IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 9765/03

In the matter between:

JENNIFER BUSIE GUMEDE Applicant

and

THE ROAD ACCIDENT FUND Respondent

JUDGMENT: 8/05/007

VAN REENEN, J:

1] The applicant is seeking an order that the action instituted by her against the respondent in this court under Case NO 9007/2003 be transferred to the Natal Provincial Division of the High Court of South Africa, in terms of the provisions of section 3(1)(a) of the Interim Rationalisation of Jurisdiction

of High Courts Act, 41 of 2001 (the Act) together with ancillary relief. The case number, as is conceded in paragraph 19.3 of the respondent's answering affidavit is incorrect and should be 9765/03.

2] The applicant in her personal capacity and in her capacity as the mother and guardian of her two minor children is suing the respondent in terms of Section 17(1)(a) of the Road Accident Funds Act, No 56 of 1996 for damages in an amount of R286 336 as well as interest and costs as a result of the death of Gregory Ervin Hastibeer (the deceased) to whom she had been married in terms of a customary union from which the said children have been born.

3] The deceased was a passenger in motor vehicle NRB 21543 driven by one Shannon Ekovamana which on 11 December 1998 and on Riverview road, Matubatuba collided with motor vehicle NRB 19115 which she alleges was driven negligently by one Michael Pryor. The deceased passed away on 24 December 1998 as a result of the injuries sustained in the collision. The claim is for loss of support and maintenance as the applicant and her two minor children were legally dependent on the deceased for such

support and maintenance and have been deprived thereof as a result of his death.
4] The respondent who is opposing the said action, has delivered and filed a special plea and a plea. This court's jurisdiction to entertain the action is being challenged in the special plea on two bases. The first is that the collision did not occur within its area of jurisdiction. The second is that the respondent's principal place of business is outside its area of jurisdiction namely, at 36 Ida Street, Menlo Park, Pretoria, Gauteng.

5] The filing of the special plea resulted in the present application being launched. When the application came up for hearing before Le Grange, AJ on 22 March 2006, he by agreement between the parties, postponed it and determined a time-table for the filing of answering- and replying affidavits and also directed that heads of argument be filed in accordance with the provisions of the rules of court.

6] The applicant delivered and filed a replying affidavit on 31 October 2006 instead of on or before 14 July 2006 as was directed by the court and simultaneously therewith delivered and filed an application for the condonation of the late filing thereof. Although the respondent's counsel Me Williams SC contends that the condonation application is unconvincing and lacking in merits she did not actively oppose the granting thereof but intimated that her client would abide the decision of

this court thereanent.

7] Condonation of the non-observance of court orders and rules is not a mere formality. A party seeking condonation must satisfy the court that there is sufficient cause for excusing the non-compliance. Whether condonation should be granted or not is a matter of discretion that has to be exercised having regard to all the circumstances of the particular case (See: **Torwood Properties (Pty) Ltd v South African Reserve Bank** 1996(1) SA 215 (W) at 228 B – F). The following factors identified by Holmes JA in **United Plant Hire (Pty) Ltd v Hills** 1976(1) SA 717 (A) at 720 E – G) are in the context of an appeal to be taken into account in the exercise of such a

discretion -

a) the degree of non-compliance; b) the adequacy of the explanation for such failure; c) the prospects of success; d) the importance of the case e) the respondent's interest in the finality of the judgment; f) convenience of the court; and g) the avoidance of delays in the administration of justice. The list is not exhaustive. Those factors are not individually decisive but are interrelated and the one is weighted against the other so that the strength of one or more may compensate for the weakness of one or more of the others. The fact that a party chooses not to oppose the granting of condonation is a relevant but by no means overriding consideration (See: **Salojee and Another NNO v Minister of Community Development** 1965(2) SA 135 (A) at 138 E).

8] The explanation put forward by the applicant for the late filing of the replying affidavit is relatively detailed and reveals regrettable disorganisation and slackness on the part of those to whom the applicant had entrusted the matter. As the applicant

resides in Matubatuba, KwaZulu, Natal, and her local attorney enlisted the services of attorneys practising in Randburg and they in turn made use of attorneys practising in Cape Town, and there on the papers is no basis upon which knowledge of and blame for the delays in the filing of the replying affidavit (which was deposed to by one of her attorneys) could be attributed to her, this, in my view, is an instance where she should not be prejudiced by any lack of application displayed by the attorneys representing her and in all probability, are unknown to her (Cf: **Ferreira v Ntshingila** 1990(4) SA 271 (A) at 281 C – H). In the circumstances the fate of the condonation application will be

dependent on the applicant's chances of success in the main application.

9] Section 3(1) of the Act, which came into operation on 5 December 2001, provides as follows: -

> "(1) If any civil proceedings have been instituted in any High Court, and it appears to the Court concerned that such proceedings –
>
> a) should have been instituted in another High Court; or
>
> b) would be more conveniently or more appropriately heard or determined in another High Court,
>
> the Court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other High Court."

10] As is apparent from the preamble to the Act, its purpose is the interim rationalisation, as a matter of urgency, of the areas of jurisdiction

"of certain High Courts" pending the rationalisation process contemplated in Item 16(6) of Schedule 6 to the Constitution which, as specifically stated, will require a considerable period of time to bring to a conclusion. The mechanism whereby such rationalisation is to be achieved is embodied in section 2 of the Act which provides as follows: -

> "(1) Notwithstanding the provisions of any other law, the Minister may, after consultation with the Judicial Service Commission, by notice in the Gazette –
>
> a) alter the area of jurisdiction for which a High Court has been established by including therein or excising therefrom any district or part thereof;
>
> b) amend or withdraw any notice issued in terms of this section."

11] The steps that have already been taken in terms of Section 2 of the Act to rationalise the areas of jurisdiction of certain High Courts have been fully set out in **Erasmus: Superior Court Practice,** P.J. Farlam et al, page A1 – 106, footnote 1, and accordingly are not repeated herein.

12] The only commentator who, to the best of my knowledge, has expressed any view on the rationale for the passing of the Act namely, Professor Elison Kahn, says the following at page 872 of the 2001 Annual Survey: -

> "This is an interim measure pending the rationalization of the superior courts. The present territorial jurisdiction of the High Courts is based on the old Republican cum TBVC structure, which has resulted in certain serious inconsistencies."

As item 4(a) of the Sixth Schedule to the Constitution of South Africa 1996 provides that

> "A provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or a general division of such a court, becomes a High Court under the new Constitution without any alternation in its area of jurisdiction, subject to any rationalisation contemplated in subitem (6)."

and the legislation in terms of which the supreme courts and general divisions of the homelands, that is, "a part of the Republic which before the previous Constitution took effect, was dealt with in South African legislation as an independent or self-governmenting territory" were created apply to clearly delineated territorial areas (See: The Republic of Transkei Constitution act 1976; Republic of Bophuthatswana Constitution Act 1977;

Republic of Venda Constitution Act, 1979; and Republic of Ciskei Constitution Act 1998) the serious inconsistencies to which the learned author alludes are not self-evident.

13] The word "any", unless restricted by the subject-matter or the context, is prima facie a word of wide and unqualified generality that includes all things to which it relates (See eg: **Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd** 1983(1) SA 254 (A) at 261 B – D; **Commissioner for Inland Revenue v Ocean Manufacturing Ltd** 1990(3) SA 89 610 A at 618 H). Accordingly the use thereof in Section 3(1) of the Act in conjunction with "civil proceedings"

and "High court" clearly signifies an intention on the part of the legislature that its provisions are to apply to all forms of civil proceedings and all High Courts without exclusion. Subsection 3(1) of the Act provides that courts "may" upon application order any civil proceedings to be removed to another High Court if it appears to it that either of the following circumstances are present:

a) that the proceedings before it should have been instituted in another High Court; or

b) that such proceedings would be more conveniently or more appropriately heard or determined by another High Court.

In the context of that subsection the word "may" does not appear to have been intended to serve a "purely

predictive function" (per Brand JA in **Minister of Environmental Affairs and Tourism v Pepper Bay Fishing** 2004(1) SA 308 (SCA) at 322 B) but used rather in a permissive sense consistent with an intention to confer High Courts with a discretion (See: **Dawood, Shalabi, Thomas and Another v Minister of Home Affairs** 2001(1) SA 997 (C) at 1022 J – 1023 A) in the sense of the power or competence to hear and determine issues between parties (See: **Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board** 1950(2) SA 420 (A) at 424), to transfer civil proceedings to other High Courts if it appears to them that such circumstances are present.

15] It is clear upon even a cursory reading

of subsections 3(1) (a) and (b) of the Act that the circumstances referred to therein are disparate. The reference in subsection 3(1)(a) to another High Court in which the proceedings should have been instituted, in my view, is clearly intended to be a reference to the court which enjoys jurisdiction in terms of the provisions of Section 19(1)(a) of the Supreme Court Act, No 59 of 1959 (the Supreme Court Act) and implies that the High Court in which proceedings have been instituted does not have jurisdiction.

16] Subsection 3(1)(a) of the Act, unlike subsection 3(1)(b) thereof, has no equivalent in the Supreme Court Act, the similarly worded Section 9(1) whereof provides as follows: -

> "If any civil cause, proceeding or matter has been instituted in any provincial or local division, and it is made to appear to the court

> concerned that the same may be more conveniently or more fitly heard or determined in another division, that court may, upon application by any party thereto and after hearing all other parties thereto, order such cause, proceeding or matter to be removed to that other division."

PJ Farlam et al (op cit) at A1 – 9 express the view that the reasons for the overlap between subsections 3(1)(b) and 9(1) is not clear. **LTC Harms: Civil Procedure in the Superior Courts** at A – 34, expresses the view that the provisions of Section 9(1) were "superseded without express repeal" by Section 3(1)(b). That a court may order the removal of a matter to another court only if the former court itself has jurisdiction to hear the matter has been held in a long line of

decided cases (See: eg **Ying Woon and Another v Secretary for Transport and Others** 1964(1) SA 103 (N) at 108 D – E and the cases there cited) and espoused by text book writers; **PJ Farlam** et al (op cit) at A – 9; **LTC Harms** (op cit) paragraph A4 – 26; **Herbstein & Van Winsen: the Civil Practice of the Supreme Court of South Africa,** Ed Mervyn Dendy, at 577). It has been held that, unlike the court which orders the removal, the court to which the matter is removed does not need to have jurisdiction (See: **Mulder and Another v Beacon Island Shareblock Ltd** 1999(2) SA 274 (C) at 277 A) and that there is a firmly established practice that jurisdiction can in that manner be conferred on the

court to which the matter has been removed (See: **Veneta Mineraria Spa v Carolina Collierees (Pty) Ltd** (in liquidation) 1987(4) SA 883 (A) at 888 A). Although I fail to see any reason why the requirement that the court transferring a matter to another court should itself have jurisdiction should not find application in the case of subsection 3(1)(b) it is unnecessary to make any firm findings thereanent because, although the deponent in the founding affidavit appears to have vacillated between the two circumstances mentioned in subsection 3(1) in having contended that "equity" and "convenience" dictate that the proceedings be transferred, it is clear from the manner in which prayer 1 of

the notice of motion has been formulated that the basis of the application is restricted to the provisions of Section 3(1)(a) of the Act.

16] Is it necessary, as was contended by the respondent's counsel, that for a court to transfer civil proceedings to another court in terms of Section 3(1)(a) of the Act that such court itself should have jurisdiction? The line of decided cases commencing with **Johnston v Byrne and Lamport,** 1 Searle, 157 and **Webb v Roux** 1903 TS 358, which appear to have served as the foundation of the finding in later cases to the effect that the court exercising powers of removal in terms of the provisions

of Section 9(1) must itself have jurisdiction, were based on an interpretation of then extant statutory provisions which permitted a transfer from one court to another in not dissimilar terminology. (See: **Van Dijk v Van Dijk** 1911 WLD 203 at 204; **Van der Sandt v Van der Sandt** 1946 TPD 259 at 263; **Ex Parte Benjamin** 1962(4) SA 32 (W) at 33 D – C). Such considerations however, do not apply in the case of subsection 3(1)(a).

17] A high court's jurisdiction under Section 19(1)(a) of the Supreme Court Act is determined with reference to the common law, any relevant statutes and its inherent jurisdiction (See eg: **Bisonboard Ltd v Braun Woodworking Machinery (Pty) Ltd** 1991(1) SA 482 (A) at 486 H – J). It, in my view, is apparent from the wording of subsection 3(1)(a) of the Act that it envisages the removal of civil proceedings which have been instituted in a court other than one in which it should have been instituted (ie. one without jurisdiction)

to another court where it should have been instituted (ie. one with jurisdiction). In my view that subsection, at least by clear implication, empowers a High Court which does not enjoy jurisdiction to order the removal of any civil proceedings before it to another court which enjoys jurisdiction and in that manner brought about a pro tanto statutory amplification of the jurisdiction of High Courts.

18] I accordingly incline to the view, contrary to the conclusion arrived at by me in **Design Holdings (Pty) Limited t/a Design Products Enterprises v Xantium Trading 377 (Pty) Limited t/a Design Products Cape and 2 Others**, Case No 4512/2003, but in conformity with the unreported decision of Willis J in **Ranpukar Ishwardutt** Case No 2001/19263 in the Witwatersrand Local Division on 15 August 2006, that this court does have jurisdiction to grant the relief sought in prayer 1 of the

application if satisfied, on all the relevant facts, that it should exercise its discretion in the applicant's favour.

19] I am in full agreement with the submissions of Mr Bremridge, who appeared for the applicant, that the reference to the High Court in which the proceedings should have been instituted in Section 3(1)(a) of the Act is consistent with a recognition by the legislature of the generally accepted precepts of jurisdiction rather than a negation thereof and that any fears that the construction favoured by this court may lead to abuse by litigants by knowingly and deliberately instituting civil proceedings in courts that lack jurisdiction are allayed by the fact that any malpractices that might manifest themselves could be taken into account by courts in exercising their discretion whether to transfer or not.

20] The unconventionality of the amplification of the jurisdiction of High Courts by means of an act promulgated for a specific and limited

purpose and intended to operate merely on an interim basis, must be immediately conceded. However, the language used in Section 3(1)(a) of the Act is so unambiguous and unrestricted that it is difficult to arrive at a conclusion other than that is exactly what the legislature intended (See: **Rampukara Ishwardutt** (supra) at page 3).

21] Should this court exercise its discretion in favour of the applicant? The collision from which the applicant's cause of action arises took place on 11 December 1998 ie. approximately 8½ years ago. If proceedings were to be instituted anew in the Natal Provincial Division, costs additional to those that have already been incurred in these proceedings will have to be incurred. It will furthermore not only result in further delays in the finalization of the matter but, as has already been foreshadowed by the respondent, it intends availing itself of the opportunity of assailing the

applicant's claim in respect of the damages suffered by her personally on the basis that it has become prescribed. The applicant's claim was duly lodged with the respondent on 13 August 2001. All that is in dispute is whether it was lodged with the respondent's Randburg or Cape Town office, and if the former, whether or not the claim had been administered by the last-mentioned office. Be that as it may, the respondent is unable to join issue with the averment of the applicant's Cape Town attorney that the action was instituted in this court on the strength of the notice published in the June 1997 addition of "De Rebus" to the effect that legal proceedings could be instituted in the High Court within whose area of jurisdiction the office of the respondent which administers a claim is situated. That notice purports to be issued by one Herman Karberg, Manager, Legal Advice, Road Accident Fund, Pretoria. The publication and contents of that notice as well as the authority of the person under whose name it was published have not been placed in issue by the respondent. The respondent's attitude is that such notice could not endow this court with jurisdiction and that the applicant, in any event, failed to comply with its contents. That stance is of little assistance as the issue is whether that notice served as the catalyst for the action having been instituted in this court and not whether it endowed it with jurisdiction. Having regard to the absence of any blame on the part of the applicant

personally as regards the court in which the proceedings were instituted; that the respondent has had adequate notification of the claim; that it is not improbable that the applicant's attorneys had been misled by the said notice; the substantial prejudice the applicant will suffer if her claim for personal damages is disallowed on the basis of prescription; the further delays that will result and the costs that would have been incurred abortively and the further costs that would result if this application were to be refused; and the absence of any material prejudice to the respondent should it be granted, I am inclined to exercise my discretion in the applicant's favour and grant the order sought.

22] Accordingly the application for condonation is granted and an order is made in terms of prayers 1 (save that the case number should be 9765/03), 2 and 3 of the notice of motion.

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D. VAN REENEN

IN THE HIGH COURT OF SOUTH AFRICA