



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 17 February 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

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

Today, the Supreme Court of Appeal (SCA) handed down judgment dismissing an appeal against a decision of the Gauteng Division of the High Court, Johannesburg (the high court).

The issue before the SCA was 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.

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 was dislodged from the forklift, toppled over and struck Ms Mkhwanazi on the head. She was severely injured and rendered permanently mentally incapacitated.

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 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 of misjoinder and 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.

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. Shoprite Checkers

argued that Ms Mkhwanazi's situation fell squarely within the purview of s 13 and the curator was therefore precluded from relying on s 12. The thrust of the case advanced by Shoprite Checkers was 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 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.

The SCA held that the completion of the relevant period of prescription would not occur for as long as the impediment persists. It emphasised that placing a person under curatorship is in itself an impediment and does not bring about a cessation of an impediment. Therefore, in her situation, Ms Mkhwanazi's impediment would cease to exist only when she recovers from her mental or intellectual disability, disorder or incapacity, hence the dismissal of the appeal.

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