
SOUTH AFRICA / JUDGMENT

Tsotetsi v Mutual and Federal Insurance (6654/94) [1995] ZAGPHC 2 (13 February 1995) [1995] ZAGPHC 2

COURT

High Courts - Gauteng

BEFORE

Curlewis

CASE / FILE NUMBER

6654/94

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CASE NO. 6654/94

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

1995-02-13

In the matter between:

E. TSOTETSI

Plaintiff

versus

MUTUAL AND FEDERAL INSURANCE

Defendant

J U D G M E N T

CURLEWIS J: In this matter, which is an ordinary collision case and has pleadings which one would expect in an ordinary third party collision case, at a very late stage the plaintiff replicated - it was on 30 January 1995 - as follows and I read out the replication:

"The plaintiff pleads that the provisions of article 7(a) of the schedules of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (hereinafter referred to as "the Act") alternatively article 46(a)(2) of the Act is unconstitutional and in conflict with Section 8 of the Constitution of the Republic of South Africa, such section determining that every person has the right of equality before the law, and is entitled to equal protection before the law. In the premises article 47(a) alternatively article 46(a)(2) is unconstitutional and stands/... stands to be struck down."

It asks that the matter should be referred to the Constitutional Court.

Counsel were not ready to argue the matter on certain legal points on Friday and it stood over until today at 09:00.

Counsel for the plaintiff wants this matter to go to the Constitutional Court. I would have thought that it would have suited the plaintiff better to have such matters as could be decided in this court decided and then go to the appellate division and then to the Constitutional Court, because that, incidentally, if that was something that the plaintiff wanted, and it was something that could better be done and give him a quicker adjudication, then I would certainly have said that that fell within matters that I could consider in terms of the words whether it is in the interests of justice to refer the matter to the constitutional court.

However that may be, that does not arise here. Plaintiff's counsel has told me that his client wants to take this matter first to the Constitutional Court. He believes that there are very few cases before the court and consequently he has the chance of coming on very quickly. That being so, I cannot stand in his way.

Now it is a very simple matter that I have to decide. It is not whether the Constitutional Court will decide that there is a conflict. I must say that, speaking for myself, if one looks at the history of the Workman's Compensation Act and the history of the 1942

Third Party Act and appreciates and knows the reasons why amendments had been brought in from time to time, making the question of the right of certain passenger to claim compensation different from other passengers, then I would have said *prima facie* that there was good reason for that differentiation. Moreover, if plaintiff succeeds he may achieve a result which does not suit him.

However, that is not what I have to decide. I have to decide merely whether there is a reasonable prospect of success. Now in that regard there is nothing to guide me as to how the Constitutional Court will approach matters concerning the differentiation between various people. I am satisfied that the judgment of *FARLAM AJ* in the Cape is one that should be followed. I am satisfied, as apparently *DIDCOTT J* was in the full bench in Natal, that the court must have some discretion whether or not to refer matters to the Constitutional

Court, otherwise that court would be flooded with all sorts of frivolous and pernicious matters.

Now Mr Preiss says that is not the test, I still have to decide whether there is a prospect of success. Let me put it this way: Where the whole matter is res nova, and no counsel has been able to suggest to me upon what basis the Constitutional Court will interpret Section 8, then, in my view, one should lean towards granting a reference, rather than otherwise.

In the result, the amendment is granted. The plaintiff will of course have to pay the wasted costs brought about by the amendment.

Paragraphs (a) and (b) of the replication are granted.

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Prepared on 12 October 2026 · Esheria