CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 70/06

THE ROAD ACCIDENT FUND	Appellant
versus	
VUSUMZI MDEYIDE	Respondent
MINISTER OF TRANSPORT	Intervening Party

Heard on : 27 February 2007

Decided on : 4 April 2007

JUDGMENT

NAVSA AJ:

Introduction

[1] This matter comes before this Court on several bases. First, on 3 October 2006, the High Court, sitting in East London, declared section 23(1) of the Road Accident Fund Act 56 of 1996 (the Act) to be inconsistent with the Constitution and invalid. It referred the declaration to this Court for confirmation in terms of section 167(5) of the Constitution.[1] Second, the Road Accident Fund, a statutory insurer established in

[1] Section 167(5) of the Constitution provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

terms of the Act and the defendant in the court below, appealed against the High Court decision in terms of section 172(2)(d) of the Constitution.[2] Third, Notshe AJ, who issued the declaratory order in the court below, did so without notice to the Minister of Transport, the responsible Minister in terms of the Act. As a result, we are called upon to consider an application by the Minister of Transport to intervene in this appeal. That application is coupled with an application for condonation.

[2] On 1 November 2006 the Chief Justice directed the Registrar of this Court to serve copies of all the necessary documentation in this matter on the Minister of Transport and afforded the Minister an opportunity until 15 November 2006 to file a notice indicating whether he wished to intervene. In the event of the Minister intending to do so, he was to file an affidavit on or before 24 November 2006 setting out the facts, if any, he wished to draw to this Court's attention. On 15 November 2006 the State Attorney wrote to the Registrar, stating that the Minister was out of the country and seeking an indulgence until 22 November 2006 to indicate whether the Minister intended to intervene. This resulted in amended directions dated 29 November 2006 which, although retaining the time for the notice to intervene as 15 November 2006, provided an opportunity for the affidavits setting out the necessary facts to be filed by 22 December 2006. The affidavits were filed on 6 December 2006. On the same date the Minister applied to intervene and simultaneously applied

[2] Section 172(2)(d) of the Constitution provides: "Any person or organ of State with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

for condonation for the late filing of the application. Both applications were heard as part of this appeal.

[3] On 20 November 2006 the Road Accident Fund applied to this Court for leave to lead evidence on the constitutional validity of section 23(1) of the Act. The application was granted and the Road Accident Fund filed further evidence on affidavit, as did the Minister of Transport.

[4] For convenience I refer to the respondent in this matter, Mr Vusumzi Mdeyide, as the plaintiff. The Road Accident Fund will be referred to as the RAF and the Minister of Transport as the Minister. As will become apparent in due course, the central issue in this case is the plaintiff's capacity to litigate and manage his own affairs. The background is set out hereafter.

Background

[5] Life has not been kind to the plaintiff. His fortunes did not improve when he encountered the judicial system for the first time. He was born on 15 March 1968 and for all practical purposes has been blind since childhood. He is illiterate, innumerate and has never been in gainful employment. On 8 March 1999, the plaintiff, accompanied and assisted by his wife, was walking on a road near East London when he was struck by a motor vehicle and apparently rendered unconscious. He was transported by ambulance from the scene of the collision to the Frere Hospital where he was admitted and treated until his discharge on 15 March 1999. The plaintiff has

no independent recall of the collision other than the memory of being struck by a motor vehicle. The duration of the plaintiff's state of consciousness during his stay in hospital and his cognitive and mental abilities at material times thereafter are aspects to which I will return in due course.

[6] On 17 September 1999, approximately six months after his discharge from hospital, the plaintiff, at his wife's urging and accompanied by her, visited the offices of attorneys Niehaus McMahon and Oosthuizen to obtain advice and assistance. There he met his present attorney, Mr Bernardus Niehaus, who consulted with him and his wife in preparation for submitting a claim for compensation against the RAF in terms of section 17 of the Act. Statements were taken from them and a subsequent consultation was contemplated. The plaintiff's wife appeared to have made the arrangements for the first consultation. Until this meeting with Mr Niehaus, the plaintiff had never had any dealings with attorneys and had not known that he had the right to claim compensation for the injuries he had sustained in the collision.

[7] It is at this stage necessary to note that section 17 of the Act provides that the RAF is obliged to compensate any person for any loss or damage suffered as a result of any bodily injury caused to him or her by the driving of a motor vehicle by any other person at any place within the Republic of South Africa, if the injury was due to the negligence or other wrongful act of the driver or owner of the vehicle or of the employee of either, acting in the performance of his or her duties. Section 17 covers claims where the identity of the driver or owner is known as well as claims where the

identity of neither the driver nor owner has been established.[3] In the present case the identity of the driver of the vehicle that struck the plaintiff is known.

[8] The plaintiff's woes continued. Soon after the visit to Mr Niehaus the plaintiff's wife deserted him and left for Cape Town. He has not heard from her since then. Mr Niehaus struggled to make contact with the plaintiff who at that time was living in informal settlements and drifting from place to place. When the plaintiff did receive letters from Mr Niehaus and was able to get someone to read them to him, he was unable to make contact with the attorney. He has never used a telephone in his life and is dependent on others for assistance in travelling from place to place. Mr Niehaus managed to secure the plaintiff's attendance at his offices on 23 January 2002 for a further consultation. Another statement was taken and arrangements were made for him to return to sign an affidavit for submission to the RAF. He failed to keep the appointment. On 11 March 2002, more than three years from the date of the collision, Mr Niehaus decided, despite not having been able to contact the plaintiff, to lodge a claim for compensation on the plaintiff's behalf. He did so by registered post, sending

[3] Section 17(1) of the Road Accident Fund Act provides:

> "The Fund or agent shall –
>
> > *(a)* subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
> >
> > *(b)* subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,
>
> be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee."

the necessary documentation, to the RAF, including unsigned affidavits by both the plaintiff and his wife.

[9] In the accompanying letter Mr Niehaus stated, inter alia, the following:

> "3. It must be understood that Mr Mdeyide is totally illiterate and because of his blindness, he has no perception of date and time. Although a MMF1 claim form was signed at a time when we took instructions, it has not been possible to attend to the other formal requirements such as affidavits because of the reasons set out above.
>
> 4. We however believe that it is in our client's interest that we lodge the claim, although *the three year period* has prescribed within which to do so.
>
> 5. We believe that this will be the perfect case wherein we are to seek an application for condonation. It would appear that this is not a very serious injury, but certainly one [for] which client is entitled to reasonable compensation.
>
> 6. It will be appreciated if you could advise whether you will be prepared to entertain our client's claim and to offer an amount in settlement or whether we should proceed to court to bring a formal application for condonation." (Emphasis added.)

The reference to a three-year period necessitates a consideration of the provisions of section 23(1) of the Act.

[10] Section 23(1), which is of importance in this case, provides:

> "Notwithstanding anything to the contrary in any law contained, but subject to subsections (2) and (3), the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor

> vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose."

Subsection (2) provides that prescription shall not run against minors, persons detained as patients in terms of mental health legislation and persons under curatorship. Subsection (3) provides that once a claim has been lodged in terms of the relatively informal procedure provided for in section 24 of the Act, namely by delivering the prescribed documentation to the RAF by hand or sending it by registered post, a claimant gains an additional two years before the claim finally prescribes. Put differently, a claimant who lodges a section 17 claim with the RAF in terms of the procedure prescribed by section 24 before the expiry of three years from the date on which the cause of action arose, effectively has a total period of five years from the date on which the cause of action arose within which to institute an action for compensation against the RAF.

[11] Mr Niehaus has not explained why he did not submit the plaintiff's claim within the three-year period – it was submitted three years and three days after the date of the collision. After all, Mr Niehaus had no more information at the time he sent the letter to the RAF than he had immediately before the termination of the three-year prescription period. There is nothing to suggest that Mr Niehaus could not have submitted the claim timeously.

[12] On 3 February 2003 the RAF wrote to Mr Niehaus stating that the plaintiff's claim had prescribed but that it was willing to entertain the claim provided that an

application for condonation was made. On 19 December 2003, after a further exchange of correspondence, Mr Niehaus himself wrote to the RAF stating that he had realised that the Act made no provision for condonation. He pointed out that, by contrast, prior legislation governing road accident claims had made such provision.[4] It is clear from the letter by Mr Niehaus that he was referring to an application to court for condonation for the late lodging of the plaintiff's claim for compensation.

Proceedings in the High Court

[13] The plaintiff's action for damages flowing from the injuries sustained in the collision was instituted on 27 February 2004. The plaintiff claimed an amount of R250 000 comprising medical expenses and general damages. It is apparent that the earlier view concerning the seriousness of his injuries – as stated in Mr Niehaus's letter of 11 March 2002 – had changed. The particulars of claim alleged, inter alia, that the plaintiff sustained a fracture of the base of the skull and a head injury that resulted in a lowered Glasgow Coma score.

[14] In response to the plaintiff's claim, the RAF raised prescription in terms of section 23(1) of the Act as a defence and pleaded over. In response the plaintiff pleaded that he had no concept of time and space and that his personal circumstances, as set out above, were relevant because they enabled him to rely on section 12(3) of the Prescription Act 68 of 1969. This section provides that:

[4] Mr Niehaus was apparently referring to sections 14(3) and (4) of the Motor Vehicle Accidents Act 84 of 1986.

> "A debt which does not arise from contract 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."

On a plain reading, section 12(3) of the Prescription Act appears less rigid than section 23(1) of the Act. It enables a person, in appropriate circumstances, to claim that prescription has not commenced running until a particular date because, prior to this date, he or she did not have knowledge of the identity of the debtor, or of the facts from which the debt arose, or could not have acquired it by the exercise of reasonable care.

[15] The matter came to trial and the parties agreed that Notshe AJ should, in terms of Uniform Rule 33(4),[5] adjudicate the prescription issue separately. The learned judge made the necessary order and proceeded to hear evidence on this aspect. Only two witnesses testified, namely the plaintiff and Mr Niehaus. A substantial part of the background sketched above is gleaned from Mr Niehaus's evidence. A few facts were obtained from the plaintiff's evidence. Other relevant parts of the evidence are recorded later.

[16] It is necessary to examine specific parts of the plaintiff's evidence. The plaintiff was unable to supply his date of birth. He gave differing dates in rapid

[5] Uniform Rule 33(4) provides:

> "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."

succession. His reason for this was the following: "The thing that is my problem is because since I bumped against that car now I am affected in my mind." It became clear very early in his testimony that the plaintiff had no concept of time and space. He was unable to tell the length of a week or a month and was unaware of how long had passed since his wife had deserted him.

[17] When asked about his condition during his stay in hospital, the plaintiff replied that he had been unconscious. He was unable to say for how long. The plaintiff's evidence-in-chief was extremely brief – it comprises just under seven pages of the record. This was probably due to the difficulty counsel was experiencing in extracting information from him. Mr Niehaus testified that he had experienced great difficulty in obtaining information from the plaintiff when he consulted with him in preparation for submitting a claim in terms of section 17 of the Act.

[18] When the plaintiff testified an important part of his hospital records indicating that he was in a state of confusion was mentioned in passing. Notshe AJ intervened and attempted to explore whether the plaintiff had been comatose for the greater part of his stay in hospital. Both the court's inquiry and the interventions by counsel on this aspect were ineffectual.

[19] Another important part of the plaintiff's hospital records, dated 18 March 1999, not explored during oral testimony reads as follows: "Head injury MVA re-admission with alleged confusion, brought back by relatives."

[20] During his stay in hospital the plaintiff's wife visited him daily. She spoke to him about visiting an "office" but did not specify which office. She told him that, prior to the visit to the office they had to obtain some or other document from the police station. She also told him that he would get "something" from the office but he did not understand what this meant.

[21] After hearing the evidence and submissions by the parties, Notshe AJ reserved judgment. Some time thereafter he asked the parties to submit argument regarding the following:

> "12.1 whether the obligation imposed by s.39(2) of the Constitution entitles me to consider, *mero motu*, the question of whether the provisions of s.23(1) of the Road Accident Fund Act, 1996 (Act no.56 of 1996) are consistent with the Constitution; and,
>
> 12.2 what course of action to be taken if I find that they are inconsistent with the Constitution."

Notshe AJ directed that the Department of Justice and Constitutional Development be given notice of his request and stated that it could, if it so wished, apply to join the proceedings. The Department did not take up this invitation. The parties presented written and oral submissions.

[22] The following three issues, relevant for present purposes, were identified by Notshe AJ for deliberation and decision:

i. whether section 12(3) of the Prescription Act was applicable;

ii. whether the plaintiff's claim had prescribed; and

iii. whether section 23(1) of the Act is inconsistent with the Constitution.

[23] Notshe AJ considered the applicability of section 12(3) of the Prescription Act. He had regard to the introductory part of section 23(1) of the Act, and concluded that it was clear that it was not subordinate to any other statutory provision. He considered the scheme of the Prescription Act and, in particular, section 10 of that Act which provides:

> "(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."

He also referred to section 11(d) of the Prescription Act in terms of which that Act applies where there is no law applicable in relation to the prescription of a particular debt. He reasoned that, since section 23(1) of the Act did cater for the debt in question, that section applied to the exclusion of section 12(3) of the Prescription Act. He thus concluded that the plaintiff's claim had indeed prescribed in terms of section 23(1).

[24] Notshe AJ then examined section 23(1) of the Act against the background of section 39(2) of the Constitution which provides that, in interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. He held that section 23(1) limited the right of access to courts by claimants. Whilst he

acknowledged that rules limiting the time during which claims may be lodged or litigation instituted are a universal phenomenon, the problem with section 23(1) was that it is a complete bar, irrespective of how worthy, unusual or exceptional particular circumstances might be, or that a claimant may in a particular instance have been unaware of the basis of the claim or the identity of the debtor. He found it offensive that section 23(1) did not take into account the ignorance of the law and illiteracy of the majority of citizens in South Africa.

[25] After comparing it to a number of other statutory provisions that permitted condonation for late claims,[6] the court below concluded that the limitation of the right of access to court imposed by section 23(1) was not reasonable and justifiable in a democratic society based on human dignity, equality and freedom. Notshe AJ declined to read into section 23(1) words that would align it with provisions such as those of section 12(3) of the Prescription Act and thus render it compatible with constitutional values.

[26] In the result, the court below made the following order:

> "1. Section 23(1) of the RAF Act, in so far as it does not make provision for the knowledge of the debtor and of the facts from which the debt arises, infringes upon the rights of the plaintiff of access to Courts as enshrined in the Constitution and is declared inconsistent with the Constitution;
> 2. The defendant's special plea is dismissed;

[6] The following statutory provisions were referred to: sections 3(4)(a) and (b) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002; section 130(5) of the Correctional Services Act 111 of 1998 (now repealed by section 2(1) of Act 40 of 2002); section 57(5) of the South African Police Service Act 68 of 1995 (now repealed by section 2(1) of Act 40 of 2002); section 39(3) of the Public Service Act of 1994 (Proclamation 103 of 1994, the section is now repealed by section 2(1) of Act 40 of 2002); section 344(3) of the Merchant Shipping Act 57 of 1951.

3. The order made in paragraph 1 shall come into effect from the date of this order and shall have no effect on judgments that have already been made;
4. The defendant is directed to pay the costs of the plaintiff; and
5. The matter is referred to the Constitutional Court for the confirmation of the order of invalidity."

The Minister's application to intervene

[27] Uniform Rule 10A[7] and Rule 5(1) of this Court[8] both require anybody who challenges the constitutional validity of an Act of Parliament to join the responsible executive authority as a party to the proceedings. In *Van der Merwe v Road Accident Fund and Another* (*Women's Legal Centre Trust as* Amicus Curiae)[9] the following appears:

> "On a number of occasions this Court has emphasised that when the constitutional validity of an Act of Parliament is impugned the Minister responsible for its administration must be a party to the proceedings inasmuch as his or her views and evidence tendered ought to be heard and considered. Rudimentary fairness in litigation dictates so. There is another important reason. When the constitutional validity of legislation is in issue, considerations of public interest and of separation of powers surface. Ordinarily courts should not pronounce on the validity of impugned legislation without the benefit of hearing the State organ concerned on the purpose

[7] Uniform Rule 10A provides:

> "If in any proceedings before the court, the constitutional validity of a law is challenged, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings."

[8] Constitutional Court Rule 5(1) provides:

> "In any matter, including any appeal, where there is a dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct, or in any inquiry into the constitutionality of any law, including any Act of Parliament or that of a provincial legislature, and the authority responsible for the executive or administrative act or conduct or the threatening thereof or for the administration of any such law is not cited as a party to the case, the party challenging the constitutionality of such act or conduct or law shall, within five days of lodging with the Registrar a document in which such contention is raised for the first time in the proceedings before the Court, take steps to join the authority concerned as a party to the proceedings."

[9] 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 7.

> pursued by the legislation, its legitimacy, the factual context, the impact of its application, and the justification, if any, for limiting an entrenched right. The views of the State organ concerned are also important when considering whether, and on what conditions, to suspend any declaration of invalidity." (Footnote omitted.)

[28] The High Court overlooked Uniform Rule 10A when it decided that it had a duty, in terms of section 39(2) of the Constitution, to consider the constitutional validity of section 23(1) of the Act. It failed to heed decisions of this Court which explained why it was important that the relevant authorities be provided an opportunity to be heard when legislation in respect of which they bear responsibility is challenged.[10]

[29] The Minister undoubtedly has a right to be heard in matters such as the present. However, as stated earlier, his application for intervention was made after the date provided for in the directions by the Chief Justice and he consequently applied for condonation. A senior official in the Department of Transport, in seeking condonation on behalf of the Minister explained that when the directions were served, the Minister was in Ireland on State business. The Minister could only acquaint himself with the details of this case and take legal advice after his return to South Africa on 18 November 2006, three days after the deadline set by the Chief Justice's directions.

[10]See Id at para 7; *Ex parte Omar* 2006 (2) SA 284 (CC); 2003 (10) BCLR 1087 (CC) at para 5; *Mabaso v Law Society, Northern Provinces, and Another* 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at paras 13-14; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 11; *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 15-17; *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) at para 27; *Jooste v Score Supermarket Trading (Pty) Ltd* (*Minister of Labour Intervening*) 1999 (2) SA 1 (CC) at paras 7-9; 1999 (2) BCLR 139 (CC) at paras 6-8; *Parbhoo and Others v Getz NO and Another* 1997 (4) SA 1095 (CC); 1997 (10) BCLR 1337 (CC) at para 5.

The explanation is satisfactory and it is in the interests of justice that the condonation application and the application for leave to intervene be granted.

Evidence on behalf of the Minister and the RAF

[30] The Minister and the RAF made common cause. The following is a summary of what was contained in the affidavits filed on their behalf. The laudable purposes of statutory prescription periods, recognised by courts on numerous occasions, were set out. There would otherwise be inordinate delays in litigation which would impact negatively on the administration of justice. Such delays would make it difficult to adjudicate matters as witnesses and documentary evidence might have disappeared.[11] In the case of the RAF, because it is unaware of the events giving rise to claims, it is unlikely to be in a position to assess properly its potential future liability, making financial planning impossible. It has a present deficit of R18,37 billion including a provision for R21,35 billion in outstanding claims. Without the relative certainty of time-bound claims ensured by section 23(1), the RAF's already strained financial and human resources would be stretched even further by having to investigate old claims. The RAF submitted that, in the event of this Court confirming the declaration of invalidity, it should not do so immediately and should allow a time for accumulation of proper data to enable it to engage more accurately in future financial planning.

The issues

[11] See for example *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng en Andere* 2001 (11) BCLR 1175 (CC) at para 6; *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) at paras 11-12.

[31] The RAF contended, at the outset, that it had been wholly unnecessary for the High Court to have embarked on an inquiry into the constitutionality of section 23(1) of the Act. It submitted that Notshe AJ had failed to realise that the plaintiff was someone who was unable to manage his own affairs and, as such, could have relied on the provisions of section 13(1)(a) of the Prescription Act. This section reads as follows:

> "(1) If –
> *(a)* the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order 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), (b), (c), (d), (e), (f), (g)* or *(h)* has ceased to exist,
> the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph *(i*)."

[32] According to the RAF, section 13 of the Prescription Act, similarly to the common law,[12] protects persons under disability from the consequences of the running of prescription, by delaying its completion until at least a year had elapsed after the disability in question had ceased to exist. The term "insane person" in section 13(1)(a) of the Prescription Act is not restricted to someone who is detained as a patient in terms of mental health legislation (as contemplated in the exceptions to prescription in terms of section 23(2) of the Act) and includes persons of unsound

[12] *President Insurance Co. Ltd v Yu Kwam* 1963 (3) SA 766 (A) at 773F-G.

mind, who are incapable of managing their own affairs and who have no capacity to institute action.[13]

[33] Section 16 of the Prescription Act provides that the prescription of all debts is covered by the provisions of the Prescription Act save insofar as they are inconsistent with the provisions of any Act of Parliament dealing with time periods within which a claim is to be made or an action is to be instituted. Section 13(1)(a) of the Prescription Act and section 23(1) of the Act, so it was contended by the RAF, do not deal with identical subject matter. There is therefore no conflict between their respective provisions and the former is therefore not excluded by the latter.

[34] There is of course support for this view in *Smith*.[14] As pointed out on behalf of the RAF, the Supreme Court of Appeal has on a number of occasions resorted to the construction contended for in the preceding paragraphs to ameliorate the apparently harsh provisions of the Act and the similar provisions of the legislation preceding it.[15]

The plaintiff's capacity

[35] The fundamental problem in the present case was the lack of proper inquiry into the plaintiff's capacity before and during the trial, with the resultant paucity of

[13] *Road Accident Fund v Smith NO* 1999 (1) SA 92 (SCA) at 100J-102B.

[14] Id at 102B-I.

[15] *Moloi and Others v Road Accident Fund* 2001 (3) SA 546 (SCA) at 552-3; *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at para 32; *Standard General Insurance Co Ltd v Verdun Estates (Pty) Ltd and Another* 1990 (2) SA 693 (A) at 697-8; *SA Mutual Fire & General Insurance Co Ltd v Eyberg* 1981 (4) SA 318 (A) at 327B-328C; *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A) at 863G; *Yu Kwam* above n 12 at 777D-E.

information on which this Court has been called upon to determine the rights of the parties. The plaintiff's attorney and the court below both failed to address the question of the plaintiff's capacity.

[36] On Mr Niehaus's own evidence, it was very difficult during consultations with the plaintiff to extract information and obtain instructions. This ought to have sounded the first alarm bells about the plaintiff's capacity to litigate. From the time that Mr Niehaus obtained the plaintiff's medical records he ought to have been even more concerned about the plaintiff's mental capacity and his ability to manage his own affairs. The plaintiff's conduct in court and the documentary evidence ought to have suggested to all the protagonists that something was badly amiss.

[37] If at the time of the trial the plaintiff had indeed been of unsound mind, he would, without the assistance of a curator ad litem, have lacked locus standi with the possible consequence that the entire proceedings in the trial court might be rendered void. It would also call into question his instructions to Mr Niehaus. In *Kotze NO v Santam Insurance Ltd*,[16] a curator subsequently appointed persuaded the High Court to permit him to ratify such steps as had already been taken. The present case might well, if the course set out later is followed, in the end be similarly decided.

[38] If the plaintiff does not have the capacity to litigate, the law requires the assistance of a curator ad litem. In a useful discussion of instances where the

[16] 1994 (1) SA 237 (C) at 248F-J.

appointment of a curator is called for, and of how proceedings in terms of Uniform Rule 57 should be initiated, it is pointed out that:

> "If it is suspected that a person is of unsound mind and as such incapable of managing his affairs, proceedings can be instituted for a declaration by the court to that effect and for the appointment of curators to his person and his property."[17]

It is clear that, the very least that was called for in the court below, was an inquiry in terms of Uniform Rule 57.[18]

[39] If, after the collision, the plaintiff had in fact been of unsound mind and in need of a curator ad litem and/or a curator bonis, and if one had been appointed before the termination of the three-year period, he would have been entitled to the protection afforded by the exception in section 23(2). Without having had a curator appointed, the plaintiff might nevertheless, on the construction contended for by the RAF, be able to seek the protection of section 13(1)(a) of the Prescription Act.

[40] If the plaintiff had been unconscious for the greater part of his stay in hospital, that fact might have impacted on the commencement of prescription in relation to both the provisions of section 13(1)(a) of the Prescription Act and section 23(1) of the Act,

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[17] Van Winsen et al *The Civil Practice of the Supreme Court of South Africa* 4 ed (Juta & Co, Ltd, Kenwyn 1997) 1126.

[18] Rule 57(1) reads as follows:

> "Any person desirous of making application to the court for an order declaring another person (hereinafter referred to as 'the patient') to be of unsound mind and as such incapable of managing his affairs, and appointing a curator to the person or property of such patient shall in the first instance apply to the court for the appointment of a curator *ad litem* to such patient."

The remainder of the rule sets out how an application is to be substantiated, requiring, inter alia, affidavits by two medical practitioners who have conducted recent examinations of the patient with a view to ascertaining and reporting on his medical condition.

on the basis of the doctrine that the law does not require one to do the impossible.[19] That aspect too was inadequately explored.

[41] Loath though one may be to prolong the plaintiff's agony by subjecting him to further processes to determine his capacity, in my view, it is inevitable that this must be done. Counsel for the RAF did indicate that, if an inquiry as envisaged determined conclusively that the plaintiff was incapacitated as contemplated by section 13(1)(a), the RAF might be prevailed upon to settle the matter.

[42] The answers to the questions posed in the preceding paragraphs are essential to determine the plaintiff's rights and the further conduct of the proceedings.

[43] In light of the above, regrettably, it is necessary to set aside the order of the High Court in its entirety and remit the matter. It is open to an appellate court, in appropriate circumstances, to remit a matter for evidence to be obtained on matters that have been left obscure on the record.[20] The High Court might consider whether to call on the Bar to assist pro amico in the inquiry into the plaintiff's capacity. The plaintiff is presently assisted by his sister who might be the ideal person to apply to court in terms of Uniform Rule 57 for the appointment of a curator ad litem.

[44] Counsel for the plaintiff appeared in this Court at the instance of the Legal Aid Board. It is hoped that assistance by the Board will continue so as not to further

[19] *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A).

[20] See Van Winsen et al above n 17 at 909.

prejudice the plaintiff. The unhappy path that this litigation has taken should be a salutary reminder to courts and practitioners that they should be sensitive to the needs and circumstances of someone as vulnerable as the plaintiff.

[45] It is to be hoped that remitting the matter will result in all the issues between the parties being properly and fully ventilated. In this regard, in the event of the trial continuing, the parties might have to apply to amend their pleadings. If necessary, the Minister and the RAF will have an opportunity to present to the trial court such evidence as best advances their interests.

[46] The deliberation and adjudication of the constitutionality of section 23(1) in the High Court was, for the reasons set out above, premature. For that reason the order of constitutional invalidity cannot be confirmed. After the inquiry in terms of Uniform Rule 57 and after hearing the parties on all the issues, the court below might nevertheless be minded to reinstate its order. In that event a referral to this Court in terms of section 167(5) of the Constitution would follow. The Minister and the RAF would then be entitled to appeal the order of the High Court. In the event of the court below establishing that at material times the plaintiff was of sound mind and thereafter reinstating its original order the RAF may re-enrol the matter in this Court for a decision on the merits.

Costs

[47] In all of the circumstances of the case the best course to follow, in my view, is to make no order as to costs.

The order

[48] The following order is made:

1. The Minister's application for condonation and for leave to intervene is granted.
2. The High Court's order of constitutional invalidity is not confirmed.
3. The appeal by the RAF succeeds only to the extent set out hereafter. The entire order of the High Court is set aside and the matter is remitted to the High Court for an inquiry in terms of Uniform Rule 57 and, if necessary, for the further conduct of proceedings.
4. In the event of the court below establishing that at material times the plaintiff was of sound mind and thereafter reinstating its original order the RAF may re-enrol the matter in this Court for a decision on the merits.
5. No order is made as to costs.

Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J concur in the judgment of Navsa AJ.

For the Applicant:	Advocate W Trengove SC and Advocate S Budlender instructed by Hart & Beyers
For the Respondent:	Advocate V Soni SC and Advocate SSW Louw instructed by Niehaus McMahon & Oosthuizen.
For the Intervening Party	Advocate W Trengrove SC and Advocate S Budlender instructed by The State Attorney.