

SOUTH AFRICA / JUDGMENT

Shoprite Checkers (Pty) Ltd v Mafate (903/2021) [2023] ZASCA 14; [2023] 2 All SA 332 (SCA); 2023 (4) SA 537 (SCA) (17 February 2023) [2023] ZASCA 14

COURT

Supreme Court of Appeal

BEFORE

Petse, Mocumie, Carelse, Nhlangulela, Chetty

CASE / FILE NUMBER

903/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 903/2021

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

APPELLANT

and

CECIL TSHEPO MOKOPANE MAFATE

RESPONDENT

Neutral citation: Shoprite Checkers (Pty) Ltd v Mafate (903/2021) [2023] ZASCA 14 (17 February 2023)

Coram: PETSE AP and MOCUMIE and CARELSE JJA and NHLANGULELA and CHETTY AJJA

Heard: 08 November 2022

Delivered: 17 February 2023

Summary: Prescription – extinctive prescription – sections 12 and 13 of the Prescription Act 68 of 1969 (the Prescription Act) – whether sections 12 and 13 of the Prescription Act are mutually exclusive – whether curator appointed on behalf of person suffering from permanent mental incapacity precluded from invoking s 12 of the Prescription Act read with s 13 – whether the appointment of a curator ad litem for a person suffering from mental or intellectual disability, disorder or incapacity has the effect that the relevant impediment

referred to in paragraph (a) of s 13(1) ceases to exist.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Maniom AJ, sitting as court of first instance):

The appeal is dismissed with costs.

Petse AP (Mocumie and Carelse JJA and Nhlangulela and Chetty AJJAconcurring):

Introduction

[1] This appeal raises two crisp but vexed questions. First, whether the appointment of a curator ad litem to a person with a mental or intellectual disability, disorder or incapacity, who, because of his or her mental condition is bereft of legal capacity,[1] has the effect that the relevant impediment referred to in paragraph (a) of s 13(1) of the Prescription Act 68 of 1969 (the Prescription Act) ceases to exist. Second, whether a curator appointed for a person with a mental or intellectual disability, disorder or incapacity is,

apart from relying on s 13(1)(a), precluded from invoking s 12 of the Prescription Act in circumstances where he or she and the person under curatorship did not have knowledge of the identity of the debtor and the facts from which the debt arose because the person under curatorship was severely injured and suffered mental incapacity as a result of the alleged negligence of an employee, whose employer is sought to be held vicariously liable for the ensuing damages.

Background

[2] These questions have arisen in this way. On 15 October 2014, Ms Nolunga Mkhwanazi (Ms Mkhwanazi), then employed as a packer with Smollan Sales & Marketing, which renders merchandising services to retail stores, was at work at the Checkers Hyper in Meadowdale Shopping Mall, Edenvale. Whilst on duty, she climbed into a cage coupled to a forklift to pack merchandise on shelves. The cage was lifted by the forklift some four metres from the shop floor. Unexpectedly, while still hoisted there, tragedy struck. The cage tilted and ejected Ms Mkhwanazi, causing her to fall to the floor. The cage itself, which was dislodged from the forklift, came tumbling down and struck Ms Mkhwanazi on the head. She was severely injured and rendered permanently mentally incapacitated.

- [3] Due to her permanent mental incapacity, she could not, in her mental condition, institute proceedings in her name. On 1 February 2017, the respondent, Mr Cecil Tshepo Mokopane Mafate (Mr Mafate) – a practicing attorney – was appointed as her curator ad litem (the curator). Following his appointment, the curator instituted proceedings for damages in his representative capacity against

Shoprite Holdings Limited (Shoprite Holdings) in the Gauteng Division of the High Court, Johannesburg (the high court). The action was founded in delict and based on Shoprite Holdings' alleged wrongful and negligent conduct, relying on various grounds. On 28 July 2017, Shoprite Holdings raised two special pleas one of misjoinder and the other non-joinder, asserting that it was not the owner of the store at the time and that instead Shoprite Checkers (Pty) Ltd (Shoprite Checkers) was.

- [4] Some 11 months later, on 28 June 2018, the curator withdrew the action against Shoprite Holdings. Curiously, it was only on 15 October 2018 when the curator instituted fresh proceedings (October 2018 summons) against Shoprite Checkers, which was served on the latter on 19 October 2018. Shoprite Checkers filed a special plea of prescription to the curator's October 2018 summons, asserting that the claim had prescribed.

- [5] Shoprite Checkers' special plea attracted a replication from the curator, which was subsequently amended on 25 September 2019. In its amended replication the curator inter alia averred that:

'1.1 Nolunga suffered severe brain injuries and trauma in the incident of 15 October 2014 as described in the particulars of claim.

1.2 Because of her injuries Nolunga was prevented from obtaining knowledge of the identity of the defendant and of the facts from which the debt arose until the plaintiff was appointed as curator ad litem on or about 1 February 2017, and she was unable to acquire the requisite knowledge by the exercise of reasonable care.

1.3 In the premises the debt became due on or after 1 February 2017 within the meaning of section 12(3) of the Prescription Act 68 of 1969, alternatively and if it were to be found that Nolunga possessed the requisite information by 1 February 2017 or could have obtained

same by the exercise of reasonable care, then and in that event the plaintiff pleads as follows:

1.3.1 Nolunga was prevented by her injuries from obtaining knowledge of the identity of the defendant and of the facts from which the debt arose during the period October 2014 to 20 June 2015 at the earliest and was unable to acquire the requisite knowledge by the exercise of reasonable care during this period;

1.3.2 In the premises the debt became due on or after, at the earliest,
20 October 2015.

1.4 When the plaintiff was appointed as curator ad litem on 1 February 2017 and despite exercising reasonable care the plaintiff acquired erroneous information which misled him to believe that the identity of the debtor was now known to him, and which caused him to refrain from any further inquiry.’

[6] The replication went on to allege that, believing that Shoprite Holdings was the employer, the curator mistakenly but reasonably, instituted action against Shoprite Holdings. And that it was only upon the filing of the special pleas of misjoinder and non-joinder on 28 July 2017 that the curator became aware of the true identity of the debtor. Accordingly, so it was asserted, prescription commenced to run only from 28 July 2017. And was therefore interrupted by the service of the summons on the true debtor, ie Shoprite Checkers.

[7] In due course, the parties reached agreement on certain facts, which were recorded in a written statement in terms of rule 33(4)[2] of the Uniform Rules of Court (the rules). It is convenient at this juncture to quote the statement of the agreed facts in full. It provides:

‘WHEREAS the parties have agreed that the defendant’s first special plea of prescription be separated from the remainder of the issues in terms of the provisions of rule 33(4) of the Uniform Rules of Court;

AND WHEREAS the parties have agreed on a set of facts to be placed before court for purposes of argument of the special plea of prescription,

NOW THEREFORE the parties agree as follows:-

1. On 15 October 2014 Nolunga Mkhwanazi was injured in an incident which happened at Checkers Hyper, Meadowdale Mall, Edenvale.
2. By virtue of the injuries sustained by Nolunga Mkhwanazi, she is mentally incapacitated, requiring a curator to administer her affairs.
3. The plaintiff was duly appointed as curator ad litem to Nolunga Mkhwanazi on 1 February 2017. A copy of the order so appointing the plaintiff is annexed hereto marked annexure “A”.
4. On 22 February 2017 the plaintiff caused summons to be issued against Shoprite Holdings Limited under case number 5851/17. A copy of the summons and particulars of claim is annexed hereto marked annexure “B”.
5. The defendant duly pleaded to the aforesaid particulars of claim under case number 5851/17 on 28 July 2017. A copy of the plea is annexed hereto marked annexure “C”.
6. On 28 June 2018 the plaintiff withdrew the action instituted under case number 5851/17. A copy of the notice of withdrawal is annexed hereto marked annexure “D”.
7. The summons commencing the proceedings under case number 38084/18 against the above-named defendant was issued on 15 October 2018 and the summons was served by the sheriff on 19 October 2018. A copy of the return of service is annexed hereto marked annexure “E”.

8. The defendant filed a plea (annexure “F”) and the plaintiff filed a replication, which replication was subsequently amended (annexure “G”), being the replication as amended.

9. It is defendant’s contention that the plaintiff’s claim has prescribed by reason thereof that a period of one year has expired after 1 February 2017 before summons was issued and served, alternatively that one year has expired after 28 July 2017, being the date when the plaintiff had full knowledge thereof that the wrong defendant had been cited under case number 5851/17 and that the defendant in the present proceedings is the correct defendant to be cited.

10. It is the plaintiff’s contention that –

10.1. Nolunga suffered severe brain injuries and trauma in the incident of 15 October 2014 as described in the particulars of claim.

10.2. Because of her injuries Nolunga was prevented from obtaining knowledge of the identity of the defendant and of the facts from which the debt arose until the plaintiff was appointed as curator ad litem on 1 February 2017, and she was unable to acquire the requisite knowledge by the exercise of reasonable care.

10.3. When the plaintiff was appointed as curator ad litem on 1 February 2017 and despite exercising reasonable care the plaintiff acquired erroneous information which misled him to believe that the identity of the debtor was now known to him, and which caused him to refrain from any further inquiry.

10.4. On this basis of this incorrect information the plaintiff identified Shoprite Holdings Ltd as the defendant, and summons citing Shoprite Holdings Limited was issued (under case number 17/5851 in the Gauteng Local Division) and served on 22 February 2017.

10.5. On or about 28 July 2017 Shoprite Holdings Ltd pleaded that its citation constituted a misjoinder, and the failure to cite the present defendant as a defendant constituted a non-joinder.

10.6. Because of the plea the plaintiff learned on or about 28 July 2017 that the owner of the store known as Checkers Hyper in Edenvale was in fact not Shoprite Holdings Ltd but rather its fully-owned subsidiary, the present defendant.

10.7. The action against Shoprite Holdings Ltd was withdrawn on 28 June 2018.

10.8. Prescription was interrupted in terms of section 15 of the Prescription Act by the service of process on 19 October 2018, and less than three years had elapsed since the debt became due within the meaning of section 12(3) of the Prescription Act –

10.8.2. alternatively, on or after 28 July 2017.’

[8] On 3 January 2020, the matter served before Maniom AJ who, on 27 January 2021, in a comprehensive judgment, dismissed the special plea of prescription with costs. In essence, the learned judge held that having regard to the general scheme of the Prescription Act, more particularly that ss 12 and 13, interpreted in light of their purpose and context, were

not mutually exclusive. Therefore, the learned judge concluded, ‘... the two sections are not inconsistent. . .’ and that ‘... any other interpretation would lead to injustice’. Further, he held that the interpretation favoured by him would promote access to courts as entrenched in s 34 of the Constitution. In this respect, the learned judge reasoned thus:

‘I find that a curator ad litem, notwithstanding the provisions of section 13(1)(a), may also rely on section 12(3). This conclusion is based on the fact that the two sections are not inconsistent, secondly any other interpretation would lead to an injustice and thirdly that this interpretation is the one more consistent with the constitutional right of access to courts guaranteed by section 34 of the Constitution which states:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

Subsequently, on 29 July 2021, the high court granted leave to appeal to this Court.

Discussion

- [9] Before dealing with the contentions of counsel, it is necessary to make some preliminary observations in regard to the agreed statement of facts. First, it is common cause that the summons in issue here was issued on 15 October 2018 and served on 19 October
2018. Second, that the curator acquired knowledge of the true identity of the debtor, ie Shoprite Checkers, on 1 February 2017. Quite apart from the foregoing, it is, in addition, common cause that Ms Mkhwanazi had suffered mental or intellectual disability as a result of her injuries rendering her incapable of acquiring knowledge as to the identity of the true debtor.
- [10] Before us, the argument advanced on behalf of Shoprite Checkers was the following. First, s 12 of the Prescription Act is specifically designed to, inter alia, cater for instances where creditors do not suffer from any mental impairment and thus able to exercise due and reasonable care to establish the identity of the debtor, except where the debtor wilfully prevents the creditor from coming to know of the existence of the debt. Second, in contrast, s 13(1)(a) regulates situations where for any or some or all of the instances spelt out in paragraphs (a) to (h) of s 13(1) the creditor is not able to interrupt the running of prescription. Third, unlike in the past where under the common law prescription did not run against minors or persons suffering from any mental or intellectual disability or incapacity, s 13(1) instead explicitly provides that the commencement of prescription is not delayed due to mental incapacity or against a person under curatorship, but that its completion is delayed for a year after ‘the day on which the relevant impediment . . . has ceased to exist’. Fourth, that there is no intersectionality between s 12 on the one hand and s 13 on the other. Fifth, that Ms Mkhwanazi’s situation falls squarely within the purview of s 13 and the curator is therefore precluded from relying on s 12. Sixth, that as the curator was appointed as curator ad litem to Ms Mkhwanazi on 1 February 2017 in order to pursue her

claim for damages, he had a year from 1 February 2017 within which to institute action and serve the summons – whereby the claim was instituted – on Shoprite Checkers.

- [11] In countering the argument advanced on behalf of Shoprite Checkers, counsel for the curator, *inter alia*, made the following submission. First, because of Ms Mkhwanazi's mental incapacity, which is permanent, she did not know, nor could she know, of the identity of the debtor, in this instance Shoprite Checkers. It was only after the curator became aware of the identity of the true debtor – upon service of the special plea in the initial proceedings on 27 June 2017 – did prescription begin to run and not before.

Statutory framework

- [12] It is now convenient to set out the relevant statutory framework that has a bearing on this dispute. The question in this case is, as alluded to above, whether the claim instituted on behalf of Ms Mkhwanazi against Shoprite Checkers is unenforceable by virtue of prescription under the Prescription Act. Section 3 of the Prescription Act makes provision, as its heading suggests, for postponement of completion of prescription in certain circumstances. It reads as follows:

‘(1) If –

- (a) the person against whom the prescription is running is a minor or is insane, or is a person under curatorship, or is prevented by superior force from interrupting the running of prescription as contemplated in section 4; or
- (b) . . .
- (c) the period of prescription would, but for the provisions of this subsection, be completed before or on, or within three years after, the day on which the relevant impediment referred to in paragraph (a) or (b) has ceased to exist,

. . .’

- [13] Section 10, which is headed ‘Extinction of debts by prescription’ reads:

‘(1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.

- (2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.
- (3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as a payment of a debt.’

- [14] Section 11, as its heading indicates, provides for various periods of prescription of debts. It provides:

‘The periods of prescription of debts shall be the following:

- (a) thirty years in respect of –
 - (i) any debt secured by mortgage bond;
 - (ii) any judgment debt;
 - (iii) any debt in respect of any taxation imposed or levied by or under any law;
 - (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;
- (b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);
- (c) six years in respect of any debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);
- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.’

[15] Then follows s 12, which provides for when prescription begins to run. It reads:

‘(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.

- (2) If the debtor wilfully prevents the creditor from coming to know the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.
- (4) ...’

[16] Reference must also be made to s 13, which provides, as is apparent from its heading, that completion of prescription is delayed in certain circumstances. It reads:

‘(1) If–

- (a) the creditor is a minor or is a person with a mental or intellectual disability, disorder or incapacity, or is affected by any other factor that the court deems appropriate with regard to any offence referred to in section 12(4), or is a person under curatorship or is prevented by superior force including any law or any other of court from interrupting the running of prescription as contemplated in section 15(1); or

...

- (i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a) . . . has ceased to exist,

...'

- [17] Finally, there is s 16, which states that, subject to two exceptions, not germane to this appeal, the provisions of Chapter V of the Prescription Act shall apply to any debt arising after the commencement of the Prescription Act to the extent that it is not inconsistent with the provisions of any Act of Parliament, which prescribes different periods concerning prescription 'or imposes conditions on the institution of an action for the recovery of a debt. . .'

Analysis

- [18] It should by now be obvious that the outcome of this appeal revolves around the proper interpretation of the various sections of the Prescription Act to which reference has been made in the preceding six paragraphs. The principles of statutory interpretation are well-settled. In *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*,^[3] this Court restated the proper approach to statutory interpretation. It explained that statutory interpretation is the objective process of attributing meaning to words used in legislation. It further emphasised that the process entails a simultaneous consideration of –

- (i) the language used in the light of the ordinary rules of grammar and syntax;
- (ii) the context in which the provision appears; and
- (iii) the apparent purpose to which it is directed.^[4]

- [19] In *Makate v Vodacom (Pty) Ltd*, the Constitutional Court said the following concerning s 39(2) of the Constitution:^[5]

'Since the coming into force of the Constitution in February 1997, every court that interprets legislation is bound to read a legislative

provision through the prism of the Constitution. In *Fraser, Van der Westhuizen J* explained the role of section 39(2) in these terms:

"When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution. This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation."^[6]

[20] In *Road Accident Fund and Another v Mdeyide*,^[7] the Constitutional Court pointedly observed that the failure to meet a prescription deadline ‘could deny a plaintiff access to a court’.^[8] Almost ten years prior, in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*, the Constitutional Court emphasised the constitutional imperative imposed by s 39(2) in these terms:

‘On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise,

enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension

is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read “in

conformity with the Constitution”. Such an interpretation should not, however, be unduly strained.’^[9]

[21] That the text, context and purpose of a statutory provision must always be considered at the same time when interpreting legislation has been affirmed in various judgments of the Constitutional Court and this Court.^[10]

[22] What the Constitutional Court said most recently in regard to statutory interpretation in *Minister of Police and Others v Fidelity Security Services (Pty) Limited*^[11] is instructive. The Court there said:

‘(a) Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.

(b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.

(c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification “reasonably possible” is a reminder that Judges must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

- (d) If reasonably possible, a statute should be interpreted so as to avoid a lacuna (gap) in the legislative scheme.’

In parenthesis, I mention that the Prescription Act, like any other statutory instrument, must be interpreted in accordance with the dictates of s 39(2) of the Constitution. In addition, the meaning of the words used in a statute must be ascertained taking cognisance of their ordinary grammatical meaning in the light of their context, the subject matter of the statute under consideration and its apparent scope and purpose.[12]

[23] In this case, there is no dispute that only the Prescription Act finds application and no other. Accordingly, we are not confronted with the kind of situation like the one that arose in cases such as

the Road Accident Fund v Smith NO[13] and ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd.[14] Nor is the question as to when prescription begins to run contentious. It is accepted by the parties that prescription commences to run as soon as the debt is due as provided in s 12(1) of the Prescription Act. And, as this Court held in Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd,[15] a debt becomes due when it is immediately claimable or recoverable. In the ordinary course, this will coincide with the date upon which the debt arose, although this is not necessarily always the case.[16]

[24] In *Truter and Another v Deysel*, this Court explained the import of s 12(1) thus:

‘. . . [T]he term “debt due” means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claims.’[17] (Footnotes omitted)

[25] In terms of s 12(3),[18] a debt is deemed to be due when a creditor has knowledge of the identity of the debtor and of the facts from which the debt arose.

And the creditor is, in turn, deemed to possess the requisite knowledge if he or she could have acquired it by exercising reasonable care. One further point can be made here, namely that the limitation of the right of access to court, to the extent that prescription could have that effect, has been found by the Constitutional Court to pass muster.[19]

[26] It bears noting that at its core the Prescription Act is designed to strike a fine balance between the rights of creditors to enforce their claims against their debtors on the one hand. Nevertheless, on the other hand, the need to safeguard the rights of creditors must be weighed against the prejudice that potential defendants would suffer if the law did not come to their aid by means of time bars beyond which creditors would lose their right to enforce their claims. The rationale for this balancing exercise was aptly captured in *Mohlomi v Minister of Defence (Mohlomi)*, where Didcott J said the following:

‘Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced,

prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.’[20]

[27] Hot on the heels of Mohlomi, in Uitenhage Municipality v Molloy, Mahomed CJ put it thus:

‘One of the main purposes of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their claims without incurring the consequences of prescription that purpose would be subverted.’[21]

[28] It is as well at this juncture to remember that the thrust of the case advanced by Shoprite Checkers is that as Mr Mafate was appointed as a curator ad litem to Ms Mkhwanazi on 1 February 2017, the impediment standing in the path of the latter ceased to exist on that date. Consequently, Mr Mafate should have instituted the action within one year after 1 February 2017. But he unquestionably failed to do so and, instead, instituted the action on 15 October 2018, and the summons was served on Shoprite Checkers on 19 October 2018. By then, asserted Shoprite Checkers, the claim had prescribed, having prescribed on 2 February 2018.

Has Ms Mkhwanazi’s impediment ceased to exist?

[29] Before I address the thrust of the argument advanced on behalf of Shoprite checkers, it is necessary to answer an anterior question namely: whether Ms Mkhwanazi’s impediment has ceased to exist as contemplated in paragraph (i) of s 13(1). The word ‘creditor’ located in s 13(1) has nowhere been defined in the Prescription Act. Accordingly, counsel for Shoprite Checkers argued that its ordinary meaning should prevail. In the context of the facts of this case, counsel stressed, the word ‘creditor’ must be understood to be a reference to the person in whom the right to enforce the claim vests, ie Ms Mkhwanazi and not the curator. This argument must, in the view I take of the matter, falter as it contains seeds of its own destruction. A simple example will illustrate this point. If Ms Mkhwanazi is the creditor – as is indeed the case – she would have one year after the impediment referred to in s 13(1)(a) ceases to exist within which to institute action in order to interrupt prescription.

[30] This then raises the question as to whether the appointment of the curator resulted in the impediment confronting Ms Mkhwanazi, qua creditor, to cease to exist. I think not. On the text of s 13(1)(a) interpreted contextually and purposively, having regard to the general

scheme of the Prescription Act, Ms Mkhwanazi's mental or intellectual disability, disorder or incapacity persists to this very day. Indeed, counsel for Shoprite Checkers readily acknowledged that from the day that Ms Mkhwanazi suffered severe head injuries to date she lacks mental capacity, hence the appointment of a curator for her.

- [31] The impediment standing in the way of Ms Mkhwanazi is her mental or intellectual disability or incapacity. To my mind, the very fact that a curator was appointed to pursue her claim, reinforces the proposition that she could not do so on her own. Generally speaking, a person suffering from a mental or intellectual disability, disorder or incapacity is someone who is bereft of his or her senses and can neither grasp the consequences of his or her acts nor make rational decisions. In *Pheasant v Warne*,^[22] Innes CJ opined that the test was whether the person's 'mind was such that he or [she] could not understand and appreciate the transaction into which he or [she] purported to enter'. In *Lange v Lange*,^[23] this Court went further and held that a person is mentally ill not only if he or she cannot understand the nature of the transaction in question, but also if he or she does not understand the consequences of his or her juristic acts but is motivated or influenced (in concluding such juristic acts) by delusions caused by mental illness.
- [32] It bears emphasising that a curator ad litem is appointed for a person who is unable to manage his or her affairs. This is because such a person lacks the capacity to act or litigate. The curator, as a result, concludes transactions and sues on behalf of the mentally incapacitated person. In the context of the facts of this case, the appointment of the curator ad litem was the consequence of Ms Mkhwanazi's mental or intellectual incapacity, disorder or disability following her freak accident whilst on duty in Shoprite Checkers shop floor.
- [33] Accordingly, if the creditor is for example a minor, the impediment will cease to exist only when the creditor attains majority and acquires full legal capacity. In the case of a creditor who is under curatorship, the impediment comes about once the curator takes office. Such an impediment will therefore cease to exist only when the curatorship comes to an end. How, then, one may ask, with respect to a creditor who is suffering from mental incapacity, disability or disorder – as is the case with Ms Mkhwanazi – can it be said that in his or her situation the impediment ceases to exist when the curator ad litem is appointed despite the fact that the creditor himself or herself – in this instance Ms Mkhwanazi – is still afflicted by mental incapacity or disability. Section 13(1)(a) could not be clearer. It explicitly provides that apart from mental or intellectual disability, disorder or incapacity, a creditor under curatorship falls within the category of creditors who are subject to the provisions of s 13(1), meaning that the completion of the relevant period of prescription would not occur before a year has elapsed after the date on which the impediment referred to in s 13(1)(i) ceases to exist. Simply put, the completion of the relevant period of prescription would not occur for as long as the impediment persists. For completeness, it bears emphasising that placing a person under curatorship is in itself an impediment and does not bring about a cessation of an impediment as Shoprite Checkers would have it.

- [34] It is common cause between the protagonists that Ms Mkhwanazi is still suffering from debilitating mental incapacity. And to all intents and purposes, she has lost all vital amenities of life for her to have any meaningful life. Also, the parties are agreed that the mental incapacity by which she is afflicted is of a permanent nature. Thus, there can be no doubt that if her claim is successfully prosecuted she would require a curator bonis to be appointed to look after the proceeds of her claim. Hence, on 1 February 2017, as previously mentioned, Mr Mafate was appointed as curator ad litem to institute a damages claim on her behalf against Shoprite Checkers.
- [35] Paragraph (i) of s 13(1) of the Prescription Act provides that the relevant period of prescription 'would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraphs (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist, and the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)'. For the sake of completeness, it bears emphasising that in her situation, Ms Mkhwanazi's impediment would cease to exist only when she recovers from her mental or intellectual disability, disorder or incapacity.
- [36] Finally, it was contended on behalf of Shoprite Checkers that resort to s 12(3) does not avail the curator. It was submitted that this was because the curator, in any event, failed to exercise due and proper care, for he had known since 28 July 2017, when the special plea of misjoinder in the initial proceedings was delivered, of the identity of the true debtor, ie Shoprite Checkers. Instead, emphasised Shoprite Checkers, he elected to remain supine for a period in excess of a year when he should and could have instituted action timeously to bring himself within the terms of s 13(1) (i) of the Prescription Act and, as a result interrupt the completion of prescription as would be expected of a prudent attorney in his position.
- [37] True, the curator inexplicably failed – at least from what is before us – to act with expedition and his inaction for more than a year remains unexplained. However, I do not find it necessary to delve into this aspect in light of the conclusion reached above as to the import of s 13(1)(i). Accordingly, the conclusion of the high court with respect to Shoprite Checkers' special plea of prescription was correct. Thus, the appeal cannot succeed.
- [38] It is therefore, not necessary for present purposes, to make a definitive pronouncement in relation to the question whether the curator is precluded from invoking s 12 of the Prescription Act in the light of the conclusion reached with respect to s 13(1). Therefore, it is best to leave this question open for determination on another day when it is not only squarely raised but also necessary for the decision of the case.[24]

Order

- [39] In the result the following order is made:

The appeal is dismissed with costs.

X M PETSE

ACTING PRESIDENT

SUPREME COURT OF APPEAL

Appearances:

For appellant: R Stockwell SC Instructed by: Whalley & Van der Lith Inc, Randburg Alberts Attorneys Inc, Bloemfontein For respondent: R S Mtohibe Instructed by: E P Sefatsa Attorneys, Germiston L & V Attorneys, Bloemfontein

[1] An instruction by a person who lacks the necessary mental capacity to an attorney is invalid. See, for example, *Vallaro v Road Accident Fund* 2021 (4) SA 302 (GJ). It is, however, competent for a subsequently appointed curator ad litem to ratify the legal steps taken as a result of the instruction. See in this regard: *Kotze NO v Santam Insurance Ltd* 1994 (1) SA 237 (C); [1994] 3 All SA 257 (C), confirmed on appeal in *Santam Insurance Ltd v Boo*

[1995] ZASCA 52; 1995 (3) SA 301 (AD); [1995] 2 All SA 537 (A); see also *Road Accident Fund v Mdeyide (Minister of Transport, Intervening)* 2008 (1) SA 535 (CC); 2007 (7) BCLR 805 (CC).

[2] Rule 33(4) reads: 'If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

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[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality*

[2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (Endumeni).

[4] *Ibid* para 18.

[5] Section 39(2) of the Constitution reads: 'When interpreting any legislation, . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

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[6] Makate v Vodacom (Pty) Ltd

[2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) para 87.

[7] Road Accident Fund and Another v Mdeyide

[2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC).

[8] Ibid para 10.

[9] Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others

[2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) para 24.

[10] For examples see Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 90 [(the judgment of Ngcobo J) quoted with approval in Du Toit v Minister for Safety and Security and Another

[2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC) para 38; Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (Bertie Van Zyl) para 21; KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal and Others

[2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) para 129; Kubyana v Standard Bank of South Africa Ltd

[2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) paras 77-8; Cool Ideas 1186 CC v Hubbard and Another

[2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (Cool Ideas) para 28; Natal Joint Municipal Pension Fund v Endumeni Municipality

[2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18; Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk

[2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA); G4s Cash Solutions v Zandspruit Cash And Carry (Pty) Ltd and Another

[2016] ZASCA 113; 2017 (2) SA 24 (SCA) para 12; Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others

[2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 46.

- [11] Minister of Police and Others v Fidelity Security Services (Pty) Limited
- [2022] ZACC 16; 2022 (2) SACR 519 (CC) para 34.
- [12] See, for example, Republican Press (Pty) Ltd v CEPPWAWU and Others
- [2007] ZASCA 121; 2008 (1) SA 404 (SCA); [2007] 11 BLLR 1001 (SCA) para 19; Jaga v Dönges NO and Another 1950 (4) SA 633 (A) at 662.
- [13] Road Accident Fund v Smith NO 1999 (1) SA 92 (SCA); [1998] 4 All SA 429 (A).
- [14] ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd 1999 (3) SA 924 (SCA).
- [15] Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd
- [1990] ZASCA 136; [1991] 1 All SA 400 (A); 1991 (1) SA 525 (AD) at 532G.
- [16] Section 12(1) of the Prescription Act quoted in para 15 above.
- [17] Truter and Another v Deysel
- [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 15.
- [18] Section 12(3) quoted in para 16 above.
- [19] See, for example, Mohlomi v Minister of Defence
- [1996] ZACC 20; 1997 (1) SA 124; 1996 (12) BCLR 1559 para 11; Engelbrecht v Road Accident Fund and Another
- [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) para 29; Brümmer v Minister for Social Development and Others
- [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) paras 64-67.
- [20] Mohlomi v Minister of Defence
- [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) (Mohlomi) para 11.
- [21] Uitenhage Municipality v Molloy
- [1997] ZASCA 112; 1998 (2) SA 735 (SCA) at 742I-743A. See also: Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality 1984
- (1) SA 571 (AD) at 578F-579G.
- [22] Pheasant v Warne 1922 AD 481 at 488.
- [23] Lange v Lange 1945 AD 332.
- [24] Compare: Western Cape Education Department and Another v George
- [1998] ZASCA 26; 1998 (3) SA 77 (SCA); [1998] 2 All SA 623 (A) at 84 E.

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