REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/22124

CASE NO: 2009/50023

DATE:22/09/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

MPINGA, MAKETHU QUEEN Plaintiff

and

MAKAKUVHULE & ASSOCIATES First Defendant

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH Second Defendant

J U D G M E N T

Summary
Prescription – when commencing – onus of proof on party alleging - Notice pursuant to s 3 of the Institution of Legal Proceedings Against Certain Organs

of State Act 40 of 2002 – failure to give in good time - condonation for the late serving of notice.

WEPENER, J:

[1] The plaintiff injured her left leg on 26 September 2006 and received treatment at various hospitals. It is common cause that the treatment was administered at the hospitals under the control of the second defendant, the Member of the Executive Council for Health, Gauteng.

[2] It is alleged that as a result of the negligent treatment of her leg by the personnel of the hospitals the plaintiff's injury deteriorated until on 30 November 2006 when it was decided by the hospital personnel that the plaintiff's leg had to be amputated. This indeed occurred on 5 December 2006.

[3] Dr Marais, an orthopaedic surgeon, who testified on behalf of the plaintiff and who studied the hospital records said that by 30 November 2006 the plaintiff's leg was beyond saving and the decision to amputate plaintiff's leg was the correct decision in the circumstances as at that date. He gave further evidence regarding the negligence of the hospital personnel, which evidence is not relevant for this decision.

[4] The plaintiff testified that during one of her visits to the hospital she was advised that her leg had to be amputated on 5 December 2006. It is not

clear whether the visit was on 29 November 2006 or 30 November 2006. However, whether it was 29 or 30 November 2006 is not relevant and I will refer to the date as 30 November as was argued by counsel for the plaintiff.

[5] The plaintiff further testified that although she gave permission for the amputation of her leg, she became aware that the treatment of her leg by the hospital personnel led to the amputation of her leg, shortly after the amputation.

[6] The plaintiff later, during May 2008, instructed the first defendant, an attorney, to act on her behalf to institute action against "*the hospital authorities*". She left the matter in the hands of the first defendant. Although there were some questions regarding a deposit to be paid to the first defendant and the different times when documents were handed to him, nothing turns on these issues for present purposes.

[7] On 27 November 2009 the first defendant issued a summons against the second defendant, which summons was served on 1 December 2009. The second defendant raised two special pleas namely, that there was no compliance with s3 the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002 ("the Act") by virtue of the fact that notice was not given as required by the Act to the State within six months from the date on which the debt became due and it raised a second special plea namely, that the plaintiff's claim had become prescribed as the delict occurred on 26 September 2006 and summons was issued more than three years later.

[8] The plaintiff then terminated the first defendant's mandate and instructed her present attorneys when it was decided to issue summons against the first defendant on the basis that the plaintiff's representatives believed that the first defendant was in breach of his mandate with the plaintiff as, according to the plaintiff's counsel's argument, it appeared that there were merits in the special plea raised by the second defendant. After issuing summons against the first defendant the two matters were consolidated.

[9] In the particulars of claim it was alleged that the agreement between the plaintiff and the first defendant included the fact that:

> "*14.4 The (first) defendant would cause a summons to be issued and served prior to the plaintiff's claim becoming prescribed and more particularly on or before the 30th day of November 2006.*" (intending 2009)

Although this allegation was admitted by the first defendant in his plea, an application to withdraw the admission as having been erroneously made was not opposed by the plaintiff and the second defendant and the plea was amended by the deletion of this admission. The first defendant, however, admitted in evidence that the service of the summons within a period of three years from the date when the plaintiff's claim arose, formed a part of his mandate.

[10] What is left as a cause of action against the first defendant is that he had a mandate from the plaintiff and had agreed to prosecute a claim against

the second defendant and that he would do all things necessary to prosecute the claim. Such things would include the giving of due notice on behalf of the plaintiff in terms of s 3 of the Act or the making of an application for condonation for the late service of such notice. This aspect of the first defendant's mandate is admitted.

[11] By agreement between the parties and pursuant to the provisions of Rule 33(4), I am called upon to decide whether the special pleas raised by the second defendant should be upheld. This would entail determining whether the first defendant failed to comply with s3 of the Act and if so, whether such failure was negligent and secondly whether the issue and subsequent service of summons on 1 December 2009 was negligent and in breach of the first defendant's mandate with the plaintiff.

[12] When the plaintiff approached the first defendant in May 2008 and he agreed to act on her behalf, the period of six months within which a notice had to be given had expired with the result that due notice was no longer possible and the first defendant and the plaintiff were consequently reliant upon s 3(4) of the Act to obtain condonation for the failure to serve the notice within the prescribed period of six months. A letter of demand or the notice letter was indeed sent on 21 October 2009 to the hospital instead of the second defendant.

[13] The following additional facts are not in dispute. Realising that the notice was out of time the first defendant prepared an application for

condonation for the defective notice. The application was not brought to court but it was served on the State Attorney, acting on behalf of the second defendant. On 12 April 2010 the State Attorney advised that his client, the second defendant, was of the view that the claim had become prescribed on 26 September 2009 and that an application for condonation would be opposed. The first defendant responded by explaining that the plaintiff's leg was amputated on 5 December 2006 and that the cause of action only arose on 5 December 2006. Without the first defendant's attorney stating so, the result thereof would have been that the three year prescriptive period would only come to an end on 4 December 2009.

[14] The second defendant's attorney thereafter advised the first defendant's attorney as follows:

> "*I have noted the contents of (*your letter*) and have recommended to my client that their decision (*to oppose condonation*) be reviewed in the light thereof.*"

[15] However, before the second defendant could respond and advise whether condonation was granted and before the application was launched to court to obtain condonation, the plaintiff elected to terminate the first defendant's mandate and to instruct her present attorneys in his stead.

[16] Having regard to the above facts it cannot be said that the first defendant failed to obtain condonation for the late or defective notice. He was in the process of attempting to obtain condonation, which he was required to

attempt to secure by virtue of the fact that the plaintiff only instructed him more than six months after the debt arose.

[17] In the absence of proof that the second defendant refused condonation despite its own attorneys' recommendation to do so, it cannot be found that there was any fault on the part of the first defendant. I am of the view that even if the second defendant would have refused condonation an approach to the court for condonation was not exhausted and may very well have been successful, had it been pursued.

[18] The special plea that there was non-compliance with s 3 of the Act is premature as the process to obtain condonation has, to date, not been finalised. No action based on this alleged breach of mandate consequently lies against the first defendant until the finalisation of the condonation application.

[19] The second question, which I am required to determine is whether the first defendant caused the claim to become prescribed by serving the summons late. The summons, which was served on 1 December 2009, was so served within the ordinary three year prescriptive period[1] from the time when the plaintiff's leg was amputated.

[20] It is trite law that the party who raises prescription must allege and prove the date of inception of the period of prescription.

---

[1] Section 11(d) of the Prescription Act, Act 68 of 1969.

'*It is not a principle of our law that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the burden of proof cannot be altered merely because the facts happened to be within the knowledge of the other party. See R. v. Cohen, 1933 T.T.D. 128. However, the Courts take cognisance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent when they had in consequence held, as was pointed out by Innes, J., in Union Government (Minister of Railways) v. Sykes, 1913 A.D. 156 at p. 173, that:*

> "*Less evidence will suffice to establish a prima facie case where a matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.*
>
> *But the fact that less evidence may suffice does not alter the onus which rests on the respondent in this case. Nor does it seem to me that counsel can advance his argument by reliance on the rather unusual manner in which the allegations relating to the issue were pleaded. Mr. Cloete pointed to the replication and argued that it was the appellant who alleged that it was not until 17 February 1971 that she learnt the identity of the respondent – she did not content herself with a mere denial of the allegations contained in the special plea, in so doing she attacked an onus.*
>
> *That submission is without substance: It overlooks the fact that it was the respondent, not the appellant, who raised the question of prescription. It was the respondent who challenged the appellant on the issue that the claim for damages was prescribed – this he did by way of special plea five months after the plea on the merits had been filed. The onus was clearly on the respondent to establish this defence. He could not succeed if he could not prove both the date of the inception and the date of the completion of the period of prescription.*" '*Gericke v Sack* 1978 (1) SA 821 (A) at 827E-828A. See also *De Klerk en 'n Ander v Groter Kroonstad Plaaslike Oorgangsraad* [2000] 4 All SA 357 at 360d.

It was consequently incumbent upon the second defendant (or the plaintiff who wished to rely on prescription) to place facts before the court so that the date when prescription commenced running could be determined. The second defendant relied on the evidence provided by the plaintiff.

[21] The relevant portions of the Prescription Act, Act 68 of 1969 (the Prescription Act) are found in s 12 thereof:

> "*12(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.*
>
> *(2) …*
>
> *(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and 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.*
>
> *(4) …*"

The question is consequently whether the plaintiff had knowledge of the facts from which the debt arose i.e. the fact that the treatment by the servants of the second defendant caused her leg to deteriorate and to be amputated, more than three years prior to the summons being served.

[22] Although the plaintiff's medical expert testified that all the facts to lead to a realisation that an amputation was necessary were present as at 30 November 2006, he could and did not say anything to contradict the plaintiff's evidence that she only knew that the amputation was necessitated as a result of the treatment by the hospital personnel shortly after the amputation. There is no evidence to suggest that the plaintiff appreciated that the reason for the amputation was as a result of any conduct of the medical staff on a date before the amputation or that she should so have known on 30 November 2006.

[23] There is no suggestion that the personnel of the hospital advised the plaintiff that her leg was amputated as a result of their treatment of her prior to the amputation. Her evidence that she became aware of this, only after the operation, is unchallenged and credible.

[24] Plaintiff's cause of action against the second defendant consequently arose when she had a complete cause of action against the second defendant i.e. shortly after the amputation of her leg on 5 December 2009 when she learnt that the amputation was caused as a result of the improper treatment of her leg by the medical staff under the control of the second defendant. The plaintiff's claim would accordingly have become prescribed shortly after 5 December 2009. The precise date is not relevant as the summons was served prior to 5 December 2009.

[25] The issue of the summons is not sufficient to interrupt prescription and service of the summons is required for such interruption. *Kleynhans v Yorkshire Ins Co Ltd* 1957 (3) SA 544 (A). The summons was served on 1 December 2009. In the circumstances the plaintiff's summons was served prior to the claim becoming prescribed.

[26] Mr Bruwer, appearing for the plaintiff, argued that based on *Truter and Another v Deysel* 2006 (4) SA 168 (SCA) at para 16-20[2], the plaintiff's cause

---

[2] *"[16] I am of the view that the High Court erred in this finding. For the purposes of the Act, the term "debt due" means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.*

[17] In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts:

> *"A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault" (emphasis added).*

[18] In the words of this Court in Van Staden v Fourie:

of action was complete on 30 November 2006 and not when the plaintiff obtained knowledge of the reason why her leg was amputated.

I do not agree with this argument. The passages in *Truter* support the view that the prescriptive period does not commence running until a plaintiff has knowledge of the facts from which the debt arises. The plaintiff's knowledge that the conduct of the medical personnel caused her leg to be amputated was gained after the amputation. The knowledge of this fact is to be distinguished from knowledge of a wrong, in a sense of culpability, which does not constitute a fact but a conclusion of law.

[27] The summons was served on the second defendant before three years had lapsed since the plaintiff obtained knowledge of the causative conduct of the hospital personnel, the latter date which is after 5 December 2006. No argument was placed before me that the proviso of s 12(3) of the Prescription Act finds any application in this matter nor are there any facts that would support such reliance. It can therefore not be found that the first defendant

---

> *"Artikel 12(3) van die Verjaringswet stel egter nie die aanvang van verjaring uit totdat die skuldeiser die volle omvang van sy regte uitgevind het nie. Die toegewing wat die Verjaringswet in hierdie verband maak, is beperk tot kennis van 'die feite waaruit die skuld ontstaan'."*

[19] "Cause of action" for the purposes of prescription thus means:

> *". . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*

[20] As contended by counsel for Drs Truter and Venter, an expert opinion that a conclusion of negligence can be drawn from a particular set of facts is not itself a fact, but rather evidence. As indicated above, the presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by the court in all the circumstances of the specific case. Section 12(3) of the Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running – it does not require knowledge of the relevant legal conclusions (ie that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions."

acted in breach of his mandate to serve the summons timeously as prescription had not extinguished the plaintiff's claim at the time when the summons was served.

[28] In the result, the following order is made:

1. It is declared that the first defendant is not liable to the plaintiff as a result of the alleged non-compliance with s 3 of the Act prior to the finalisation of the application for condonation for the defective notice given pursuant to s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.
2. The second defendant's special plea of prescription is dismissed.
3. The second defendant is ordered to pay the costs of the plaintiff regarding the determination of the issues herein referred to including the qualifying fees of Dr L Marais.
4. The second defendant is ordered to pay the costs of the first defendant.

_____

W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR PLAINTIFF	A P BRUWER
INSTRUCTED BY	AUSTIN-JORDAAN INC
COUNSEL FOR FIRST DEFENDANT	L G BOALE

INSTRUCTED BY	MAKAKUVHULE ATTORNEYS
COUNSEL FOR SECOND DEFENDANT	M ZONDO
INSTRUCTED BY	THE STATE ATTORNEY
DATE OF HEARING	12 AUGUST 2011 AND 19 SEPTEMBER 2011
DATE OF JUDGMENT	22 SEPTEMBER 2011