THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before: The Hon. Mr Justice PAL Gamble
The Hon. Ms Justice D Kusevitsky
The Hon. Ms Justice N Mangcu-Lockwood
Date of hearing: 23 July 2021
Date of judgment: 17 August 2021

REPORTABLE

Case No: A31/2021

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, WESTERN CAPE Appellant

and

N[....] D[....] Respondent

JUDGMENT

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is an appeal against a judgment and order of Hockey AJ in which the appellant's special plea of prescription was dismissed with costs. The appeal comes before us after leave to appeal was granted to the full bench of this division by Hockey AJ.

[2] The respondent's heads of argument were delivered out of time, and after considering the condonation application, condonation was granted.

B. THE RELEVANT FACTS

[3] The relevant background facts are common cause. On 1 March 2015 the respondent was admitted into Tygerberg Hospital with labour pains. After receiving some monitoring, her membranes were ruptured, and Oxytocin was administered to her to aid the delivery of her baby. Her baby boy, K[....] was born on the same day with hypoxic ischemic encephalopathy, which included cerebral palsy and numerous other disabilities. After delivery, he was admitted into the intensive care unit and later into the neonatal ward, for a period totalling two weeks. Thereafter, he was transferred to Khayelitsha Hospital for another two weeks, after which both he and the respondent were discharged. The minor child continued to suffer from many complications and was repeatedly treated for numerous conditions.

[4] On 5 October 2018 the respondent issued summons in her representative capacity on behalf of K[....], and in her personal capacity, for damages flowing from alleged negligence of the hospital staff for whom the appellant is ultimately responsible. The parties agree that the summons was served on 11 November

2018.[1] Sadly, K[....] passed away after the issue of the summons (in September 2019), and as a result the matter only concerns the claim of the respondent in her personal capacity. Her personal claim is for a total amount of R3 800 000 and is in respect of future medical costs, past and future loss of earnings, and general damages.

[5] The appellant raised a special plea in terms of section 11 of the Prescription Act 68 of 1969 (*"the Prescription Act"*) against the claim brought in the respondent's personal capacity, as follows:

> *"5 Both K[....]'s birth certificate and the hospital records indicate that K[....] was born on 1 March 2015.*
>
> *6 The Plaintiff's summons and particulars of claim was served on the Defendant's attorneys of record on 11 November 2018, which is more than 3 years after the date on which the claim arose.*
>
> *7 In the premises the Plaintiff's claim for damages in her personal capacity has prescribed in terms of section 11 of Act 68 of 1969."*

[6] In response to the special plea the respondent delivered a replication, stating that the cause of action arose on 11 May 2018, the day on which she consulted with, and obtained knowledge from Dr Yatish Kara, a pediatrician, that K[....]'s disability was due to medical negligence caused by the Tygerberg Hospital staff during delivery. According to the respondent, until her consultation with Dr Kara, she had

[1] Although the parties agree in the pleadings that service was effected on 11 November 2018, the stamp of the State Attorney which acknowledged service of the summons indicates that it was received on 11 October 2018. The judgment of the court *a quo* determined the matter on the basis of the parties' pleadings.

decided to accept and live with information she had obtained from the hospital staff, that K[....] was disabled, without knowing the cause for the child's condition.

[7] The appellant also delivered a plea in which it took issue with the respondent's non-compliance with the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (*"the Legal Proceedings Act"*). In response, the respondent delivered a condonation application. No answering affidavit was delivered by the appellant in opposition to the condonation application. The averments made in the affidavit supporting the condonation are central to the determination of this matter. At paragraphs 8 and 9 of her affidavit the respondent states as follows[2]:

> *"During 2015, when my baby was 6 (six) months of age, I could notice that my baby is not developing as other children do. During my reviews at Tygerberg Hospital in and during late 2015 I sought clarity from the hospital about the late developmental stages of my baby and I was advised that my child will not be like other children. She will be late in milestone development due to some disability and I was not told as to the nature and extent of my child's disability. I was told she will be fine later on. I decided to accept that and live with it hoping that my baby's conditions will change later on, with no knowledge what caused my child's conditions.*
>
> *The elders in my community asked me to seek legal advice in early 2018…*
>
> *On 17 May 2018, I upon the instructions of my attorneys attended rooms of Dr Kara in Durban, during my consultation with him, he indicated that my labour with K[....] was mismanaged. He also stated to me, the basis upon which in his view there had been mismanagement of my labour. At that stage, I was advised by my attorneys of record that I may have a claim against the defendant. It's only then that I became aware that the employees of defendant were responsible for my baby's disability and therefore that I had a claim against the defendant. Before consulting with Dr Kara I did not know/understand neither appreciated that the employees of the defendant*

[2] Quoted *verbatim*.

were responsible for my baby's disability and that I had a claim against the defendant."

[8] No oral evidence was led in the court *a quo* for purposes of determining the special plea. The appellant's counsel, Ms Mahomed, advised the court *a quo* that, apart from the pleadings, the appellant intended relying on the medico-legal report of Dr Kara, as well as the respondent's affidavit in the condonation application.

[9] The court *a quo* dismissed the special plea of prescription, holding that the appellant had failed to discharge its *onus* to establish that prescription started to run three years before 11 November 2018, i.e. by 10 November 2015. The court *a quo* also declined to consider the medico-legal report of Dr Kara, stating that it was not adduced in evidence and only serves as proof of what it purports to be, in terms of an agreement between the parties in an agreed pre-trial minute.

C. THE APPEAL

[10] The appellant raises many interrelated issues on appeal. It is convenient to start with the second ground of appeal - a complaint that there were reasonable grounds to find that the respondent should have suspected fault on the part of the medical staff during the birth of the minor child, which should have caused her to seek further advice before the date of consulting Dr Kara. This appeal ground formed the basis of most of the appellant's argument before us and before the court *a quo*. The basis for the argument is firstly that prescription started to run on 2 March 2015, the day after K[....] was born. Further, the appellant relies on the knowledge that the respondent possessed from the time that she experienced labour complications until

the birth of the minor child on 1 March 2015; and on the respondent's version in the affidavit in the condonation application that she knew that the minor child was disabled and not developing like other children after birth, but decided to accept the child's condition. On this basis, it is argued that an inference should be drawn that, had the respondent exercised reasonable care, she could have acquired further facts relating to the cause of the minor child's disability.

[11] It is clear from the appellant's heads of argument that this argument and ground of appeal is based on section 12(3) of the Prescription Act. The first observation is that the reliance on this provision is not foreshadowed anywhere in the pleadings of the appellant. As indicated by the portion quoted earlier from the appellant's special plea, its complaint is that the summons was delivered more than three years after the debt arose, thus placing itself within the ambit of section 11(d) of the Prescription Act, which provides that *"[t]he periods of prescription of debts shall be… save where an Act of Parliament provides otherwise, three years in respect of any other debt."* Nevertheless, section 12(3) was triggered because the respondent's case in response to the special plea of prescription is that she did not have knowledge of the facts from which the debt arose until 11 May 2018. It is in response to the respondent's allegations in the condonation application and in the replication that the proviso in section 12(3) is relied upon by the appellant. We note that the respondent has also never expressly relied on section 12(3). Given the arguments raised by the parties, the court *a quo* was correct in approaching the matter on the basis that the matter pivotally involves the interpretation of that provision, albeit via a mistaken reference to "section 13(3)".[3]

[3] See paragraph [15] of the judgment.

[12] Section 12(3) of the Prescription Act provides as follows:

> *"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."*

[13] In *Links*[4], the Constitutional Court held that, in order for a party to successfully rely on a prescription claim in terms of section 12(3) he or she must first prove "*what the facts are that the applicant is required to know before prescription could commence running"* and secondly, that *"the applicant had knowledge of those facts"*.[5] The appellant accordingly attracted such an *onus* before the court *a quo.*

[14] As I have stated, the context in which the appellant places reliance on section 12(3) is in response to the respondent's allegations in the condonation application and the replication. However, the appellant did not oppose the condonation application by delivering an answering affidavit. Neither did it deliver a rejoinder in response to the replication. It relies on an inference that is sought to be made from the facts provided by the respondent. Those facts, however, remain unchallenged.

[15] As regards the facts necessary to sustain the respondent's claim, the starting point is section 12(1) of the Prescription Act, which provides that prescription *"shall commence to run as soon as the debt is due"*.[6] A debt is due *"when the creditor*

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[4] *Links v Member of the Executive Council, Department of Health, Northern Cape Province* 2016 (4) SA 414 (CC)at para [24].

[5] See also *Loni v Member of the Executive Council, Department of Health, Eastern Cape Bhisho* 2018 (3) SA 335 (CC) paras [23] – [25].

[6] Subsections 12(1) and (2) of the Prescription Act provide as follows:

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."[7]

[16] Since this is a claim for delictual liability based on the Aquilian action, negligence and causation are essential elements of the cause of action, and, as the Constitutional Court has stated[8], they each have factual and legal elements. Further, in cases involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff.[9] This means that, until the respondent had knowledge of facts that would have led her to think that possibly there had been negligence and that this had caused the disability, she lacked knowledge of the necessary facts contemplated in section 12(3).[10]

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

[7] *Truter and Another v Deysel* 2006 (4) SA 168 (SCA) para [15].

[8] See *Links* at para [45], and the authorities cited there.

[9] *Links v Member of the Executive Council, Department of Health, Northern Cape Province* 2016 (4) SA 414 (CC) at para [42].

[10] *Ibid*.

[17] In this case, the uncontroverted evidence is that it was during approximately September 2015, six months after K[....] was born, that the respondent was sufficiently concerned about K[....]'s condition to ask the staff at Tygerberg Hospital about his late developmental stages. And the answer she was given was that he would not be like other children and would be late in milestone development due to *"some disability"*. She was not told the nature and extent of the disability. It does not strike me as unreasonable that the respondent would resign herself to that advice. After all, there are many possible reasons for disability, and she is not a medical person. Importantly, she was told at that point that he *"will be fine later on",* and this is the reason that she decided to accept that advice, *"hoping that my baby's conditions (sic) will change later on".* There is no evidence that she was told the contrary.

[18] One therefore wonders on what basis it can be suggested that the respondent was supposed to seek alternative advice at that stage, or at least by 10 November 2015, in the light of the advice that she was given. There are no facts proffered by the appellant as to why the respondent must be reasonably expected to have been dissatisfied with the advice she was given. As the Constitutional Court has now stated[11]:

> *"Without advice at the time from a professional or expert in the medical profession, the applicant could not have known what had caused his condition. It seems to me that it would be unrealistic for the law to expect a litigant who has no knowledge of medicine to have knowledge of what caused his condition without having first had an opportunity of consulting a relevant medical professional or specialist for advice. That in turn requires that the litigant is in possession of sufficient facts to cause a reasonable person to suspect that something has gone wrong and to seek advice".*

[11] *Links* at para [47]. See also *Loni v MEC for Health, Eastern Cape* 2018 (3) SA 335 at paras [23] – [24].

[19] The fact that the respondent did seek advice at the prompting of her community leaders in early 2018 does not mean that she had reason to do so at the time relevant to these proceedings, namely by 10 November 2015. The respondent has explained that at the relevant time, based on the advice that she had received from the medical staff, she was hoping that the child's condition would change, presumably for the better because the staff told her that he *"will be fine later on"*.

[20] Furthermore, the evidence of the respondent makes it clear that, by September 2015, she was not aware of the cause of, or reason for, the minor child's condition. Indeed, there is no evidence that the respondent was ever informed by the hospital staff as to what the cause of K[....]'s condition was at any stage, let alone by 2 March 2015, the day after his birth. The fact that the disability was connected to the conduct of the hospital staff is a very relevant fact to the claim. And there is no evidence indicating that she had any reason to even suspect that the disability was due to the conduct of the medical staff. Even with the difficult labour that she experienced, the respondent cannot, in my view be reasonably expected to have drawn a link, without more, between that experience, the conduct of the medical staff and the disability. In light of the *Links* and *Loni*[12] decisions, those were necessary facts for a litigant wishing to sue for the type of claim that the respondent has now brought to have known.

[21] What is more, the 'debt' to which the respondent's claim relates is for the respondent's own medical costs, loss of earnings and general damages, not those in respect of the claim on behalf of K[....]. In order for the respondent's debt to be due

[12] See *Loni* at paras [23] – [24].

as at 2 March 2015 the necessary facts required for the *sequelae* pleaded in her summons (including her psychological shock, trauma, loss of amenities of life, and loss of employment) would have had to exist. On the available evidence, none of those pleaded *sequelae* had occurred by 2 March 2015. By way of example, the evidence shows that the respondent and the minor child were only discharged from hospital some four weeks after the birth of the minor child. This means that the claim based on the psychological shock and trauma of having to deal with the minor child's disabilities on a daily basis, would not have been apparent as at 2 March 2015. The same applies to the claim that the respondent had become psychologically impaired and no longer participated in social and other leisurely activities by reason of the fact that she had to look after the minor child.

[22] Similarly, according to the summons, the respondent expected to return to work two months after the birth of the minor child, but was unable to do so because of K[....]'s medical condition. Logically, that claim could only have arisen, at the earliest, two months after K[....]'s birth. Even then, it is not a certainty that she would have become aware within the two months that she had permanently lost her employment. Simply put, there is no evidence to gainsay the respondent's version that, by 10 November 2015, she lacked knowledge of the requisite facts required in terms of section 12(3).

[23] There remains one more ground of appeal, namely that the court *a quo* failed to consider the medico-legal report of Dr Kara. The court *a quo* held that the report was a document in the trial bundle, and not evidence *per se,* and that this was in accordance with the pre-trial minute agreed between the parties. A copy of the

pretrial minute was not included as part of the appeal record. However, according to the judgment the parties recorded in it that all documents in the bundle will, without proof thereof, serve as evidence of what they purport to be without admission of the truth and correctness of the content thereof. The judgment also records that the pre-trial minute provides that no document included in the bundle shall be regarded as having been adduced in evidence unless and until it has been referred to in evidence at the trial.

[24] The appellant does not take issue with what the court *a quo* states is recorded in the pre-trial minute. Instead, it is stated in the heads of argument that *"expert reports do not constitute documentary evidence but constitute reasoned conclusions based on certain facts and data which are common cause or established by an expert's own evidence or by some other competent witness"*. Further, according to the appellant, the court *a quo* should have had regard to Dr Kara's report firstly because its contents were not in dispute between the parties, and secondly, because the respondent relies on the report as the basis for why the summons was only issued in November 2018.

[25] It is not correct that the respondent relies on the contents of Dr Kara's report in her replication and condonation application as the basis for why the summons was issued when it was. What the respondent states is that she received advice from Dr Kara on 11 May 2018. There is otherwise no indication that the respondent is relying directly on the contents of Dr Kara's report in the manner that the appellant is suggesting. Instead, it is the appellant that wishes to rely on certain allegations contained in the report for its assertion that Dr Kara's report is based on information

provided by the respondent. In other words, the appellant sought to include in the factual matrix before the court *a quo* recordals made by the expert of facts conveyed to him by the respondent. This, without any evidence being led as to the contents of the report. It is established law that an expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence.[13] In the result, the court *a quo* was justified in approaching Dr Kara's report in the manner that it did.

[26] In any event, the court ***a quo's*** refusal to rely on the report is of no consequence as the report itself is not conclusive as to the cause of the minor child's condition. It concludes by stating that *"[o]bstetric experts need to determine if such injury was due to sub optimal care rendered to the mother in labour"*.

[27] For all the above reasons, there is no basis on which to interfere with the decision of the court *a quo.*

D. ORDER

[28] In the result, I would make the following order:

"The appellant's appeal is dismissed with costs".

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[13] *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämp-fung MBH,* 1976 (3) SA 352 *(A)* at p 371G; *Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 *(A)* at p 315E); *Lornadawn Investments (Pty) Ltd v Minister van Landbou* 1977 (3) SA 618 *(T)* at p 623; *Holtzhauzen v Roodt* 1997 (4) SA 766 *(W)* at p 772.

N. MANGCU-LOCKWOOD
Judge of the High Court

I agree and it is so ordered.

PAL GAMBLE
Judge of the High Court

I agree

D KUSEVITSKY
Judge of the High Court

APPEARANCES

For the appellant	:	Adv S Mahomed
Instructed by	:	Ms M Faurie
		State Attorney
For the respondent	:	Adv A Bodlani
Instructed by	:	Msondezeni Dayimani Inc.