

SOUTH AFRICA / JUDGMENT

## Eksteen v Road Accident Fund (4972/2016) [2020] ZAFSHC 181 (22 October 2020) [2020] ZAFSHC 181

COURT

Free State High Court, Bloemfontein

BEFORE

MUSI, LOUBSER, MURRAY

CASE / FILE NUMBER

4972/2016

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### Source record

IN THE HIGH  
COURT OF SOUTH AFRICA,  
FREE STATE  
DIVISION, BLOEMFONTEIN  
Case  
no: 4972/2016  
In

the matter between:

JOHAN  
SEBASTIAAN  
EKSTEEN Applicant  
and  
THE  
ROAD ACCIDENT  
FUND Respondent

CORAM:

MUSI, JP et LOUBSER, J et MURRAY, AJ

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**JUDGMENT**

BY: MURRAY, AJ

DELIVERED ON: 22 OCTOBER 2020

- [1] The applicant seeks leave to appeal to the Supreme Court of Appeal against the Full Court's dismissal, with costs, of his High Court action against the Road Accident Fund ("the RAF") on 2 May 2019[1].
- [2] The Full Court sat as the court of first instance after the matter was referred to it by a single Judge of this Division.[2] On 3 June 2019, the applicant applied directly to the Supreme Court of Appeal for leave to appeal, and was granted such leave.[3] On 15 July 2020, however, the Registrar notified the applicant that the appeal was not properly before the court since leave should have been sought from the Full Court[4].
- [3] The High Court application for leave to appeal, with a condonation application, was filed on 5 August 2020 and the applicant submitted his heads of argument on 17 September 2020. The respondent confirmed on 12 October 2020 that it was not opposing

either of the applications[5] which were then adjudicated on the papers.

- [4] The proposed appeal is aimed at the Full Court's interpretation of section 2(1)(e)(ii) of the Road Accident Fund (Transitional

Provisions) Act 15 of 2012 ("the TPA"). The applicant alleges, in essence, that the section's permissive

language and a purposive reading thereof ought to have resulted in the dismissal of the special pleas of prescription and *lis pendens*, filed by the respondent at the trial.

- [5] The relevant subsection of the TPA reads as follows:

*"S 2(1)(e) A third party who has prior to this Act coming into operation*

(i) ...

(ii) instituted an action against the Fund in a Magistrate's Court, may withdraw the action and, within 60 days of such withdrawal, institute an action in a High Court with appropriate jurisdiction over the matter. Provided that no special plea in respect of prescription may be raised during that period..."

- [6] The applicant (the plaintiff in the dismissed action) is such a third party who was a passenger in a motor vehicle accident on 18 June

2003. At the time sections 18(1)(a)(i), 18(1)(b) and 18(2) of the Road Accident Fund Act 56 of 1996 (as it read before 1 August 2008) limited his claim for damages to R25 000[6]. On 17 January 2008 he issued summons for that amount in the Bloemfontein Magistrate's Court. The RAF defended the action which is still pending in that Court.

[7] On 19 October 2016, without removing its action in the Magistrate's Court, the applicant instituted a new action in this Court for an amount of R 1 764 200, based on the same cause of action between the same parties. In doing so he relied on the transitional provisions of the TPA, and, more specifically, on the interpretation of section 2(1)(e)(ii) by a single Judge of this Division in Sekwere[7] in 2015.

[8] The institution of High Court actions without removing the Magistrate's Court actions for capped claims, either prior

thereto, thereafter, or at all, has led to divergent judicial interpretations of section 2(1)(e)(ii) and the provisions of the TPA, with various, unpredictable outcomes, not only in this Division, but also in others.

[9] In Sekwere[8] section 2(1)(e)(ii) was held to be clear and unambiguous, couched in permissive terms. In the learned Judge's view it neither provided a step by step procedure which a litigant was obliged to follow to prosecute his or her higher claim in the High Court, nor obliged the litigant to remove the Magistrate's Court action before issuing summons in the High Court in order to qualify for protection against pleas of prescription or lis pendens.

[10] The plaintiff in Klaas[9] relied on the Sekwere interpretation. The Court, however, found that section 2(1)(e)(ii) indeed provided a step by step procedure with 'a very clear' sequence[10]. In that Court's view the permissive language served to indicate that a litigant could not be obliged to move his or her previously limited claim from the Magistrate's Court to the High Court. But, should the litigant elect to do so, he or she needed to follow the procedure laid out in the TPA to escape defeat of the higher claim by a special plea of prescription. However, the Court then advocated for a purposive reading of the provisions of the TPA 'to achieve equality for the claimants who had their claims previously limited by an unconstitutional' statutory provision regardless of whether the sequence had been adhered to or not.

[11] In Buthelezi[11] the plaintiff relied on Klaas to aver that the TPA did not provide for when a Magistrate's Court action must be withdrawn, wherefore his failure to first

withdraw the Magistrate's Court action did not amount to an irregularity. The Court, however, interpreted section 2(1)(e)(ii) to indeed provide for the Magistrate's Court action to be withdrawn prior to the issuing of the summons in the High Court.[12] The 'may', in the Court's view, did indicate that the third party was not compelled to withdraw the action in the Magistrate's court, but determined that he or she was only allowed to do so if he or she had the intention to institute the action in the High Court.

[12] The Court in Tshabalala[13] described the provisions of section 2(1)(e)(ii) as ‘quite specific’, with ‘may’ allowing the Plaintiff to elect to institute a new action for the full amount in the High Court, but granting it no discretion to do so without first

withdrawing the Magistrate’s Court action. The learned Judge pointed out that failure to first withdraw the Magistrate’s Court action would render the High Court action prone to an immediate defence of *lis alibi pendens*, an absurdity which the Legislature would never have intended.

[13] The Full Court in Eksteen[14] found that section 2(1)(e)(ii) indeed provided a step by step procedure, with the conditions precedent to the protected institution

of the claim in the High Court being an action on the Magistrate’s Court based on the cap; an election to prosecute that action in the High Court with jurisdiction over the matter; withdrawal of the action in the Magistrate’s Court, and institution of the High Court action within 60 days thereafter. The permissive ‘may’ in section 2(1)(e)(ii) in the Full Court’s view therefore allows the litigant an election between two fora, namely to either prosecute the claim in the Magistrate’s Court to finality, or pursue the claim for the higher amount in the High Court, with failure to withdraw the Magistrate’s Court action first rendering the plaintiff vulnerable to pleas of prescription and *lis pendens*.

[14] Counsel for the applicant argues that the Full Court should have dismissed the respondent’s pleas of prescription and *lis pendens* since the interpretation of section 2(1)(e)(ii) and the application thereof in Sekwere gave effect to the purpose of the TPA. It should therefore have been accepted, so the argument goes, that Sekwere laid down a binding authority for instituting the uncapped High Court actions without or before withdrawing the Magistrate’s Court actions, and which, due to the RAF’s failure to appeal that judgment, has become a ‘settled legal principle’ that has been followed by other courts and litigants.

[15] Section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013[15] requires a compelling reason for leave to appeal to be granted. The divergent interpretations of section 2(1)(e)(ii), not only in this Division, but also in other Divisions, which have resulted in, for instance, the five contradictory judgments above, coupled with the binding authority of the Full Court judgment in this Division and its potential persuasive power in other Divisions, in our view constitutes a sufficiently compelling reason to meet the criterion for leave to be given.

WHEREFORE the following order will issue:

1. The late filing of the application for leave to appeal is condoned.
2. Leave to appeal to the Supreme Court of Appeal is granted.
3. Costs are to be costs in the appeal.

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H. MURRAY AJ

I concur

P.J. LOUBSER, J

I concur and it is so ordered.

C.J. MUSI, JP

For the Applicant: Adv N Snellenburg SC

Instructed by Honey Attorneys

Bloemfontein

For the Respondent: Mr Albert Cilliers

## Judgment

Monitoring Officer

Road Accident Fund

Bloemfontein CSC

- [1] Eksteen v Road Accident Fund (4972/2016)[2019] ZAFSHC 46 (2 May 2019).
- [2] The Judge referred the matter to the Full Court in terms of section 14(1) of the Superior Courts Act 10 of 2013 when he realised that upholding the special pleas of ‘prescription’ and ‘lis pendens’ would be contrary to an earlier judgment of this Division, M.E. Sekwere v Road Accident Fund (2691/2014) ZAFSHC (18 June 2015).
- [3] On 23 July 2019.
- [4] In terms of s 16(1)(a) of Act 10 of 2013.
- [5] But stipulated that it would secure legal representation if leave were granted and the appeal proceeded in the SCA.
- [6] The Road Accident Fund Amendment Act 19 of 2005 as from 1 August 2008 removed the R25 000 cap for subsequent claims, but not for those arising prior to 1 August 2008, such as the Applicant’s. Pursuant to the Constitutional Court’s confirmation of the unconstitutionality and invalidity of sections 18(1)(a)(i), 18(1)(b) and 18(2) of Act 56 of 1996 as it read before 1 August 2008, in *Mvumvu v Minister for Transport* 2011(2) SA 473 (CC), the TPA was introduced on 13 February 2013 to assist ‘passenger’ claimants whose capped pre-1 August 2008 claims were still pending in the Magistrate’s Court to issue new claims in the High Court for their full damages, should they wish to do so.

- [7] M.E. Sekwere v Road Accident Fund (2691/2014) ZAFSHC (18 June 2015) at par [10].
- [8] At par [10].
- [9] Klaas v Road Accident Fund (25693/2013) [2015] ZAGPPHC 778 (7 September 2015) at paras [21], [24], [25] and [28]. In that case the special plea of prescription was dismissed.
- [10] Namely to withdraw the Magistrate's Court action and institute the High Court action within 60 days thereafter.
- [11] Buthelezi v Road Accident Fund (87723/14) [2018] ZAGPPHC 449 (2 February 2018) at par [22].
- [12] Ibid, at par [26]. In that case the special plea of prescription was upheld.
- [13] Tshabalala v Road Accident Fund (27822/2013) [2015] ZAGPJHC 281 (21 October 2015) at paras [27] and [29]. The Court upheld the special plea of prescription and dismissed the action.
- [13] Tshabalala v Road Accident Fund (27822/2013) [2015] ZAGPJHC 281 (21 October 2015) at paras [27] and [29]. The Court upheld the special plea of prescription and dismissed the action.
- [14] In paras [25] and [26].
- [15] Section "17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that – (a)
- (i) ... (ii) there is some other compelling reason why the appeal should be heard. Including confliction judgments on the matter under consideration."
- [15] Section "17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
- (a)
- (i) ...
- (ii) there is some other compelling reason why the appeal should be heard. Including confliction judgments on the matter under consideration."

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Prepared on 9 October 2026 · Esheria