THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

In the matter between :

		Case No: 543/06
1)	**ROAD ACCIDENT FUND**	**APPELLANT**
	and	
	ISHWARDUTT RAMPUKAR	**RESPONDENT**
		Case No: 314/07
2)	**ROAD ACCIDENT FUND**	**APPELLANT**
	and	
	JENNIFER BUSIE GUMEDE	**RESPONDENT**

CORAM : **SCOTT, BRAND, MAYA JJA HURT *et* MHLANTLA AJJA**

HEARD : **8 NOVEMBER 2007**
DELIVERED : **28 NOVEMBER 2007**

Summary: Section 3(1)(a) of Act 41 of 2001 – jurisdiction under s 19 of Supreme Court Act 59 of 1959 on part of transferring court not a requirement – operation of section not limited to areas affected by change of jurisdiction under s 2 of the Act.

Neutral citation: This judgment may be referred to as *Road Accident Fund v Rampukar/Road Accident Fund v Gumede* [2007] SCA 148 (RSA)

JUDGMENT

BRAND JA/

BRAND JA:

[1] These two appeals were heard together because the issues they raise are substantially the same. In essence they turn on the interpretation of s 3(1)(a) of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001. By the nature of things, I am bound to return to the provisions of the Act in more detail when evaluating the opposing contentions. Broadly stated for introductory purposes, however, s 3(1)(a) affords a High Court the authority to order the removal of civil proceedings instituted in that court to another High Court if it appears to the former that such proceedings should have been instituted in the latter.

[2] The appellant in both matters is the Road Accident Fund ('the RAF') which has its principal place of business for purposes of s 19(1) of the Supreme Court Act 59 of 1959 (in the sense contemplated, eg in *K Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 496A-C) within the area of jurisdiction of the Pretoria High Court. Another feature common to both matters is that the motor vehicle accidents that gave rise to the respondents' claims against the RAF occurred in the province of KwaZulu-Natal. Yet, the respondents did not institute their actions against the RAF in the Pretoria High Court or in the High Courts of KwaZulu-Natal, which would appear to be the options indicated by s 19(1) of the Supreme Court Act. While Mr Rampukar's action was launched in the Johannesburg High Court, Mrs Gumede brought hers in the Cape. In each case the RAF raised the special plea that the court had no jurisdiction, whereupon both the respondents conceded the validity of this special defence.

[3] After making the concession that the Johannesburg High Court had no jurisdiction, Mr Rampukar brought an application in that court, based on s 3(1)(a) of the Act, for an order that his action be transferred to the Pretoria High Court where the RAF has its principal place of business. Despite opposition by the RAF, the application was granted by Willis J. Mrs Gumede brought the same application in the

Cape High Court, save that she wanted her action to be transferred to the Pietermaritzburg High Court within whose area of jurisdiction the accident giving rise to her claim occurred. Relying *inter alia,* on the judgment of Willis J in *Rampukar,* Van Reenen J granted her application as well. The appeals against these two judgments are with the leave of the court *a quo* in each case.

[4] I think the issues that arose on appeal will best be understood against the background and the relevant provisions of the Act. The background appears from the comprehensive preamble to the Act. In essence it amounts to this: by virtue of item 16(4)(a)(1) of Schedule 6 to the Constitution, Act 108 of 1996, all provincial and local divisions of the erstwhile Supreme Court of South Africa as well as the superior courts of former homelands, became High Courts under the Constitution without any alteration in their areas of jurisdiction. Item 16(6)(a) of the same Schedule 6 provided, however, that there should be a comprehensive rationalisation of various matters concerning these newly created High Courts, including their areas of jurisdiction, as soon as possible after the Constitution took effect. But the legislature foresaw that the finalisation of the comprehensive rationalisation process would require considerable time. In the meantime, interim changes to the areas of jurisdiction of some High Courts were urgently necessary. Consequently, so the preamble to the Act explains, the legislature decided to promulgate the Act in order to facilitate these interim changes.

[5] The relevant provisions of the Act are contained in ss 2, 3 and 4. They read as follows:

‘2 **Minister may alter area of jurisdiction of any High Court**

(1) Notwithstanding the provisions of any other law, the Minister [of Justice] 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 [magisterial] district or part thereof;

(b) amend or withdraw any notice issued in terms of this section.

(2) Any notice referred to in subsection (1) must be approved by Parliament before publication thereof in the *Gazette*.

(3) The publication of a notice referred to in subsection (1) does not affect any proceedings which have been instituted but not yet completed at the time of such publication.

3 **Transfer of proceedings from one High Court to another**

(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.

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

4 **Repeal of laws and saving**

(1) Subsections (1) and (4) of section 6 of, and the First Schedule to, the Supreme Court Act, 1959, are hereby repealed.

(2) Notwithstanding the repeal of the laws referred to in subsection (1), the seats and the areas of jurisdiction of the High Courts referred to in the said First Schedule shall, subject to any alteration under section 2, remain as they were immediately before the commencement of this Act.'

[6] To complete the picture: the provisions of the Supreme Court Act which are repealed by s 4(1) and saved by s 4(2) of the Act, are those defining the geographical areas of jurisdiction of the divisions of the Supreme Court. After the Act came into operation on 5 December 2001, the Minister of Justice on more than one occasion, effected alterations to the areas of jurisdiction of different High Courts by way of notices in the Government Gazette as contemplated in s 2. These alterations are conveniently set out in Erasmus, *Superior Court Practice*, at A1-106B to A1-106C. Suffice it to say for present purposes, however, that neither Pretoria – where the RAF's principal place of business is situated – nor any of the areas in KwaZulu-Natal – where the two accidents in question occurred – were affected by any of these alterations. Conversely stated, the Johannesburg High Court and the Cape High Court, where the present matters were instituted, never had jurisdiction to entertain these cases.

[7] In the *Rampukar* appeal, the RAF limited itself to the contention that, on a proper interpretation of s 3(1)(a) of the Act, the court *a quo* was not authorised to transfer the proceedings to another High Court. In *Gumede* it raised the same argument, but contended, in the alternative, that even if the court *a quo* had the

power to do so, it should not have exercised the discretion it derives from the section in favour of the respondent.

[8] The RAF's first argument in support of its main contention raised in both matters departed from the premise that, as a matter of basic principle, a court that has no jurisdiction to decide a particular case, also has no jurisdiction to deal with that case by transferring it to another court. And, so the RAF's argument proceeded, there is nothing in s 3(1)(a) which is indicative of an intention to change that basic principle. For the proposed basic principle pivotal to this argument, the RAF sought to rely on a long line of cases relating to s 9(1) of the Supreme Court Act and the similarly worded predecessors to that section in earlier legislation (see eg *Van Dijk v Van Dijk* 1911 WLD 203 at 204; *Ying Woon v Secretary for Transport* 1964 (1) SA 103 (N) at 108C-F; *Welgemoed and another NNO v The Master* 1976 (1) SA 513 (T) at 523A-D).

[9] The wording of s 9(1) of the Supreme Court Act closely resembles s 3(1)(b) of the Act. In fact, the provisions of these two enactments are so similar that it gives rise to the suggestion that the latter had superseded the former without express repeal (see eg *Nongovu NO v Road Accident Fund* 2007 (1) SA 59 (T) para 10; L T C Harms, *Civil Procedure in the Supreme Court*, A-34). Whether this is so or not, is not necessary to decide. Of significance for present purposes, however, are two things. First, s 3(1)(a) of the Act is new. It has no counterpart in the Supreme Court Act or any of its predecessors. Secondly, s 3(1)(a) and s 3(1)(b) deal with completely disparate situations.

[10] As I see it, s 3(1)(a), on its own wording, deals with the situation where the proceedings should have been instituted in 'the other court', ie the transferee court. This can only mean that they should not have been instituted in the court where they were in fact instituted, ie the transferring court. Admittedly the section suggests no reason why they should not have been so instituted. But, in the context of an act dealing with jurisdiction, the only reason I can think of is that the transferring court lacked jurisdiction to determine the dispute between the parties under s 19(1) of the Supreme Court Act. In these circumstances, s 3(1)(a) does not bestow the transferring court with jurisdiction to entertain and decide the main dispute; all the

section does is to afford the transferring court the limited jurisdiction – which otherwise it would not have had – to transfer the matter to the 'right' court, ie the court with proper jurisdiction to determine the dispute under s 19(1) of the Supreme Court Act. Thus understood, I think the situation that s 3(1)(a) seeks to address is obvious. It is the one where a plaintiff has wrongly instituted proceedings in the transferring court instead of the transferee court and now seeks a transfer from the former to the latter.

[11] Stated somewhat differently; if both s 3(1)(a) and s 3(1)(b) require original jurisdiction on the part of the transferring court – as the RAF will have it – I cannot see what purpose s 3(1)(a) could possibly serve in addition to s 3(1)(b). Why would a court with jurisdiction to determine the matter transfer that matter to another court, unless it is convenient or appropriate to do so, as contemplated in s 3(1)(b)? As I understand s 3(1)(a), it complements s 3(1)(b) in that the two sections provide for what are, in a sense, converse situations. According to the interpretation previously given to s 9(1) of the Supreme Court Act – which must as a logical necessity apply to s 3(1)(b) as well – 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 or not (see eg *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A) at 888A-B). In s 3(1)(a), on the other hand, it is the transferee court that must have original jurisdiction and not the transferring court. In this light, the RAF's first contention as to why the courts *a quo* could not transfer the proceedings under s 3(1)(a), ie because they had no original jurisdiction under s 19(1) of the Supreme Court Act to determine the main disputes, is in my view unsustainable.

[12] I turn to the RAF's second contention as to why s 3(1)(a) did not empower the courts *a quo* to transfer the proceedings. According to this contention the section is only available to parties in matters which are affected by changes in jurisdiction under s 2 of the Act. Since the matters under consideration were not so affected, the RAF contends, s 3(1)(a) found no application at all. In broad outline, the argument in support of this contention proceeds as follows: the whole Act was intended as a temporary measure to facilitate the interim rationalisation of the areas of jurisdiction

of the High Courts, pending finalisation of the more comprehensive rationalisation process contemplated by the Constitution. That much appears from the preamble. The mechanism for realising this goal is created in s 2. Read in this context, s 3 constitutes no more than an ancillary provision. It deals with the transfer of matters in the affected areas as part of the alteration process. The interpretation of s 3(1)(a) contended for by the respondents and endorsed by the courts *a quo,* so the argument goes, is far too wide. It would result in the negation of s 19(1) of the Supreme Court Act which specifically bestows territorial jurisdiction on the different High Courts in respect of prescribed geographical areas. It will enable litigants to choose the court in which they wish to institute proceedings, in total disregard of the defined and extant areas of jurisdiction. Having regard to the limited and temporary nature of the act, so the argument concludes, it is highly unlikely that the legislature would have intended s 3(1)(a) to have these drastic and far reaching consequences.

[13] I do not agree that the wider interpretation of s 3(1)(a) adopted by the courts *a quo* results in a negation of s 19(1) of the Supreme Court Act. On the contrary, I believe that the wider interpretation is premised on a recognition of the generally accepted principles of territorial jurisdiction underlying s 19(1). As I have said before, in accordance with the wider interpretation, s 3(1)(a) does not bestow jurisdiction on a court which has no jurisdiction under s 19(1) of the Supreme Court Act to decide the case on its merits. All it does is to afford the ‘wrong’ court – ie the transferring court – limited jurisdiction to transfer the case to the ‘right’ court which does have jurisdiction under s 19(1).

[14] In this light the RAF’s suggestion that the wider interpretation of s 3(1)(a) would enable litigants to institute their actions in the courts of their choice, is difficult to understand. It begs the question why litigants would knowingly institute proceedings in a court with no original jurisdiction when at best for these perverse litigants the section would enable them to seek a transfer to the right court. This could only result in an expensive, wasteful exercise for the litigant who will receive no perceivable benefit in return. What is more, under s 3(1)(a) a transfer is not just for the asking. The transferring court has a discretion to refuse the application and will presumably do so if the applicant had chosen the wrong court for no acceptable reason.

[15] What also seems clear to me is that s 3(1)(a) was not intended for the situation where a party instituted proceedings in a court which had jurisdiction at the time of institution but then lost that jurisdiction due to an alteration of its area of jurisdiction under s 2 of the Act. This situation is adequately covered by s 2(3) which specifically provides that the publication of a notice under s 2(1) does not affect any proceedings which were instituted prior to the publication of that notice.

[16] Hence it can, in my view, be accepted with confidence that s 3(1)(a) was intended to alleviate the predicament of a litigant who mistakenly instituted proceedings in the wrong court. Once this is appreciated, an analysis of the RAF's argument seems to show that the essential difference between the wider and the narrower interpretation of s 3(1)(a) turns on the **reason** for the mistake. According to the narrower interpretation, there must be some link between the reason for the mistake and a change in jurisdiction under s 2 of the Act. Consequently, on the narrower interpretation, s 3(1)(a) only applies where the litigant mistakenly instituted proceedings in a court which at one time had territorial jurisdiction to decide the case, but which at the time of institution no longer had jurisdiction due to an alteration under s 2(1). By contrast, the wider interpretation imposes no restriction on the reason for the mistake. If a litigant had mistakenly instituted action in the wrong court, that court has a discretion to come to his or her aid and it matters not why the mistake was made.

[17] An appropriate starting point in deciding between these divergent interpretations is, in my view, that as a matter of everyday language, the plain meaning of the section imposes no limitation on the type of mistake. On the contrary, the language seems to be as wide as it can possibly be. Yet, the RAF contended that such limitation is indicated by the context of the preamble and the other provisions of the Act as a whole. Read in this context, so the RAF argues, the words 'any High Court' in the introductory part of s 3(1)(a) should therefore be understood as if they were notionally qualified by the phrase 'which had jurisdiction prior to an alteration under s 2(1)'. This argument, of course, immediately gives rise to the question why, if this was indeed the legislature's intention, it failed to take the relatively simple step of introducing the restricting phrase.

[18] Apart from this, I have a twofold problem with the qualification contended for by the RAF. On the one hand, it will only provide assistance to litigants whose mistake was that they did not realise that they had been affected by a change in jurisdiction. Litigants who made the same type of mistake by thinking that they were affected by a change in jurisdiction while they were not, will derive no assistance from the section, simply because the court never had any jurisdiction to hear the case. Conversely, the section would, upon acceptance of the RAF's qualification, provide relief to litigants who were affected by a change in jurisdiction, even when their mistake did not relate to the change in jurisdiction at all, ie where they realised there had been a change in jurisdiction but for some other reason made the mistake of initiating proceedings in the wrong court.

[19] In the end it becomes apparent, in my view, that the narrower interpretation of s 3(1)(a) would lead to arbitrary – and sometimes even absurd – differentiations between situations which are indistinguishable in principle. It would permit a litigant who mistakenly instituted proceedings in the wrong court to have the matter transferred to the right court if the mistake is excusable and of a particular kind. But if the mistake was brought about by some other equally excusable reason, a transfer would not be possible. More often than not this will have the result – as in the present matters – that litigants who have made one type of mistake may lose their claims through prescription while the claims of other litigants who made some other mistake may be saved. I can find no indication in s 3(1)(a) that the legislature intended to bring about this irrational discrimination between different litigants in the same predicament.

[20] The further consideration relied upon by the RAF in support of the narrower interpretation is that the Act was intended to be of limited duration only. I find this proposition equally unconvincing. The mere fact that it is an interim measure cannot, in my view, make any difference as to how it should be understood. While it is in operation, effect must be given to it. What will happen if and when it is repealed, is not for us to divine. The end result is that I am not persuaded by any of the arguments advanced by the RAF that the courts *a quo* were wrong in adopting the wider interpretation of s 3(1)(a).

[21] This brings me to the alternative argument raised by the RAF in *Gumede,* namely that the court *a quo* should not have exercised the discretion bestowed upon it by s 3(1)(a) in favour of the respondent. The evaluation of this argument requires a somewhat more detailed account of the background facts. Mrs Gumede's claims against the RAF, in her personal capacity and on behalf of her two minor children, are for the loss of support that they suffered when their breadwinner died as a result of the injuries he sustained when the motor vehicle, in which he travelled as a passenger, was involved in an accident with another vehicle. The accident occurred in Mtubatuba, KwaZulu-Natal on 11 December 1998. It is common cause that, if she has to institute action anew in the Pietermaritzburg High Court, the claim in her personal capacity – which is by far the largest of her claims – would be lost through prescription, though the claims of her two minor children will probably survive.

[22] In an affidavit filed in support of Mrs Gumede's application for the transfer of the matter, her attorney gives the reason why her action was instituted in the Cape High Court. It appears that the reason flows directly from a directive issued by the RAF, which was published in the June 1997 edition of *De Rebus* (at 383). According to the directive, claimants were invited to lodge their claims at any of the three offices of the RAF in Pretoria, Randburg or Cape Town. In addition, it informed claimants that a claim would normally be administered at the office where it was lodged and that, if legal proceedings were to follow, these should be instituted in the High Court with jurisdiction over the area in which the administering office is situated. This invitation was confirmed in a newsletter distributed by the legal advice department of the RAF in October 1997. Though Mrs Gumede's claim had been lodged at the Randburg office of the RAF, it was, for reasons unknown, administered by its Cape Town office. That was the sole reason, Mrs Gumede's attorney explained, why her action was instituted in the

Cape High Court. In fact, the attorney stated, it would be far more convenient for her and her legal advisors to institute the action in Pietermaritzburg.

[23] Prior to the close of pleadings in the matter, judgment was handed down by the Cape High Court in the case of *Ex Parte Kajee* 2004 (2) SA 534 (C) where it was held, *inter alia* (at 542B), that the RAF is not entitled to consent to jurisdiction in respect of a court which has no jurisdiction to entertain the action in accordance with s 19 of the Supreme Court Act. Since the present appeals were argued on the basis that *Kajee* was correctly decided, I specifically refrain from expressing any view as to whether this is so. Of relevance, however, is that it was the decision in *Kajee* which led to the filing of the RAF's special plea – which eventually proved to be successful – that the Cape High Court had no jurisdiction to entertain Mrs Gumede's claims.

[24] The main reason advanced by the RAF as to why the court *a quo* should, in the exercise of its discretion, have refused to transfer the matter, is that, in the event, the RAF will be deprived of the opportunity to plead prescription in respect of Mrs Gumede's personal claim. It appears, however, that, in the present context, the issue of prescription is a two edged sword. It raises the question whether in the circumstances it would be fair that Mrs Gumede should lose her personal claim. I think not. It is clear that the confusion with regard to jurisdiction which led to the institution of her action in the wrong court, was induced by the RAF's own conduct. In these circumstances, I believe, it does the RAF no credit to rely on that very confusion to avoid Mrs Gumede's claim. What is more, with regard to the claims of Mrs Gumede's minor children, a refusal to transfer the proceedings will require a re-institution of the action in the Pietermaritzburg High Court with the consequent waste of time and money, from which no one – including the RAF – will derive any perceivable benefit. I therefore believe that the court *a quo* cannot be criticised for the way in which its discretion was exercised. On the contrary, I think in its position I would have done exactly the same.

[25] In the result, both appeals are dismissed with costs.

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F D J BRAND
JUDGE OF APPEAL

Concur:

SCOTT JA
MAYA JA
HURT AJA
MHLANTLA AJA