IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 37390/2020

REPORTABLE: YES/ NO
OF INTEREST TO OTHERS JUDGES: YES/ NO
REVISED
06 JUNE 2022

In the matter between:

CHARLES JOSEPH GOEDHALS APPLICANT

and

MOBI LODGE RESPONDENT

This judgment by the Judge whose name is reflected herein, is delivered and submitted electronically to the parties/their legal representatives by e-mail. This judgment is further uploaded to the electronic file on this matter on Caselines by the Judge or his / her secretary. The date of the judgment deemed to be 06 June 2022.

JUDGMENT

MOLEFE J

[1] The applicant seeks an order in terms of the provisions of section 27(1)(a) read with section 27(2) of the Superior Courts Act[1] ('the Act') that the pending trial action instituted by the applicant in the Gauteng Division, Pretoria, under case number 37390/2020 is to be removed from the Gauteng Division, Pretoria and transferred to the Mpumalanga Provincial Division of the High Court, Middelburg. The respondent opposes the application.

Background

[2] The applicant is an adult male pensioner currently residing at [....] I[....] Gardens, [....] I[....] Avenue, Eldoraigne, Pretoria.

[3] The respondent, Mobi Lodge is a firm trading under such name with its registered offices and main place of business at 1 Joule Street, Middelburg, Mpumalanga. At all relevant times during 2018 the respondent was the manufacturer and distributor of the Mobi Lodge Ultimate caravan ('MLU').

[4] During 2018 the applicant was an owner of an MLU with a ground clearance of approximately 500mm. Having knowledge of such installation on a different model manufactured by the respondent, the applicant approached the respondent regarding the installation of an electrical lifting platform at the door of the applicant's MLU. The purpose of such installation was to assist the applicant who suffered from polio as well as post-polio syndrome, and caused him severe mobility limitations. The lifting platform was to enable the applicant to access and/or exit the MLU easier.

[5] The applicant then purchased an electric lifting platform from the respondent to be manufactured alternatively sourced by the respondent. After the manufacturing and/or installation was completed, the applicant received his MLU with the attached lifting platform on or about 25 May 2018.

[6] On or about 30 July 2018, at or near Satara Camp, Kruger Park, the applicant attempted to make use of the lift to exit the MLU. Shortly after pressing the button on

[1] Superior Courts Act 10 of 2013.

the remote to descend, the cable of the system broke, resulting in the applicant falling approximately 500mm to the ground. As a result of the fall, the applicant broke his left hip, injured both his ankles and injured both his knees. He required a total left hip replacement due to his injuries.

[7] During September 2020, the applicant as plaintiff issued summons against the respondent as defendant out of this court claiming damages. The claim is based upon the alleged defect of the manufacturing of the lift system resulting in the applicant's fall and injuries. The defendant defended the action and filed a special plea of non-jurisdiction. In its special plea the respondent avers that its main place of business and registered address, the place where the agreement was concluded and where the incident occurred are all outside the jurisdiction of this court.

[8] The applicant accepts that the special plea is good in law and concedes that the action should have been instituted in the Mpumalanga High Court. As a result of the special plea, the applicant launched this application to invoke the section 27 of the Act and the transfer of the action from this court to Mpumalanga Division of the High Court, Middelburg.

[9] Section 27 of the Act provides:

> "*Removal of proceedings from one division to another and from one seat to another in the same division*
>
> *1. If any proceedings have been instituted in a division, and it appears to the court that such proceedings-*
>
> *(a) Should have been instituted in another division or at another seat of that division; or*
>
> *(b) Would be more conveniently or appropriately heard or determined-*
>
> *i.at another seat of the division; or*
>
> *ii.by another division,*
>
> *that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other division or seat, as the case may be.*

2. *An order for removal under subsection (1) must be transmitted to the registrar of the court to which is ordered, and upon receipt of such order that court may hear and determine the proceedings in question.*"

[10] The Act repealed section 9 of the Supreme Court Act 59 of 1959 as well as section 3 of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001[2] ('Interim Rationalisation Act').

[11] In *Road Accident Fund v Rampukar*[3], the Supreme Court of Appeal ('SCA') considered the interpretation of section 3(1)(a) of the Interim Rationalisation Act which reads similar to the now section 27 of the Act, and found that the relief afforded by this section is available to all litigants, and that the reason why the litigant mistakenly instituted action in the wrong court is of no consideration. The court found that if such reason is to be considered, it might result in irrational discrimination between different litigants which cannot be attributed to the legislation. Although *Rampukar* dealt with the now repealed legislation, the ratio of the SCA is similarly applicable in casu.[4]

Points in limine

The respondent raised the following two points in limine in respect of this application.

[12] The respondent submitted that the application does not comply with the provisions of rule 6(5)(b)(ii) of the Uniform Rules of Court and the application is therefore irregular and fatally defective. In response, the applicant correctly pointed out that this application is actually governed by the provisions of rule 6(11), and not rule 6(5)(b)(iii). Rule 6(11) governs applications incidental to pending proceedings. An interlocutory or incidental application is an application for an order at an intermediate stage in the course of litigation, aimed at settling and giving directions

[2] Section 55 (1)(a) of the Superior Courts Act 10 of 2013.
[3] *Road Accident Fund v Rampukar* 2008 (2) SA 534 SCA.
[4] Van Loggerenberg Superior Courts Practice- Vol 1, page A2-141.

with regard to some preliminary or procedural question that has arisen in the dispute between the parties.[5]

[13] An application incidental to pending proceeding is to be brought on notice, which does not mean a notice of motion, and need not be served by a Sheriff. Service may be affected upon the attorney of record of the respondent by the party initiating the proceedings. The current application is clearly incidental to the main action. Rule 6(5) relates to new applications and as such finds no application in this application. This point in limine is without substance, bad in law and is therefore dismissed.

[14] The second point in limine is that the application does not contain the referral in terms of rule 41A(2) of the 'Supreme Court Rules'(sic), and is therefore irregular in terms of rule 30(A) of the Uniform Court Rules. It is accepted that the respondent's reference to section 41A(2) is actually reference the Uniform Rules of Court, which rule relates to every new action or application. Rule 41A(2) compels the plaintiff or applicant as the case may be, to serve on each of the defendants or respondents, a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.

[15] In my view, this application does not constitute a new application but is incidental to pending proceedings. This point in limine is therefore without any merit and is dismissed.

[16] The question to be determined by this court is whether the action was indeed instituted on a division that lacks jurisdiction. On a basic consideration of the facts, it is clear that this court does not have the necessary jurisdiction to entertain the matter. More importantly, the absence of jurisdiction is common cause. Section 27(1)(a) of the Act caters for this exact scenario.

[17] The respondent's argument is that the reasons advanced by the applicant for instituting the action in the wrong jurisdiction does not constitute a valid and

[5] Graham v Law Society, Northern Provinces 2016 (1) SA 279 (GP) at 289 (E-F).

acceptable excuse for failure to ensure that the proceedings were instituted in the correct forum, that the applicant was negligent and that the application should be dismissed.

[18] This argument is in my view of no relevance in determining the issue before this court. I am satisfied that the applicant has shown compliance with the requirements of section 27(1)(a) of the Act. The action was instituted in a division that has no jurisdiction. The use of the word “may” in section 27 is an indication of a discretion that must be exercised, and in exercising the court’s discretionary powers, the application is removed and transferred to Mpumalanga Provincial Division of the High Court.

Costs

[19] The applicant has been successful and there is no reason why costs should not follow the results.

[20] I therefore make the following order:

1. The application in terms of section 27 of the Superior Courts Act 10 of 2013 is granted with costs and the draft order marked “X” attached hereto, initialled, dated and signed is made an order of court.

D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Applicants:	Adv. W R du Preez
Instructed by:	GMI Inc Attorneys
Counsel for the Respondents:	Adv. P A Venter
Instructed by:	Birmans Inc c/o VZLR Inc

Date heard: 03 May 2022