' applications. In accordance with the statutory framework provided for in the Act, in particular s 50 (1) thereof, the transfer of an action at the instance of the plaintiff to the High Court is not possible. There is no discretion bestowed upon the magistrate in the granting of this application, unless it is brought by the defendant. As a result, as the Act now stands, the only manner in which a plaintiff may transfer a case to the

High Court lies solely on the indulgence by and the consent of the defendant. In addition, in terms of s 170 of the Constitution read with s 110 of the Act, a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation. The court below, as such, could only pronounce itself on its ability or otherwise to exercise its discretion in terms of s 50 (1) of the Act in respect of the relief sought by the appellants, and not on its constitutional invalidity.

THE GROUNDS OF APPEAL

[12] On appeal before us, the appellants are persisting with their claim of the constitutional invalidity of s 50 (1) of the Act and are raising the following grounds of appeal:

12.1 That s 50 (1) of the Act provides for transfer of a case from the magistrates' court to the High Court, only at the instance of a defendant. In addition thereto, s 35 (1) of the Act provides for the transferral of a case from the district magistrates' court to the regional magistrates' court, but not to the High Court.

12.2 That the abovementioned sections of the Act unfairly and unjustly discriminates against the appellants' constitutional right of access to court and/or the right to equality and not to be unfairly discriminated against.

12.3 That the abovementioned sections be declared invalid and inconsistent with the provisions of the Constitution of the Republic of South Africa.

12.4 It will be prayed that the order of the court below be set aside and replaced with an order that the application to transfer the action be granted.

THE ISSUE

[13] The crisp issue before us, as a court of appeal, is whether the provisions of s 50 (1) of the Act infringes upon the appellants' right to equality and access to court as contained in s 9 and s 34 of the Constitution.

THE LAW APPLICABLE

[14] Section 50 (1) of the Act 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 –
>
> *(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 that 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."

APPLICATION OF THE LAW TO FACTS

[15] It is the case for the appellants that s 50 (1) of the Act violates their constitutional rights whereas it is the respondents' contention that the section does not violate any of the appellants' constitutional rights.

[16] The respondents are opposing the appeal and are contending that, besides their main defence, that the section does not in any way violate the appellants' constitutional rights, the appellants' respective claims have prescribed. In respect of Mr Kgoale the submission is that the whole claim has prescribed whereas in regard to Ms Degenaar, the contention is that the general damages' part of the claim has prescribed.

[17] The appellants do not deny that their respective claims have prescribed. However, their counsel contends that the issue of prescription should not be considered at this stage of the proceedings. The argument is that we should not concern ourselves with the issue of prescription as it is irrelevant at this point and can be raised in the High Court once the matter has been transferred.

[18] But, the respondents are adamant that the issue of prescription should be considered now. Their submissions is that the appellants are contending, in a circuitous manner, to circumvent the provisions of the Act and to apply constitutional remedies to what is simply a dereliction of duty either on the part of the appellants or the appellants' attorneys of record. By acceding to the appellants' request to have the matter transferred to the High Court without much ado, would have a substantive effect, namely, the revival of the prescribed claim, so the argument goes.

[19] The appellants and the respondents referred, in support of their submissions, to the judgment in *Oosthuizen v RAF* [2011] All SA 71 (SCA). In that judgment, as in this instance, the plaintiff, in the court below, had issued summons against the Fund for damages in the magistrates' court and his claim was found to exceed the monetary jurisdiction of the magistrates' court. The plaintiff was unable to withdraw his case from the magistrates' court and issue fresh summons in the High Court as the claim had prescribed. The plaintiff applied to have the case transferred from the magistrates' court to the High Court having jurisdiction, on appeal, it was found that there was no statutory provision authorising such transfer and that section 173 of the Constitution was also not applicable.

[20] The background to the appellants' respective cases, in this instance, is as follows:

Mr Kgoale's Case

[21] Mr Kgoale was injured in a motor vehicle collision that occurred on 26 November 2008 when an unknown motor vehicle driven by an unknown driver collided with him whilst a pedestrian at the time. After the collision he experienced severe pains in the left extremities and went to hospital. He was x-rayed and treated with analgesics, given a sling and sent home to recover for two weeks.

[22] Based on the clinical notes provided by the hospital, and on 10 October 2012, Mr Kgoale instructed his attorneys of record to institute a claim against the Fund. In the summons Mr Kgoale claimed for medical expenses in the amount of R50 000, and general damages in the amount of R50 000, which brought him within the monetary jurisdiction of the magistrates' court.

[23] Mr Kgoale later attended several medico-legal consultation assessments where it came to light that he suffered very serious injuries. It was concluded that the injuries manifested over time and that the injuries were not present and/or visible immediately after the collision. He did not realise, despite some unbearable pain and discomfort that the injuries he sustained were as severe as it later appeared from the medico-legal reports compiled in preparation for the trial.

[24] On 15 January 2014, a Serious Injury Assessment Report (RAF4) was compiled by an orthopaedic surgeon, indicating that Mr Kgoale suffered serious long-term impairment which could cause loss of body function, and therefore, qualifying him for general damages. In addition, Mr Kgoale will be compromised in future employment with a loss of income due to his injuries.

[25] It is submitted on behalf of the respondents that Mr Kgoale's claim was based on the negligence of an unidentified driver and that in terms of regulation 2 (1) *(a)* of the Road Accident Fund Act such a claim must be sent or delivered to the Fund within two (2) years from the date upon which the cause of action arose. Mr Kgoale's claim had, according to the respondents, already become prescribed when the summons, dated 8 October 2012, was served on the Fund. Mr Kgoale underwent a serious injury assessment on 15 January 2014 which means that any entitlement that Mr Kgoale might have had for an award to increase his claim of general damages had also become prescribed.

Ms Degenaar's Case

[26] Ms Degenaar was involved in a motor collision on 23 August 2008 whilst a passenger in one of the motor vehicles that collided. She as a result sustained multiple injuries and taken to hospital. She was conscious and complained of neck pain and had multiple soft tissue injuries. At the hospital she was given a soft neck cover to wear and discharged the same day. At that time she did not realise that despite some pain and discomfort the injury was as severe as it later appeared from the medico-legal report compiled in preparation for the trial.

[27] She instituted her claim against the Fund on 3 March 2011. No settlement proposals were forthcoming and she gave instructions to her attorneys of record to proceed with the issue of summons against the Fund. On 21 September 2011 the Fund was served with the summons. In the summons, Ms Degenaar claimed for only medical expenses in the amount of R77 294, 44.

[28] On 9 December 2013, and in preparation for trial, a medico-legal report was compiled by an orthopaedic surgeon, indicating that the extent of the injury that she sustained in the motor vehicle collision was more severe than previously indicated. The report concluded the following: that on the date of examination (five (5) years after the collision) the pathology has increased rapidly and there are radiological

signs visible on 2 levels; due to the current pathology Ms Degenaar has a good chance to end up with progressive spondylosis which will require surgical intervention; and, the injuries were of such a nature, that it only manifested over time after the accident and as such, were not present during the medical examination after the collision neither when summons was issued.

[29] On the same date, a Serious Injury Assessment Report (RAF4) was compiled by the orthopaedic surgeon, indicating that Ms Degenaar suffered serious long term impairment which could cause loss of body function, therefore qualifying her for general damages. In addition, she would also be compromised in future employment with loss of income that will be suffered in that regard.

[30] Ms Degenaar was involved in a motor collision on 23 August 2008. She lodged her claim with the Fund on 10 March 2011 and a statutory medical report was submitted on the same day. Summons was issued against the Fund on 8 September 2011. At the time of issue of the summons the insured driver was unidentified. The particulars of claim were later amended to base her claim of negligence on an identified insured driver but did not claim for general damages. She was first assessed for a serious injury in terms of s 17 (1) (A) *(a)* of the Road Accident Fund Act on 9 December 2013, which is some two (2) years and three (3) months after the service of summons upon the Fund.

[31] Claims against the Fund are understandably time bound. There are statutory prescribed prescription periods. The Fund, like any other litigant, is entitled to raise a defence based on prescription. See Oosthuizen v RAF [2011] All SA 71 (SCA) para 23

[32] It is common cause that at the time the appellants underwent the assessment for serious injury to enable them to claim for general damages, their respective claims for general damages had already prescribed. Put differently, at the time the

assessment was done Mr Kgoale's claim as a whole had prescribed and Ms Degenaar's claim in respect of the general damages had also prescribed. Therefore, based on the prescription issue, even if the matters are transferred to the High Court, there is no prospect of success of such claims as they have already prescribed. In effect, the claims have become academic and to rule that the actions be transferred to the High Court will serve no purpose.

[33] I do not agree with the contention that neither of the appellants nor their legal representatives foresaw, at the time that the appellants' claims were lodged, that the claims would exceed the monetary jurisdiction set by the Act in respect of the magistrates' courts and, that the medico-legal reports which were obtained later revealed that the injuries manifested over time and were not visible immediately after the collision. This argument by the appellants does not take their case any further, the fact remains that at the time the appellants realised that they were entitled to claim for general damages as *per* the assessed serious injuries their respective claims had long prescribed and would not be revived by having them transferred to the High Court.

[34] The appellants' argument in the heads of argument that the *Oosthuizen*-judgment above cannot be regarded as authority for the issues raised in the matter before us is to me unfounded. I am more inclined to agree with the respondents who submit that the *Oosthuizen*-judgment is in fact very much a case in point. The respondents' argument, to which I am aligned, is that the only difference between the facts in this instance and those in the *Oosthuizen*-judgment is that the plaintiff's claim in the *Oosthuizen*-judgment had prescribed, whereas in this instance, Ms Degenaar's entitlement to an award for general damages has been extinguished by prescription and Mr Kgoale's claim for damages has prescribed as well. Another difference is that in the *Oosthuizen*-judgment the attorney in question was in possession of the medico-legal reports prior to the five year prescription period and for some reason did not act on them; whereas in this instance the appellants' attorneys only obtained the medico-legal reports after the five year period of prescription and was, as a result of the time lapse, unable to withdraw the action

from the magistrates' court and issue same in the High Court. However, in both cases the claims had been extinguished by prescription. The appeal court in the *Oosthuizen*-judgment at para 23 was of the view that '*Acceding to the respondent's request would have a substantive effect, namely the revival of a prescribed claim*'; and that by acceding to the request would be tantamount to depriving the Fund of a lawful defence of prescription.

[35] It is also my view that the appellants' claim in respect of the relief they sought in the application before the court below was in any way flawed. The appellants did not in their papers before the court below nor before us set out positive averments relating to the *quantum* determination of the matter, that is, the amount in respect of general damages and in respect of the other heads of damages to show that the *quantum* would exceed the jurisdiction of the court below and/or that of the regional court. The appellants ought to have quantified their respective damages to enable the court to determine if indeed their claims exceed the jurisdiction of the court below and that of the regional court for their claims to can be referred to the High Court.

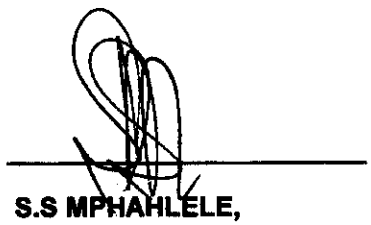
[36] Similarly as in the *Oosthuizen*-judgment, the circumstances of this case do not cry out for the moulding of a constitutionally acceptable remedy to circumvent the provisions of s 50 (1) of the Act. I therefore do not intend to venture into that territory as called upon by the appellants to do so. On the issue of prescription alone the appeal must fail.

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

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

I AGREE



S.S MPHAHLELE,

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE	: 17/05/2016
DATE OF JUDGMENT	: 23/06/2016
APPELLANTS' COUNSEL	: ADV. G. J. SCHEEPERS
	: ADV. W. R. du PREEZE
APPELLANT'S ATTORNEYS	: VAN ZYL LE ROUX INC.
FIRST RESPONDENT'S COUNSEL	: ADV. R. STRYDOM
FIRST RESPONDENT'S ATTORNEYS	: FOURIEFISMER INC.
SECOND & THIRD RESPONDENTS' COUNSEL	: ADV. L. M. MAITE
SECOND & THIRD RESPONDENTS' ATTORNEYS	: STATE ATTORNEY