



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

Of interest

Case no: 1123/2021

361/2021

In the matter between:

NONTUTHUZELO VOKO

APPLICANT

and

THE ROAD ACCIDENT FUND

RESPONDENT

and in the matter between:

MAKAGONGWE SAWULA

APPLICANT

and

THE ROAD ACCIDENT FUND

RESPONDENT

REASONS

Govindjee J

[1] The abovementioned matters were moved on my motion court roll on 22 March 2022. They are practically identical in substance. The applicants both seek orders removing and transferring their proceedings against the respondent to the 'East London Circuit Local Division', with costs to be costs in the undefended main actions between the parties.

[2] The applicants rely on affidavits from their legal representative. The essence of both affidavits is the same. The applications are premised on s 27 of the Superior Courts Act, 2013 ('the Act'):¹

'Removal of proceedings from one Division to another or from one seat to another in same Division

(1) If any proceedings have been instituted in a Division or at a seat of 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 more appropriately heard or determined –

(i) at another seat of that 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.'

[3] The main actions were instituted in this court because of the location of the respective motor vehicle collisions. The actions could not have been instituted in the East London Circuit Court, which lacks the requisite jurisdiction. The basis for the applications is the place of business of the applicants' legal representatives (East London), the extra costs necessitated by the appointment of correspondents in Makhanda and the need for the applicants' legal practitioner to travel and be accommodated here. The deponent also avers that costs will be saved by the filing of documentation in East London rather than by incurring postage costs to Makhanda. In addition, the respondent's head office is in East London, and the applicants' orthopaedic surgeon is located there. In essence, it was submitted that

¹ Act 10 of 2013.

it would be convenient and cost-efficient to remove the main proceedings from this court to the East London Circuit Court.

[4] I have previously considered identical arguments in a matter argued before me during November 2021. As in that instance, I find myself unable to agree with counsel's submissions and the applications stand to be dismissed in my view. I suggested to counsel that it might be appropriate for me to provide written reasons for my decision on this occasion, also to ensure that counsel moving similar applications in future can at least bring this line of reasoning to the attention of presiding officers. I understand that orders granting similar relief may have been granted on occasion in the past and consider it important that the position is clarified. The reasons for my approach follow.

[5] The Constitution of the Republic of South Africa, 1996, ('the Constitution') was amended in 2012 to constitute a single High Court in South Africa.² The Act, following suit, abolished local divisions and constituted the High Court in its present divisions,³ corresponding to the nine provinces, with main seats in each division and some local seats.⁴ The main seat of the Eastern Cape Division is Grahamstown.⁵ Erstwhile local divisions (the South-Eastern Cape Local Division, the Witwatersrand Local Division and the Durban and Coast Local Division, with their seats in Port Elizabeth,⁶ Johannesburg and Durban, respectively) were separately constituted as High Courts prior to the Act establishing a single High Court for South Africa. Following the abolition of local divisions, those courts, and those in Mthatha, Bhisho and Thohoyandou, are now 'local seats' of the provincial divisions.⁷ As the SCA held in *Murray NO and others v African Global Holdings (Pty) Ltd and others*, 'They are not separate courts and it is no longer appropriate to refer to them as such or to describe them as local divisions'.⁸

² S 166(c) of the Constitution. For a useful synopsis of the history of the Act and its application in the Eastern Cape Division, see the judgment of Chetty J in *Them bani Wholesalers v September 2014* (5) SA 51 (E).

³ 'Division' is defined in the Act to mean 'any Division of the High Court', and 'High Court' is defined to mean 'the High Court of South Africa referred to in section 6(1)'.
⁴ *Murray NO and others v African Global Holdings (Pty) Ltd and others 2020* (2) SA 93 (SCA) para 15.

⁵ S 6(1)(a), read with s 50(1)(b) of the Act. It may be noted that the name 'Grahamstown' has been changed to 'Makhanda' and that legal proceedings challenging this name-change are ongoing.

⁶ Now Gqeberha.

⁷ S 50(1)(a), (c) and (d) of the Act.

⁸ *Murray NO and others v African Global Holdings (Pty) Ltd and others* op cit para 18.

[6] It is the responsibility of the Minister of Justice and Correctional Services ('the Minister'), after consultation with the Judicial Service Commission ('JSC'), to determine the area under the jurisdiction of a division by notice in the Government Gazette.⁹ Importantly, the Minister may, after consultation with the Judicial Service Commission, by notice in the Gazette establish 'one or more local seats for a Division, in addition to the main seats ... and determine the area under the jurisdiction of such a local seat ...'¹⁰

[7] A Judge President of a division may, after consultation with the Minister, hold a sitting for the hearing of any matter at a place other than at the seat or a local seat of the division when it is expedient or in the interests of justice to do so.¹¹ The Judge President may also establish a 'circuit court of the Division',¹² by establishing circuit districts for the adjudication of civil and criminal matters by notice in the Gazette.¹³

[8] S 7(3) of the now repealed Supreme Court Act, 1959¹⁴ provided that such courts were to be known as 'the circuit local division' for the district in question. The statute provided specifically that such courts were deemed, for all purposes, to be a local division. The East London 'circuit local division' was established for the Eastern Cape Division on this basis.¹⁵ The Circuit Court Rules 'Regulating the conduct of the proceedings of the several provincial and local divisions of the Supreme Court of South Africa relating to Circuit Courts' were made in terms of s 43(2)(a) of the now repealed Supreme Court Act, 1959.¹⁶ 'Circuit court' was defined with reference to the now repealed s 7 of that Act, to be 'held within the area of jurisdiction of the provincial or local division'. As indicated, the nomenclature of a

⁹ S 6(3)(a) of the Act. The Minister may, in the same manner, amend or withdraw such a notice.

¹⁰ S 6(3)(c) of the Act.

¹¹ S 6(7) of the Act.

¹² S 7(3) of the Act.

¹³ S 7(1) of the Act. In each circuit district of a division there must be held, at least twice a year and at such times and places as may be determined by the Judge President concerned, a court which must be presided over by a judge of that division: s 7(2) of the Act.

¹⁴ Act 59 of 1959.

¹⁵ Four civil terms and four criminal terms are held during the year and two motion courts are provided each month throughout the year (sitting on the second and fourth Tuesday of every month).

¹⁶ S 51 of the Act provides that the rules applicable to the various High Courts immediately before the commencement of this section remain in force to the extent that they are not inconsistent with the Act, until repealed or amended.

'local division' is now inappropriate given the wording of s 166(c) of the Constitution, read with ss 6 and 50 of the Act. Any circuit court established under any law repealed by the Act and in existence immediately before the commencement of the Act is deemed to have been duly established in terms of the Act 'as a Circuit Court of the Division concerned'.¹⁷

[9] It must be accepted that the legislature, in repealing the Supreme Court Act, 1959 and enacting the Act, acted deliberately in crafting the provisos dealing with circuit courts differently than it had done in the past. A court held in a circuit district is now called a circuit court of the division in question. More importantly, the deeming provision that resulted in a circuit court for the district being equated to a local division has been repealed. The powers of circuit courts are also affected by other sections of the Act. For example, neither s 7 of the Act, nor any other section thereof, provides for the constitution of a circuit court before more than one judge. It has therefore been submitted that a circuit court cannot hear appeals or any other cases where a quorum of two or more judges is required.¹⁸ In the Eastern Cape Division, this is confirmed explicitly by Rule 18(c) of the Joint Rules of Practice. In addition, these rules provide that no bail appeals or applications for the admission, suspension, striking-off or readmission of a legal practitioner will be heard in a 'circuit local division' (now to be read as 'circuit court of the division').¹⁹ There is a distinction between the matters that may be heard by the main seat of the division, the local seats of the division and the circuit courts of the division.

[10] Section 27 of the Act must be considered against this backdrop. Leaving aside proceedings removed from one division to another, it is possible for instituted proceedings to be heard or determined by a different court within the division. There are two possible reasons for this. Firstly, that it appears to the court that the proceedings should have been instituted at another seat of the division. Secondly, that the court considers it to be more convenient or more appropriate for the proceedings to be heard or determined at another seat of the division.²⁰ The court

¹⁷ S 50(3) of the Act.

¹⁸ See DE van Loggerenberg *Erasmus: Superior Court Practice* RS 12 (2020) A2-10F.

¹⁹ Similarly, reference to the 'Joint Rules of Practice for the High Courts of the Eastern Cape Province' should be read as 'Joint Rules of Practice for the Eastern Cape Division of the High Court of South Africa': s 6(a) of the Act.

²⁰ Ss 27(1)(a) and (b) of the Act.

may then order such proceedings to be removed to the other seat upon application by any party, and after hearing all other parties.²¹

[11] As indicated, in addition to the main seats referred to in s 6(1) of the Act, it is open for the Minister, after consultation with the JSC, to establish one or more 'local seats for a Division' and determine the areas under their jurisdiction.²² In the Eastern Cape Division, it is only the Eastern Cape High Court, Bhisho, the Eastern Cape High Court, Mthatha, and the Eastern Cape High Court, Port Elizabeth, that became local seats of this division when the Act commenced.²³ This was subject to the Minister's power to amend or withdraw this by notice in the Gazette.²⁴ The East London 'circuit local division' is not a 'local seat' of the division. It has not been established by the Minister as such, following consultation with the JSC. It is, in fact, a circuit court of the division. The power of a court to remove proceedings from one seat in a division, in terms of s 27 of the Act, is restricted to removal to 'another seat'. This must relate to 'local seats' established by the Minister for a division in terms of s 6(3)(c) of the Act.

[12] In coming to this conclusion, I have considered the suggestion by Van Loggerenberg in *Erasmus* that 'the words "seat of a Division" and "another seat of the Division" in s 27(1) include the place for the holding of a circuit court as determined by the Judge President of a division in terms of s 7(2) of the Act'. I have been unable to find any authorities to support such an interpretation. The authority relied upon by the learned author for the submission that a matter may be removed from a division of the High Court to a circuit court is *Rainer v Rainer*.²⁵ That matter was an unopposed application that considered whether the provincial division had the authority to remove a matter to one circuit court in circumstances where both parties resided in a district covered by a different circuit court. After

²¹ S 27(1) of the Act. An order for removal under subs (1) must be transmitted to the registrar of the court to which the removal is ordered, and upon receipt of such order that court may hear and determine the proceedings in question: s 27(2) of the Act.

²² S 6(3)(c) of the Act.

²³ These local seats are endowed with concurrent jurisdiction over smaller areas than that enjoyed by the division's main seat: *Them bani Wholesalers v September* op cit para 10, cited with approval in *The Standard Bank of SA Ltd and others v Thobejane and others* and *The Standard Bank of SA Ltd v Gqirana NO and another* [2021] ZASCA 92 para 33.

²⁴ S 50(1) of the Act, read with s 6(3)(a).

²⁵ 1941 CPD 391.

referring to the legislation applicable at the time, the court held that this was permissible. In *Van Niekerk v Van Niekerk*,²⁶ Van Winsen J considered the balance of convenience to be strongly in favour of a matter being removed from a provincial division to a circuit court where the parties and witnesses resided. There was no reference to the provisions of the Supreme Court Act, 1959 in the judgment.

[13] I consider myself bound to consider the question of removal based on s 27 of the Act, which is the issue that appears from the papers, rather than based on any inherent power the court might have to regulate the proceedings before it. In *Them bani Wholesalers v September*, Chetty J noted that the constitutional right to access to justice could not ‘... be invoked to endow a local seat with original territorial jurisdiction when the Act itself merely vests it with concurrent jurisdiction ...’²⁷ The learned judge went on to add that the s 27 power to order the removal of a matter from one court to another was discretionary, citing authority premised on the wording of now repealed proclamations and the Supreme Court Act. Those authorities, including the judgment of Plasket J in *Davis v Denton*, which considered removal of an action from Grahamstown to Port Elizabeth, ground the power of the court to remove matters to another court firmly in legislation.²⁸ It is out of legislation that the ‘balance of convenience’ principle emerges. In the context of s 27 of the Act, the convenience principle is restricted to instances where application is made²⁹ for the removal of proceedings to another division or seat, and finds no application in the matters before me.

[14] It is now firmly established that a High Court has no power to exercise a discretion to decline to hear a matter falling within its jurisdiction on the ground that another court has concurrent jurisdiction.³⁰ A High Court is therefore obliged by law to hear any matter that falls within its jurisdiction. This includes the obligation on the

²⁶ 1969 (2) SA 430 (C).

²⁷ *Them bani Wholesalers v September* op cit para 11. Also see *The Standard Bank of SA Ltd and others v Thobejane and others* and *The Standard Bank of SA Ltd v Gqirana NO and another* op cit paras 50, 51.

²⁸ *Davis v Denton* 2008] ZAECHC 138 para 5.

²⁹ For the suggestion that the court may exercise such power *mero motu*, see *Them bani Wholesalers v September* op cit para 13. *Cf*

³⁰ *The Standard Bank of SA Ltd and others v Thobejane and others* and *The Standard Bank of SA Ltd v Gqirana NO and another* op cit para 25: it must be the plaintiff who chooses a court of competent jurisdiction and the granting of an order for the transfer of legal proceedings from a High Court to a Magistrate’s Court, in the absence of plaintiff’s consent, would infringe upon this right.

part of a main seat to entertain matters that fall within the jurisdiction of a local seat of a division, because the main seat has concurrent jurisdiction.³¹ It is a fundamental misconception to suggest that it may decline to hear a matter which is within its jurisdiction.³² It is, furthermore, untenable to argue that a High Court enjoys a discretion to do so based on s 169 of the Constitution.³³ It is equally misconceived to invoke the concept of the High Court's inherent jurisdiction to regulate its own process to support the applicants' arguments. The inherent jurisdiction of the High Court can only be applied, with caution, to address a lacuna which, in the absence of judicial intervention, would result in injustice.³⁴ It cannot be the basis for overtaking the clear intention of the legislature. As the Constitutional Court held in *Phillips and others v National Director of Public Prosecutions*:³⁵

'...[A]n Act of Parliament cannot simply be ignored and reliance placed directly on a provision in the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common law.'

[15] Even if I was somehow empowered to consider whether it was more convenient or appropriate to hear the applications in the East London Circuit Court, I would answer that question in the negative in these matters. In determining the removal on that basis, the court must have regard to the convenience of the parties, the convenience of the court and the general disposal of litigation.³⁶ In *Mekula v Road Accident Fund*, Pickering J considered similar arguments as that advanced by the applicants in these matters, but in the context of a s 27 application for removal of a matter from Grahamstown to Port Elizabeth.³⁷ The way the learned judge disposed of the arguments advanced in respect of costs, consultation with experts and convenience is instructive, and should be considered by legal

³¹ *The Standard Bank of SA Ltd and others v Thobejane and others and The Standard Bank of SA Ltd v Gqirana NO and another* op cit para 88.

³² *The Standard Bank of SA Ltd and others v Thobejane and others and The Standard Bank of SA Ltd v Gqirana NO and another* op cit para 39.

³³ *The Standard Bank of SA Ltd and others v Thobejane and others and The Standard Bank of SA Ltd v Gqirana NO and another* ibid paras 40, 41: s 169(1) of the Constitution provides that the 'High Court of South Africa may decide' the types of matter listed in subs (a) and (b).

³⁴ *The Standard Bank of SA Ltd and others v Thobejane and others and The Standard Bank of SA Ltd v Gqirana NO and another* op cit paras 53-55.

³⁵ *Phillips and others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC) paras 47-51.

³⁶ See *Mulder v Beacon Island Shareblock Ltd* 1999 (2) SA 274 (C); *Nongovu NO v Road Accident Fund* 2007 (1) SA 59 (T) and *Mekula v Road Accident Fund* [2017] ZAECGHC 118 para 5.

³⁷ *Mekula v Road Accident Fund* ibid.

practitioners before launching applications, based solely on their own convenience, for removal in terms of s 27. It goes without saying that a party's choice of legal representatives is not a factor that is ordinarily relevant to the exercise of a discretion in terms of this section.³⁸

[16] It might be added that these applications were launched in this court because of the place where the motor vehicle collisions occurred. In the first instance the collision occurred in Mthatha, and in the second on the road between Cala and Tsomo. In both cases the main actions could not have been instituted in the East London Circuit Court because of a lack of jurisdiction. The applicants seek, effectively, to circumvent that jurisdictional difficulty by invoking s 27 of the Act. Given the wording of that section, and the difference between 'another seat' of that division and a 'circuit court of the division', they cannot succeed.

Order

[17] The applications are dismissed.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

³⁸ *Davis v Denton* op cit para 8.

Heard: 22 March 2022
Delivered: 29 March 2022

Appearances:

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