REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 69036/2015

25/5/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHERS JUDGES: YES
(3) REVISED

SIGNATURE

DATE 25 May 2017

In the matter between:

DENZIL ADAM LAKEY Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

C R JANSEN, AJ

[1] In this case the plaintiff claims damages against the Road Accident Fund (RAF) as a result of alleged injuries sustained in a motor vehicle collision on 25 March 2014. The only issue I had to adjudicate during the trial was the issue of liability of the fund. Determination of quantum, in the event that the issue of liability was determined in favour of the plaintiff, would stand over for later determination.

[2] As far as RAF claims are concerned, this case is probably as garden variety as they come. There are, however, two ancillary issues that need serious comment and which relate to the way practitioners, the fund and the courts, especially in this division, do business in RAF matters.

THE ISSUE OF LIABILITY

[3] The merits of the matter can easily be disposed of. According to the plaintiff's pleadings, the collision took place on the corner of Moroeng and James Moroko Streets in Mafikeng on 25 March 2014. Two vehicles were involved, namely that of the plaintiff and that of the insured driver, a Mr Mothlabane. Plaintiff obtained the details of the insured driver at the scene of the collision.

[4] The plaintiff did not report the collision within 24 hours as he was supposed to do in terms of section 61(1)(f) of the National Road Traffic Act 93 of 1996. He did, however, consult a medical doctor a few hours after the collision.

[5] Plaintiff testified that sometime after the date of the accident, he attempted to report the accident at the Mafikeng Police Station, but he was apparently informed that he had to bring the other driver involved in the collision to the police station. This information, if indeed it was given to the plaintiff, was obviously incorrect. I accept that strange advice is sometimes given at police stations, and I cannot reject this testimony of the plaintiff out of hand. After numerous attempts to get the insured driver who was involved in the collision to attend at the police station, it appeared that the insured driver was unwilling to do so. As a result, the accident was never formally reported at the police station.

[6] Probably as a result of the fact that there wasn't a police reference number for the collision, the RAF denied the allegation that a motor vehicle collision had occurred. During the pre-trial conference, the RAF very specifically placed the occurrence of the collision in dispute. In its answer to a question in paragraph 4 of the pre-trial minute, the RAF specifically stated that it was not prepared to make any admissions in

respect of the collision and that it required the plaintiff to provide it with a copy of the vehicle accident report.

[7] Despite this very specific denial of the fact that an accident had occurred, plaintiff's attorney made no effort to produce any corroborating evidence. This led to the plaintiff producing undiscovered photographs during his evidence, and further seeking an adjournment after his own evidence to call the medical doctor he had consulted on the day. I point no fingers at plaintiff's counsel, who obviously received a very late pass in this matter.

[8] The RAF's counsel objected to the doctor's evidence being presented on affidavit. I upheld the objection, considering the facts of this case, more particularly because the accident had not been reported and the photographs were not made available prior to the trial commencing. The defendant's initial scepticism was justified.

[9] Although the RAF was perfectly entitled to deny the existence of a collision, it cannot completely absolve itself from its duty to diligently investigate claims properly[1]. Had the RAF made simple enquiries with the plaintiff or his legal representatives, it would have been in a position to trace the insured driver, as well as to pay a visit to Dr Mansoor. In

[1] *Daniels and others v Road Accident Fund and Others* [2011] ZAWCHC 104 at para 14.

fact, most of this information was contained in the claim form. Coincidentally, this matter first came before this Court during a week when the local newspapers carried headline stories about how rampant fraud committed against the RAF was, which included collusion between claimants and medical doctors.

[10] In any event, as it transpired from the evidence of the plaintiff, the collision most definitely happened. Plaintiff also appeared to be a credible and honest witness. The same can be said of Dr Mansoor, who is a general practitioner in Mafikeng and who is the family doctor of the plaintiff. Plaintiff attended at her surgery on the morning of the collision, reporting the fact that he was involved in a motor collision and that he had sustained a whiplash injury.

[11] The facts surrounding the motor collision itself are very simple. The insured driver drove straight into the back of the plaintiff's vehicle when the plaintiff was stationary at a four way stop. The insured driver was clearly exclusively to be blamed for the collision, and the issue of liability must therefore be decided in favour of the plaintiff.

[12] Having disposed of the merits of this matter, I believe it is necessary that I comment on two ancillary matters, namely that of the *locus* of the

litigation, the Gauteng Division of the High Court of South Africa in Pretoria, and, secondly, on the issue of the choice of language in pleadings and court proceedings.

THE CHOICE OF COURT

[13] In this case, it was most inappropriate to issue summons in this division. In the interests of justice and considering the position of the plaintiff, it was, however, not appropriate to transfer the matter by the time it was ready to proceed to trial. Apart from the fact that the RAF has its national headquarters in the area of jurisdiction of this court, there is absolutely no nexus between the present motor collision and the area of jurisdiction of this court.

[14] The accident happened in Mafikeng, which is also the seat of the Provincial Division of the North West Province. In fact, the accident took place about two kilometres from the High Court in Mafikeng. Both the plaintiff and the insured driver were resident in Mafikeng. In addition, the potential witnesses in this matter, such as panel beaters and Dr Mansoor, conduct their businesses and practices in Mafikeng.

[15] As it turned out, it took five months before Dr Mansoor was available for evidence in Pretoria. This caused great inconvenience to the court,

the litigants as well as Dr Mansoor. There were obviously the concomitant costs involved. If this trial had taken place in Mafikeng, Dr Mansoor could have been accommodated at her convenience and she would not have been expected to absent herself from her practice for more than an hour or two. I have always understood that this was the manner in which medical practitioners were supposed to be treated by the court.

[16] There are obviously very good reasons why section 15(2) of the Road Accident Fund Act provides that:

> *An action to enforce a claim against the Fund or an agent may be brought in any competent court within whose area of jurisdiction the occurrence which caused the injury or death took place.*

[17] I accept that it is open to a plaintiff to institute proceedings in any court in accordance with the ordinary common law rules which establish jurisdiction, usually being either the court of the defendant's domicile (*ratio dimicilii*), the court in whose area of jurisdiction the cause of action arose (*ratione res gestae*), or the court where the goods in dispute are situated (*ratione re sitae*). But this choice is not an entirely free one, and it should be appropriately adapted in the public law context, especially where we are dealing with a national insurance fund that has a national presence. In RAF matters, the residual liability of the insured

driver no longer exists. The action has therefore lost its private character[2].

[18] Again, I must accept that the institution of RAF proceedings in the high court in Pretoria, no matter where the collision took place, is accepted as regular by virtue of the fact that the RAF has its main place of business in Pretoria[3].

[19] At the same time, the reason for the legislature to include section 15(2) in the RAF Act must be considered. The provision is effectively a repetition of the *ratione res gestae* rule. The real purpose of the provision appears to be to ensure that the RAF must be able to defend and settle claims in all areas of jurisdiction, including that of Magistrates' Courts. There is some disagreement on this issue in the reported cases[4].

[20] The logic behind the common law rule that the defendant's domicile establishes jurisdiction in private disputes is simple. The rule ensures the efficacy of court orders and often avoids uncertainty about which court may have jurisdiction in any particular matter. A defendant can also not be prejudiced by a plaintiff choosing to follow the defendant.

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[2] Section 21 of the RAF Act
[3] *Road Accident Fund v Rampukar* 2008(2) SA 534 SCA at para 2.
[4] *Nel v Road Accident Fund* 2000(1) SA 931 T at 935 D to H; *Ex parte Kajee* 2004(2) SA 534 C at 537H to 542C; *Nongovu v Road Accident Fund* 2007(1) SA 59 T at para 6.

[21] The question that arises is whether this court must simply accept the fact that any RAF claim can be instituted in Pretoria. The RAF roll in this division is quite a spectacle. The court corridor in the morning outside the RAF roll call reminds of an old-era trading floor where stock prices are fixed, only here it is the misery of road collision victims that is traded in bulk. The factual backdrop to the matter of *General Council of the Bar of South Africa v Geach and Others*[5] is this court roll. It is no co-incidence that this set of facts occurred in Pretoria. The system and people's ethics buckled under the pressure.

[22] I do not believe this court must simply accept this state of affairs. Requirements of access to justice and the appropriate use of judicial resources dictate that a plaintiff should institute action in the most appropriate division, and not the division that suits the convenience of the plaintiff's attorneys or the Fund. The fund must serve all South Africans, not only those in the main centres.

[23] Other jurisdictions such as the United States have developed rules to ensure that inappropriate forum shopping does not occur and that certain

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[5] *General Council of the Bar of South Africa v Geach and Others, Pillay and Others v Pretoria Society of Advocates and Another, Bezuidenthout v Pretoria Society of Advocates* 2013 (2) SA 52 (SCA)

court rolls do not become overly congested[6]. Our courts should do the same.

[24] Should the application of the *dominus litis* rule in respect of a plaintiff's choice of court be tempered by the provisions of section 27(1) of the Superior Courts Act 10 of 2013 or some other power. In the matter of *Thembani Wholesalers (Pty) Ltd v September and another*[7] a full court of the Eastern Cape Division decided that a high court has the power to transfer a matter *mero motu* to another division of the high court. It is not clear from the judgment whether this power is sourced in section 27(1) of the Superior Courts Act or whether it is derived from an inherent power of the high court to regulate its own roll and procedures. Caution must obviously be applied when considering what the ambit of the high court's inherent jurisdiction is[8]. The use of the words "on application" in section 27 may suggest that this statutory power may not be exercised by a court *mero motu*. On the other hand, a purposive interpretation may lead to the conclusion that a court may raise the issue *mero motu*. Other than this, section 27(1) appears to apply to any case where the choice of court was either incorrect or inappropriate[9]. Ideally,

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[6] *Gulf Oil Corp v Gilbert* 330 US 501, later followed by transfer of venue legislation such as the 1948 §1404(a) of the Judicial Code
[7] 2014 (5) SA 51 ECG at para 13.
[8] See in general *Oosthuizen v Road Accident Fund* 2011(6) SA 31 SCA at paras 7 to 20.
[9] *Rampukar (supra)* at paras 9 to 17 on the similarly worded section 3(1) of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001. The position appears to have been different under

this section should operate as a fully-fledged transfer-of-venue provision.

[25] A less accommodating approach to the inappropriate choice of court was followed by Legodi J in the matter of *First National Bank v Lukhele and seven other matters*[10].

[26] In the *Lukhele* case the court sought to protect the interests of individual litigants against powerful corporate litigants. In my view, a similar approach should be followed in cases where the broader public interests are at stake. Taking from the factors which the US courts developed from the doctrine of *forum non conveniens*,[11] a court should consider all the connecting factors in the litigation and must consider all the private and public interests at stake.

[27] The underlying principles of convenience and access to justice should be expanded to include the broader public interest in litigation that is effectively funded by the public. The RAF Act is social legislation and litigants should respect its underlying purposes. It does not serve justice when litigation is instituted in courts far away from witnesses, who are

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section 9(1) of the preceding Supreme Court Act 59 of 1959 as discussed in *Davis v Denton* [2008] ZAECHC 138.

[10] [2016] ZAGPPHC 616 (sitting in Mbombela) at para 39

[11] See ftn 6 above

compelled to come to court, and where the costs are in most cases ultimately borne by the RAF.

[28] This issue is especially pressing in this division. The roll is flooded with RAF matters, many of which could be instituted more appropriately in other high courts.

[29] There may be some instances where issuing proceedings at the main seat of the RAF may be justified, and a court should accommodate any *bona fide* election made by a plaintiff in this regard. However, the present matter is not such a case. Summons should have been issued in Mafikeng.

[30] It would, however, not have been fair towards the plaintiff to transfer the matter to the Mafikeng High Court by the time it was ready for trial. I do, however, believe that it is a matter where the choice of court was most inappropriate and that this issue cannot be left without comment. Practitioners in RAF matters should apply their minds to what the appropriate jurisdiction is before commencement of action, and also when dealing with the issue during pre-trial conferences in terms of Rule 37(6)(e).

THE USE OF LANGUAGE IN PLEADINGS

[31] The plaintiff's pleadings were drafted in Afrikaans. It is not appropriate to use Afrikaans in pleadings or in correspondence where other litigants involved are not conversant in the language, or where it can be foreseen that they may not be.

[32] In the present matter it was particularly inappropriate. The plaintiff testified in English and confirmed that his mother tongue is, in fact, English. More importantly, counsel for the defendant, Ms Kelaotswe, confirmed that she does not understand Afrikaans and that she can neither read nor write the language. Her position is most invidious. At the time of the trial she was still in the first year of her practice, and she informed me that when she receives Afrikaans pleadings or correspondence, she is compelled to have these translated at her own cost. This is most unfair towards her and is also a violation of what I consider the correct approach to be in respect of multilingualism in our courts.

[33] That multilingualism and tensions over the use of language is nothing new, is well illustrated in an insightful article written by Professor Gardiol van Niekerk entitled *Multilingualism in South African Courts:*

The legislative regulation of language in the Cape during the Nineteenth Century.[12] The problem is as old as the law itself. There is a fair amount of literature available on the subject[13].

[34] The judicial branch of government has not yet framed a set of rules that deals with the issue of choice of language in courts. Neither the Superior Courts Act 10 of 2013, nor the Rules Board for Courts of Law Act 107 of 1985 seems to deal with this issue in any specifics.

[35] For the legislative branch Parliament has adopted rules as well as policies for choice of language use in the legislature[14], and for the executive Parliament has enacted the Use of Official Languages Act 12 of 2012 that creates the framework for implementing multilingualism in the national sphere of government[15].

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[12] Fundamina, vol 21, No 2, 2015 pp 372 – 391

[13] See also: LTC Harms, *Law and Language in a Multilingual Society*, PELJ 2012 (15) 2; *Comments by the South African Law Society on the South African Language Bill (B23-2011); Observations on the use of Official Languages for the Recording of Court Proceedings, Prof Koos Malan,* TSAR 2009-1 p141; *The Tower of Babel - Language Usage and the Courts, Prof MG Cowling,* SALJ, Vol 124, Issue 1, 2007*; International and Comparative Perspectives in the Use of Official Languages: Models and Approaches for South Africa,* Dr Fernand de Varennes, Assessment prepared for the Afrikaanse Taalraad on the use of official languages and the proposed Languages Act, 2011 and other issues, Afrikaanse Taalraad, 2012. *Receiving justice in your own language - the need for effective court interpreting in our multilingual society,* JM Hlope, Judge President of the Cape High Court, The Advocate, April 2004, p42; *The right to address the court in the language of one's choice*, Fawzia Cassim, *Codicillus,* XLIV no 2, p24.

[14] *Lourens v Speaker of the National Assembly and others* 2015(1) SA 618 EqC at paras 11 to 14. From the website of Parliament, it appears that policies have been adopted for the use of language in Parliament in matters other than legislation.

[15] An *Implementation Plan: National Language Policy Framework* was finalised by the Department of Arts and Culture in April 2003.

[36] The absence of rules makes it difficult for a judge to rule on the issue without betraying his/her personal views on the matter. Apart from the rules of this court not dealing with the issue, I am not aware of any practice directive that deals with the issue. The references in Rule 4(11), Rule 60(1), Rule 61(1) and Rule 61(3) to language issues all seem to be obsolete provisions.[16]

[37] In the matter of *Absa Bank Limited v Ferreira NO and Others*,[17] Revelas J observed the following in respect of what the rules are in respect of the choice of language in pleadings and forensic conduct:

> "*[21] ...In my experience the practice adopted in courts in cases where persons prefer to use their mother tongue in preference to English is the following: a litigant may choose to litigate in any of the official languages but is not required to translate the pleadings and documents at own cost for the benefit of the party using a different language.*
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> *[22] Just as the defendants, in reliance on s30 of the Constitution have a right to litigate in Afrikaans, so the plaintiff has a right to litigate in English. There is no obligation founded in law, on the party who is dominus litis, to translate all its correspondence and process in ongoing litigation for the benefit of the defendant or respondent, as the case may be. It may be done as a courtesy or as an indulgence.*
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> *[23] The defendants have postulated the plaintiff's language policy with its customers as its choice of language when it litigates. These are separate issues entirely. The plaintiff is not obliged to conduct its litigation in Afrikaans and English simply because its opponent (as a customer) was dealt with in Afrikaans. Practical considerations ought to take preference when striking a balance between the right of a litigant to*

[16] These observations do not apply to the Supreme Court of Appeal and Constitutional Court. Their rules do have provisions that accommodate all official languages. Rules 10A (viii) and 14(2) deal with the issue in the SCA rules and these work from the premise that English is the default language. Rules 13(4)(a) and (b) and Rule 25 deal with the issue in the Constitutional Court.

[17] 2016 (2) SA 258 (ECP)

initiate litigation in the language of its choice, and the right of the party defending or opposing that litigation to use his or her language of choice. That means that neither party can prescribe to the other what language to use.

[24] If, for example, a person who only speaks isiXhosa, and who lives in a remote area in the Transkei, is cited as a defendant in civil proceedings drafted in English, he or she would not be entitled to insist that:

(a) All documents served on him be in isiXhosa.

(b) That all court proceedings be conducted in isiXhosa.

(c) That the plaintiff's English speaking counsel argue the matter in isiXhosa.

(d) That the magistrate or judge must conduct the proceedings and write the judgment in isiXhosa.

[25] That would simply be impracticable..."

[38] The judge's summary of what appears presently to be the practice in South Africa is correct. However, the problem is that the practice has not been informed by a proper discussion within the legal community on this issue. I am not aware of any ruling made by any of the law societies or by the General Council of the Bar or any of its constituents in respect of choice of language. Yet I am aware of many informal and somewhat muted grumblings by practitioners about the insensitive use of Afrikaans in correspondence and pleadings. This case is a good example of the inappropriate use of Afrikaans.

[39] The problem with such a very sensitive matter, which is also a matter of constitutional importance, is that one cannot properly formulate a rule if there has not been a proper discussion of the issue. This discussion is dearly needed.

[40] It is respectfully not appropriate to revert to concepts such as *dominus litis* as the source of a rule for the choice of language. This may have been appropriate in the pre-democratic era, where there were only two official languages in South African courts, and all practitioners and judicial officers were required to be conversant in both. In such a system, it can easily be expected of any practitioner to read communications in a language other than his preference, but at the same time be entitled to present his or her case in the language of his choice, or, more appropriately, in the language of his client[18]. The *dominus litis* principle simply does not have the wherewithal to serve as the crucible for the recognition of the status of official languages in court procedings.

[41] Such a rule is simply not practicable in our system of multilingualism. In many instances, such as the present, it is insensitive, uncollegial and even socially obnoxious to use a language that may very well not be

[18] For a general discussion on the history of constitutional recognition of official languages, see Iain Currey in chapter 37 of *Constitutional Law of South Africa, Woolman et al, Juta (LL).*

understood by the opposing party. On the other hand, all official languages must be used and developed to make their status as official languages real.

[42] In the ideal South Africa, practitioners and judicial officers will themselves be multilingual and would be able to accommodate most languages used in their particular region of the country. However, South Africa isn't anywhere near such a situation.

[43] I cannot take the matter any further other than stating that the use of Afrikaans in this matter for either correspondence or pleadings was most inappropriate. This type of litigation, as with most litigation, should be conducted in English as the only real lingua franca in South Africa. It also does not help that the professional bodies have not engaged in broader internal discussions and that they have not come up with specific rulings to assist practitioners.

[44] While the use of English as a default language is the only practical solution at present, I do not wish to be understood as saying that the use of Afrikaans or other indigenous languages in South Africa should not be used in courts or that their use should not be encouraged. To the contrary, the use of all 11 official languages in our courts should be

something that the legal profession should positively support. It is a constitutional imperative.

[45] In *ex parte* matters, or in matters where it is known that all the parties are Afrikaans speaking, there is nothing inappropriate in the use of Afrikaans. In fact, it would be somewhat contrived and awkward not to use Afrikaans in such settings. The use of Afrikaans in such a context, where it does not offend or inconvenience, should be encouraged.

[46] The Afrikaans speaking community should also not be hamstrung because there appears to be a lack of language activism amongst speakers of indigenous languages. Language activism is deeply rooted in the socio-political fibre of many Afrikaans speaking South Africans, and this is most certainly not something to object to. Indigenous language speakers would do well to champion their constitutional language rights and to insist that it be used in courts as a primary language, and not only as a secondary translated language. But its use must be practical.

[47] The use of language in courts cannot be compared with the situation where an individual citizen insists on being served by an organ of state in the official language of her choice. In court proceedings, there are

other people involved, such as opposing litigants, witnesses, judicial officers, assessors and attending public.

[48] Ultimately, the issue around language is something where an urgent discussion is needed in the legal community, and the inappropriate use of language in correspondence and pleadings can also not go without comment and some measure of censure.

COSTS

[49] Finally, I must deal with the issue of costs. Although the plaintiff could have done considerably better to avoid all the wasted costs in this matter, the defendant also had a duty to do the necessary investigations. Ordinary members of the public do not have the financial ability to investigate their own claims. The RAF must serve the interests of claimants, the fund and the broader public. It is not a private litigant that approaches claims in an adversarial manner. Again, I point no finger at the legal representatives of the fund. Their handling of the case was competent and sensible. The fund itself should have done the necessary investigations long before the litigation started.

[50] Considering all the circumstances, especially the time wasted as a result of getting Dr Mansoor to court, I am of the view that plaintiff should be

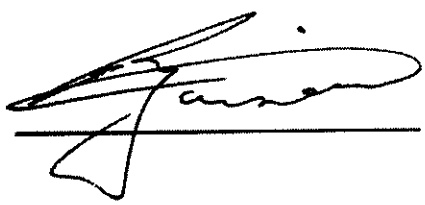
awarded costs of two of the four court days that the matter was before court.

[51] In the result, I make the following order:

1. The defendant is liable to pay 100% of the damages which may be proven by the plaintiff.

2. The defendant must pay the costs of the separated hearing on the issue of liability, save that only two court days shall be taxable.

3. All remaining issues stand over for later determination.



C R JANSEN AJ

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	8, 12 and 22 August 2016, 27 January 2017
Date of judgment:	25 May 2017

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