CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 55/23

In the matter between:

SHOPRITE CHECKERS (PTY) LIMITED Applicant

and

CECIL TSHEPO MOKOPANE MAFATE N.O. Respondent

Neutral citation:	*Shoprite Checkers (Pty) Limited v Mafate N.O.* [2024] ZACC 16
Coram:	Bilchitz AJ, Chaskalson AJ, Dodson AJ, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J.
Judgment:	Madlanga J (unanimous)
Heard on:	29 February 2024
Decided on:	15 August 2024

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Johannesburg):

1. Leave to appeal is granted.
2. The appeal is dismissed with costs.

JUDGMENT

MADLANGA J (Bilchitz AJ, Chaskalson AJ, Dodson AJ, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring):

Introduction

[1] In the Supreme Court of Appeal judgment that is the subject of this appeal Petse AP aptly opens by saying that the appeal raises "crisp but vexed questions".[1] This is an application for leave to appeal against that judgment. In the main, the application is about extinctive prescription, in particular the interpretation of section 13(1)(a) and (i) of the Prescription Act.[2]

Background

[2] Ms Nolunga Mkhwanazi worked as a packer for a business entity called Smollan Sales and Marketing which offers merchandising services at retail stores. On 15 October 2014 Ms Mkhwanazi was doing merchandising work at Checkers Hyper at the Meadowdale Mall in Edenvale. Part of what she did on the day entailed being lifted high up in a cage that was attached to a forklift. This was done to enable her to pack merchandise on high-up shelves. When the cage was a few metres up, it tilted. Ms Mkhwanazi fell off. As she lay on the floor, the cage came hurtling down, hitting her on her head. The severe head injury she sustained resulted in mental incapacity, which, it is common cause, is permanent.

[1] *Shoprite Checkers (Pty) Ltd v Mafate* [2023] ZASCA 14; 2023 (4) SA 537 (SCA) (Supreme Court of Appeal judgment) at para 1.

[2] 68 of 1969.

[3] On 1 February 2017, Mr Cecil Tshepo Mokopane Mafate, the respondent, was appointed as curator *ad litem*[3] to prosecute a damages claim on behalf of Ms Mkhwanazi. Exercising his mandate, Mr Mafate instituted a delictual claim in the High Court of South Africa, Gauteng Division, Johannesburg, against Shoprite Holdings Limited on 22 February 2017. In a special plea, which raised misjoinder and non-joinder, filed on 28 July 2017, Shoprite Holdings Limited pleaded that the Checkers Hyper at the Meadowdale Mall in Edenvale did not belong to it, but to Shoprite Checkers (Pty) Ltd (Shoprite Checkers), the applicant before us. In the special plea Shoprite Holdings Limited explained that Shoprite Checkers was its wholly owned subsidiary. Just under a year later, on 28 June 2018, Mr Mafate withdrew the action against Shoprite Holdings Limited. About four months later, on 19 October 2018, he served the summons in the present action on Shoprite Checkers.

[4] By way of a special plea, Shoprite Checkers raised a defence that the claim had prescribed. This, on the basis that a year had elapsed since the appointment of Mr Mafate as curator *ad litem*. In this regard, Shoprite Checkers relied on paragraph (i) read with paragraph (a) of section 13(1) of the Prescription Act. I will render fully the then applicable version of section 13(1) later. For now, let me say that the effect of section 13(1)(a) to (h) read with (i) and the end-part of section 13(1)[4] is that, for as long as a person falls under the categories set out in paragraphs (a) to (h) (all of which the section refers to as impediments and which include, in paragraph (a), affliction with mental incapacity and being a person under curatorship), their claim will not prescribe because the period of prescription will not be completed. The period of prescription will be completed only upon the expiry of a period stipulated in section 13(1). The stipulated period is reckoned from the date of cessation of the relevant impediment.

[3] A curator *ad litem* is a person appointed by a court to institute specified legal proceedings on behalf of another, usually a mentally incapacitated person or sometimes a minor.

[4] By "the end-part" of section 13(1), I am referring to the part that comes after paragraphs (a) to (i) of the section and which reads "the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)". The context in which this appears will be given later.

[5] With this in mind, Shoprite Checkers' special plea proceeded from the proposition that the appointment of Mr Mafate as curator *ad litem* constituted a cessation of the impediment of mental incapacity. The thinking behind this proposition was that interposing a curator *ad litem* made it possible for the delictual claim to be instituted. According to Shoprite Checkers, the relevant impediment had thus ceased. The impediment ceased to exist because, although Ms Mkhwanazi could not personally prosecute the claim, the curator *ad litem* could do so on her behalf.

[6] The substance of the special plea was that from 15 October 2014, the date on which tragedy befell Ms Mkhwanazi, the three-year prescription period had commenced and by 15 October 2017 it had elapsed. Therefore, in terms of a conjoined reading of paragraphs (a) and (i) and the end-part of section 13(1), as at 19 October 2018, when Mr Mafate served summons on Shoprite Checkers, the additional period of a year stipulated in section 13(1) had also elapsed. The result was that the claim had prescribed.

[7] In a replication, Mr Mafate took issue with the special plea of prescription. He contended that the running of prescription was interrupted by the service of process on Shoprite Checkers on 19 October 2018, and that less than three years had elapsed since the debt became due within the meaning of section 12(3), which provides that—

> "[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."

[8] Mr Mafate took the view that he acquired knowledge of the identity of the debtor only after Shoprite Holdings Limited had raised the defences of misjoinder and non-joinder, and that acquiring this knowledge at the time that he did was not the result of a failure on his part to exercise reasonable care.

[9] At the instance of the parties, the High Court separated the issues in terms of rule 33(4) of the Uniform Rules of Court. The issue to be determined first was whether the claim had prescribed. The rest of the issues were to be determined at a later stage. For purposes of the prescription point, the parties reached agreement on a set of facts on the basis of which the point would be determined. I do not think it necessary to set out those facts as they are basically what has been summarised above. Likewise, the legal contentions raised by the parties on the prescription point were those that I have already captured.

[10] The High Court dismissed the special plea. Manoim AJ held:

> "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.'"

[11] The High Court granted leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal held that, since a curator *ad litem* had been appointed for Ms Mkhwanazi, such appointment rendered her a person under curatorship as envisaged in section 13(1)(a). The effect of this holding was that, at the time Shoprite Checkers says the claim had prescribed, Ms Mkhwanazi was under curatorship as the curatorship was ongoing. Therefore, the period of prescription could not have been completed.[5]

[12] The Supreme Court of Appeal also held that the condition of mental incapacity would cease to exist only when Ms Mkhwanazi recovered from it,[6] something that

[5] Supreme Court of Appeal judgment at para 33.

[6] Id at para 35.

would never materialise as – on the acceptance of both parties – her condition is permanent. Thus, the import of the reasoning of the Supreme Court of Appeal was that the period of prescription would never be completed.

[13] The Supreme Court of Appeal did not find it necessary to determine Shoprite Checkers' section 12(3) argument.

[14] Before us each party stands by its position of sustainability or non-sustainability of the prescription defence. On jurisdiction, the parties' submissions are as follows. Shoprite Checkers argues that the matter raises an arguable point of law of general public importance which ought to be considered by this Court. That point concerns the interpretation of section 13(1) and the interplay between that section and section 12(3) of the Prescription Act. Shoprite Checkers submits that this point is of general public importance as its determination will provide legal certainty on the interpretation of section 13(1).

[15] Shoprite Checkers contends that three constitutional issues are engaged. First, prescription raises a constitutional issue as it may have an adverse impact on a creditor's right to pursue a claim that would otherwise be valid and enforceable. Second, it is submitted that inordinate delays in the finalisation of claims are at odds with legal certainty, which is better served by the timeous prosecution of claims. Third and relatedly, it is contended that Shoprite Checkers' right of access to courts is implicated.

[16] Mr Mafate argues that Shoprite Checkers' contentions do not engage this Court's jurisdiction. He also submits that leave to appeal ought to be refused as it is not in the interests of justice to hear the matter. The latter contention is substantiated on the basis that Shoprite Checkers, a large company with financial might, has for the past decade used its deep pockets to frustrate the claim of Ms Mkhwanazi, an indigent, mentally incapacitated woman. Further, it is contended that Shoprite Checkers lacks reasonable prospects of success as the High Court and Supreme Court of Appeal have provided cogent interpretations of section 13(1).

[17] At this juncture, I must point out that Mr Mafate was represented by Ms Nasreen Rajab-Budlender SC, Ms Salome Manganye and Ms Nicola Soekoe. All three counsel appeared pursuant to a request made by this Court to the Pan African Bar Association of South Africa (PABASA) to appoint counsel to assist it, as Mr Mafate did not have a legal practitioner to represent him at the hearing. PABASA appointed the three counsel. Although the request was made a couple of days before the hearing, the three counsel were ready to appear and present oral argument. The Court granted them leave to file written submissions after the hearing, also affording Shoprite Checkers an opportunity to file written submissions in response. Indeed, each side filed post-hearing written submissions. The Court is indebted to Ms Rajab-Budlender SC and her team for their valuable assistance.

Jurisdiction

[18] This Court's constitutional jurisdiction is engaged. Extinctive prescription limits the time within which a claim may be brought. The timeous prosecution of a claim impacts the fairness of a hearing which, in turn, better guarantees justice between the litigating disputants. Section 34 of the Constitution affords everyone the right to a fair hearing.[7] Inordinate delays detract from the fairness of a hearing and, indeed, "damage the interests of justice".[8] In *Mohlomi*,[9] Didcott J said:

> "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

[7] Section 34 of the Constitution.

[8] Obvious examples of prejudice arising from delay are the forgetfulness of witnesses, loss of witnesses through death or other phenomena and loss of evidence, for example, documents or electronic and mechanical material.

[9] *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) at para 11.

> 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."

[19] In similar vein, Mahomed CJ had this to say in *Molloy*:[10]

> "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."

[20] Despite the fact that the principle to be gleaned directly from these two cases concerns balancing the interests of creditors and debtors, on a proper reading, the cases do support the point I make regarding this Court's jurisdiction.

Leave to appeal

[21] Coming to leave to appeal, the very fact that the matter does not admit of easy resolution shows that there are reasonable prospects of success. Additionally, the issues before us are of import. This is especially so as the plaintiff is from a vulnerable group within our society, i.e. mentally incapacitated persons. Leave to appeal must be granted.

Must the appeal succeed?

[22] I promised earlier to quote section 13(1) in full. Here it is as it read at the time the issues arose:

> "If—
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> (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
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> (b) the debtor is outside the Republic; or

[10] *Uitenhage Municipality v Molloy* [1997] ZASCA 112; 1998 (2) SA 735 (SCA) at 146.

(c) the creditor and debtor are married to each other; or

(d) the creditor and debtor are partners and the debt is a debt which arose out of the partnership relationship; or

(e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or

(f) the debt is the object of a dispute subjected to arbitration; or

(g) the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act, 1966 (Act 28 of 1966); or

(h) the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and

(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)."

[23] It is to be noted from paragraph (i) of this section that what are itemised in paragraphs (a) to (h) are referred to as "impediments". That is, impediments to a creditor's ability to institute proceedings. These are not necessarily *all* impediments in the true sense. Saner explains:

> "The use of the word 'impediment' in section 13(1)(i) is not to be taken too literally and interpreted as meaning an absolute bar to the institution of legal proceedings. While some of the circumstances set forth in section 13(1)(a) to (h) give rise to an absolute bar, others do not. An example of the former is section 13(1)(h), and an example of the latter is section 13(1)(e). The word 'impediment' therefore covers a wide spectrum of situations ranging from those in which it would not be possible in law for the creditor to sue to those in which it might be difficult or awkward, but not impossible, to sue. In short, the impediments range from the absolute to the relative."[11]

[11] Saner *Prescription in South African Law* (LexisNexis, Cape Town 2023) Service Issue 34 at 222-3.

[24] Before clarifying how the period of prescription runs under section 13(1), let me first set out the context provided by section 12. In terms of section 12(1), prescription begins to run as soon as the debt is due. Section 12(3) provides that the debt is deemed to be due once the creditor has knowledge of the identity of the debtor and of the facts giving rise to the debt. So, where the creditor has immediate (i.e. immediately after the occurrence in issue) knowledge of the identity of the debtor and the facts from which the debt arises, the debt becomes due immediately. Where that is not the case, the debt will become due at a later date, which will be when the creditor acquires actual knowledge of the two categories of mentioned factual material. The proviso to section 12(3) is to the effect that, even where such knowledge has not been acquired, the knowledge shall be deemed to have been acquired if it could have been acquired through the exercise of reasonable care.

[25] There may be instances where the creditor does not have a mental incapacity when the debt arises but several months later they suffer a brain injury or are afflicted with a brain disease that causes mental incapacity. There, depending on whether the creditor had become aware of the two categories of factual material referred to above or ought reasonably to have become aware of them, the debt may have become due prior to the mental incapacity. In that event, prescription would have started to run, but the subsequent brain injury or disease and mental incapacity would affect the completion of the prescription period.

[26] Insofar as people with mental incapacity are concerned, it is clear from paragraph (i) of section 13(1) that there is a notional date of commencement of the running of prescription. There is such a notional commencement date because paragraph (i) refers to a time when, but for an impediment referred to in paragraphs (a), (b), (c), (d), (e), (f), (g) or (h), the period of prescription would have been *completed*. There cannot be "completion" without commencement, even if the commencement be notional. If we do not accept the idea of notional commencement, section 13(1) would otherwise be rendered inoperable. Fortunately, in this matter, we do not have to decide the point from which the notional date must be reckoned.

[27] I next clarify how the period of prescription runs and gets completed under section 13(1). Paragraph (i) envisages the possibility – in some instances – of the relevant impediment referred to in paragraphs (a) to (h) ceasing to exist. Since the relevant period of prescription (three years, in this matter) will have been running throughout, there are the possibilities that, when the impediment ceases, the three-year period will, or will not, have expired.

[28] Paragraph (i) provides that if the relevant period of prescription would, but for the impediments contained in section 13(1)(a) to (h), be completed before or on, or within one year after, the day on which the relevant impediment has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day of cessation of the impediment. That means if, on or before the date of cessation of the impediment, the period of prescription would have been completed, the claimant has only a year – not three years – within which to institute proceedings. Even where the period of prescription would have been completed within a year after the impediment had ceased, the claimant still has a year from the date of cessation of the impediment to bring action. If, by the date of cessation of the impediment, the period still remaining was more than a year, the claim must be instituted within that remaining period.[12]

[29] Paragraph (a) – as amended by the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act[13] – now reads—

> "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 order of court from interrupting the running of prescription as contemplated in section 15(1)."

[12] *ABP 4×4 Motor Dealers (Pty) Limited v IGI Insurance Company Limited* 1999 (3) SA 924 (SCA) at para 10.

[13] 15 of 2020.

[30] The amendment served the important purpose of getting rid of the offensive word "insane" in the old paragraph (a). The amendment introduced a substitute descriptor that refers to "a person with a mental or intellectual disability, disorder or incapacity". I do not think this amendment was intended to introduce a change in the category of people referred to. In referring to Ms Mkhwanazi's condition, I will not use the old terminology. For convenience, I will not use the full new, long descriptor. Instead, I will use the shortened terminology "mental incapacity".

[31] How people are labelled may implicate the right to dignity. People with mental incapacity, a vulnerable group, are highly deserving of the protection of their dignity. This is so because they are less likely to fight, or be able to fight, for this protection. Unsurprisingly, Article 1 of the Convention on the Rights of Persons with Disabilities[14] provides, amongst others, that the Convention seeks to promote respect for the inherent dignity of persons with disabilities. In terms of this Article, persons with disabilities include persons with "mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

[32] There is no issue about the nature of Ms Mkhwanazi's condition as the parties are agreed that her condition is covered by the old section 13(1)(a). Thus, I do not have to delve into (a) what exactly constitutes mental incapacity – as was done in cases like *Pheasant*[15] – and (b) whether Ms Mkhwanazi fits into that category. I will simply accept that she does. Indeed, that is not an issue on which the parties required an answer on the separated question sought to be determined first.

[33] In accordance with the *Endumeni* interpretative triad of language, context and purpose,[16] the language we are concerned with is that of an impediment arising from

[14] Convention on the Rights of Persons with Disabilities, 12 December 2006. South Africa ratified the Convention in 2007.

[15] *Pheasant v Warne* 1922 AD 481.

[16] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA). In this case Wallis JA held at para 18:

mental incapacity. This language is used in the overall context of the balance that the Prescription Act seeks to strike between the conflicting interests of creditors, on the one hand, and of debtors, on the other.[17] The purpose of the inclusion of this impediment in section 13(1)(a) is to safeguard the interests of the vulnerable group of persons suffering from mental incapacity in a manner that guarantees that the running of prescription will not be completed for as long as the impediment persists.

[34] The interpretation advocated by Shoprite Checkers says, upon the appointment of the curator *ad litem*, Ms Mkhwanazi's impediment ceased to exist; the curator *ad litem* could institute proceedings on her behalf. Therefore, she had only one year from the date of such cessation to institute proceedings. This interpretation affords Ms Mkhwanazi and similarly placed persons less protection. Even with the appointment of a curator *ad litem*, such persons remain mentally incapacitated. They continue to be subject to the vagaries of the competence, or lack thereof, or tardiness of the curator *ad litem*. And – because of their mental incapacity – this is a situation about which they cannot do, or be expected to do, anything. On Shoprite Checkers' interpretation, the fortunes of a mentally incapacitated person are contingent on the competence and diligence of the appointed curator. I do not think that paragraph (i) and the end-part of section 13(1) read with paragraph (a), insofar as the latter paragraph relates to mentally incapacitated persons, meant to divest such persons of the paragraph (a) protection in circumstances where there was no guarantee of an optimal safeguard of their interests.

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors."

This Court has endorsed *Endumeni* a number of times, but so as not to clutter annotations, I refer only to *Road Traffic Management Corporation v Waymark Infotech (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR 749 (CC) and *Diener N.O. v Minister of Justice and Correctional Services* [2018] ZACC 48; 2019 (2) BCLR 214 (CC); 2019 (4) SA 374 (CC).

[17] See *Mohlomi* above n 9 and *Molloy* above n 10.

[35] Assuming that Shoprite Checkers' interpretation were correct, the possibility of the claim supposed to be prosecuted by the curator *ad litem* prescribing cannot be discounted. In fact, the inordinate delays by the curator *ad litem* in this very case are an indication that things may go wrong. I am not saying they did in this instance. Where the claim does prescribe in the hands of the curator *ad litem*, it would be cold comfort to say that the affected person with a mental incapacity has a claim against the curator *ad litem*. The person would be in as good a position as where they were before, if not worse off. I would sooner continue to have a claim against an established, huge company like Shoprite Checkers than to have a new claim against, for example, an attorney from a small law firm or an individual advocate.[18] Why then should the impediment contained in paragraph (a) not continue unaffected by the appointment of a curator *ad litem*? I do not see why not. This is less about whether there is a person (the curator *ad litem*) who can bring action on behalf of the person with a mental incapacity. It is more about the optimal protection of the interests of a person belonging to a vulnerable group; a person certainly deserving of such protection.

[36] That this must be so is supported by the comparable, but, of course, different, position of a minor child. For as long as a minor child has a parent or legal guardian, legal proceedings may be instituted on their behalf during minority. For purposes of the protection afforded by section 13(1), however, this fact is irrelevant. The only real difference in the case of an adult person with a mental incapacity is that there is not – on a continuous basis – a person who may institute legal proceedings on their behalf. There has to be the positive step of appointing someone – a curator *ad litem* – who must institute specified proceedings. It cannot be that this *ad hoc* appointment must have the drastic consequence Shoprite Checkers is urging upon us. For the duration of "office", the interposed curator *ad litem* is comparable to the parent or legal guardian in the case of a minor child.

[18] I give the examples of an attorney or advocate because curators *ad litem* are ordinarily appointed from their ranks.

[37] The appointment of curators *ad litem* in respect of persons with mental incapacity is a chance occurrence. It just does not accord with my sense of justice that such chance occurrence should result in the affected people with mental incapacity being divested of the wholesome, meaningful protection enjoyed by a substantial number of other persons with mental incapacity in respect of whom there are no such appointments. Any benefits that may be derived from the appointment of a curator *ad litem* are not reason enough to divest a person with mental incapacity of continued protection.

[38] This interpretation sits comfortably with the language of the section. Ms Mkhwanazi and similarly placed persons are persons with a mental incapacity as envisaged in section 13(1)(a). The overall context of balancing the interests of creditors and debtors does not detract from this interpretation. This is especially so here as – on one side of the scale – we have creditors who are mentally incapacitated. The scale must tilt in their favour. The interpretation I proffer advances the purpose of protecting the vulnerable group of persons with mental incapacity from the completion of the period of prescription for as long as the incapacity persists.

[39] An overarching constitutional imperative in the interpretative exercise is to be found in section 39(2) of the Constitution, which provides that "[w]hen 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". In this matter, each side is appealing to a right protected in the Bill of Rights. Each calls in aid section 34 of the Constitution. The question that arises is: whose appeal to section 34 must take precedence?

[40] In instances where – whilst a court is engaged in an interpretative exercise in accordance with section 39(2) – there are competing provisions that bear relevance to the spirit, purport and objects of the Bill of Rights, this Court has held that such a situation calls for a balancing exercise. Here is what Langa CJ said in *Phumelela*:

> "[T]he promotion of the spirit, purport and objects of the Bill of Rights cannot be confined to the impact of section 25 of the Constitution alone, as Phumelela seems to suggest. The process of weighing up must include consideration of other provisions of the Bill of Rights which might be relevant to the issue, for example, as has already been mentioned, the right to freedom of trade.
>
> In its judgment, the Supreme Court of Appeal noted that goodwill is a valuable asset in the sphere of competition. The Bill of Rights does not expressly promote competition principles, but the right to freedom of trade, enshrined in section 22 of the Constitution is, in my view, consistent with a competitive regime in matters of trade and the recognition of the protection of competition as being in the public welfare.
>
> It is not permissible for a litigant to simply carve out those provisions that are favourable to it in the application of section 39(2). The interests of other holders of rights must also be taken into account in the balancing exercise. In this case, the section 39(2) exercise would have to balance the goodwill enjoyed by Phumelela against the rights that may be protected by the right to trade."[19]

[41] In this case as well, a balancing exercise is called for. It matters not that the adversaries rely on the same right, i.e. section 34 of the Bill of Rights. The point is that each party relies on the right to advance different interests in the interpretative exercise. Shoprite Checkers is advancing the interest that there must be finality to litigation as otherwise there may be no fairness in a trial that takes place when the memory of witnesses has faded, when evidence has been lost and when witnesses have died or are no longer available for whatever other reason. On the other side, the question is one of preserving the right of access to court for as long as there is a section 13(1) impediment.

[42] For the reasons I proffer for the interpretation I render in paragraphs [33] to [39], the result yielded by a balancing exercise engaged in for purposes of section 39(2) is one that says the appointment of a curator *ad litem* does not divest a person with mental incapacity of the protection afforded by section 13(1) for as long as mental incapacity exists. Simply put and as I said above, the scale must tilt to the side of preserving the

[19] *Phumelela Gaming and Leisure Limited v Grundlingh* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) at paras 35-7.

interests of mentally incapacitated creditors given that, if the claim were to prescribe, the denial of their rights to institute a claim would be absolute.

[43] In sum, the section 13(1) protection founded on mental incapacity continues for as long as Ms Mkhwanazi's incapacity persists. For as long as that is the position, the prescription period will not be completed. That being the case, there is no need to engage with the interface between section 13(1) and section 12(3) as was done by the High Court.

[44] Likewise, I see no point in deciding the question whether the appointment of a curator *ad litem* results in the person in respect of whom the appointment is made being a person under curatorship for purposes of section 13(1)(a). The one protection on which I rely (mental incapacity which persists to this day) is enough.

Delay

[45] It is close to ten years since the fateful day on which Ms Mkhwanazi sustained her life-changing injuries. And more than seven years have elapsed since litigation for the recovery of damages commenced. This is an unacceptably long delay. To make matters worse, the end is far from being in sight because, from this point, the matter is going back to the High Court to be litigated on what is still outstanding. At the hearing in this Court, a colleague lamented the inordinate delay and put the following to Mr Stockwell, for Shoprite Checkers, and I will paraphrase: surely, in the event that this Court decides the special plea against Shoprite Checkers, the legal representatives will cooperate and expedite the just conclusion of the matter. Mr Stockwell responded and commendably said he was giving that undertaking. The purpose of this brief narrative on the delay is to say to him it is now time for him to make good on the undertaking, something which – I have no doubt – must come naturally, in accordance with the best traditions of the Bar.

Order

[46] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs.

For the Applicant:	R Stockwell SC instructed by Whalley and Van der Lith Incorporated
For the Respondent (Appearing at the request of this Court):	N Rajab-Budlender SC, S Manganye and N Soekoe The Respondent's attorneys being E P Sefatsa Attorneys