

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 4056/2019

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

SIBONGILE MARIA MTHIMKHULU

OBO LANGALETHU PATIENCE THABEDE

Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH FOR THE FREE STATE PROVINCE

First Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH FOR GAUTENG PROVINCE

Second Respondent

HEARD ON: 28 APRIL 2022

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 7 JULY 2022

[1] On 9 February 2011 the Applicant gave birth to a girl that was later diagnosed with cerebral palsy. Having been made aware much later that the condition of her

child was caused by the negligent conduct of the medical staff at the hospital, the Applicant caused a summons to be served on the First Respondent on 5 September 2019, claiming many millions of Rands. She also caused a notice in terms of Section 3 of the Institution of Legal Proceedings against Certain Organs of State Act¹ to be delivered on the First Respondent on 14 February 2019. The Applicant claimed in her personal capacity and in her representative capacity, as mother and natural guardian of the child.

[2] In response to the summons, the First Respondent filed a Special Plea to the effect that the Applicant's claim in her personal capacity had already become prescribed on the 8 February 2014, and to the effect that notice was not given within the period stipulated in Section 3 of Act 40 of 2002. It is common cause that the claim on behalf of the child as not become prescribed because she is still a minor.

[3] The Applicant now approached this court on motion for a declaratory order that her summons was served on the First Respondent within a period of 3 (three) years from the date upon which the debt become due, and that her claim complied with the provisions of Section 12 of the Prescription Act.² In addition, the Applicant seeks a declaratory order that she has complied in all respects with Section 3 (1), (2) and (3) of Act 40 of 2002, alternatively that her non-compliance with these provisions be condoned in terms of Section 3 (4) (b) of the said Act. In the present proceedings, the Applicant claims no relief from the Second Respondent.

[4] The first question to be determined is then whether the Applicant's claim had already become prescribed by the time that summons was served on 5 September 2019. South African Courts have been seized with such questions almost on a daily basis in recent years, with the result that there is a plethora of reported judgements dealing with the issue. The judgements show that in each case, the applicable legal principles are time and again weighed up against the particular facts to arrive at a justifiable conclusion. This Court will follow the same course to determine whether the Applicant's claim has become prescribed or not.

¹ Act 40 of 2002

² Act 68 of 1969

[5] Where the Applicant relies in her Notice of Motion on the date upon which the debt became due, reference is obviously made to the provisions of Section 12 (1), (2) and (3) of the Prescription Act. These sections provide as follows:

12. When prescription begins to run

(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.

[S 12(1) subs by s 68 of Act 32 of 2007.]

(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.

(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.

[S 12(3) subs by s 1 of Act 11 of 1984.]

[6] Probably the decision most quoted when it comes to determining when a debt becomes due in terms of the Prescriptions Act, is the unanimous decision of the Constitutional Court in *Links v Department of Health*.³ In that case, the Plaintiff's thumb was amputated in hospital, and he was apparently not aware that the amputation was due to the negligence of the hospital staff. When he was later advised of the negligence he instituted action, but prescription of the claim was raised as a defence.

[7] Firstly, the Court referred with approval to the following passage in the case of *Truter and Another v Deysel*⁴: "Debt due means a debt, including a delictual debt, which is owing and payable. A debt is due in this case when the creditor acquires a complete cause of action for the recovery of a debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against

³ 2016 (4) SA 414 (CC)

⁴ 2006 (4) SA 168 at par. 16

the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute and pursue his or her claim.” The Court also referred to another passage⁵ in the Truter case where “cause of action” for the purpose of prescription was defined as “every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of 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.”

[8] The court further quoted the following passage in the case of Minister of Finance and Others v Gore No.⁶ to explain the meaning of “knowledge” in relation to prescription: “ The defendants’ argument seems to us to mistake the nature of ‘knowledge’ that is required to trigger the running of prescriptive time. Mere opinion of supposition is not enough; there must be justified, true belief. Belief on its own, is insufficient. For there to be knowledge, the belief must be justified.”

[9] The Court then came to the following conclusions:

9.1 “Until the applicant had knowledge of facts that would have led him to think that possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in Section 12(3).”⁷

9.2 “A firm finding that the applicant did not know what caused his condition as at 5 August 2006 can, therefore, be justifiably made. That was a material fact that a litigant wishing to sue in a case such as this would need to know.”⁸

9.3 “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

⁵ Par 19 in the Truter case

⁶ 2007 (1) SA 111 (SCA) par 18

⁷ Par 45 of the Judgement

⁸ Par 46 of the Judgement

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.”⁹

[10] Turning now to the facts of the present case, the Applicant alleges in her Founding Affidavit that in the early hours of 9 February 2011 she “pushed” for 2 (two) hours and 30 (thirty) minutes before the baby was born. This happened at the Mafube Hospital at Frankfort. During the night of 9 February 2011, the baby was transferred to the Boitumelo Hospital, where she remained until 4 March 2011. The treating doctor there informed the Applicant that they are keeping her because she was suffering from epileptic seizures. Nobody advised her that the baby’s condition might have been the result of medical staff being negligent.

[11] From 13 April 2012 and onwards the baby received treatment at two hospitals in Gauteng province. At one of the Hospitals the Applicant was advised that the child’s characteristics fitted the profile of cerebral palsy. It was revealed to the Applicant there that such a condition is a brain injury caused by any multitude of events before, during or after birth, including prolonged labour and the birth process. According to the Applicant, she still did not realize at that point that negligence could have played a role. She did wonder at the time, however, whether the child’s outcome could have been avoided, but she had no idea whether it is possible to find out, and she did not know how to find out.

[12] Some 3 (three) years later and during 2015, however, a relative of the Applicant listened to a talk show on the radio where it was mentioned that the condition under discussion may be caused by negligent conduct of medical staff. The relative then persuaded the Applicant to seek legal advice, which she did. She consulted the firm of Friedman and Associates on a contingency fee agreement, and she furnished them with the hospital file from Mafube Hospital. In October 2015 the attorneys requested medical records from the other institutions concerned and after a prolonged battle all the records were eventually obtained on 3 July 2017. On 2 May 2018, copies of the records were delivered to Professor Nolte of the University of

⁹ Par 47 of the Judgement

Johannesburg for an opinion. In a medical-legal report submitted on 8 October 2018, Professor Nolte advised that the treatment of the child was substandard and that it breached protocol. Subsequently the attorneys delivered the required notice to the First Respondent within 5 weeks. On 9 February 2019 and on 10 February 2019 the attorneys obtained two further reports from medical experts. A final report was obtained from an expert on 23 March 2019. According to the Applicant, she only became aware of the facts and the identity on the basis of this final report, which contained an analyses of the causal nexus between the conduct of the medical staff and the cerebral palsy. Summons was then served within 3 (three) years, she says.

[13] In his Answering Affidavit the First Respondent contends that the Applicant could have acquired knowledge of the identity of the Respondents and of the facts giving rise to her claim long ago, had she exercised reasonable care. In this respect the First Respondent relies on the fact, inter alia, that the Applicant was in possession of the Mafube Hospital records all the time, that she already wondered in 2012 whether the child's outcome could have been avoided, and that she could have discussed the cause of the child's condition with doctors at the two Gauteng Hospitals in 2012 like "any reasonable mother would have done." It is furthermore denied in this Affidavit that there was any need to wait for confirmation of a causal nexus between the negligence of the medical staff and the resultant cerebral palsy. This was not a fact that was required before the Applicant could institute the claim, it is contended.

[14] This is then in main the evidence and the facts of the matter, which must now be weighed up against the legal principles applicable to the issue of prescription to determine whether the Applicant's claim has become prescribed.

[15] Some 2 (two) years after the judgement in the Links matter, the Constitutional Court again pronounced itself on the issues of medical negligence and prescription of a claim instituted years later in the matter of Loni v MEC for Health, Eastern Cape.¹⁰ The Plaintiff in that matter was admitted to hospital with a gunshot wound in 1999. He underwent an operation to insert a plate and screws in his femur. The bullet was not removed. He was later given his hospital file and discharged. In

¹⁰ 2018 (3) SA 335 (CC)

December 2000 his leg became swollen and he returned to the hospital. He was examined and told that his leg was fine. At some stage the Plaintiff developed a limp.

[16] In 2008 the Plaintiff became a clerk in the SAPS and as a result, he was able to secure medical insurance. He thereafter approached doctors in private practice to establish the reason for his limp and the constant pain in his leg. He was referred to an orthopaedic surgeon, and the Plaintiff showed him his hospital file. In November 2011 the surgeon advised him that his condition was attributable to medical negligence.

[17] In June 2012 the Plaintiff issued summons, and the defence of prescription was raised. As in the present case, it was also pleaded that the Plaintiff had not complied with Section 3 of Act 40 of 2002. It was the case of the Plaintiff, however, that he only acquired knowledge of his claim in November 2011 when he was advised as such by the orthopaedic surgeon.

[18] In its judgement, the Constitutional Court referred to and relied on several passages in the Links case, and came to the following conclusions: “When the principle in Links is applied to the present facts, the applicant should have over time suspected fault on the part of the hospital staff. There were sufficient indicators that the medical staff had failed to provide him with proper care and treatment, as he still experienced pain and the wound was infected and oozing pus. With that experience, he could not have thought or believed that he had received adequate medical treatment. Furthermore, since he had been given his medical file, he could have sought advice at that stage. There was no reason for him to wait more than seven years to do so. His explanation that he could not take action as he did not have access to independent medical practitioners who could explain to him why he was limping or why he continued experience pain in his leg, does not help him either. The applicant had all the necessary facts, being his personal knowledge of his maltreatment and a full record of his treatment in his hospital file, which gave rise to his claim. This knowledge was sufficient for him to act. This is the same information that caused him to ultimately seek further advice in 2011.”¹¹

¹¹ Par 34 of the Judgement

[19] The Court also referred with approval to the assessment of the two Courts that have dealt with the matter before it eventually ended up in the Constitutional Court. The Court stated that “the objective assessment, which was appropriately applied by both courts, established that a reasonable person in the position of the applicant would have realised that the treatment and care which he had received were substandard and were not in accordance with what he could have expected from medical practitioners and staff acting carefully, reasonably and professionally. On an assessment of the applicant’s evidence, it is clear that by December 2000 he had already suffered significant harm.....and it would have been apparent from a reasonable assessment that the pain and suffering which he had endured were a direct result of the substandard care which he had received.”¹² The Court therefore found that the applicant’s claim had become prescribed.

[20] The situation in the present case is somewhat different. At one of the Gauteng hospitals the Applicant was informed in 2012 that the child probably had cerebral palsy, and that it was a brain injury caused by any multitude of events before, during and after birth, including prolonged labour and the birthing process. She was not told, and therefore did not realise at that point, that negligence could have been involved. In 2012, she therefore did not have the required knowledge as the applicant in the Loni-case had soon after his treatment in the hospital. Thereafter 3(three) years went by before she consulted with her attorneys in October 2015. Following this consultation, it took several years to obtain all the hospital records and to obtain records from medical experts. The first report was obtained on 8 October 2018 from professor Nolte, which indicated negligence on the part of the hospital staff, and further, that there may be a nexus between this negligence and the resultant cerebral palsy.

[21] From the above it must be assumed that the Applicant cannot be blamed for the delay that occurred between October 2015 and 8 October 2018. She had no control over the events of that period. What is concerning, though, is that the Applicant states in her Founding Affidavit that “I am advised that Professor Nolte’s report on its own was insufficient to prove a nexus between the negligence and the resulting cerebral palsy which still had to be established.” The attorneys

¹² Par 32 of the Judgement

consequently obtained a further two expert reports, both of which indicated negligence on the part of the hospital staff. Still not satisfied, the attorneys then obtained a last report from a practising paediatrician, Dr. Lewis, on 23 March 2019. Thereafter summons was issued.

[22] Now the advice regarding the need for causal nexus was clearly wrong. It was found in both the Links¹³ and Loni¹⁴ cases that it would be setting the bar too high to require knowledge of causative negligence for the test in Section 12 (3) to be satisfied. Strictly speaking, therefor, the Applicant can therefore also not be blamed for the delay that occurred after receipt of Professor Nolte's report, because she had relied on advice.

[23] The question is then whether the Applicant had obtained the necessary knowledge between 2011 and 2015. As already indicated above, I think not. Nobody informed her of possible negligent conduct of the hospital staff or that such conduct could have resulted in the child's condition. As a layperson, it could also not be expected from her to infer possible negligence from the Mafube Hospital records that were in her possession. I therefore find that she only acquired the necessary knowledge when the report of Professor Nolte became available on 8 October 2018, but that she was advised not to take any action yet on the basis of that report.

[24] This brings me to the next and last question, namely whether the Applicant could have acquired the necessary knowledge by exercising reasonable care. The question arises from the provision of Section 12 (3) of the Prescription Act that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

[25] On her own version, the Applicant had already wondered in 2012 whether her child's outcome could have been avoided. This happened at the time when she attended one of the Gauteng hospitals in April 2012 to participate in support groups and to visit the cerebral palsy clinic at the hospital. She asserts in her Founding Affidavit that she did not know whether it was possible to find out if the child's

¹³ Par 42 in Links

¹⁴ Par 23 in Loni

outcome could have been avoided, and she also did not know how to find out. I find this hard to believe. At the time, she was right there at the support group and at the clinic specializing in cerebral palsy, and nothing could have been easier than to discuss the issue with a doctor or someone there who could have advised her. After all, she was in possession of the Mafube Hospital records, and she could have shown it to such a person in order to obtain an informed opinion. Any reasonable person in her position would have done so.

[26] In addition, the Applicant also did nothing during the next 3 (three) years to find out whether the child's condition could have been avoided. On her own version, the father of the child enrolled the child as a new member on his medical aid scheme in 2015, but she presents no evidence that she even then took the opportunity to consult a doctor to find out what she wanted to know. In my view, any reasonable mother with a child suffering from a serious condition such as cerebral palsy, would have jumped at the chance to consult an independent doctor at the earliest opportunity to establish whether anyone was responsible for the child's condition.

[27] I am therefore constrained to find that the Applicant could have acquired knowledge of the identity of the debtor and the facts from which the debt arose in 2012 or during the following 2 (two) to 3 (three) years, had she exercised reasonable care. In terms of Section 12(3), she is therefore deemed to have had the necessary knowledge during the time. The claim in her personal capacity has become prescribed.

[28] In view of this finding, it is not necessary for this Court to deal with the prayers in the Notice of Motion relating to the provisions of Act 40 of 2002. As for costs, the Court is mindful of the fact that the Applicant litigated on a contingency fee agreement with her attorneys, and that she would in all probability not be able to pay the costs of the application. I therefore make the following order:

1. Prayers 1, 2, 3 and 4 of the Notice of Motion are dismissed.
2. There is no order as to costs

P. J. LOUBSER, J

For the Plaintiff:

Instructed by:

Adv. P. Zietsman SC

Friedman Attorneys, Johannesburg
c/o McIntyre van der Post, Bloemfontein

For the Defendants:

Instructed by:

Adv. R.K. Ramdass

The State Attorneys, Bloemfontein