"DLS"

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Case No: 1870/2012
Heard: 09/06/2014
Delivered: 15/08/2014

In the matter between:

DIRK LINKS **Appellant/Plaintiff**

AND

THE MEC, DEPARTMENT OF HEALTH, NORTHERN CAPE PROVINCE **Respondent/Defendant**

Coram: Kgomo JP; Lacock J et Pakati J

JUDGMENT

KGOMO JP

[1] The appellant/plaintiff, Mr Dirk Links, of the Promised Land Plot 10, Galeshewe, Kimberley, Northern Cape, was born in September 1981 and reached Grade 7 at school. He sued out summons against the respondent/defendant/the Member of Executive Council (MEC) of Health of the Northern Cape Province on 04 August 2009, which process was served on 06 August 2009, for the recovery of damages in the amount of R2 977 744.00 resulting from the alleged negligent medical conduct of the MEC's servants.

[2] The appellant claims that the cause of action arose on 26 June 2006 when he was admitted to Kimberley Hospital (KH) for

the treatment of a self-inflicted left-thumb injury. In broad he accuses the MEC that: The doctors and other staff who attended to him wrongfully misdiagnosed and/or mistreated the injury; that a plaster cast was applied too tightly to the affected hand, thumb and forearm which contributed to the buildup of pressure and induced ischaemia (Inadequate blood supply); consequently, that these aberrations led to the fasciotomy (amputation) of his left thumb on or about 04 July 2006 and the subsequent progressive shriveling up of his left arm which was rendered dysfunctional.

[3] The MEC raised two special pleas:

3.1 Firstly, that the appellant's claim has become prescribed in accordance with the Prescription Act, 68 of 1969, by virtue of the fact that the cause of action arose on 26 June 2006 when he first received medical treatment and had prescribed by 06 August 2009 when the summons was served on the MEC, more than three years later. See s 11(d) read with s 12(1) – (3) of the Prescription Act, to be reverted to.

3.2 Secondly, that the notice that the appellant gave to the MEC pursuant to the prescripts of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, No 40 of 2002, was out of time in that more than six months had elapsed.

[4] By consent between the parties, and sanctioned by **Mamosebo AJ** before whom the matter served, the special pleas were entertained separately from the merits as they were evidently dispositive of the entire case, if well founded. On 24 May 2013 **Mamosebo AJ** decided that the appellant's action had indeed prescribed and dismissed it with costs.

[5] As far as the s 3 of Act 40 of 2002 notice to the MEC is concerned **Mamosebo AJ** declared it to be of mere academic interest in light of the prescribed claim and remarked:

5.1 *"30 ---- If the plaintiff's claim had not prescribed I would have condoned his default in giving timeous notice to the defendant for the reasons set out [elsewhere]. This aspect is also relevant in the event that it could be found that I was wrong in finding that the plaintiff's cause of action had not prescribed."*

5.2 The court *a quo* then made the following order in this regard:

"2. Condonation for plaintiff's failure to serve the notice contemplated in s 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 within the period laid down in s 3(2)(a) of the Act must fail in view of the order in para 1 [relating to the prescription]."

This observation is correct. In **Madinda v Minister of Safety and Security** 2008 (4) SA 312 at 316D (para 9) the SCA held that:

"[9] The first requirement speaks for itself: the court must be satisfied that the applicant relies on an extant cause of action. That this is so in the present instance has never been in dispute."

[6] The court *a quo* refused leave to appeal. This appeal now serves before us with leave of the Supreme Court of Appeal.

THE APPELLANT'S/PLAINTIFF'S CASE MADE ON AFFIDAVIT

[7] The appellant states that he dislocated his left thumb on 26 June 2006 and that there were no open or gaping wounds. This statement must be correct because Annexure "A3" to the

MEC's papers, deposed to by Dr Lizanne Koning, a medical practitioner at Kimberley Hospital, has this entry the authenticity of which was not placed in dispute:

"Problem-Orientation Patient Progress Record

Date 26/06/2014: Time 14h00: Progress Note:

Wound irrigated with normal wound bright red, certain areas still red, no offensive smell, no bleeding. Black slab still intact not able to move fingers."

[8] A Plaster of Paris (POP) was applied to the appellant's hand and forearm at Kimberley Hospital and he was discharged therefrom on the same day. He was directed to return after 10 days for the removal of the device. Four or five days later (29 or 30 June 2006) he returned to the hospital because he experienced excruciating pain. He was merely given a clinical examination and supplied with painkiller tablets. He was on this occasion directed to return after five days for observation/assessment.

[9] When the appellant could not withstand the extreme pain he returned to the hospital after only three days. The affected hand/thumb was X-rayed and sepsis was diagnosed in his left thumb. This, by way of deduction, must have been on 03 July 2006 because the appellant states (translated):

"17.5 I underwent an operation under general anesthesia the following day. I discovered later on that my left thumb was amputated. I accepted that this amputation took place during this procedure."

It should, accordingly, be common cause or accepted that the fasciotomy of the thumb took place on 04 July 2006.

[10] However, the appellant also states, contradictorily, that he discovered for the first time that his thumb was amputated "a day after" his discharge from the hospital (which discharge took place at the end of August 2006) when he attended at the wound-clinic for the cleaning of the thumb.

[11] The appellant maintains that (an unnamed) doctor informed him upon his discharge (at the end of August 2006) that his left hand has become dysfunctional. He went on (translated): *"21. About a month later, during September 2006, I noticed that my left forearm was shrivelling up and became totally useless and dysfunctional. It also started to shrink and became emaciated as compared to the right forearm. It then became evident to me that I have lost its use permanently."*

He was not informed that the hospital was medically negligent. Not surprisingly.

[12] The appellant states that he approached Booysen McLeod Attorneys in November 2006 for legal assistance but they could not help, *inter alia*, because he was indigent. This is how he ended up with Legal Aid South Africa, Kimberley, in December 2006. The court *a quo*, correctly chronicles his experiences thereat as follows:

"[7] Although he does not remember the name of the legal aid practitioner who assisted him that day he was asked by this official verbally to return on 06 March 2007 when they will commence with the investigation of his case. [The practitioner] also advised the plaintiff to obtain copies of the hospital records in the meantime. The plaintiff requested his cousin around December 2006 to obtain his medical records from Kimberley

Hospital on his behalf. The request was denied by hospital personnel as the records are confidential.

[8] His subsequent numerous visits to the Legal Aid Centre, Kimberley, as reflected in his founding affidavit are 10 May 2007, 27 June 2007, 12 October 2007, 21 November 2007, 02 January 2008, 17 April 2008, 23 June 2008, 10 September 2008, 09 October 2008, 11 December 2008, and 24 March 2009. The plaintiff states that he was seen by a different practitioner on each occasion. It must be said that these visits demonstrate that he pursued his action diligently.

[9] On 27 June 2007 he consulted with Mr Jansen Van Vuuren of the Legal Aid Centre, Kimberley, who is apparently the supervisor. Every time when he was called in by Mr Van Vuuren to visit the Legal Aid Centre, he obliged. Although he was assured during all of his visits that his matter is receiving attention it was only when his file was handed over to a private attorney, Mr Van Niekerk, that some progress was made.

[10] The plaintiff only consulted Mr Van Niekerk on 15 July 2009. Two days thereafter, on 17 July 2009, the plaintiff consulted with an advocate. Summons was issued on 06 August 2009; thus more than three years had lapsed from the date of his first treatment. Mr Van Niekerk made attempts to obtain the hospital file on 14 September 2009 but in vain. The hospital only provided part of the records on 01 November 2010."

[13] On 21 January 2011 Dr Willem Reyneke, a general surgeon (algemene chirurg) wrote to the appellant's attorney (Elliot, Maris, Wilmans & Hay – for the attention of H Van

Niekerk/Erika/vn600) as follows (translated by the doctor himself):

"DIRK LINKS/DEPARMENT OF HEALTH NORTHERN CAPE PROVINCE/KIMBERLEY HOSPITAL

After clinically evaluating Mr Link's current condition on 19/01/2011, as well as having had insight into the hospital records, as well as the history as disclosed by Mr. Links regarding the time and visits to Kimberley Hospital between 27 June 2006; when he received plaster of paris on his arm; and on 03 July 2006 when he had the first surgery, I hereby want to add the following to my previous statement.

1. *Mr. Links presently has a Volkmann's contracture of his left hand, as well as amputation of the distal phalanx of the left thumb. Clinically there is total loss of function of the Ulnar, Median and Radial nerves in the forearm and hand. This includes motor as well as sensory function.*
2. *The causes of Volksmann's contraction may be the following:*
   - *2.1 Ischemia due to vascular injury (this can be thrombosis or bleeding) with increased pressure in the muscles compartment of the forearm.*
   - *2.2 Plaster of paris for a tourniquet causing ischemia because it is too tight.*
3. *Regarding the history of Mr. Links: the injury was on 26 June 2006, and the treatment was given on the 26th June 2006. Treatment included plaster of paris of the left forearm.*
4. *During 5 days (from 26/06/2006 until 03/07/2006) Mr. Links went back to the hospital on two occasions with complaints of pain. Pain medication was given.*

5. *According to the hospital notes the treatment Mr. Links received from the 3rd of July 2006 was medically correct. The damage occurred before then.*
6. *The cause of the Volmann's contraction is most probably due to plaster of paris that was too tight, and not removed soon enough. Ischemia developed and the patient had severe pain for which he went back to hospital on the 28th or 29th of June 2006. He was given pain medication.*

IN SUMMARY

The Volksmann's contracture is of a severe degree with total loss of function of the left hand. This is most probably due to the plaster of paris which was applied too tight on the 26th of June 2006, and not removed when ischemia occurred."

THE RESPONDENT/MEC'S CASE

[14] Dr Lizanne Koning proffered the following defence in countering the relief claimed by the appellant. She is a medical doctor employed by the Department of Health, Northern Cape, and the Superintendent in charge of the Kimberley Hospital Complex.

[15] The doctor contends that the appellant was informed of the nature and possible consequences of each proposed medical procedure. As examples are appended Annexures "A1" and "A2". Annexure "A1" is a pro-forma document entitled: *"Toestemming tot Mediese Prosedure/Ondersoek".* (Consent to Medical Procedure/Examination). It is dated 15 July 2006 and signed by a *"Geneesheer [Doctor] A Pretorius"* and the appellant, "D Links", as well as two witnesses. The nature of the procedure proposed to be undertaken is stated as:

"Wound inspection and debridement of the left forearm". Annexure A2 reflects that the same medical procedure was repeated on 31 July 2006, the main difference being that the proposed medical procedure was scheduled by a Dr Slabbert.

[16] In consequence of the aforegoing information Dr Koning stated:

"2.2 Typically during those kinds of procedures (debridement), dead tissue (in this case due to sepsis) is removed and that would have been the reason for the amputation of the finger as well.

2.3 It is submitted that the Applicant would have known on the day of the amputation of his left thumb that he had lost the use of this left thumb and at least some functionality of his left hand. In terms of the Prescription Act, that will be the time prescription starts to run as he was aware of the identity of the debtor and the facts from which the debt arises.

2.4 On Plaintiff's version he became aware of the amputation on 04/07/2006. Consequently it is not possible that he only became aware of the loss of functionality in September 2009 as alleged.

2.5 Deformity of the Appellant's left hand as depicted in Annexure "D" to the Applicant's affidavit is the last stage of the process after compartment syndrome and muscle ischaemia. Loss of functionality is immediate with amputation and it would be incorrect to consider the deformity stage to be the time prescription starts to run.

2.6 As a rule wounds are dressed every 48 hours or less, and that this was done is evident from the medical records. Consequently, even in the highly unlikely

scenario that he was not told of the amputation he would have become aware of it and the concomitant loss of functionality at the most 48 hours after the amputation on 04/07/2006 – in other words at the latest on 06/07/2006. Consequently this claim became prescribed on 05/07/2009. As summons was only served on 06/08/2009, the claim has prescribed.

2.7 A lot is being made of the fact that the Applicant did not know in which manner the Respondent was negligent due to the fact that medical records were not provided timeously. I have been advised that there are ample authority for the proposition that it is not necessary to actually be aware of the grounds of negligence in order for prescription to start running.

2.8 Certainly the Applicant did not need the medical records in order to send the Section 3 Act 40/2002 notice as that was done on 12/05/2009 whereas the records were only received on 04/11/2010. Similarly summons was issued on 06/08/2009 – more than a year before receipt of the medical records."

THE REASONING AND FINDING OF THE COURT *A QUO*.

[17] **Mamosebo AJ** made the following observations and finding:

"*26. The plaintiff in this case became aware of the amputation on 05 July 2006. He had suspected prior to this date while still in hospital that something was not right. In my view, the plaintiff ought reasonably to have realised on or about 15 July 2006 that the operation was not successful; alternatively that the subsequent treatment was not properly done or that there was no proper remedial medical follow-up action. The plaintiff's knowledge can be imputed to him from*

the time the plaster cast was removed. From the papers I have not discerned any event that interrupted or could be construed to have interrupted the running of the prescription.

27. *The following passage appears in,* ***Prescription in South African Law, J Saner at 3-69 issue 19****:*

'Where the plaintiffs could have issued summons against the Government of the Republic of South Africa within the prescriptive period, but failed to do so because his legal advisors failed to appreciate the fact that this would have been competent in the circumstances, the court upheld a plea of prescription. This it did on the basis that the plaintiff became aware that the state farm in question (on which the fire affecting the plaintiffs had started) belonged, ultimately, to the Government of the Republic of South Africa, on a date more than three years prior to issue of summons. However, despite receiving information to this effect, the plaintiff's attorneys continued to try to ascertain the identity of the actual department of state which owned the farm. Only when they had done this did they issue summons accordingly. Unfortunately, as noted, this was too late.'"

THE LAW AND APPLICATION OF THE LAW TO THE FACTS.

[18] Section 11(d) of the Prescription Act, Act 68 of 1969, provides that:

"The periods of prescription of debts shall be the following:

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[19] Section 12 of the same Act stipulates that:

"*(1) Subject to the provisions of subsections (2), (3) and (4), 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.

(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."

[20] The word "debt" in s 12(1) of the Prescription Act does not bear the narrower concept or connotation of a "cause of action" but eminently the broader connotation of a "right of action" or even the creditors "claim". In **Drennan Maud and Partners v Pennington Town Board** 1998 (3) SA 200 (SCA) 212F-J Harms JA (then) observed in relation to the phrase in s 12(3) of the Prescription Act, namely "the facts from which the debt arises" that regard must be had to the body of authority that deals with the meaning of the word "debt" in s 15(1) of the Act (collected and discussed in two later cases of this Court, namely **Sentrachem Ltd v Prinsloo** 1997 (2) SA 1 (A) at 15B--16D and **Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd** (in Liquidation) 1998 (1) SA 811 (SCA) at 825B--827F). He then went on to say:

"The word `debt' does not refer to the `cause of action', but more generally to the `claim'. There is in my view no reason to give the word another meaning in s 12(3).

In the Drennan Maud – judgment (supra) Olivier JA in the majority judgment at 209 F-G stated:

"Section 12(3) of the Act provides that a creditor shall be deemed to have the required knowledge if he could have acquired it by exercising reasonable care'. In my view, the requirement "exercising reasonable care" requires diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises."

And at 211F Olivier JA concluded:

"(A) debt to pay damages becomes due when loss occurs as a result of a delict (Oslo Land Co Ltd v The Union Government 1938 AD 584 at 590; Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 838H--839G) or a breach of contract (Swart v Van der Vyver 1970 (1) SA 633 (A) at 643C--D)."

See also **Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika** 2001 (1) SA 987 (SCA).

[21] In terms of s 12(1) of the Act "prescription shall commence to run as soon as the debt is due". The phrase "debt due" must be given an ordinary meaning, which is a debt that is "owing and already payable" **See Lagerwey v Rich and Others** 1973 (4) SA 340(T) at 345 F-G. See also **Evins v Shield Insurance Co Ltd** 1980 (2) SA 814(A) at 838D- 839A and 842C-H.

[22] Mr Botha, for the appellant, argued that on the substantiated evidence:

"16. The court a quo erred in failing to take into account that, when the appellant was discharged from hospital at the end of August 2006, he was still unaware of the following facts:

16.1 That the plaster of paris was put on too tightly.

16.2 That the plaster of paris was not removed timeously.

16.3 That the compression by the plaster of paris led to the ischaemia and the loss of his thumb and the use of his left forearm.

16.4 Who was responsible for the damages suffered and to be suffered by him.

16.5 Whether the employees of the respondent played a role in the damages suffered and to be suffered by him.

16.6 What caused the problem that led to the operation and the eventual loss of his left thumb and the use of his left forearm."

[23] Counsel submitted that in the result the court *a quo* should have found that the respondent MEC failed to prove that the appellant should be deemed to have had the requisite knowledge of the (necessary) facts by 06 August 2006. He urged upon us to set aside that Court's finding that the prescription plea (the first special plea) succeeds and that we replace same with an order that it is dismissed with costs. Counsel further submitted that this is moreso the case having regard to **Macleod v Kweyiya** 2013 (6) SA 1 (SCA) at 6F (para 10) and **Gericke v Sack** 1978 (1) SA 821 (A) at 828B to the effect that the defendant MEC bears the onus to prove that the appellant/plaintiff had adequate facts and knowledge.

[24] In **Minister of Finance and Others v Gore NO** 2007 (1) SA 111 (SCA) at 119 -120E (paras 17-19) **Cameron and Brand JJA** held authoritatively that:

"[17] This Court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'. The defendants relied on these authorities to contend that Rabie knew, at the latest, by the latter half of 1995, that Louw and Scholtz had defrauded 3D-ID out of its tender. They pointed out that Rabie insistently asserted under oath, starting with his replying affidavit in the review (October 1994), and repeated in his Anton Piller (January 1995) and liquidation affidavits (April 1995), that fraud tainted the tender process. The allegations of fraud then made found expression, later, in the particulars of claim.

[18] Rabie certainly did cry fraud soon after 3D-ID lost the tender. But what did he know when he did so? The defendants' argument seems to us to mistake the nature of 'knowledge' that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified, true belief. Belief, on its own, is insufficient. Belief that happens to be true (as Rabie had) is also insufficient. For there to be knowledge, the belief must be justified.

[19] It is well established in our law that:

(a) Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing

or participating in events, or by being the direct recipient of first-hand evidence about them.

(b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.

(c) On the other hand, mere suspicion not amounting to conviction belief justifiably inferred from attendant circumstances does not amount to knowledge."

[25] In **Macleod v Kweyiya** (supra) at para 9 Tshiqi JA reiterated the principle propounded in the Gore judgment (above) when she stated:

"In order to successfully invoke s 12(3) of the Prescription Act either actual or constructive knowledge must be proved. Actual knowledge is established if it can be shown that the creditor actually knew the facts and the identity of the debtor. The appellant places no reliance on actual knowledge but relies on constructive knowledge. Constructive knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care."

See to the same effect **Van Staden v Fourie** 1989 (3) SA 200 (A) at 216D-E; **Truter and Another v Deysel** 2006 (4) SA 168 (SCA) at 174C-D. The commentary by the author J Saner on Prescription in South African Law at 3 – 69 issue 19 quoted by **Mamosebo AJ** and reflected in para 17 of this judgment is consonant with the aforegoing jurisprudence.

[26] Adv Van Rhyn SC points out that there is some equivocation in the approach adopted by the appellant and, I may add, indeed of his counsel, on whether the provisions of s 13(1)(a) of the Prescription Act are being invoked. This provision

speaks to an impossibility which prevents a plaintiff from instituting an action within the prescribed three-year time frame.

26.1 At para 91 of his affidavit the appellant states (translated):

"While I was in Hospital, and a month thereafter, I had to visit Kimberley Hospital daily where I had to spend hours waiting for my wounds to be cleaned. ***During these occasions it was not possible for me to consult a lawyer in order to acquire information to enable me to establish whether I indeed have a claim against the hospital."***

26.2 At para 103 to 105 the appellant states: (translated):

"103. However, I still did not know [during 26/6/2006 to 31/08/2006] nor could I establish without the aid of the hospital records and notes on the file what caused my complications (problems) and who or what was responsible for them.

104. I submit with respect that, through the exercise of reasonable care, I was only in a position to become aware of the requisite facts during January 2007: Provided (indien) the Legal Aid Board requisitioned the hospital records.

105. In addition and of importance is the fact that the employees of the Respondent (MEC) prevented me (my verhinder) to acquire the relevant knowledge because they denied my brother-in-law access to my file. Even after my current attorneys of record requisitioned the hospital records, and threatened court action, it took more than a year to be furnished with only part of such records.

106. I therefore deny that I could have acquired the requisite knowledge before 05 August 2006 through the exercise of reasonable care."

[27] The hospital was well within their right to deny the appellant's brother-in-law, Mr Isaac Kgone, access to the private records of its patient. Doctor/patient privilege applied. In addition the hospital would have infringed the privacy and dignity of a patient, which conduct would have been unethical and actionable. The simplest, easiest and cheapest measure to have been adopted was for the appellant to have sought personal access to his hospital records. There is no explanation that he attempted to do so or if not why not or that the hospital was obstructionist. See **Lombo v African National Congress** 2002 (5) SA 668 (SCA) at 678H-679A whereat the Court stated:

"[25] The physical detention of the appellant outside the Republic of South Africa in circumstances in which he was prevented from pursuing personally any action arising from the alleged assaults and maltreatment inflicted upon him, and totally denied access to anyone who could do so on his behalf, amounted to his being prevented by a superior force from interrupting the running of prescription as contemplated by s 13(1)(a). Consequently, he had one year from the time this impediment ceased to exist (his release from detention and return to this country) within which to institute action in respect of all causes of action arising from the alleged assaults and maltreatment to which he was subjected during his detention, and his property that was allegedly misappropriated. The Act therefore made provision for his situation to the exclusion of the common law and the maxim invoked accordingly finds no application. Unfortunately for the

appellant he failed to institute action within the one-year period prescribed by s 13(1) and any claims he might have had in respect of the causes of action referred to have consequently been extinguished by prescription."
See also **Montsisi v Minister of Police** 1984 (1) SA 619 (A) at 638 A-D.

I am accordingly satisfied that s 13(1)(a) of the Act finds no application by virtue thereof that the appellant's movement was never restricted, event when he was hospitalised. He still had access to his family.

[28] Mr Van Rhyn has argued, convincingly in my view, that without the aid of the hospital records counsel, as instructed by the appellant, was able to settle the Particulars of Claim and deal with the following ingredients of the Claim:
28.1 The contract between the hospital and the appellant;
28.2 The negligent breach of that contract by the employees of the MEC;
28.3 The causation issue; and
28.4 The damages suffered under the various heads.
See Harms: Amler's Precedents of Pleadings, 7th Ed at pp276 and 277. See also **Evins v Shield Insurance Co Ltd** (supra) at 838H- 839A.

[29] The hospital records consist of only five pages which do not add substantively to what the appellant already knew. Demonstrative of this assessment is that in essence the only addition to appellant's Particulars of Claim by way of amendment are paras 26.6 – 26.10 which allege:
"*26.6 Deur nie, alternatiewelik, nie betyds die gips te verwyder nie.*

26.7 Deur nie, alternatiewelik, nie betyds die intree van Ischaemie te diagnoseer nie.

26.8 Deur nie, alternatiewelik, nie betyds die Ischaemie te behandel, alternatiwelik, effektief te behandel nie.

26.9 Deur nie die Eiser behoorlik te ondersoek nie.

26.10 Deur nie betyds die korrekte toepaslike behandeling op Eiser toe te pas nie."

See **Geldenhuys NO v Diedericks** 2002 (3) SA 674(O) at 681D-E whereat Wright J stated:

"Alhoewel bogemelde beslissing [Van Staden vs Fourie 1989 (3) SA 200 (A) at 216C-E] nie op deliktuele aanspreeklikheid betrekking het nie, is dit ook duidelik uit die toepassing van bogemelde beginsels dat 'n dagvaarding wat sekere gronde van nalatigheid (wat opsigself slegs die juridiese afleiding van sekere feite behels) uiteensit, na die verstryking van die verjaringsperiode (en selfs ten tyde van die verhoor) gewysig kan word om meerdere of ander gronde van nalatigheid uiteen te sit."

[30] In **Genicke v Sack** 1978 (1) SA 821 (A) at 832 A-D **Diemont JA** observed:

"In the light of the evidence that appellant's injuries were of a comparatively minor nature I see no good reason why she should not then and there have asked the respondent who he was or, if she felt too perturbed to speak to him personally, why she should not have put the same question to the two uniformed club officials who arrived on the scene within minutes of the occurrence. Moreover she could at any time later in the afternoon have asked her husband or her son the same question or have asked them to make inquiries at the club house which was only 200 or 300 yards away. It does not

seem to me that this was asking too much of appellant or causing her any hardship. The Act merely requires the creditor to seek such knowledge by the exercise of reasonable care; she is not required to issue summons - she is given a generous three years in which to institute proceedings. All that she is called on to do is to ask one question to establish identity and not to be content to play a purely passive roll. If she could have acquired this knowledge by acting diligently, her inertia, ineptitude or indifference will not excuse her delay.

The creditor who fails to exercise the reasonable care prescribed by the Act must pay the penalty for he is then deemed to have acquired the knowledge necessary for the debt to become due and for prescription to begin to run."

[31] In **Gunase v Anirudh** 2012 (2) SA 398 (SCA) at 402B-403J (paras 14-20) the Supreme Court of Appeal held that a plaintiff cannot postpone the commencement of prescription through his/her own inaction.

[32] I endorse the comments by **Mamosebo AJ** that the appellant and Legal Aid South Africa (Kimberley) must sort out this unfortunate situation between themselves. She observed:

"41. I do not see any point why the Legal Aid Board attorneys invited the plaintiff to their offices on numerous occasions. Clearly a lot of nonchalance was displayed. In one of the letters informing him of progress in the matter dated 17 April 2008 and marked Annexure 'I', the Legal Aid Board stated that the subject-matter was "RE: Your matter: divorce". The plaintiff's matter before them was about medical negligence and not divorce. This is uttely ridiculous even for a candidate attorney. On the facts before me my sense is that they did

not cover themselves in glory. It is undesirable at this stage to say more on this aspect because the Legal Aid Board is not a party to these proceedings. See ***Mazibuko v Singer*** *1979 (3) SA 258 (W) in which Colman J said at 261 C:*

'In the carrying out of his contractual obligations the defendant was obliged (either personally or through others) to exercise knowledge, skill and diligence to be expected of an average practicing attorney. (See Mouton v Die Mynwerkersunie 1977 (1) SA 119 (A) at 142-3 and authorities there cited). It is the plaintiff's case that the defendant fell short of that standard.'"

[34] It follows that the appeal cannot succeed.

ORDER

The appeal is dismissed with costs.

F DIALE KGOMO
JUDGE PRESIDENT
High Court of South Africa
Northern Cape Division, Kimberley

I concur.

H J LACOCK
JUDGE
High Court of South Africa
Northern Cape Division, Kimberley

I concur.

B M PAKATI
JUDGE
High Court of South Africa
Northern Cape Division, Kimberley

On behalf of the Applicant: **Adv C H BOTHA**
ELLIOTT MARIS WILMANS & HAY

On behalf of the Respondent: **Adv A J R VAN RHYN SC**
OFFICE OF THE STATE ATTORNEY

"DL6"

the **doj & cd**
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

SUPREME COURT OF APPEAL
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YOUR REF: ELL3/0007/Mr DG Roberts/Miss B Strydom

YOUR REF: 239/201401256/P1 L

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9300

STATE ATTORNEY
Private Bag X20630
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Mr / Ms

APPLICATION FOR LEAVE TO APPEAL
DIRK LINKS v MEC. DEPARTMENT OF HEALTH NORTHERN CAPE

With reference to the application lodged in this office on 12 SEPTEMBER 2014 this Court ordered on 13 NOVEMBER 2014 that the application be **dismissed** as per attached order:-

Yours faithfully

P.S.W MYBURGH (MR)/sm
REGISTRAR

REGISTERED POST (H/B/D/O)

YOUR REF: 1870/2012 KGOMO JP; LACOCK and PAKATI JJ (Court a quo)

Registrar of the High Court
Private Bag X 5043
KIMBERLEY
8300

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