

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2010/02456

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

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DATE

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SIGNATURE

In the matter between:

NGAKANE MATSHIDISO

Plaintiff

and

**MEMBER FOR THE EXECUTIVE COUNCIL FOR
HEALTH (GAUTENG PROVINCIAL GOVERNMENT)**

First Defendant

LERATONG HOSPITAL

Second Defendant

UNIVERSITY OF LIMPOPO (MEDUNSA CAMPUS)

Third Defendant

J U D G M E N T

MASHILE, J:

[1] This is a delictual claim for damages. The Plaintiff instituted the action following the death of her father at Leratong Hospital and the subsequent

donation of his corpse by the latter to the Third Defendant in terms of the now repealed Section 2(2)(b) of the Human Tissue Act No. 68 of 1983, which has since been replaced by Section 63 of the National Health Act No. 61 of 2003.

[2] The facts surrounding this claim are briefly that:

2.1 On 16 July 2003 the deceased, Mr Petrus Ngakane, the father of the Plaintiff, was admitted and detained at the Second Defendant in order to receive medical treatment;

2.2 When members of the deceased's family, the Plaintiff included, subsequently visited the Second Defendant to check on his health and general well-being, they were sent from pillar to post;

2.3 This carried on for a period of approximately 1 year 6 months when the Plaintiff eventually traced her father's corpse to the Third Defendant in February 2005;

2.4 The Director General donated the corpse of the Plaintiff's father in contravention of Section 62(3)(b) of the National Health Act No. 63 of 2003, which reads:

“The Director-General may only donate the specific tissue if all the prescribed steps have been taken to locate the persons contemplated in subsection (2).”

2.5 The Third Defendant made arrangements for the Plaintiff to collect the corpse on 21 February 2005.

[3] The Plaintiff avers that during the period, July 2003 and 21 February 2005, she suffered psychological trauma as a result of the Second Defendant's unlawful act of failing to disclose what had transpired with her father's corpse. She alleges that in consequence of that shock she incurred damages amounting in all to R12 000 000.00, payment of which she is demanding from the Defendants jointly and severally the one paying the other to be absolved.

[4] When the matter served before court though the Plaintiff had withdrawn the action against the Third Defendant. The case is therefore only against the First and the Second Defendants.

[5] The Defendants have raised a special plea against the claim of the Plaintiff. The special plea is that the claim of the Plaintiff against both Defendants has prescribed. In the circumstances it is imperative to consider the prescription of the claim.

[6] Section 12(1), 12(2) and 12(3) of the Prescription Act No. 68 of 1969 respectively provides as follows:

6.1 *"Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is*

due.

6.2 *If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.*

6.3 *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.”*

[7] Section 11 of the Prescription Act No. 68 of 1969 deals with periods of prescription and sub-paragraph (d) thereof stipulates that save where an Act of Parliament provides otherwise, the period of prescription will be 3 years in any other case. The Plaintiff having collected the body of Petrus Ngakane on 21 February 2005, her claim became extinguished by effluxion of time on 21 February 2008.

[8] The Plaintiff is adamant that the claim has not prescribed but advances no coherent reasons for her persistence that it has not. All the court knows is that she instituted her action against the Defendants on 22 January 2010.

[9] From the date on which the action was instituted the court can reasonably infer that her argument is that prescription could not have begun to run prior to 22 January 2007. If one were to go beyond that date then prescription would have occurred by 22 January 2010.

[10] For purposes of Section 12(1) the debt became due on 21 February 2005, the date on which she claimed her father's body from the Third Defendant. Admittedly, the Second Defendant sent her from pillar to post from 17 August 2003 to 21 February 2005, a period of approximately 16 months. The Defendants concede this fact. For that reason the Defendant has acknowledged that the court should disregard the 16 months being the period from Petrus Ngakane's death on 17 August 2003 and 20 February 2005.

[11] According to the Defendants, prescription began to run on 21 February 2005 because that is when the Plaintiff came to know of the debt. The provisions of Section 12(2) must for that reason be taken to have been satisfied on that day.

[12] In terms of Section 12(3) of the Act, the Plaintiff was already aware of the facts that gave rise to her claim and had also identified all the Defendants at the time when she collected her father's body from the Third Defendant. . Knowledge of the existence of a claim against the Defendants was therefore present.

[13] There is just no basis on which the Plaintiff can convince this court that her claim did not prescribe on 21 February 2008. The Plaintiff intimated that the Plaintiff was mentally unfit to appreciate what was happening around her and that possibly the date of the prescription came and went without her realising it.

[14] The above argument is not sustainable especially in view of her visit to the Law Society of the Northern Provinces and/or University of Pretoria law Clinic, which referred her to an attorney to specifically investigate the possibility of legally proceeding against the Defendants. The Plaintiff also suggests that prescription was interrupted in 2007 when Second Defendant apparently made an admission that it was liable for her damages.

[15] The court was not placed in possession of any document that supports that assertion. Besides no identity or authority of the person who did so on behalf of the Respondents was revealed. Furthermore, other than mentioning in her affidavit that the Respondent undertook to compensate her for the resultant psychological trauma, which is denied by the Respondent, there is no reference to a specific date on which the undertaking was made. The court cannot therefore attach any value to that bald allegation.

[16] In the circumstances the special plea is upheld and I make the following order:

1. The case is dismissed;
2. The Plaintiff is to pay the costs.

B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 25 February 2014

Date of Delivery: 30 April 2014

Counsel For Plaintiff: Adv. TJ Magano

Instructed by: Mojela Hlazo Practice

Counsel For Defendant: Adv. R B Makhabela

Instructed by: The Office of The State Attorney