In the Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 13813/07

In the matter of:

LEONARD THEODOR VOLKER	First Applicant
And	
THE ROAD ACCIDENT FUND	First Respondent
THE PREMIER OF THE WESTERN CAPE	Second Respondent
VUSELA CONSTRUCTION (PTY) LTD	Third Respondent
JOHANNES H LOUW	Fourth Respondent

In re:

LEONARD THEODOR VOLKER	Plaintiff
And	
THE PREMIER OF THE WESTERN CAPE	First Defendant
VUSELA CONSTRUCTION (PTY) LTD	Second Defendant
JOHANNES H LOUW	Third Defendant
THE ROAD ACCIDENT FUND	Fourth Respondent

Judgment: August 2011

MIA (AJ)

[1] On the 12 August 2011 I handed down the following order:

1. The applicant is granted leave in terms of section 2(4) (a) of the Apportionment of Damages Act (Act No 34 of 1956) to sue the first respondent as a joint wrongdoer for the damages suffered by him in consequence of a collision in which he was involved on 29 October 2006, which is the subject of the action instituted by him in the abovementioned case number.
2. The applicant is granted leave to join and sue the first respondent as a further defendant in the main action.
3. The first respondent shall pay the costs of the application which shall include the cost of two counsel.

My reasons for the above order follow hereunder.

[2] The applicant is the plaintiff in the main action. The first respondent is the Road Accident Fund (hereafter "the Fund"), a statutory body and juristic person in terms of the Road Accident Fund Act (Act No 56 of 1996). The Fund is liable to compensate the applicant for injuries sustained in a motor vehicle accident where injuries caused were as a result of the negligence of the driver of the motor vehicle. The application for relief in prayer 1 of the notice of motion is brought in terms of section 2(4) (a) of the Apportionment of Damages Act (Act No 34 of 1956). The applicant seeks leave to sue the first respondent as a joint wrongdoer in respect of damages suffered in a collision which occurred on 29 October 2006. In prayer 2 of the notice of motion, the applicant also seeks leave to join the first respondent as a defendant in the main action in terms of rule 10 of the Uniform Rules of the Supreme Court. The applicant sought costs which include the costs of counsel in view of the opposition by the Fund. There was no opposition to the application from the second to fourth respondents.

[3] In the main action the applicant claimed damages from the second to fourth respondents for injuries sustained in a motor vehicle collision on 29 October 2006 when he was conveyed in the back of a vehicle driven by the fourth respondent. The pleadings in the main action closed in March 2008. The trial commenced in November 2010 and was postponed in January 2011. At this time seven witnesses had been led. The applicant (plaintiff in the main action) has not closed its case and further witnesses are envisaged to be called in relation to the merits and in relation to quantum. At the time the applicant instituted action his claim against the Fund was limited to R25 000 in terms of section 18(1) (b) of the Road Accident Fund Act No. 56 of 1996. The Constitutional Court handed down a judgment on 17 February 2011 that declared section 18(1) (a) (i), 18(1) (b) and 18(2) of the Road Accident Fund Act No 56 of 1996 invalid. The declaration of invalidity was suspended for 18 months to afford Parliament an opportunity to amend the Road Accident Fund Act No. 56 of 1996. In the event that the amendment does not occur the cap on the recovery of damages will fall away, alternately if the amendment is finalised, the cap may increase. The result is that the Fund will be liable for more than R25 000 as previously envisaged.

[4] It was submitted on behalf of the applicant that notice was not given in terms of section 2(2)(a) before the trial commenced because of the limitation which applied at the time that pleadings closed. The R25000 cap which the Fund would be liable for was insignificant in comparison to the claim of the applicant for R 22 million as recently amended. The applicant submitted that his position changed after the change brought about by the decision in **Mvumvu and Others v Minister for Transport and Another 2011 (2) SA 473 (CC)**. It was submitted on behalf of the applicant that he could not have anticipated the change in the legal position, and further his counsel only became aware of the import of the decision after the trial had commenced herein.

[5] In contrast it was submitted on behalf of the Fund that the application for relief is

premature as the invalidity of section 18 had been suspended and that the applicant should institute separate proceedings against the Fund. Further it was submitted on behalf of the Fund that it is not at present in a position to tender a settlement figure to the applicant to avoid costly litigation. The Fund's position will become clearer after August 2012 when an amendment ought to have occurred or the suspended declaration of invalidity falls away. In view of this difficulty to tender a settlement to the applicant to dispose of any litigation between it and the applicant, it suggests that a new action be instituted by the applicant. Further that this action should be postponed until after August 2012 when the invalidity will fall away. This submission must be viewed in the context of the applicant's submission that his claim against the Fund prescribes in October 2011 and the main action has in any event been postponed until March 2012. In the event that a new action is instituted there may well be a request to consolidate the two actions. The applicant appears to have suggested same as an alternative.

[6] The applicant does not have the protection that joint wrongdoers have in terms of the Apportionment of Damages Act No. 56 of 1996 to recover from a joint wrongdoer within twelve months after judgment in the main action and the applicant must issue summons against all potential wrongdoers before his claim prescribes. It was submitted on behalf of the applicant that it was always the applicant's intention to bring an application in terms of section 2(4)(a) of the Apportionment of Damages Act No. 56 of 1996 for leave to sue the first respondent in the event that the main action had not reached finality. These circumstances presented themselves. This is so especially as the main action has been postponed until March 2012 and the applicant's claim against the Fund prescribes in October 2011.

[7] The applicant also requested leave to join the Fund as a defendant in the main action. It was submitted on behalf of the applicant that while it had opposed the application brought by the second and third respondent previously, this opposition was aimed at avoiding a delay in the trial which was due to commence on the 19 July 2011

and was envisaged to be finalised shortly thereafter. In light of the first application to join being granted, a delay in the matter proceeding had occurred. The applicant reassessed his position and was of the view that a joinder of the Fund was appropriate to avoid a multiplicity of actions.

[8] Counsel for the applicant submitted that the applicant brought the application in terms of Rule 10 which does not indicate any time limit within which to bring the application for joinder. The main action has been postponed until March 2012 and the considerations giving rise to the initial opposition have fallen away or been overtaken by the orders for joinder and application for leave to appeal. The order granting leave to join the Fund is at present suspended by a notice of leave to appeal. A delay in the proceedings is thus unavoidable.

[9] It was submitted on behalf of the Fund that it was too late to join the Fund and that the Fund was prejudiced because the statement made by the fourth respondent to the Fund was subpoenaed by the third respondent and further that the fourth respondent had been led by the applicant to prove that the fourth respondent had not been negligent. In light hereof it was submitted that the applicant was estopped from suing the Fund in view of his previous position that the fourth respondent was not negligent. The Fund does not wish to inherit an action concerning possible negligence by the fourth respondent, where the Fund has not had the opportunity to present evidence of the fourth respondent. The applicant has led the evidence of the fourth respondent and now wishes to rely on the fourth respondent's negligence. The Fund also required clarity on how it should now proceed to present a case before court after the seven witnesses have been led and a witness that would ordinarily have been available to it has already been led. In relation to the statement subpoenaed by the third respondent, the Fund did not claim privilege as it was entitled to do. In response to the subpoena served by the third respondent in terms of rule 38(1) (b) on the Fund to produce the documents, the Fund provided the documents when they could have

claimed privilege and are saddled with their decision to do so.

[10] The central consideration in relation to the question of leave to serve a notice in terms of section 2(4) (a) of the Apportionment of Damages Act No.56 of 1996 is whether good cause has been shown why notice was not served earlier. The applicant has satisfactorily explained it position in view of the change in the legal landscape and the unavoidable delay occasioned by the further postponement in the matter. This required a re- assessment of the applicant's position which resulted in the application herein. The applicant seeks to curtail the legal costs which will be occasioned by instituting another action against the Fund where the issues will be the same as in the main action herein. The applicant's intention to avoid a multiplicity of actions is understandable and desirable.

[11] The scope of Rule 10 is wider than at common law. A joinder of the first respondent will avoid a multiplicity of actions where different courts will have to consider the same facts. As indicated above a delay in the proceedings at this stage is unavoidable. This Court has a discretion to join the Fund based on convenience. This convenience presents itself in the present matter in that there is an overlap of issues. The Fund is an interested party and has an interest in the outcome of the matter. In light hereof it is appropriate that all the parties who have an interest in the matter are before the court.

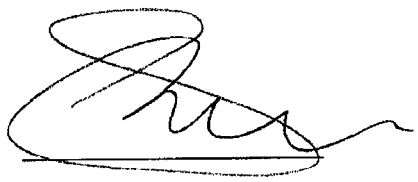
[12] The questions of fact and law are the same in relation to all the respondents and the same information is applicable. Whilst it is preferable for the first respondent to have been joined early on in the matter, the applicant has attached a copy of the amended summons it intends to serve on the first respondent. There is no indication from the Fund why they will not be in a position to plead thereto. The possibility remains for the relevant witnesses to be recalled to enable the first respondent to place considerations before the court that it deems relevant to enable the court to make a decision. The Fund

should be afforded an opportunity to prepare to enable it to place relevant information before the Court either by way of cross examination or leading further witnesses in the normal course. In view of the overlap of the factual issues I am of the view that it is not feasible to run a trial on the same facts again at a later stage.

[13] In exercising my discretion to grant the application I have been had regard to Wapnick **v Durban City Garage 1984 (2) SA 414 (D)** where the Court per Booysen J stated at page 423 that:

> "...It seems to me that the Court is indeed given a wide discretion and it is neither necessary nor desirable that limitations should be laid down...
>
> The purpose of the Rule is to enable a litigant to avoid multiplicity of actions...
>
> The Court should obviously not lightly refuse leave in terms of sub rule (3) (b) as such refusal might result in such multiplicity of actions"

[14] In light of the above I am satisfied that good cause exists why notice in terms of section 2(2) of the Act was not given and that it is appropriate to join the Fund herein.



MIA AJ