IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MAKHANDA)

REPORTABLE

Case no: 1795/2020

In the matter between:

GILBERT KAMUPUNGU **Applicant**

AND

THE ROAD ACCIDENT FUND **Respondent**

Case no: 1792/2021

and in the matter between:

SINESIPHO LUKHANYO MADUBELA **Applicant**

AND

THE ROAD ACCIDENT FUND **Respondent**

Coram: D van Zyl DJP, T V Norman and V P Noncembu JJ

Heard: 2 December 2022

Delivered: 24 March 2023

JUDGMENT (FULL COURT)

D VAN ZYL DJP:

[1] Two applications serve before this court. The primary question for decision, in both applications, is whether a circuit court is a seat of a division of the High Court for purposes of section 27(1)(b) of the Superior Courts Act[1] (the Act). The applicants are applying for an order transferring their actions for damages against the Road Accident Fund (the RAF) from the seat of the Eastern Cape Division of the High Court in Makhanda, to the East London Circuit Court. Section 27 of the Act gives the High Court the authority to order, upon application by a party to civil proceedings before it, that the proceedings be removed from one division to another division, or from one seat to another seat in the same division. The section reads as follows:

"27 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 the 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.

[1] Act 10 of 2013.

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] The applications are based on sub-paragraph (b) in that it is contended by the applicants that it would be convenient and cost-effective to remove the proceedings from this court to the East London Circuit Court. According to the interpretation given to a similar provision in the Supreme Court Act, 1959 (the Supreme Court Act)[2] and the Interim Rationalisation of Jurisdiction of the High Courts Act (the Interim Rationalisation Act),[3] which must logically also apply to section 27(1)(b), this section deals with the situation **"where the transferring court has jurisdiction to determine the main dispute. Yet it is asked to transfer the matter to the transferee court for the sake of convenience and it matters not whether the transferee court has original jurisdiction to determine the main dispute."**[4] Section 27(1)(a) on the other hand deals with the situation where the proceedings should have been instituted in the transferee court, with the result that it is that court that must have original jurisdiction, and not the transferring court.[5] The crisp issue raised by the applications before us is whether section 27(1)(b) gives the High Court the discretionary power to order the transfer of civil proceedings

[2] Act 59 of 1959.

[3] At 41 of 2001.

[4] Brand JA in Road Accident Fund v Rampukar 2008 (2) SA 534 (SCA) at para [11]. See also Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation) 1987 (4) SA 883 (A) at 888 A – B.

[5] Ibid.

from a seat of the division to a circuit court of that division for reasons of convenience, and if so, whether this Court must, on the facts placed before it, and in the exercise of its discretion, order the transfer of the applicants' actions against the RAF to the East London Circuit Court.

[3] The jurisdiction[6] of the court to order the removal of proceedings from one court to another is based on statute[7]. In *Voko v The Road Accident Fund*[8] (Voko) this Court, sitting as a single judge, dealt with an application in terms of section 27(1)(b) of the Act, and found that it must be accepted that the repeal of the Supreme Court Act, by the legislature and in crafting the provisions in the Act relating to circuit courts differently to those which previously existed, it was done so intentionally. The differences in the relevant sections of the two pieces of legislation referred to by the Court are that a circuit district as envisaged in the Supreme Court Act is now called a circuit court of the division in question, and the deeming provision in the repealed Supreme Court Act that resulted in a circuit court for the district being regarded as a local division, is now not part of the Act. It held that on a reading of section 27(1)(b) of the Act, the power of a court to transfer civil proceedings is restricted to the removal of

[6] The word **"jurisdiction"** is used here in the sense of the power or competence of the court to entertain proceedings and not the limitations placed thereon by the original jurisdiction of the court in the territorial sense of the word. **"Jurisdiction means the power or competence of a Court to hear and determine an issue between parties, and limitations may be put upon such power in relation to territory, subject matter, amount in dispute, parties etc."** *Watermeyer CJ in Graaf Reinet Municipality v van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424.

[7] See *Ying Woon and Another v Secretary for Transport and Others (Ying Woon)* [1964] (1) SA 103 (N).

[8] (06/2022) [2022] ZAECGHC 33.

such proceedings to **"another seat"** of a division and that a seat is a seat of a division as established by the cabinet member responsible for the administration of justice (the Minister)[9] in terms of section 6(3)(c) of the Act. In the result, this Court concluded that because the East London Circuit Court was not established in terms of section 6(3)(a), it is not a seat of the Eastern Cape Division, and accordingly it lacked the authority to transfer civil proceedings to that court.

[4] Consequent upon the decision in Voko, the Judge President, acting in terms of Section (4)(1)(b) of the Act, referred the present two applications for hearing to the Full Court. The RAF elected not to oppose the applications. At the outset, I wish to extend our gratitude to counsel for the applicants and the two *amici curiae* nominated by the Society of Advocates at the request of the Court for their valuable assistance in deciding the issues raised.

[5] The primary question for decision is one of interpretation. It essentially requires a determination of the meaning and effect of the words **"at another seat of that Division"** in section 27(1)(b) of the Act. A seat is not defined in the Act. Simply put, the question is whether a seat of the division must be confined to a main or local seat as established for a division by the Minister in terms of section 6(3)(a) of the Act, or whether it must be given the wider meaning of the statutorily determined location where a court of a division exercises the

[9] The Minister of Justice and Correctional Services.

jurisdiction of that division as determined by the Act. It was submitted by both counsel for the applicants and the *amici curiae* that the latter interpretation is more consistent with the ordinary grammatical meaning of the word **"seat"**, the context in which it is used, and the purpose of section 27 of the Act.

[6] What the proper approach to the interpretation of a statute or any other document is, was dealt with by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*,[10] and received the approval of the Constitutional Court in *Cool Ideas 1186 CC v Hubbard*.[11] Aptly described as a **"unitary endeavour"** in *Betterbridge (Pty) Ltd v Mosilo*,[12] it is the process of attributing meaning to the words used in the legislation by giving consideration to the **"nature of the document, … the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbussinesslike results or undermine the apparent purpose of the document."**[13] This approach accords with the second of the two approaches mentioned by

[10] 2012 (4) SA 593 (SCA) at para [18].

[11] 2014 (4) SA 474 (CC) at para [28]. See Also *Municipal Employees Pension Fund and Others v Natal Joint Pension Fund* (2017) ZACC 43.

[12] 2015 (2) SA 396 (GP) at para [8].

[13] *Endumeni supra* fn 10 at para [18].

Schneiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another (Jaga*),[14] namely that from the outset one considers the context and the language together, and not the one after the other. Of further importance, particularly so in the context of the present matter, is the point emphasised by Schreiner JA in Jaga that **"the context"** is not limited **"to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the subject matter of the statute, its apparent scope and purpose, and, within limits, its background."**[15]

[7] The interpretation suggested by counsel is in my view the preferred meaning to be attributed to the words **"at another seat of that Division"** in section 27, as opposed to it being given a meaning that is primarily focused on the drawing of a distinction between a seat of the Division and a circuit court as envisaged in sections 6 and 7 of the Act. The words used in the section are grammatically capable of the wider meaning that counsel argued it should be given. It is a construction that accords more with the present structure of the High Court; the purpose of circuit courts; the purpose of section 27; its background; and the constitutional imperative that **"all courts, including their structure composition, functioning and jurisdiction, and all relevant legislation, must be**

[14] 1950 (4) SA 653 (A) at 662 G – 663 A.

[15] At 662 G-H.

rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution."[16]

[8] What follows are my reasons for reaching this conclusion. The court in Voko considered the legislative framework that deals with the establishment of the divisions of the High Court,[17] the main and local seats of a division and the circuit courts, and the legislation that preceded the present dispensation. The history of the structure of the High Court is therefore a good starting point. Before 1994, the judicial authority of the Republic was vested in a supreme court known as the Supreme Court of South Africa. It consisted of an Appellate Division and such provincial and local divisions as may be prescribed by law.[18] In terms of the Supreme Court Act the provincial and local divisions each had a defined territorial area of jurisdiction and a seat.[19] There were in addition, three permanent local divisions each with a seat and its own territorial area of jurisdiction placed within the jurisdictional area of a provincial division.[20] The provincial divisions exercised concurrent jurisdiction in the areas of jurisdiction of the local divisions.[21]

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[16] Paragraph 16(6)(a) of Schedule 6 to the Constitution.

[17] The history of what is now the Eastern Cape Division of the High Court, and the status of the seats created by the Act is extensively dealt with in *Thembani Wholesalers v September* 2014 (5) SA 51 (ECG).

[18] Section 94(1) of the Republic of South Africa Constitution Act, Act 32 of 1961.

[19] Section 2 of the Supreme Court Act.

[20] The First Schedule to the Supreme Court Act.

[21] Section 6(2) of the Supreme Court Act.

[9] Circuit courts were dealt with in section 7 of the Supreme Court Act. It gave authority to the Judge President to divide the area of jurisdiction of such division into circuit districts, or alter the boundaries of such districts from time to time. A court, which was to be presided over by a judge of the division, in which the district was situated, was to be held at least twice a year. Such a court was known as a circuit local division, and importantly, was **"for all purposes deemed to be a local division."**

[10] Acting in terms of section 7(3) of the now repealed Supreme Court Act, the Judge President of the then Eastern Cape Division of the Supreme Court in 1988 divided the area of jurisdiction of the division into a number of circuit districts.[22] This included the East London Circuit District with its territorial area confined to the magisterial district of East London. The Chief Justice subsequently issued court rules which *inter alia* serve to regulate the issue of process in a circuit court, and making the Uniform Rules of Court, **"in so far as they are appropriate and can be applied *mutatis mutandis*"** applicable to civil proceedings before any circuit court. The seat of the circuit court is defined in the Rules as **"any place determined in terms of section 7(2)"** of the Supreme Court

[22] Notice No 48 of 1988 published in Government Gazette No 11096 dated 15 January 1988.

Act. These rules survived the repeal of the Supreme Court Act owing to the transitional provisions in section 51 of the Act.

[11] In accordance with section 7(3) of the Supreme Court Act, the circuit district for East London was known as the East London Local Circuit Division with its seat in East London. Its continued existence post the Constitution and the repeal of the Supreme Court Act by the Act was ensured by the transitional provisions in Schedule 6 to the Constitution, and in section 50(3) of the Act. The latter section provides that any circuit court in existence at the time of the coming into operation of the Act **"shall be deemed to have been duly established in terms of this Act as a Circuit Court of the Division concerned."** This subsequently necessitated the renaming of the East London Local Circuit Division to the East London Circuit Court.

[12] The starting point under the new dispensation is the Constitution. It provides for a single High Court of South Africa. [23] The structure of the

[23] Section 166 of the Constitution. The hierarchal structure of the courts of the Republic is listed as:

" (a) the Constitutional Court:

(b) the Supreme Court of Appeal;

(c) the High Courts including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;

(d) the Magistrates' Courts; and

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts."

Superior Courts is dealt with in Chapter 8 of the Constitution. Section 169 provides that the High Court shall consist of such divisions that are to be established by an Act of parliament, **"with one or more seats in a Division,"**[24] and a Division and its seats must be assigned a territorial area of jurisdictions.[25] Following a number of amendments to the Supreme Court Act over the years and the introduction of the Interim Rationalisation Act, the Act was finally assented to in August 2013. As stated in Nedbank v Norris,[26] the Act marked "**a significant step in the reorganisation and renationalisation of Superior courts in the post-1994 constitutional democratic order, "**and was of **"particular moment to the Eastern Cape since, prior to the enactment of the Superior Courts Act, the superior courts in the province exhibited all of the characteristics of a fragmented structure and jurisdiction."**[27] In compliance with the Constitution, the Act repealed the Supreme Court Act, and in section 6(1), established a division for each of the nine provinces with a main seat in each division.

[13] Section 6(3)(c) of the Act gives the Minister the power, after consultation with the Judicial Service Commission, **"to establish one or more local seats for a Division, in addition to the main seats referred to in subsection (1), and determine the area under the jurisdiction of such a local seat,"** In terms of section 50(1) of the Act, and at its commencement, the High Court of Makhanda became the main

[24] Section 169(2) (a).

[25] Section 169 (2)(b).

[26] 2016 (3) SA 568 (ECP).

[27] At paras [11] and [12].

seat of the Eastern Cape Division, and the High Courts of Bhisho, Mthatha and Gqeberha became local seats of the Eastern Cape Division.[28] The area of jurisdiction of each of those courts became the area of jurisdiction or part of the area of jurisdiction of the Division. Section 50 must be read with section 21(1), which provides that a division has jurisdiction over all persons residing or being in, and in relation to all causes arising or offences triable, within its area of jurisdiction. In *Thembani Wholesalers v September*,[29] this Court held that the territorial area of the main seat encompasses the whole of the area of jurisdiction of the Eastern Cape Division; and that the local seats have concurrent jurisdiction over smaller areas than that enjoyed by the main seat.

[14] Like the Supreme Court Act, the Act provides for the creation of circuit courts. A circuit court is established in terms of section 7 of the Act.[30] For the most part, the wording of the section is similar to that of Section 7 of the Supreme Court Act. Subsection (1) gives the Judge President of a division the

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[28] Section 50(1)(a) to (d) read with subsection (2).

[29] Supra fn 17 at para [10]. See also *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana NO and Another* 2021 (6) SA 403 (SCA) at para [33].

[30] It reads as follows:

"7. Circuit Courts

(1) The Judge President of a Division may by notice in the Gazette within the area under the jurisdiction of that Division establish circuit districts for the adjudication of civil or criminal matters, and may by like notice alter the boundaries on any district.

(2) 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 the Judge of that Division.

(3) A court referred to in subsection (2) is called a circuit court of the Division in question."

power to, by notice in the gazette, establish circuit districts within the area of jurisdiction of that division for the adjudication of civil and criminal matters. In terms of subsection (2) **"a circuit "court", which must be presided over by a judge of that Division,"** must sit in each circuit district at least twice a year at such times and places as may be determined by the Judge President of that division. Subsection (3) provides that a court referred to in the section will be called a circuit court of the division in question. Subsection (3) presents a departure from its equivalent in section 7(3) of the Supreme Court Act, in that a court sitting as a circuit district is no longer known as a circuit local division and deemed to be a local division. It is now simply called a **"circuit court of the Division in question."** In paragraph 16, I deal with the reason for the change in the wording of the section.

[15] In *Mhlongo and Others v Mokoena N O and Others (Mhlongo),*[31] the Supreme Court of Appeal had the opportunity to deal with section 7 of the Act. It made two findings. The first is that the authority of a Judge President to establish circuit districts is circumscribed by the section, and he cannot exercise more power than that given to him by the section. The second finding relates to the status of circuit districts. The court found that circuit districts are not self-standing divisions of the High Court. The result, in the context of the issues raised in *Mhlongo*, is that the division retains its territorial jurisdiction over the

[31] Case no 723/2020 [2022] ZASCA 78.

whole of the area determined by the Minister in terms of section 6(3) of the Act, inclusive of the area, which the Judge President determined to be the boundaries of the circuit district in question. It is accordingly not open to a court of the division to decline to hear matters in respect of which it has concurrent jurisdiction with a circuit court.

[16] The nature of the court structure created by the Constitution and the Act, removed any significance that may be attached to the differences in the wording of section 7(3) of the Act and the Supreme Court Act. The existence of the deeming provision in section 7(3) of the Supreme Court Act must be seen in the context of the fact that the repealed Supreme Court consisted of provincial and local divisions, each with its own seat. The distinction between provincial and local divisions was reflected in the provisions of the Supreme Court Act. The equivalent provision to section 27 that made provision for the removal of proceedings, was section 9 of the Supreme Court Act.[32] In line with the structure of the Supreme Court, it restricted the authority of a court to order the removal of proceedings which were "**instituted in any provincial or local**

[32] The relevant part is sub-section (1). It reads:

> **"9 Removal of proceedings from the division to another**
>
> **(1) If any civil cause, proceeding or matter has been instituted in an provincial or local division, and it is made to appear to the court concerned that the same may be more convenient 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, proceedings or matter to be removed to that other division."**

division" to another "**division**". As a circuit court is not a division or local division, the deeming provision enabled the transfer of a matter to a circuit court, or from a circuit court to another division within the province, and to another division in another province.

[17] It is evident from the court structure envisaged in the Constitution, and given effect to by the Act, that the erstwhile distinction between a **"provincial"** and a **"local"** division is done away with. A **"division"** consists of the Judge President, one or more Deputy Judges President and so many other judges as may be determined by the President of the Republic, each with headquarters within the area of jurisdiction of the division.[33] In terms of section 14 of the Act, a "**court of the Division"** must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter.[34] For the hearing of a criminal matter as a court of first instance, a court of the division must be constituted in the manner prescribed in the applicable law relating to procedure in criminal matters.[35]

[18] A court sitting at a location in a circuit district as established in the manner provided in section 7 of the Act, is presided over by a judge of the division in which the circuit district is situated.[36] Subject to the limitation in

[33] Section 6(2).

[34] Section 14(1)(a).

[35] Section 14(2).

[36] Section 7 (2) of the Act.

relation to territory and the matters it may or may not hear, a court sitting as a circuit court in a circuit district at a location determined by the Judge President, is a court of similar status to any of the other courts of the division, and cannot be anything other than a **"court of the Division"** as envisaged in the Act. As correctly stated in *Nedbank v Norris*, the effect of the court structure created by the Act **"is to create a single unitary division in which … the courts of the division exercise the jurisdiction of the division, subject only to territorial limitation based on their location at a seat of the division."**[37] In *Murray NNO and Others v African Global Holdings (Pty) Ltd and Others*[38] the Supreme Court of Appeal also emphasised, with reference to the seats of the division, that: **"They are not separate courts and it is no longer appropriate to refer to them as such or to describe them as local divisions."**[39]

[19] A seat referred to in section 6 is therefore not a separate court of the division. In the scheme of the Act the creation of a seat of the division in section 6, and a circuit district in section 7, primarily serves to determine the location where the courts of the division as contemplated in the Act must sit to entertain civil or criminal proceedings, and the jurisdiction of such a court when sitting at that location. In my view, there exists no logical reason to distinguish between a court of a division sitting at one of the seats determined by the

[37] *Supra* fn 27 at para [15].

[38] 2020 (2) SA 93 (SCA).

[39] At para [18].

Minister in section 6, and a court of a circuit district sitting at a location determined in terms of section 7 by the Judge President, a function delegated to him as a person who is better placed to determine the location where there is a need for a court of the division to sit occasionally at a place away from its principal seats. As is evident from the decision in *Mhlongo*, circuit courts are an integral part of the court structure created by the Act. It is a conclusion that is consistent with the constitutional imperative that the court structure "**must be rationalised with a view to establishing a judicial system suited to the requirements of the Constitution.**"[40] The court structure envisaged in the legislative framework gives effect to the right of access to justice in Section 34[41] of the Bill of Rights by making the courts more accessible to the people who reside in the division. It is achieved by creating, in addition to a main seat, a number of local seats and circuit courts at locations in a division that reduces travel and costs by bringing the courts of the division closer to the people.

[20] The notion that proceedings may be transferred from one court to another, based on considerations of convenience of the parties, is consistent with the primary purpose of circuit courts of settling disputes at locations that are conveniently proximate to the litigants. The practice of judges of superior courts

[40] Paragraph 16(6)(a) of Schedule 6 to the Constitution. See also section 2(1) of the Act.

[41] "**Access to courts**

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

travelling from one venue to another to hear cases away from the permanent seat of the court is based in legislation and has a long history. Circuit courts were first established in 1811 by proclamation in what was then known as the Cape Colony. This was later replaced by circuit courts established under the First Charter of Justice in 1827, a provision that was repeated in later legislation.[42] Menzies J explained the purpose of the introduction of circuit courts as follows: **"To bring the administration of criminal and civil justice by superior tribunals of the colony as near to the residences of the inhabitants as the extent and circumstance of the colony would permit; and that it was considered that the institution of the circuit courts was highly expedient, as it would necessarily give a very great part of the population an opportunity of witnessing the administration of justice by the superior tribunals which they could not possibly otherwise have had; and that a knowledge of the rules and principles in which civil and criminal jurisdiction was administered by Great Britain, would thus be generally communicated to the great benefit and advantage of the colony; and also that a closer and more effectual check over the inferior tribunals would thus be kept up than could otherwise be had, besides the advantage the inferior judges themselves would obtain by witnessing the proceedings of the circuit courts."**

[21] The removal of proceedings in terms of section 27(1)(b) from a main seat or a local seat to what is the seat of a circuit court, serves to facilitate the purpose of circuit courts of bringing the courts nearer to the people. A narrow

[42] See Erasmus, HJ. Circuit Courts in the Cape Colony during the Nineteenth Century: Hazards and achievements Fundamina (Pretoria) Unisa Press [online] 2013 vol.19, n.2. See Ying Woon *supra* fn 3 at 106 C-E.

construction of the language used in the section would not promote the purpose of both the section itself, and or that of section 7, including the entrenched right in section 34 of the Constitution. Instead, a construction that is reasonably available and would promote the more effective attainment of the purpose of these provisions must be preferred to an interpretation that would otherwise hamper its realisation.[43]

[22] Another consideration is that a narrow interpretation of the words **"a seat of the division"** is problematic in the context of the rest of section 27. It is unavoidable that any interpretation given to those words in sub-paragraph (1)(b) must also find application to the rest of the section. If that is done, it leads to an anomalous result. To explain this, it is necessary to look at what the purpose of sub-paragraph 1(a) is. Sub-paragraph (1)(a) resembles the wording in sections 3(1)(a) of the now repealed Interim Rationalisation Act.[44] In *Road Accident Fund v Rampukar*[45]*(Rampukar)* the Supreme Court of Appeal found that it was intended to come to the assistance of a litigant who mistakenly institutes civil proceedings in the incorrect court (the transferring court) by granting that court

[43] *Neethling v Klopper en Andere* 1967(4) SA 459 (A) at 464H.

[44] It read: **Transfer of proceedings from one High Court to another**

3. (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 15

(b) would be more conveniently or more appropriately heard or determined in the Court may, upon application by any party thereto and after hearing all other pades thereto, order such proceedings to be removed to that other High Court.

[45] *Rampukar* supra fn 4 at para [10].

the discretion to come to his aid and order the removal of the proceedings to the correct court (the transferee court). The most obvious purpose of the section, the court said, was to deal with the situation where the court in which the proceedings were instituted lacked jurisdiction to determine the dispute between the parties.[46]

[23] The introduction of sub-paragraph 1(a) in section 3 of the Interim Rationalisation Act and its equivalent in section 27(1)(a) of the Act was intended to address the situation created by the finding in several court decisions that where a court lacked jurisdiction to determine the dispute raised by the proceedings before it, it also did not have the jurisdiction, in the sense of authority or competence, to transfer the matter to another division or court that has jurisdiction to deal with the matter.[47] This meant that the proceedings had to be started afresh in the division having jurisdiction. This had serious implications for a plaintiff in that the proceedings instituted in the wrong Court would not have served to interrupt prescription. Section 27(1)(a) now affords the transferring court the limited jurisdiction which it otherwise would not have had to transfer a matter to the court that has jurisdiction to determine it.[48] In

[46] Ibid.

[47] See *Rampukar supra* fn 4 at para [8]; *Ying Woon supra* fn 7 at 108 c –I and *Welgemoed and Another, NNO v The Master and Another* 1976 (1) SA 513 (T) at 523A-D

[48] *Rampukar* fn 4 at paras [10] and [11]. See also Harms Civil Procedure in the Supreme Court at page A – 35.

Ngqula v South African Airways (Pty) Ltd[49] the Supreme Court of Appeal left the question open whether it must follow that a defendant who is deprived of the right to object to the court's jurisdiction by the application of sub-paragraph 1(a), can as a result also not complain about the loss of any other advantage that he may otherwise have obtained by the fact that the proceedings were instituted in the wrong court, such as a plea of prescription. However, in *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[50] the Constitutional Court appears to have accepted, as a general proposition, that prescription is interrupted by the launching of proceedings in the wrong forum. The Court, with apparent approval, referred to *Kruger v Minster of Health and Others*[51] where the following was said; "**The continuation of applicant's action is governed by the rules which provide for transfer of a matter from one court to the other. It is my view that the institution of proceedings in a court with or without jurisdiction does interrupt prescription."**

[24] If a court of a division sitting at the seat of a circuit district is found not to be a seat of that division, it would create the anomaly that proceedings which were wrongly instituted in a circuit district would, as a result, not be proceedings instituted **"at a seat of a division"** that can be removed to another seat of the same division as envisaged by section 27(1)(a). This, as counsel correctly

[49] 2013(1) SA 155 (SCA) at para18.

[50] 2018 (5) BCLR 527 (CC).

[51] [2016] ZAFSHC 179.

in my view pointed out, would defeat the purpose of sub-paragraph 1(a) and the intention of the legislature to come to the assistance of those litigants who had chosen the wrong court, and who subsequently seek a transfer of a matter to another seat in a division that has jurisdiction to entertain the dispute.

[25] What is evident from the case law is that the authority of a court of a division to transfer civil proceedings to and from the circuit court has existed for well over a century.[52] Where the emphasis post 1994 has been on making justice accessible to everyone, there simply exists no logical reason for taking away the authority of a court of a division to order the removal of a civil matter to a circuit court for reasons of the convenience of the parties. Having regard to the apparent purpose of section 27, and the context in which it appears in the Act, a meaning that is available on the language used that is less restrictive is to be preferred to one that may otherwise lead to "**impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation."**[53]

[26] That then leaves the question whether an order must be granted for the removal of the applicant's actions to the East London Circuit Court. Section

[52] See for example *Rothman v Woodrow & Co* 1884 (4) ECD 32; *Sapiero v Lipschitz and Tooch* (1909) 26 SC 493 at 495; *Morgan v Eskine* 1913 EDL 94; *Raubenheimer v Smith* 18 EDC 476; *Swanepoel v De Klerk* 1911 CPD 508; *Jiran v African Canning & Packing Corp Ltd* 10 PH F44; cf *Waberski v Waberski* 1912 EDL 186; *Swallow v Swallow* 1947 (3) SA 3 (C); and *Radloff and Another v Union South West Africa Insurance Co Ltd* 1972 (4) SA 634 (E). See further Cilliers Loots and Nel op cit at page 171-172.

[53] *Endumeni supra* fn 10 at para 26.

27(1)(b) requires the applicants to show that their actions **"would be more conveniently or more appropriately"** heard by that court. The party who brings the application has the burden of proving that the matter would be more conveniently and appropriately determined elsewhere.[54] As mentioned earlier, the court is asked to exercise a discretionary power. It is a discretion that must be exercised upon a consideration of the facts placed before the court from which it appears that removal would be convenient or appropriate. **"The court must exercise the right of removal founded upon certain facts in which the parties to the suit** [are] **interested and not solely *suo arbitrio,* however justly followed."**[55]

[27] In reaching a decision, the relevant factors the court will consider are the balance of convenience of both parties, the convenience of the court, and the general disposal of the court business.[56] These factors are informed by considerations such as that: the parties and their witnesses are resident at the seat of the transferee court;[57] hearing a matter at the proposed venue may result in a saving of expenses and legal costs;[58] the possibility exists that an inspection

[54] *Swallow v Swallow* 1947 (3) SA 3 (C) at 5 and *Mekula v Road Accident Fund* [2017] ZAECGHC 118 at para [12].

[55] *Johnston v Byrne & Lamport* (1852) 1 Searle 157 at 160.

[56] *Walters Brick Industries Ltd v Henkes* 1938 WLD 4; *Thompson v Thompson* 1946 NPD 601; *Smith v Wilson & Another* 1949 (3) SA 537 (D); *Ying Woon* supra fn 7 at 111; *Mulder and Another v Beacon Island Shareblock Ltd* 1999 (2) SA 274 (C) at para [19] and Nongovu NO v Road Accident Fund 2007 (1) SA 59 (T) at para [31].

[57] *Morgan v Eskine* 1913 EDC 94; *Jiran v African gaming & Packing Corporation* Ltd (1927) 10 PH F44 (E); *Waberski v Waberski*: 1912 EDC 186 and *Swallow v Swallow supra* fn .

[58] *Morgan v Erskine* supra fn 57.

in loco will be held at the place of the seat of the transferee court; [59] or that **"the issue is a small one; and the parties are not wealthy."**[60]

[28] Applications for removal of a civil matter have been refused in circumstances **"where, from the nature and circumstances of the question at issue, it appeared desirable to have the matter tried at the earliest opportunity; where the applicant failed to show special grounds for removal; where there was a strong suspicion that the application was made for the purpose of delaying the action so as to defeat the enforcement of the claim; where, even though a great many witnesses resided at the circuit town, a question of law was involved. The court has also refused an application for removal to circuit where it was made so late that the other party would not have had sufficient time to prepare his case before circuit opened; and where it was uncertain whether a circuit and, if it was, when the court would sit."**[61]

[29] The factual basis for the two applications in the present matter, which is very much lacking in any detail, is that: the firm of attorneys who is representing both the applicants has its office in East London; prosecuting their claims in Makhanda would result in the applicants having to incur additional costs by the employment of correspondent attorneys and by the filing of court

[59] *Jenkins v Omdal* [1897] 12 EDC 217.

[60] *Jenkins v Omdal* supra fn 59.

[61] Cilliers, Loots and Nel op cit at page 773 and the cases cited by the authors in footnotes 33 to 38.

process at a location other than where their attorney is based; an orthopaedic surgeon who has his practice in East London has been instructed by the applicants to file an expert witness report; and the head office of the RAF is situated in East London that would result in it similarly benefitting from a saving of costs and expenses should the actions be tried in East London.

[30] The applicants failed to deal with and provide any information with regard to the waiting trial list and the disposal of cases at the East London Circuit Court. On the limited factual information provided, there are a number of considerations that militate against the removal of the actions from this Court on the sole basis of convenience. The first is that the pleadings have not closed. In fact, at the date of the launching of the present proceedings the RAF had not yet entered an appearance to defend. It is generally undesirable to grant an order for the removal of a case to another court before the close of pleadings. The reason lies in the fact that it is not clear what the nature and the extent of the issues are that the trial court will ultimately be asked to determine, and a compromise may be reached once the pleadings are closed. **"In my view it is generally undesirable to do so prior to the closure of pleadings. In the present case, for instance, there may well be a payment into Court which in turn may be accepted – thus terminating the litigation. Again it may appear, after pleadings have been closed, that there is no dispute in regard to the medical issues. Such considerations are compelling**

reasons why removal to a Division, which would not ordinarily be vested with jurisdiction in a particular action, should not be prematurely granted."[62]

[31] The issues may be of a legal or a factual nature, or a combination thereof. It is a consideration that is more accentuated by the fact that in the majority of claims against the RAF the claims become settled which would eliminate the need for witnesses to travel to Makhanda. Except possibly for the orthopaedic surgeon in respect of whom the applicants have apparently gone no further than to instruct to provide them with an expert evidence report, it is as a result not possible to determine with any measure of certainty who the other witnesses may be that would be required to testify at the trial, and importantly, where those witnesses would be located. Save for stating that the RAF has its head office in East London, a statement that is in itself factually incorrect, as it is common knowledge that the office in East London is a regional office where claims are lodged and some are handled, it is not possible for the applicants at this early stage to state anything that would not amount to mere speculation with regard to the number and location of any witnesses which they or the RAF may elect to call to testify at the trial.

[32] The applications for a transfer are therefore premature. It is consequently not possible to make a determination of the convenience that a transfer of the

[62] *Radloff and Another v Union South West Africa Insurance Co Ltd* supra fn 52 at 635 A.

actions may hold for either party, bearing in mind that a transfer should not be granted if the result is merely to shift the inconvenience from one party to another.[63] A second consideration that militates against a transfer of the actions is that a party's choice of legal representative is not a factor that is ordinarily relevant to the exercise of the Court's discretion. On the few facts placed before this Court the inescapable conclusion is that the applications are primarily motivated by the fact that the firm of attorneys whom the applicants have instructed to represent them, has its practice in East London. The applicants are not resident in East London. The one applicant, Mr Kamupungu, resides at Takana in the district of Elliott, and the other, Mr Madubela, at Crossroads Administrative area in Peddie. These are areas which are not in close proximity to East London at all.

[33] Further, the motor vehicle collisions which gave rise to the applicants claims for damages occurred in the areas where the applicants reside. It is as a result more likely than not that the two applicants and those witnesses, if any, who would be required to testify with regard to the issue of liability, will ultimately have to travel to the court where their actions would be tried. It begs the question why the applicants have chosen to employ an attorney that is not based at the court where they have elected to institute their actions. A final

[63] *Rothman v Woodrow & Co supra* fn 52 at 34.

consideration is that it is not the applicants' contention that they were constrained by considerations relating to the territorial jurisdiction of this Court to launch the proceedings in Makhanda. The locations where the collision are alleged to have occurred on the contrary raises the suspicion that the actions could also have been instituted at another seat(s) of the division that may be more proximate to where the applicants and their witnesses reside, and where the actions can more conveniently be tried.[64] These are matters that should have been dealt with fully by the applicants in their applications. Their failure to do so makes it impossible to determine where the convenience lies.

[34] In all the circumstances, I am not satisfied that the requirements of section 27(1)(b) of the Act have been met, and the applications for the removal of the two actions to the East London Circuit Court must accordingly be refused. There will be no order as to costs.

D VAN ZYL

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree:

[64] Section 15(2) of the Road Accident Fund Act 56 of 1996 provides that an action against the RAF may be brought in any competent court within whose area the occurrence which caused the injury or death took place.

_____
T V NORMAN
JUDGE OF THE HIGH COURT

I agree:

_____
V P NONCEMBU
JUDGE OF THE HIGH COURT

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