THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 449/2013

Not reportable

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH: EASTERN CAPE PROVINCE **Appellant**

and

FEZA MBODLA **Respondent**

Neutral citation: *MEC for Health: Eastern Cape v Mbodla* (449/2013) [2014] ZASCA 60 (6 May 2014)

Coram: MTHIYANE DP, MAYA and WALLIS JJA, VAN ZYL and MATHOPO AJJA.

Heard: 2 May 2014

Delivered: 6 May 2014

Summary: Application proceedings – respondent raising prescription by way of notice in terms of Rule 6(5)*(d)*(iii) – court not satisfied that issue capable of determination without oral evidence – proper order one in terms of Rule 6(5)*(g)*.

ORDER

On appeal from: Eastern Cape High Court, Mthatha (Griffiths J sitting as court of first instance):

1 The appeal is upheld and the order of the court below is set aside and replaced by the following order:

'(a) The application is referred for the hearing of oral evidence on the question whether the Plaintiff's claim had prescribed before the service of summons.

(b) The plaintiff shall appear to be examined and cross-examined at the hearing of such oral evidence.

(c) The provisions of Rules 35, 36, 37 and 38 shall apply to the hearing of such oral evidence.

(d) The costs of the application are reserved for decision by the court hearing such oral evidence.'

2 The costs of the appeal, including the costs of the application for leave to appeal, are to be costs in the application.

JUDGMENT

Wallis JA (Mthiyane DP, Maya JA and Van Zyl and Mathopo AJJA concurring)

[1] Mr Mbodla was injured in a motor accident on 25 June 2006. According to him, he was treated at the Nelson Mandela Hospital. He complains that his treatment was negligent in various respects and on 1 November 2011 he instituted an action for damages against the MEC

for Health, Eastern Cape Province (the MEC). The MEC caused a plea to be delivered in which he raised two special pleas. The first was that Mr Mbodla had not complied with the requirement that he give notice of his claim to the MEC within six months of the debt becoming due, as required by s 3(1)*(a)*, read with s 3(2)*(a)*, of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (the Legal Proceedings Act). The second was that the claim had prescribed in terms of s 10(1), read with ss 11*(d)* and 12, of the Prescription Act 68 of 1969.

[2] The delivery of the plea prompted Mr Mbodla to bring an application, in terms of s 3(4)*(a)* of the Legal Proceedings Act, seeking condonation for his failure to deliver a notice within the prescribed period. The MEC's response was to deliver a notice in terms of Rule 6(5)*(d)*(iii) of the Uniform Rules of Court averring that his claim had prescribed and that accordingly condonation could not be granted.[1] The notice averred that the grounds set out by Mr Mbodla for saying that his claim had not prescribed were bad in law and that he had known of the identity of the MEC as his debtor and the full facts giving rise to his claim as early as 25 June 2006, when he received treatment at the Bedford Hospital.[2] Before the matter came to court Mr Mbodla delivered an amended notice of motion in which, instead of condonation, he sought a declaratory order that he had timeously complied with the requirements of the Legal Proceedings Act. The basis for this contention was that in terms of that Act a debt did not become due until he had knowledge of the identity of his debtor and the facts giving rise to the debt. He contended that he had only acquired this knowledge in April 2011 and that a notice given on his behalf on 2 June 2011 was accordingly timeous notice. The

[1] Section 3(4)*(b)*(i) of the Legal Proceedings Act.
[2] There appears to be confusion over the simple question of where Mr Mbodla received treatment.

court below (Griffiths J) granted a declaratory order to this effect. The appeal is with his leave.

[3] The affidavit by Mr Mbodla in support of his application largely reproduced his particulars of claim. The only facts relevant to the plea of prescription that it contained were the date of the accident, that he was treated at the Nelson Mandela Hospital and some general allegations of negligence on the part of the hospital staff. Insofar as his knowledge of the facts giving rise to his claim was concerned all that he said was that he was a lay person and not conversant with the law, in particular the law relating to vicarious liability for the wrongful conduct of employees, and that he had only learned that he had a claim after consulting his attorney in April 2011. He annexed to his affidavit a copy of the medico-legal report that was also attached to his particulars of claim. Lastly under the heading of prejudice he mentioned that 'the incident was fully investigated in terms of a detailed departmental enquiry shortly after it transpired'. No further information was given about this enquiry. We do not know why it was undertaken or what its outcome had been.

[4] In opening the appeal counsel for the MEC started to give us a time line of events. However, that time line was drawn from the medico-legal report the contents of which had not been proved in evidence. At best the report contained hearsay statements by its author of facts he said he had distilled from the hospital records and what counsel described as admissions by Mr Mbodla. To make matters worse the report itself had only been issued on 2 August 2011, which was after the date upon which Mr Mbodla's attorneys had written to the MEC giving notice of his claim. That was the notice that the court below held had been timeously given. The report was accordingly irrelevant to the issues before the court below.

Nonetheless it featured prominently in its reasoning, the court holding that until it was received there was nothing to alert Mr Mbodla 'to the fact that he had not received optimal treatment'.

[5] The reality was that the issue of compliance with the Legal Proceedings Act and the question of prescription could not properly be determined on the facts before the court below. The facts in Mr Mbodla's founding affidavit were too cryptic, too inadequate and too confusing to found a decision in his favour. In some respects there were glaring contradictions. For example, he said that he only realised that he had a claim when he consulted with his attorney in April 2011. However, the papers include a letter from the attorney to the MEC in which he said that Mr Mbodla had consulted with him in December 2010 and it was then that he became aware that he had a claim. As the MEC's Rule 6(5)*(d)*(iii) notice pointed out the affidavit did not say why Mr Mbodla waited for over four years to consult an attorney, or why he eventually did so, or what he had done in the intervening period to address his disabilities. On the other hand the failure of the MEC to place any facts before the court from the hospital records in relation to Mr Mbodla's treatment left the entire picture unclear.

[6] In those circumstances it was inappropriate for the court below to reach a final conclusion on the issue of prescription and compliance with the statute on the papers alone. The fault for the shortcomings in the evidence was attributable to both parties. Mr Mbodla's founding affidavit needed to be more forthcoming in regard to the history of events and it can rarely, if ever, be the case that a question of prescription, involving constructive knowledge of certain facts, can be resolved as a question of

law alone. The MEC should have placed facts before the court to substantiate the plea of prescription.

[7] Rule 6(5)*(g)* deals with this situation as is apparent from its opening words, which are:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision.'

This Court has confirmed that the powers this rule vests in the court are extremely broad and should be exercised to ensure that matters are decided justly and expeditiously.[3] They are usually exercised because of the presence of disputes of fact in the papers before the court, but the rule is not confined to that situation.[4] If a court is unable to make a just decision because the parties have failed to place sufficient information before it to enable it to do so, it may in an appropriate case, exercise its powers under the rule to give directions that will enable the deficiencies to be remedied and a just decision to be rendered.

[8] This is such a case, particularly when one bears in mind the consequences of a decision either way on the point of prescription. If Mr Mbodla fails, his claim will be dismissed. If the plea is dismissed, the MEC will be faced with exhuming medical records from eight years ago and tracing witnesses who can testify in regard to Mr Mbodla's treatment. The claim is substantial. In those circumstances I am satisfied that this is a case where the court below should have acted in terms of Rule 6(5)*(g)* and made an order referring the issues in dispute for the hearing of oral evidence. When this possibility was raised with counsel they both

[3] *Nkwentsha v Minister of Law and Order and Another* 1988 (3) SA 99 (A) at 117B-f, where the court held that it was wide enough to warrant the grant of an order that a detainee held under emergency regulations be produced to court to give evidence, notwithstanding a regulation that prohibited anyone from having access to the detainee without the consent of the respondent.

[4] *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 91A-E.

accepted that it would be appropriate to confine such a reference to the issue of prescription. Counsel for the MEC accepted that if the plea of prescription fails then the letter of 2 June 2011 constituted compliance with the notice requirement in the Legal Proceedings Act.

[9] In the circumstances I make the following order:

1 The appeal is upheld and the order of the court below is set aside and replaced by the following order:

‘(a) The application is referred for the hearing of oral evidence on the question whether the Plaintiff’s claim had prescribed before the service of summons.

(b) The plaintiff shall appear to be examined and cross-examined at the hearing of such oral evidence.

(c) The provisions of Rules 35, 36, 37 and 38 shall apply to the hearing of such oral evidence.

(d) The costs of the application are reserved for decision by the court hearing such oral evidence.’

2 The costs of the appeal, including the costs of the application for leave to appeal, are to be costs in the application.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	P J de Bruyn SC (with him V Kunju) Instructed by: The State Attorney, Mthatha and Bloemfontein.
For respondent:	A G Dugmore Instructed by: Nonxuba Inc, Johannesburg and Webbers, Bloemfontein.