



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 322/17

In the matter between:

NDISHAVHELAFHI THOMAS NEKOKWANE

Applicant

and

ROAD ACCIDENT FUND

Respondent

Neutral citation: *Nekokwane v Road Accident Fund* [2018] ZACC 11

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgment: Froneman J (unanimous)

Heard on: 13 November 2018

Decided on: 26 March 2019

Summary: Road Accident Fund Act 56 of 1996 — whether injuries fall within ambit of sections 17 and 20

Jurisdiction — misapplication of legislation does not ordinarily give rise to a constitutional issue — purely factual dispute

ORDER

On appeal from the High Court of South Africa, Limpopo Local Division, Thohoyandou:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

[1] This is an application for leave to appeal against the dismissal of the applicant's claim for damages for personal injuries in the High Court¹ under the Road Accident Fund Act (RAF Act).² The issue that the applicant seeks to have determined is whether the circumstances under which he sustained the injuries fall within the ambit of sections 17 and 20 of the RAF Act.

[2] The application must, however, fail because this Court has no jurisdiction to hear the appeal. As will become apparent below, the facts in this matter do not sustain or support the applicant's pleaded cause of action. It became clear at the hearing that the applicant's case was a purely factual one – which, in order to be successful, requires that we overturn factual findings made by the trial court. This we cannot do.³

¹ High Court of South Africa, Limpopo Local Division, Thohoyandou. An application for leave to appeal was subsequently dismissed by the Supreme Court of Appeal.

² 56 of 1996.

³ See, for example, *Conradie v S* [2018] ZACC 12; 2018 (7) BCLR 757 (CC); *S v Barlow* [2017] ZACC 27; 2017 (2) SACR 535 (CC); 2017 (11) BCLR 1357 (CC); *S v Molaudzi* [2014] ZACC 15; 2014 JDR 0975 (CC); 2014 (7) BCLR 785 (CC); *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC); *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC).

[3] The trial Judge made the following adverse factual and credibility findings against the applicant:

“I, as a result of the three versions created by the plaintiff himself, am unable to find the plaintiff a credible witness. It is further difficult for me to comprehend how he expects this court to find him a truthful and reliable witness when he gave three contradictory versions, all under oath. Can the plaintiff be said to have proved his case on a balance of probabilities? I am afraid not. On this leg alone, the plaintiff’s case stands to be dismissed.”⁴

[4] In order to entertain the appeal we would have to overturn these factual findings. But this Court does not have jurisdiction to determine appeals of fact only. That should really be the end of the matter.

[5] The applicant contended, however, that these findings did not affect his version that the insured driver had left the vehicle (TLB)⁵ stationed with its ignition, which operates the hydraulics, “on” but the engine of the TLB off and the front loading basket not resting properly on the ground. He contended that this was sufficient factual grounding for his contention that a constitutional issue of legislative interpretation arises.

[6] The uncontentious parts of the applicant’s evidence established that he was injured on 3 June 2014 at Tshavhalovhedzi, Limpopo, when the front loading basket of the TLB fell on his feet. At the time of the accident, the TLB was parked with no driver in the vehicle, nor was anyone operating the hydraulic system on which the loading basket worked. The person who parked the TLB had left the loading basket with one end in the air and the other resting on the ground. Relying on hearsay, the applicant testified that although the TLB’s engine was not on at the time, by leaving the ignition key in an “on” setting, the hydraulic pump operating the loading basket was turned on.

⁴ *Nekokwane v Road Accident Fund*, unreported judgment of the High Court of South Africa, Limpopo Local Division, Thohoyandou, Case No 501/2012 (20 July 2017) (High Court judgment) at para 24.

⁵ Tractor-Loader-Backhoe, a heavy equipment vehicle commonly known as a digger or backhoe.

[7] The trial Judge considered the issue to be determined as “whether the motor vehicle moved from where it was parked as a result of gravity” in order to bring it within the ambit of section 20(2) of the RAF Act. This subsection reads:

“For the purposes of this Act a person who has placed or left a motor vehicle at any place shall be deemed to be driving that motor vehicle while it moves from that place as a result of gravity, or while it is stationary at that place or at a place to which it moved from the first-mentioned place as a result of gravity.”

[8] The applicant attacks the trial Court’s finding that section 20(2) requires that the “movement as a result of gravity” must have caused the TLB’s tyres to have rolled from its stationary position, and that the mere falling of the loading basket to the ground without this was not enough to bring it under section 20(2)’s umbrella. He contends that, in coming to this conclusion, the Court failed to comply with the interpretative injunction of section 39(2) of the Constitution that “[w]hen interpreting any legislation . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. This alleged failure, contends the applicant, is the constitutional issue that grounds our jurisdiction to entertain the application. But that mere assertion is not enough.

[9] Section 167(3)(c) proclaims that this Court “makes a final decision whether a matter is within its jurisdiction”. The applicant for leave must place before the Court facts showing that the matter falls within its jurisdiction.⁶ And it is for this Court to determine if indeed that is so. In *Mbatha*, Madlanga J made this clear:

“[W]here it is clear that the substance of the contest between parties is purely factual, it cannot be said to raise a constitutional issue purely because an applicant says it does. Otherwise, that would be the simplest stratagem by means of which the unscrupulous

⁶ Usually the facts alleged by an applicant are accepted at face value to determine the potential existence of a constitutional issue (*Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 168; *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75), but where, as here, those facts were held not to have been established in the trial court, this principle cannot assist the applicant.

would have their issues ventilated in this Court under the guise that they raise constitutional issues.”⁷

[10] The applicant again faces an insuperable obstacle at this factual level, arising from his own contradictory evidence. The applicant testified that the loading basket was operated hydraulically and that the hydraulic system would operate with the key “on”. In his evidence he further testified that the failure of the hydraulic system caused the accident. This would put in doubt any argument about gravity being the initial or sufficient cause of the accident. In addition there was no pleaded case or evidence that the insured driver ought to have foreseen the reasonable possibility that the hydraulic cylinder would fail and that he failed to take steps against this failure. The factual premise for the applicant’s submission in relation to the interpretation and application of section 20(2) is thus absent. Once again that should be the end of the matter. And it now is.

Order

[11] The following order is made:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

⁷ *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC) at para 221.

For the Applicant:

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For the Respondent:

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