IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 12082/2016

In the matter between:

M C **Plaintiff**

And

MEC FOR HEALTH, WESTERN CAPE **Respondent**

JUDGMENT DELIVERED ON 29 MARCH 2019

BAARTMAN,J

[1] The plaintiff alleged that due to negligence and substandard medical treatment in 1998–2005, he suffered neurological damage that rendered him a motor and sensory incomplete paraplegic. He issued summons in July 2016, claiming damages. This judgment concerns two special pleas of prescription.

The issue for determination

[2] Mr Webster SC, the plaintiff's counsel, put the question for determination as follows: (**the first special plea**)

'…the matter relates to the narrow issue of prescription and it is plaintiff's case that in the circumstances and the totality of the circumstances, he was not in a position to know that he had a claim until a late stage of the proceedings as documented by the correspondence and as recorded in the statement of agreed facts.

…over a period of time he continued to be treated at Tygerberg, at Michael Mapongwane Hospital… and he had a range of treatments aimed at his rehabilitation and aimed at improving his condition and it was his perception that his condition was going to improve. In fact it did improve to an extent, and he was hopeful that he would be in a position to be functional once again. …

Given his level of education, given his circumstances, he wasn't objectively placed in a position to know at an earlier stage that he had a claim, that there was a likelihood and in addition to that, by virtue of his interaction or engagement with the medical authorities there was an ongoing process of treatment and rehabilitation and follow-up in rehab and callipers and all this sort of thing. …

And that in terms of the amendment we say, it wasn't brought to his attention that he had a claim, or that there was a problem involving medical negligence.'

Agreed facts

[3] The parties submitted a set of agreed facts and the plaintiff testified. The following are the agreed facts:

'1. Plaintiff …was born on […] January 1963.

2. During early 1998 plaintiff underwent a surgical procedure at Somerset Hospital, Cape Town, to drain a rectal abscess during which a spinal anaesthetic was administered.

3. Subsequent to the surgical procedure during early 1998, plaintiff attended Tygerberg Hospital, Cape Town.

4. During May 1999 plaintiff returned to Tygerberg Hospital, was admitted, underwent an MRI and was given a date for further surgery.

5. On 15 July 1999 plaintiff underwent further surgery at Tygerberg Hospital, a T7/T8 laminectomy. Following this further surgery, he was transferred to Karl Bremer Hospital where he remained for a period of three months.

6. Plaintiff underwent further surgery, involving the introduction of a cystperitoneal shunt, at Tygerberg Hospital on 27 November 2005. Following this surgery his condition deteriorated and he was put in final, irreversible, progressive paraplegia and lost the ability to walk.

7. Plaintiff was discharged from Tygerberg Hospital in a wheelchair on 15 November 2005 as a motor and sensory incomplete paraplegic.

8. During January 2016 plaintiff heard a radio advertisement broadcast over Radio 98.2/ Radio Zibonele advertising the services of Jonathan Cohen & Associates in regard to personal injury claims. The advertisement was broadcast in Xhosa and the translated English text of the advertisement reads as follows:

'Have you been seriously injured in a motor vehicle accident or have you or your child suffered injuries as a result of the fault of a doctor or hospital? Let our specialist personal injury lawyers assist you to claim monetary compensation. Phone Jonathan Cohen & Associates on

(021) 422 5270 for further information. That is (021) 422 5270. We are waiting for your call.'

9. After hearing the radio advertisement plaintiff telephoned the offices of Jonathan Cohen & Associates and made an appointment to see Mr Cohen.

10. On 2 February 2016 plaintiff attended the offices of Jonathan Cohen & Associates for the first time and consulted with Mr Jonathan Cohen.

11. On 14 February 2016 Jonathan Cohen & Associates addressed a letter, in terms of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, to the Director-General of the Department of Health, a copy of which is annexed hereto marked 'AF1'. This letter was sent by registered post to the Director-General in the Department of Health of the Provincial Administration of the Western Cape.

12. Summons in the matter was served on 8 July 2016.'

[4] The letter, dated 14 February 2016, in terms of section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 (**the section 3(2) letter**), was included as 'part and parcel' of the agreed facts. It was common cause that the plaintiff was the source of the information contained in the letter, the relevant sections provide:

'1. In and during May/June 1998, and at the new Somerset hospital our client underwent surgery to remove a septic boil from his buttocks. In order to have the boil removed, a spinal anaesthetic was performed on our client's lumbar vertebra.

2. When our client was discharged the following day after having undergone the surgery, he returned home but experienced extreme pain in his spine. He attended his local clinic, the Michael

Mapongwane day hospital in Khayelitsha and was given pain relief medication and medication to clean the wound from the operation site.

3. Our client progressively found that it was more difficult for him to walk and he returned to the Michael Mapongwane day hospital where he was given further pain relief medication and ointment to clean the surgical wound. His main complaint was pain in the region of the spinal anaesthetic.

4. Our client returned home and after a week, he returned again to the day hospital where an x-ray was performed. He was then referred to Tygerberg hospital with a referral letter. In approximately September 1998, our client attended Tygerberg hospital. At that stage, he was finding it even more difficult to walk and was experiencing pain in the region of the spinal anaesthetic. An x-ray was performed at Tygerberg hospital and he was told that a scan was necessary.

There were no scanning facilities at Tygerberg hospital, and our client was transported by ambulance to the City Park hospital. A scan was performed. Following the scan, our client was informed that the problem lay with the spinal anaesthetic and that there was water on our client's spinal-cord which needed to be drained. He was returned by ambulance to Tygerberg hospital and was given a date for the performance of the operation to drain the water.

5. In September /October 1999, our client underwent a further operation at Tygerberg hospital to "drain the water on the spinal cord" at the time of the operation, our client was walking with difficulty, and with an elbow crutch.

6. He remained in ward A at Tygerberg hospital for a week. He began experiencing problems urinating. He was transferred to the Karl Bremer hospital for further convalescence and physiotherapy

treatment. He remained at the latter hospital for a further three months, during which he underwent intensive physiotherapy on a daily basis. The physiotherapy however did not work and his condition continued to deteriorate. Our client was discharged after three months with elbow crutches. He was given pain relief medication and medication to assist with his urination problem.

7. Our client continued to return every month to his local day hospital to receive his medication and this continued until September/October 2005. At this point our client continued to ambulate with the use of two elbow crutches. At this point he returned to Tygerberg hospital complaining about his urination problem. He was admitted overnight. An x-ray was performed the next day and he was told that his spinal cord was not functioning properly and that they needed to insert a pipe in his back to alleviate the urination. He remained at Tygerberg hospital for a week, where after an operation was performed to insert a pipe in his back. After this operation his condition worsened even further and he became completely paralysed and was unable to walk. He was unable to even move his legs. He could no longer feel anything below his stomach. He was discharged with a wheelchair after three days. …

9. Our client has since attended his local day hospital on a monthly basis to receive his medication which he has continued to use for the last 10 years. …

Our client consulted with the writer hereof for the first time on 2 February 2016, after he had heard an advert on the radio, during which this firm's services were being advertised.

It became apparent during the aforesaid consultation on 2 February 2016, that our client at no stage prior to such consultation was ever aware of the fact that he is entitled to claim for damages as against the MEC for Health of the Western Cape province for the injuries that

he sustained at the hands of the doctors and the staff at both Somerset hospital as well as at Tygerberg hospital.

As such, the prescription of our client's claim only commences to run as from 2 February 2016. …'

[5] In addition, each party relied on a bundle of medical records, 'which [were] received in evidence as being what they purport to be.'

The amendment

[6] At the hearing, the plaintiff amended[1] his replication as follows:

'1. By the insertion of a subparagraph 1.4 which reads as follows:

'1.4 <u>Alternatively</u>, plaintiff alleges that the defendant, through its employees at the various hospitals and clinics at which the plaintiff received ongoing treatment, wilfully prevented him from coming to know of the existence of his claim against the defendant through rendering him ongoing medical treatment and other measures purportedly aimed at his rehabilitation and by failing at the same time to inform him that the negligence of defendant's employees was the cause of his spinal condition and its sequelae, and furthermore this condition was in fact permanent and irreversible.'

[7] The defendant agreed to the amendment but reserved the right to lead evidence in respect of the amendment but did not exercise the option. The defendant closed its case, content to argue that it should succeed with the special plea on the agreed facts despite the amendment.

Plaintiff's testimony

[8] The plaintiff testified that he was born on […] January 1963 in Alice in the Eastern Cape. His deceased father was a waiter in hotels in East

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[1] Rule 28 of the Uniform Rules of Court.

London and his mother a housewife. He was one of 4 siblings and attended school in Alice until standard 4, now grade 2. His sister is a domestic worker and his two brothers are a driver and hotel casual worker.

[9] The plaintiff became a herdsman at age 16 for a period of 4 years. Thereafter, he went to Gauteng where he worked as a general labourer on the mines. He left the mines in 1986 and came to Cape Town where he secured employment at Conradie hospital as a general labourer. His duties included cleaning the wards. He held that position for 6 years. Thereafter, he did casual work for Discount Job Buyers in Mowbray followed by casual work at a bakery in Parow until the surgery relevant to this judgment; he has been unable to work since.

[10] The plaintiff confirmed that the content of the section 3(2) letter correctly reflected his instructions to his attorney. In 1998, the plaintiff had training, 30 minutes in the morning, 'with full leg callipers – a metal that the doctors have prepared to attach to [the plaintiff's] leg from ankle to come right up to just below the hip…' This was necessary as the plaintiff was unable to stand unassisted. He confirmed that he used elbow crutches in October 1998. In 1999, he applied for a disability grant. At the time, the doctor concluded that he was disabled. The plaintiff has been in receipt of a disability grant since. He has been wheelchair bound since 16 November 2005.

[11] In 2015, the plaintiff met people who enquired about his condition. They were of the opinion that he could still claim compensation. In 2016, following the radio advertisement, he consulted his current attorney. Prior thereto, nobody had informed him that his condition was due 'to a mistake by the medical personnel and that he had a claim.'

Discussion

Plaintiff did not know the identity of the debtor

[12] The defendant bore the onus to show which facts the plaintiff was required to know before prescription could commence to run. The defendant bore the further onus of showing the plaintiff had knowledge of the identity of the debtor and the material facts necessary to institute his action, when he had or should be deemed to have acquired the information. In the section 3(2) letter, the plaintiff's attorney specifically claimed that:

> *'It became apparent during the aforesaid consultation on 2 February 2016, that our client at no stage prior to such consultation was ever aware of the fact that he is entitled to claim for damages as against the MEC for Health of the Western Cape province for the injuries that he sustained at the hands of the doctors and the staff at both Somerset hospital as well as at Tygerberg hospital.'*

[13] Mr Joseph SC, defendant's counsel, submitted that '…*it was not necessary for [the plaintiff] to know that "he has a claim for damages against the MEC for Health of the Western Cape pursuant to negligent conduct on the part of medical staff at the provincial hospitals at which he had been treated.*"' He relied on the Blaauwberg[2] matter for that proposition. Blaauwberg is not authority for that proposition – at para [16] the court held:

> *'[16]…Prescription penalises negligence and inactivity. Judged according to the legislative intention the respondent remained absent and inert for more than three years. Both shortcomings are ascribable to the failure to take reasonable precautions from the time of preparing the summons to the belated awakening…'*

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[2] *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports)* Limited 2004 (3) SA 160 (SCA).

[14] The plaintiff relied on Mtokonya[3] for his submission that the identity of the defendant as debtor was a fact that he should have known before prescription could commence running against him. Zondo J, writing for the majority, found that the identity of the debtor [the Minister of Police in that matter] was an admitted fact therefor it was not an issue for determination in that matter[4]. However, Jafta J[5] for the minority, disagreed and held that the issue was in dispute and said:

'[141] In circumstances like the present where prescription is not triggered by the debt becoming due, its commencement may be activated only by the creditor's actual knowledge of the identity of the debtor and facts from which the debt arises, if the deeming proviso in s 12(3) does not apply. Here that proviso is not applicable. What needs to be determined, therefore, is whether the applicant had actual knowledge of the identity of the Minister as the debtor and the facts from which the debt arose. This is a factual enquiry which may be determined with reference to the agreed facts only. …

[156] On the correct interpretation of s 12(3), the trial court should have concluded that, with reference to the facts set out in the agreed statement of facts, the Minister on whom the onus rested had failed to show that before July 2013 the applicant had actual knowledge of the identity of the Minister as the debtor. Accordingly, the running of prescription could not begin before the applicant had acquired actual

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[3] *Mtokonya v Minister of Police* 2018 (5) SA 22(CC).
[4] Ibid at para [25] '…In the first lines of the passage it is made clear that the applicant's case was that he did have knowledge of the identity of the debtor and the material facts giving rise to the debt…'
[5] Ibid at para 160 '…There are no facts in that statement which establish that the applicant acquired knowledge to the effect that the Minister was liable for the wrongful acts of the police. At best, it can be said that he knew about the arrest and detention by members of the Service. Therefore, he had knowledge of the identity of the Minister's co-debtors and not the identity of the Minister. For the Minister's special plea to succeed, it was incumbent upon him to prove that the applicant knew that the Minister was the debtor…'

knowledge not only of the identity of the debtor but also of the facts giving rise to the debt.'

[15] As indicated above, the parties placed agreed facts before the court and the plaintiff testified; in addition, the defendant reserved its right to lead evidence but abandoned that cause. It follows that I am not restricted to a stated case. In any event, the section 3(2) letter was included in the agreed facts. The plaintiff testified that he went to see an attorney '*because I was injured at the hospital*.' He further testified, under cross-examination that he went to his attorney to request that the attorney '*please put a claim against the hospital on my behalf.*' I am persuaded that the plaintiff learnt of the defendant's position as debtor in February 2016. This was a necessary fact for prescription to commence running.

[16] Even if I am wrong, the admitted facts indicate that the plaintiff learnt in September 1998 that '… *the problem lay with the spinal anaesthetic and that there was water on [his] spinal-cord which needed to be drained.*' This is not the equivalent of knowing that the negligent application of the anaesthetic had caused the water on his spine[6]. The plaintiff's uncontroverted evidence was that:

'Q by counsel: And when did you for the first time believe that the hospital was to blame or that they had done something wrong in respect of your condition?

Answer: It began during 2015, M'Lady, when I met some people who enquired as to what had happened to me. Then they were of the view that there is still something you can do about that and that it was concluded by me during 2016 after the advert from the radio.

Q: Where did you encounter these people that mention this to you?

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[6] Ibid para 50.

Answer: I met these people at the Khayelitsha Mall'

[17] There is nothing to suggest that this chance meeting was a fabrication. I accept the plaintiff's version. There is no basis to suggest that the plaintiff knew or had reasonable grounds to suspect that the negligent application of the spinal anaesthetic had caused the water on his spine. In this action, the defendant was prepared to put it no higher than:

(a) 'May 1999, after the plaintiff had undergone the MRI scan and was informed that his difficulty in walking 'could <u>possibly</u> be associated with the epidural anaesthesia administered in February 1998; alternatively…' (my emphasis)

[18] Without that knowledge, the plaintiff did not have the full facts necessary for him to institute his claim. The defendant, who bore the onus of proof, failed to show that the plaintiff had the knowledge of all the material facts needed to institute legal action in 1998 or in 2005.

[19] It is in issue whether the plaintiff could with reasonable care have acquired that information. Mr Webster and Mr Joseph put to the plaintiff extracts from the medical record – these indicate the following:

(a) On 4 October 2011, a medical note prepared by Doctor Scriba indicates improved strength in the plaintiff's legs.

(b) Although the plaintiff was discharged in 2005 with a wheelchair, he also took his crutches with him. Prior to the operation in 2005, the plaintiff used elbow crutches to walk.

(c) On 14 August 2015, the plaintiff had been evaluated and recommended for 'Client now for gait training'.

(d) On 21 September 2015, a Lengtegeur rehabilitation centre note indicates 'Weekly 10% increase in the length of time he walks. Swing through and crutches'.

The plaintiff understood that the medical personnel were 'trying to help [him] with [his] walking.'

[20] The plaintiff confirmed that he was in receipt of a disability grant but did not qualify for a grant in aid. He said that the staff at Lentegeur and Karl Bremer hospital had explained to him that the treatment was to assist 'me to be able to do things for myself and not be dependant on anybody like maybe to make up the bed and so forth.'

[21] The plaintiff said that he did not recall any improved strength in his legs in 2011. However, the note is consistent with the plaintiff's claim that medical personnel gave him the impression that he would improve. The plaintiff impressed as an honest and credible witness. Although the 2011 medical note recorded improved strength, he did not opportunistically claim increased strength. His claim that medical personnel gave him the impression that he would improve is borne out by the medical notes referred to above.

[22] This is so considering the plaintiff's level of education and his personal circumstances referred to above. He testified through an interpreter; there is no indication that such services were available to him at the hospitals. It is quite possible that he understood improved strength differently from what was intended to be conveyed to him. There is no evidence to gainsay his apparent understanding of what was conveyed to him. I am persuaded that the plaintiff believed that his condition would improve and therefore attended the various hospitals and underwent the treatment referred to above. I am persuaded that the circumstances in this matter are as described in Mtokonya at para [148]:

'Therefore, in my view s 12(3) should not be read as authorising prescription to commence running where the claimant, through no fault of his or hers, has successfully established that he or she was not aware of the existence of the debt. The effect of holding

otherwise would be denying the uneducated and poor people in society the protection arising from constitutional rights. …'

[23] In the circumstances of this matter, it cannot be said that the plaintiff could by the exercise of reasonable care have ascertained the information necessary to institute his claim earlier. The defendant did not meet its burden of proof. It follows that the first special plea stands to be dismissed.

The second special plea

[24] As indicated in paragraph 4 above, the section 3(2) letter was sent on 14 February 2016. The section provides:

'3(2) A notice must –

(a) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and

(b) briefly set out –

(i) the facts giving rise to the debt; and

(ii) such particulars of such debt as are within the knowledge of the creditor.'

[25] The defendant alleged that the notice did not comply with the provisions. The second special plea must suffer the same fate as the first special plea. The debt became due on 2 February 2016 – when the plaintiff acquired knowledge of the existence of the debt. It follows that the letter was sent timeously.

Conclusion

[26] I, for the reasons stated above, make the following order.

(a) The defendant's special pleas are dismissed with costs.

BAARTMAN J