THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 339/09

MEC FOR SAFETY AND SECURITY (EASTERN CAPE PROVINCE) **Appellant**

and

TEMBA MTOKWANA **Respondent**

Neutral citation: *MEC v Mtokwana* (339/09) [2010] ZASCA 88 (31 May 2010)

CORAM: Navsa, Heher and Malan JJA

HEARD: **19 May 2010**

DELIVERED: **31 May 2010**

SUMMARY: **Joinder or substitution by way of notice of amendment not served on the intended defendant – inappropriate procedure – high court overlooking fundamental principle that an intended defendant or respondent be informed of an action or any other court proceedings against him or her.**

ORDER

On appeal from: Eastern Cape High Court, Mthatha (Dawood AJ and Schoeman J sitting as court of first instance).

1. The application for leave to appeal is granted.
2. The cost order of the court below in dismissing the application for leave to appeal is set aside and the costs of the application for leave to appeal in this court and in the court below are costs in the appeal.
3. The appeal is upheld with costs.
4. The order of the court below is set aside in its entirety and substituted as follows:

'The appeal is dismissed with costs.'

JUDGMENT

NAVSA JA: (Heher and Malan JJA concurring)

[1] The application for leave to appeal in this matter was referred, by direction of this court, for oral argument in terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959. The parties were forewarned that they should be prepared, if called upon, to address the court on the merits. We heard argument on the application for leave to appeal and on the merits.

[2] As will soon become apparent this matter has followed an unusual path on its way to this court. The relevant facts appear hereafter. Temba Mtokwana, the respondent, instituted action against the appellant, the Member of the Executive Council for Safety and Security (the MEC), Eastern Cape, in the Magistrates' Court for the district of Mthatha, seeking to hold the latter vicariously responsible for acts perpetrated by members of the South African Police Services (the SAPS). In his particulars of claim he alleged that on 2 April 1998 at or near the Mthatha Magistrates' Court a member of the

SAPS unlawfully and intentionally or negligently set a dog on him, causing him to sustain injuries. He claimed damages in a total amount of R97 420.66.

[3] Summons was issued by the respondent on 9 July 1998. In a special plea filed in September 1998 the MEC denied that *he* was vicariously liable for the alleged wrongful conduct of members of the SAPS, stating that the National Minister of Safety and Security was the correct person to cite in legal proceedings concerning members of the SAPS. It was submitted that there had been a misjoinder of the MEC and a non-joinder of a necessary and interested party.

[4] In an apparent acceptance of that proposition an attempt was made to remedy the situation by a legal representative acting on behalf of the respondent. The attorney representing the respondent followed a strange procedure. First, an 'amended summons' was filed in June 2004. The amended summons cited the National Minister of Safety and Security (the Minister) as the defendant and made no reference to the MEC. The amended summons was served only on the attorney acting for the MEC and then filed in court.

[5] Eight months later, during February 2005 the respondent's attorney filed a notice, purportedly in terms of Rule 55A of the Magistrates' Court Rules[1] to amend the summons. The notice of amendment reads as follows:

'BE PLEASED TO TAKE NOTICE THAT applicant intends to amend its Summons in the following terms:-

By *substituting* the Name Member of Executive Council for Safety and Security by Minister of Safety and Security of Republic of South Africa on the face of Summons and Particulars of claim.

In the subsequent pleadings *Defendant be regarded as Minister of Safety & Security of the Republic of South Africa*.

Further Take Notice that if no written objection has been filed within 10 days therefore the proposed amendment would be deemed made.' (My emphasis.)

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[1] Rule 55A(1) of the Rules provides:
'Any party desiring to amend a pleading or document other than an affidavit, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish the particulars of the amendment.'

[6] On 8 March 2005 the respondent's legal representative once more filed an amended summons in the same terms as the first. The notice of intention to amend and the second amended summons were served only on the MEC's attorney. It is uncertain whether, even at this point in time, the Minister has any knowledge that he had been substituted as a party by way of a notice of amendment and amended summons, neither of which was served on him.

[7] It is necessary to record that a formal notice of withdrawal of the action against the MEC was never served on the latter and there was no tender of wasted costs.

[8] The attorney who at material times represented the MEC is an attorney in private practice who appears to have acted in the state attorney's stead, having been instructed to do so by the latter's office in Mthatha. His mandate appears to have been for the specific purpose of defending the action instituted by the respondent. There is no indication to the contrary on the record.

[9] The Magistrate had regard to the manner in which the Minister was 'sued' or 'joined' by the respondent. He took into account that there was nothing to show that the summons or the amended summons had been served on the state attorney representing the Minister. He considered, probably in the light of the special plea and the subsequent notice of intention to amend, that the Minister was the party legally liable and not the MEC. Consequently, he upheld the special plea of non-joinder and dismissed the respondent's claim with costs. One would have thought that that would have been the end of the matter. It was not.

[10] The respondent appealed against the Magistrate's decision to the Mthatha High Court. The notice of appeal was served only on the MEC's attorney and indicated the Minister as 'the defendant'. Importantly, para 7 of

the notice of appeal reads as follows:

'The learned Magistrate erred and misdirected herself in finding that the MEC is not vicariously liable without evidence ever lead. The argument was confined on the non joinder of the Minister of Safety and Security. There was no issue about MEC for Safety and Security as a result that there was no evidence ever adduced. It is submitted that MEC for Safety and Security was held liable with the wrongful and unlawful acts by the MEC in the matter of **Manqalaza v MEC for Safety and Security, Eastern Cape [2001] 3 All SA 255 (Tk)**.'[2]

I will say more about this passage, later in the judgment.

[11] The Mthatha High Court (Dawood AJ, Schoeman J concurring), held that the Magistrate had erred. The appeal was upheld with costs and the matter was referred back to the Magistrate 'for determination on the merits in respect of the action against the Minister'. It is necessary to scrutinise the high court's reasoning.

[12] The high court took into account that there had been no formal application for joinder[3] and that the respondent had substituted the Minister as a party by way of an amendment in terms of Rule 55A of the Magistrates' Court Rules. The following parts of the high court's judgment bear repeating:

'[6] The plaintiff utilised the provision of Rule 55A to seek a substitution of the Minister as the defendant.

[7] The MEC failed to utilise the provision of 55A (3) to object to the amendment.

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[2] In *Manqalaza* it was common cause that the policemen involved were employed by the MEC for Safety and Security, Eastern Cape and that they had acted within the course and scope of their employment when effecting the arrest in question there. Section 2 of the State Liability Act 20 of 1957 provides:

'(1) In any action or other proceedings instituted by virtue of the provisions of section *one*, the Minister of the department concerned may be cited as nominal defendant or respondent.

(2) For the purposes of subsection (1), "Minister" shall, where appropriate, be interpreted as referring to a member of the Executive Council of a province.'

In the present case it was never suggested that the MEC had been sued on the basis of s 2(2) of the State Liability Act nor had it been contended that the police in question were in the employ of the MEC.

[3] Rule 28(1) of the Magistrates' Courts' Rules provides that the court may on application by a person desiring to intervene in any proceedings and having an interest therein, grant such person leave to intervene on such terms as may be just. Rule 28(2) provides that the court may, on application by any party to any proceedings, order that another person shall be added either as a plaintiff or applicant or as a defendant or a respondent on such terms that may be just. Such application must be on notice and the person to be added must receive proper notice of the application. See Harms *Civil Procedure in Magistrates' Courts* at 3.13 and the authorities cited.

[8] Accordingly in terms of Rule 55(4) the MEC is deemed to have consented to the amendment.'[4]

[13] The reasoning set out above is inherently flawed. It was the Minister who was entitled to notice in any attempt to include or substitute him as a party. It is ironic that the high court held it against the MEC that he had not objected to the amendment and reasoned that the MEC must therefore have consented to the amendment.

[14] The respondent appears to have accepted that he wrongly sued the MEC. In the words of his notice of intention to amend he intended 'substituting' the Minister for the MEC. He ought rightly to have withdrawn his action against the MEC and thereafter have instituted action against the Minister, taking care to follow the procedure for service prescribed by the Rules of Court. That part of the respondent's notice of appeal quoted in para 10 above, evidences some confusion in the respondent's thinking. Despite having 'substituted' the defendants the respondent, in his notice of appeal, appears to consider that the MEC might still be liable for the wrongful acts complained of by him. If the respondent had intended to join the Minister as a party the proper procedure would have been to apply to join him as a party in terms of Rule 28 of the Magistrates' Courts Rules. In terms of the respondent's notice of amendment and the amended summons the MEC was no longer a party to the *lis*. In light thereof para 7 of the respondent's notice of appeal appears even more strange.

[15] An apparently intractable problem for the respondent is that by the time he resorted to the amendment (February 2005), by which he sought to substitute the Minister as a party, his alleged claim against the Minister had already prescribed (the claim arose in April 1998). It will be recalled that he

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[4] The learned judge had Rule 55A(5) in mind, which reads as follows:
'If no objection is delivered as contemplated in subrule (4), every party who received the notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days after the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).'

had been alerted to the Minister's potential liability by way of the special plea filed in September 1998.

[16] In coming to the conclusion that the Minister had properly been substituted as a party by virtue of the amendment, the high court relied primarily on *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W). In that case the trustees of a trust had applied to amend a summons to substitute the trustees rather than the trust as the litigating party. The court in that case held that in essence the amendment had corrected the misdescription of a party and that the Magistrate had correctly allowed the amendment. In *Rosner* it was held that there could be not prejudice to the opposing party as a result of the amendment and that prejudice was a critical factor in determining whether or not to allow an amendment. The *Rosner* case is a far cry from the facts of the present case.

[17] Having concluded that the amendment had the effect, not of joining the Minister, but of substituting him as a defendant, the court below held that the MEC was no longer a party. It concluded that the MEC was precluded from arguing that there had been no formal withdrawal against him, or that the Minister was not a party to proceedings or that the action was correctly dismissed by the Magistrate.

[18] The appellant ostensibly accepted that he had wrongly sued the MEC and intended an action against the Minister. Service on the Minister of any process to that effect was obligatory. That did not occur. If what was intended was a joinder of the Minister ─ although all the indications are to the contrary ─ there ought to have been a proper and substantiated application in terms of the rules of court served on the Minister. Had there been a proper application for joinder the Minister might very well have provided numerous grounds for resisting such an application. Not least of all would have been the defence of prescription which, having regard to the chronology set out above, is startlingly obvious.

[19] The court below recognised that it was '[a] cornerstone of our legal system that a person is entitled to notice of the institution of proceedings against him'. Dawood AJ accepted that in the amended summons the Minister was cited 'care of' the state attorney. The learned judge recorded that it was common cause that service had not been effected on the Minister or the state attorney, but rather on the MEC's attorney. She considered that the failure to serve the summons on the Minister was an 'irregularity' that could be condoned. In the view of the court below the fact that the MEC had filed a second special plea of prescription was critical to an exercise of its discretion to condone the irregularity. The plea of prescription had merely, and correctly I might add, stated that by the time the first amended summon had been served, the respondent's claim against the Minister had already prescribed. The MEC prayed that the claim be dismissed on that basis. The court below reasoned that in filing such a plea 'on behalf' of the Minister the MEC's attorney was acting as the former's agent. This, the court reasoned, showed that he was authorised to accept service on the Minister's behalf.

[20] With respect, the reasoning and conclusion of the court below, based on the plea of prescription, represents a quantum leap. In addition, two issues appear to be confused. If there had been authority on the part of the MEC's attorney to accept service on behalf of the Minister then one is not concerned with condonation. Prior to the notice of intention to amend, the respondent sought to hold the MEC liable. The latter was entitled to raise such defences as might be available, including that the claim, for which another party was liable, had prescribed against that party. It does not follow that the raising of such a plea means that the MEC was acting as the Minister's agent. In addition, the court below erred in inferring the agency of the attorney from his own acts. See in this regard *Volkskas Bank Bpk v Bonitas Medical Aid Fund* 1993 (3) SA 779 (A) at 789I-J and the cases there cited.

[21] The court below, whilst expressing the necessity for service on an intended defendant or respondent, failed to have regard to the facts of this case, and to the bewildering steps taken by the respondent and the bizarre manner in which litigation was conducted. The Minister, the party entitled to

notice of the action against him, did not have court process of any kind served on him.

[22] Against the background of intention to amend and the amended summons the Magistrate was entitled to assume that the respondent accepted that he had sued the wrong party. For the reasons set out above, the Magistrate was correct in his conclusion about the wholly inappropriate manner in which the respondent had sought to introduce the Minister as a party. Consequently, the Magistrate was right in dismissing the respondent's claim. The high court was wrong in overturning that decision.

[23] Before us there was no appearance for the respondent, costs probably being the inhibiting factor. Heads of argument on his behalf had, however, been filed.

[24] There is a remaining aspect that requires attention. The court below excluded the MEC as a party to the *lis* and substituted the Minister. Initially we were concerned about whether the MEC had standing in the present proceedings. I am, however, not persuaded that those concerns and the foundation on which they were based are sound.

[25] First, the MEC was deprived of the substantive success and the cost order in his favour obtained in the magistrates' court. The respondent could not merely by changing the heading on the documents that required to be filed in prosecuting the appeal, change the fact that the MEC was a party to the proceedings and had a very real interest in the outcome of the appeal. Second, the respondent's notice of appeal itself suggested, albeit confusingly, that he did not exclude liability on the part of the MEC should the matter proceed to be heard on the merits. Third, as I have shown above the substitution of the Minister was a nullity. The MEC remained a party to the proceedings entitled to the order in his favour with costs. Fourth, the court below held that the MEC's attorney could rightly be regarded as being authorised to be served with court process in the state attorney's stead. This is an issue of considerable importance to the MEC for the future. He has a

real and substantial interest in whether that view should prevail. Fifth, the court below pronounced, incorrectly, as has been shown, on fundamental questions of notice to intended defendants, and in the present case with particular reference to the state attorney and the MEC. The latter has a very real interest that the decision does not remain extant as a precedent in the Province in which he holds office.

[26] For all the reasons set out above, the following order is made:

1. The application for leave to appeal is granted.

2. The cost order of the court below in dismissing the application for leave to appeal is set aside and the costs of the application for leave to appeal in this court and in the court below are costs in the appeal.

3. The appeal is upheld with costs.

4. The order of the court below is set aside in its entirety and substituted as follows:

‘The appeal is dismissed with costs.’

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M S NAVSA

JUDGE OF APPEAL

APPEARANCES:

For Appellant: M Tshiki

Instructed by
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Mthembu & Van Vuuren Bloemfontein

For Respondent: -

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