



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA**

OF INTEREST

Case no: CA05/2022

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF HEALTH,
EASTERN CAPE**

Appellant

and

SIBUSISO GAMEDE

Respondent

JUDGMENT ON APPEAL

Govindjee J

Background

[1] The respondent ('Mr Gamede') instituted action against the appellant ('the MEC') for damages allegedly suffered as a result of a breach of contractual obligations on the part of staff at the Nelson Mandela Academic Hospital. Mr Gamede relied, in the alternative, on the negligent breach of a legal duty which had caused him harm.

[2] The MEC raised two special pleas. The first was that the claim was based on a delict which had allegedly occurred on 19 November 2010, so that the claim prescribed three years thereafter, well before service of summons on 3 February 2017 ('the special plea'). The second was based on non-compliance with s 3(1) of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 ('the Act').¹ An interlocutory application seeking condonation for non-compliance with the provisions of s 3 of the Act was granted on 24 October 2017. In terms of that order, Mr Gamede was granted leave to proceed with his action against the MEC.

[3] In pleading over, the MEC denied that Mr Gamede had presented himself at Nelson Mandela Academic Hospital for any medical care and services, averring that he had presented at Mthatha General Hospital ('the hospital'). Various admissions confirm the terms of an oral contractual agreement entered into between the parties as well as the treatment administered to Mr Gamede. The MEC admitted, for example, that hospital staff would employ suitably skilled and qualified staff to provide reasonable medical care of sufficient standard to Mr Gamede. The plea was that Mr Gamede had been provided with reasonable medical examination, care, assessment and supervision when he presented at the hospital. He had been diagnosed with soft tissue injury on the right ankle, an X-Ray had been conducted and no abnormalities had been detected. The MEC admitted that Mr Gamede had been examined again on 21 December 2010 at the hospital, after complaining of pain on the ankle when walking. After further X-Ray, he had been referred to Bedford Orthopaedic Hospital for further management. A below knee Plaster of Paris had been administered and he had been issued with crutches at that hospital. A review had been booked for 19 January 2011. The rest of the plea over contained denials of Mr Gamede's particulars of claim in respect of the alleged breach of contractual obligations and harm suffered. Mr Gamede had placed reliance on a medico-legal report ('the report') of a physiotherapist ('Somaroo'), which was attached to the particulars of claim, in support of his allegations of negligence and harm. The MEC put Mr Gamede to the proof of the contents of the report.

¹ Act 40 of 2002.

[4] Mr Gamede's replication to the first special plea indicated that he had only acquired the knowledge of all the facts to constitute the cause of action on 4 August 2016, when the report had been received. As such, his claim had not prescribed by time summons was served on 3 February 2017. No rejoinder was filed.

[5] The parties agreed in a pre-trial minute to separate the remaining special plea from other issues of liability and quantum. The parties also agreed, *inter alia*, that there would be no need for evidence to be given on affidavit. When the trial commenced before the Court *a quo*, it became apparent that the MEC did not intend to call any witnesses. Only Somaroo was called by Mr Gamede, who did not testify himself.

[6] Despite clear indication from the parties that only the special plea related to prescription required adjudication, the Court *a quo* erroneously decided to deal with the merits of the matter as a whole, and did so mainly by extracting evidence from medical reports that had been included in the bundle that had been prepared. The Court *a quo* went so far as to make remarks about the state of sophistication of Mr Gamede, despite the fact that he had not testified. It speculated on his low level of education and on medical precautions he would likely have taken. Having done so, the court *a quo* dismissed the special plea and concluded that the MEC was liable for the proven damages sustained by Mr Gamede.

[7] Leave to appeal was granted to this Court. Amongst the various grounds of appeal noted, the MEC raised Mr Gamede's failure to testify and the consequent lack of evidence as to when he might have acquired knowledge of all the facts to constitute his cause of action. It was also argued that Somaroo's evidence amounted to inadmissible hearsay and that the Court *a quo* had erred by delving into the merits of the matter given that the parties had agreed to separate the prescription issue.

[8] Counsel for both parties were in agreement that the Court *a quo* had erred at least in that respect. That this is so is evident from Uniform Rule 33(4), which provides that a court must, on the application of a party seeking separation, order this unless it appears that the questions cannot conveniently be decided separately. It is not unusual for such an application to be made orally at the commencement of a trial. In this instance, the application was also pre-empted in the pre-trial minute that formed

part of the papers. The Court *a quo* proceeded as if the order for separation had been granted, only to about turn and issue a judgment on the merits as a whole. That approach was untenable. The appeal must succeed at least to the extent that this irregularity may be corrected.

The special plea and the burden of proof

[9] For purposes of prescription, a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises.² A proviso to s 12 of the Prescription Act, 1969, indicates that a creditor shall be deemed to have such knowledge if they could have acquired it by exercising reasonable care.

[10] A party seeking to rely on prescription must first prove ‘what the facts are that the [claimant] is required to know before prescription could commence running’. These are the minimum essential facts that the plaintiff must prove in order to succeed with the claim.³ The ‘facts from which the debt arises’ are full facts that would be ‘material to the debt’.⁴ The SCA has recently referred to these facts as ‘the primary facts’.⁵ At least in cases involving professional negligence, they are different to the facts that must be proved at a trial.⁶ In these cases they are the facts which would cause a plaintiff, on reasonable grounds, ‘to suspect that there was fault on the part of the medical staff and that caused him or her to “seek further advice”’.⁷ The party raising prescription must prove such facts. Failing to do so results in the conclusion that the claimant cannot be said to have knowledge of the facts from which the debt arises.⁸

² S 12(3) of the Prescription Act, 1969.

³ *MEC for Health, Western Cape v MC* [2020] ZASCA 165 para 7. Mere opinion or supposition is insufficient as there must be justified, true belief: *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA); [2007] 1 All SA 309; [2006] ZASCA 98 (‘Gore’) para 18.

⁴ *Links v MEC, Department of Health, Northern Cape Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (‘Links’) paras 30, 50.

⁵ *MEC for Health, Western Cape v MC* n 3 para 8.

⁶ *WK Construction (Pty) Ltd v Moores Rowland and Others* 2022 (6) SA 180 (SCA) para 32.

⁷ *Links* n 4 para 42.

⁸ *Id.*

[11] The party raising prescription must, in addition, show that 'the claimant had knowledge of those facts'.⁹ To the extent that this may differ from the enquiry detailed in the previous paragraph, the proviso to s 12(3) enables a debt to be deemed due if the creditor could have acquired knowledge of the identity of the debtor and of the facts from which the debt arises by exercising reasonable care.

[12] It is not necessary for the extent of the harm to be known, or to have knowledge of legal conclusions for prescription to run.¹⁰ The debt arises once harm has indeed been suffered and the creditor need not be in a position to prove its case.¹¹ Prescription is not postponed until the creditor has established the full extent of their rights.¹² As the SCA held in *Minister of Finance and Others v Gore NO*:¹³

'This court has in a series of decisions emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case comfortable ...'

[13] As was the case in *Loni*, Mr Gamede's claim was founded in contract and alternatively in delict. The alternative claim fell away by virtue of the MEC having admitted the contract and the matter fell to be adjudicated upon the basis of the contractual claim. Mr Gamede's particulars of claim reflect that his condition was caused by the breach of contractual obligations on 19 November 2010. The claim is based on the hospital staff's failure to examine and diagnose his fracture, including the failure to refer him for X-Rays, resulting in misdiagnosis and mistreatment. Whilst the allegations relied upon suggest negligent acts, the focus is effectively on conduct on the part of the MEC's employees that, due to their inadequacy, amounted to breach of terms of the admitted contract and caused Mr Gamede harm.¹⁴

⁹ Id para 24; *MEC for Health, Western Cape v MC* n 3 para 8.

¹⁰ *Claasen v Bester* 2012 (2) SA 404 (SCA); [2011] ZASCA 197 para 15.

¹¹ *WK Construction (Pty) Ltd* n 6 para 33; *Loni v MEC, Department of Health, Eastern Cape Bhisho* [2018] ZACC 2; 2018 (3) SA 335 (CC); 2018 (6) BCLR 659 (CC) ('*Loni*') para 30.

¹² *Van Staden v Fourie* 1989 (3) SA 200 (A); [1989] ZASCA 36 at 216B-F.

¹³ *Gore* n 3 para 17.

¹⁴ *Loni* n 11 paras 29, 30. In *Links*, the Constitutional Court considered the plaintiff's knowledge of the facts that had caused his medical condition to be material knowledge required before the institution of action, and held that this was the case irrespective of whether the claim that followed proceeded on the basis of breach of contract or delict: *Links* n 4 para 46.

[14] The factual causes of his condition, to be gleaned from the particulars of claim, constitute indispensable primary facts.¹⁵ Unlike, *Minister of Health, Western Cape v MC*, it cannot be said that the MEC required further particularity as to the facts underpinning Mr Gamede's claim before issuing the special plea. The plea reflects the MEC's view that prescription commenced on 19 November 2010 and that the date of completion was three years later. Strictly speaking, that date is crucial and the belated suggestion on appeal that Mr Gamede knew, or ought to have known, that he had fractured his wrist and ankle by no later than 21 December 2010 is irrelevant. The onus is on the party raising prescription as a defence to prove both the date of inception of the prescriptive period and the date of the completion thereof.¹⁶ The SCA has recently confirmed that it was for the MEC to prove that prescription began to run against Mr Gamede's claim on the date reflected in its plea.¹⁷

[15] In this case the position would be no different even if a more benevolent approach was adopted so as to permit the MEC to prove the commencement of prescription any time before 4 February 2014.¹⁸ The MEC must then demonstrate that Mr Gamede was in possession of sufficient facts, by no later than 4 February 2014, to cause him, on reasonable grounds, to suspect that it was the fault of hospital staff that had caused him injury so as to prompt him to seek further advice. Until Mr Gamede had this comprehension, he lacked knowledge of the necessary facts contemplated in s 12(3). The MEC did not aver in the plea that Mr Gamede had knowledge of the facts that caused his problem. In replication, Mr Gamede indicates that he only acquired the knowledge of all the facts to constitute the cause of action on 4 August 2016.

[16] As in *Links*, there is nothing to gainsay that averment.¹⁹ In the absence of agreed facts, was it possible for the MEC to discharge its burden without leading any oral evidence whatsoever? Put differently is there any basis to conclude, on the facts of the matter, that it was necessary for Mr Gamede to lead evidence 'in rebuttal', or that an adverse inference ought to be drawn from his failure to do so?

¹⁵ *MEC for Health, Western Cape v MC* n 3 paras 10-13.

¹⁶ *Gericke v Sack* 1978 (1) SA 821 (A).

¹⁷ *Greater Tzaneen Municipality v Bravospan* 252 CC [2022] ZASCA 155 para 14. It is impermissible to advance a different case on appeal. Cf *Links* n 4 paras 24, 44.

¹⁸ See *Links* n 4 paras 41, 44.

¹⁹ *Id* para 46; Also see *MEC for Health, Western Cape v MC* n 3 para 9.

[17] It may be accepted that the key facts relevant to the special plea fell almost exclusively within the knowledge of Mr Gamede. As a result, the MEC faced various difficulties of the kind typically associated with raising a plea of prescription in circumstances where the facts in question are particularly within the knowledge of the other party. Despite these challenges, the SCA has confirmed that the burden of proof cannot be altered merely because the facts happen to be within the knowledge of the other party.²⁰ In such cases, the associated difficulties are accommodated by permitting a lower level of proof to suffice for purposes of establishing a prima facie case, not by altering the onus.²¹

[18] The MEC, having raised prescription in circumstances where it may be accepted that Mr Gamede was the only person aware of certain facts, bears this reduced evidentiary burden to prove that special plea. This includes the date of the inception and the date of the completion of the period of prescription, and the date on which Mr Gamede obtained actual or constructive knowledge of the debt.²² The burden only shifts to Mr Gamede if the MEC has established a prima facie case.²³ The position does not change because Mr Gamede's replication advanced a date on which he had acquired knowledge of the relevant facts.²⁴

[19] The MEC was required to discharge the reduced burden by adducing evidence to support its case in the usual way.²⁵ In failing to do so, the burden never shifted to Mr Gamede. His failure to testify in proceedings where the burden lay upon the other side is different to the position described by the majority of the SCA in *M. v MEC for Health, Eastern Cape*,²⁶ where the burden was on the plaintiff to establish negligence.²⁷ The fact that much of Somaroo's testimony constitutes inadmissible hearsay given Mr Gamede's failure to testify is immaterial on the facts in casu.

²⁰ *Gericke v Sack* n 16 at 827D-G.

²¹ *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173.

²² See *Gericke v Sack* n 16 at 827H-828B, read with *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) para 10.

²³ *Macleod v Kweyiya* id para 10.

²⁴ *Gericke v Sack* n 16 at 828B.

²⁵ See *Lekup Properties Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA); [2012] 4 All SA 136 (SCA) [2012] ZASCA 67 para 32.

²⁶ *M. v MEC for Health, Eastern Cape* [2018] ZASCA 141 para 47.

²⁷ Id para 65.

The appropriate relief

[20] The question remains whether this Court should nevertheless uphold the appeal, given the lack of evidence, and refer the matter for the hearing of oral evidence. In *Road Accident Fund v Ntoni*,²⁸ a full court of this Division considered a judgment that had dismissed a special plea of prescription on the strength of pleadings in circumstances where no evidence had been led. The Court upheld the appeal for two reasons, one of which related to the question of evidence.²⁹

‘[9] I revert to the fact that no evidence was led by either party. The appellant placed various letters which were exchanged between the parties’ respective attorney before the court *a quo*. The parties seemed to have laboured under the impression, wrongly so, that those letters constituted evidence. There was no agreement between the parties as to the evidentiary value of those letters. The present situation is akin to what Griffiths J described as “a trial without a trial”. The appellant should have placed evidence or sufficient agreed facts before the court *a quo* to substantiate its plea of prescription. The issue of prescription could not properly have been determined without evidence or agreed facts. With respect, it was accordingly inappropriate for the court *a quo* to reach a final conclusion on the issue of prescription on the basis of the pleadings and the above correspondence alone.

[10] Mr Frost, counsel for the appellant, submitted that once the judgment of the court *a quo* is set aside, we should uphold the special plea of prescription because of the absence of evidence to substantiate it. That submission cannot be upheld. It would also be inappropriate for us, as a court of appeal, to determine whether or not the respondent’s claim has prescribed without evidence or agreed facts upon which such a determination can be made. In the circumstances of this case it would be just to refer the action back to the court *a quo* to determine, on the basis of evidence or agreed facts, whether or not the respondent’s claim has prescribed.’

[21] It must be noted that *Ntoni* dealt with a matter where no evidence had been led and that the full court deliberately added the words ‘In the circumstances of this case ...’ to qualify the decision to remit the matter to the court *a quo*. The particular circumstances which may have warranted that decision were, however, not described.

²⁸ *Road Accident Fund v Ntoni* [2016] ZAECHGHC 8.

²⁹ *Id* paras 9 and 10, footnotes omitted.

Despite these considerations, the parallels between *Ntoni* and this case are undeniable. In both matters there was a final conclusion on the prescription point despite a lack of evidence. The court in *Ntoni* held that it was inappropriate to arrive at such a decision. As a result, the matter was remitted for the hearing of evidence or the receipt of a stated case. That judgment and approach, being a decision of the full court of the same division, is binding unless this court is persuaded that it is clearly wrong.³⁰

[22] The judgment in *Ntoni* relied upon *MEC for Health: Eastern Cape v Mbodla*³¹ in coming to its decision. That matter concerned application proceedings where the respondent raised prescription by way of notice in terms of Uniform Rule 6(5)(d)(iii). The Court had not been satisfied that the issue was capable for determination without oral evidence and an order in terms of Uniform Rule 6(5)(g) followed. That Rule contemplates applications that cannot be properly decided on affidavit. It permits a referral of matters, launched by way of application, to oral evidence as an option, without curtailing the Court's extensive powers to make a just and equitable decision by making any appropriate order.³²

[23] Referring the matter to a single judge for the hearing of oral evidence would allow the MEC to have a second opportunity to discharge its burden. We are, with respect, unconvinced that it would be justifiable to do so in the present circumstances. There is a risk that a party raising prescription by way of special plea may deliberately fail to lead evidence in the hope of a favourable outcome on the papers, and rely on the anticipated second opportunity in the event of an adverse judgment. This approach would place the claimant in the disadvantageous position, during the initial hearing, of leading evidence to rebut anticipated future evidence, rather than evidence that has already been led. It would also result in duplication of efforts and a waste of judicial resources. Counsel could point to no authority in support of that approach and it must respectfully be concluded that the approach is clearly wrong. Zondo JP had occasion

³⁰ See *MEC for Finance, Economic Development, Environmental Affairs and Tourism (Eastern Cape) and Others v Legal Practice Council and Others* [2022] ZAECKMHC 58; [2022] 3 All SA 730 (ECG) para 31.

³¹ *MEC for Health: Eastern Cape v Mbodla* [2014] ZASCA 60.

³² *Id* para 7.

to consider a similar issue in *Bouwer v City of Johannesburg and Another*,³³ and concluded as follows:

'[20] ... sometimes a court issues an order of absolution from the instance in a case where both parties have adduced all the evidence that they chose to adduce, have presented their oral argument and none of them has indicated that there is any witness he wishes to call who was unavailable earlier on.

[21] I have serious doubt that an order of absolution from the instance is competent in a case such as the one referred to immediately above. Of course, if any of the parties had a witness who was temporarily not available whom he wanted to call, he would have applied for a postponement of the trial to a later date when that witness would be available. Such a party would not close his case and hope for an absolution from the instance. If both parties to the dispute had a fair chance to adduce all the evidence that they wanted to adduce and the Court found such evidence not enough to justify giving a judgment in the plaintiff's favour, there can be no justification, it seems to me, for the Court to grant an absolution from the instance. The proper order in such a case is that the plaintiff's claim is dismissed.

[22] If it were right for a Court to grant an absolution in such a case, that would mean that a Court is entitled to let a party institute a second action and seek the same order that he had sought in earlier proceedings on the same cause of action even though in the earlier proceedings the parties had had a fair opportunity to adduce all the evidence that they wanted to adduce, had in fact adduced such evidence and even presented oral argument in the matters. In my view when the parties have done all of that the Court is obliged to decide the dispute before it on the merits and may not grant an absolution from the instance...'

[24] A decision refusing to remit the matter, despite the dearth of evidence, also finds academic support, albeit in the context of an application for remittal:³⁴

'Where, however, remittal is asked for by a party who has failed, despite having had the opportunity to do so, to produce any evidence, or any legally admissible evidence, or all the available evidence on a point that was plainly in issue, the application will usually be refused.'

³³ *Bouwer v City of Johannesburg and Another* [2008] ZALAC 15 paras 20-23.

³⁴ Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th Ed) (2009) ch 39-p1241.

[25] In *Deintje v Gratus and Gratus*,³⁵ the position was explained with reference to old English law, and the adoption of the following approach:³⁶

‘It is an invariable rule in all the Courts, and one founded on the clearest principles of reason and justice that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial.’

[26] It follows that we are of the view that there is no basis to afford the MEC a further opportunity to adduce evidence to substantiate its prescription point in the present circumstances, and that the court *a quo* was correct in dismissing the special plea. It might be added that, given the lengthy period of time that has elapsed, and in fairness to both parties, counsel for the MEC also urged us not to remit the matter for purposes of adducing further evidence.

Prescription and condonation in terms of the Act: res judicata?

[27] Given the nature of our engagement with counsel during the hearing of the appeal, it is necessary to make some remarks about the relationship between a special plea of prescription and the requirements for condonation in terms of the Act, and whether an order granting condonation renders the prescription point *res judicata*.

[28] A cursory consideration of the requirements for granting condonation in terms of the Act suggests that there is a further reason for upholding the decision of the court *a quo* in dismissing the special plea. As already indicated, the other special plea was argued and resulted in an order taken before Jolwana AJ condoning non-compliance with the provisions of s 3 of the Act and granting Mr Gamede leave to proceed with his action. A court may only grant such an order if it is satisfied that ‘the debt has not been extinguished by prescription’, amongst other considerations. The implication is that on 24 October 2017, when condonation was granted in terms of the Act, a court had already concluded that Mr Gamede’s claim had not prescribed. There has been no attempt to rescind or appeal that order. It is not a nullity and remains binding until

³⁵ *Deintje v Gratus and Gratus* 1929 AD 1.

³⁶ *Id* at 6. See *Shedden v Patrick* (L.R., 1 H.L. 476 at 545).

set aside, even in the event that it had been erroneously granted. That order exists in fact and continues to have legal effect until it is set aside.³⁷ Accepting that line of thinking results in the conclusion that the special plea is *res judicata*.

[29] A similar approach was followed by the Western Cape Division in *Patterson v Minister of Safety and Security and Another*.³⁸

‘[16] Accordingly one of the jurisdictional prerequisites to success in an application of that nature is that the court must be satisfied that the debt has not been extinguished by prescription ... Traverso DJP was clearly satisfied that the debt had not prescribed and that the other requirements referred to had been met or she would not have granted the order (of condonation) ... I disagree with the submission made by the defendants’ counsel that Traverso DJP “did not hand down a judgment on prescription”; by clear implication that is precisely what she did ...

[17] The order made by Traverso DJP is clearly a judgment between the same parties and it also relates to the same point in issue. Prescription was pertinently raised by the defendants in their earlier special plea; that defence was raised and dealt with by the plaintiff in his application for condonation; and at the risk of repetition condonation could not have been granted unless Traverso DJP was satisfied that the plaintiff’s claims had not prescribed.’

[30] That approach was trenchantly rejected on appeal to a full court.³⁹ The ratio of that decision cannot be faulted. In essence, the court held that there is a conceptual distinction between a court being ‘satisfied’ for the purposes of s 3(4)(b)(i) of the Act that a ‘debt has not been extinguished by prescription’ and a court determining conclusively for the purpose of dismissing a special defence that the defendant has not ‘proved’ that the debt has been extinguished by prescription. The test for *res judicata* includes that the same issue of fact or law which was an essential element of the judgment on which reliance has been placed must have arisen and must be regarded as having been determined in the earlier judgment.⁴⁰ It was not necessary for a defence of prescription to be raised before a court seized with a condonation

³⁷ See *MEC for the Department of Public Works and Others v Ikamva Architects and Others* [2022] ZAECHC 13; [2022] 3 All SA 760 (ECB); 2022 (6) SA 275 (ECB) paras 25, 26.

³⁸ *Patterson v Minister of Safety and Security and Another* [2013] ZAWCHC 73 paras 16, 17.

³⁹ *Minister of Safety and Security and Another v Patterson* [2016] ZAWCHC 169 paras 12-18.

⁴⁰ *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) para 22.

application in terms of the Act. There is therefore no onus on a defendant to establish its defences in the pending main proceedings when applying for condonation in terms of the Act:⁴¹

‘On the contrary, there is ‘a burden of persuasion on the applicant for condonation to ‘*satisfy*’ the court that its claim has *not* prescribed. If an intention to raise a defence of prescription in the pending principal proceedings is indicated by the respondent in the condonation application, the court, for the purposes of s 3(4)(b)(i), is required to do no more than form a view on the prospects of success of the indicated defence; it is not called upon to decide it; and would be venturing impermissibly outside its remit if it purported to do so. If the court were in the postulated circumstances to form the impression that the defence of prescription was unlikely to succeed, it would be ‘*satisfied*’ for the purposes of s 3(4)(b)(i) that the claim had not prescribed and would incline to grant condonation; *aliter*, if it took the opposite view.’

[31] The full court relied on the SCA decision in *Madinda v Minister of Safety and Security*⁴² to explain the distinction between the ‘burden of persuasion’ on an applicant seeking condonation in terms of the Act, and an ‘onus’ that burdens a defendant raising prescription as a special defence to a claim:⁴³

‘The phrase “if [the court] is satisfied” in s 3(4)(b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties ... I see no reason to place a stricter construction on it in the present context.’

That distinction appears to answer the point raised with counsel.

Costs

[32] Although the MEC has been successful in so far as setting aside the court *quo*’s judgment on the merits, the thrust of its submissions focussed on the issue of the special plea. There the MEC has been unsuccessful. It would be appropriate, in these circumstances, for each party to bear their own costs of the appeal.

⁴¹ *Minister of Safety and Security and Another v Patterson* n 36 para 16.

⁴² *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA).

⁴³ *Id* para 8.

Order

[33] The following order will issue:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and replaced with the following:
‘The special plea is dismissed with costs.’
3. Each party is to pay its own costs of the appeal.

A GOVINDJEE
JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

M MAKAULA
JUDGE OF THE HIGH COURT

I agree.

T MALUSI
JUDGE OF THE HIGH COURT

Heard: 14 November 2022

Delivered: 29 November 2022

Appearances:

Counsel for the Appellant:

Adv TW Mgidlana
Makhanda Chambers

Instructed by:

The State Attorney
Broadcast House
94 Sission Street
Fortgale
Mthatha
047 502 9900
mgidlana@roundbar.co.za

Attorney for the Respondent:

Mr C Pangwa

Instructed by:

Caps Pangwa and Associates
Suit No.202 1st Floor City Centre
York Road
Mthatha
047 532 3664
caps@mweb.co.za