IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION : MTHATHA

CASE NO. 2701/11

In the matter between:

FEZA MBODLA **Plaintiff**

And

MEC FOR HEALTH, EASTERN CAPE **Defendant**

JUDGMENT

GRIFFITHS, J.:

[1] By way of a summons issued on 1 November 2011, the plaintiff sued the defendant for damages arising from breach of contract, alternatively delictual damages arising from the alleged negligent conduct of servants of the defendant. To this the defendant has raised two special pleas, the first being non-compliance with section 3 of Act 40 of 2002 ("the Act") and the second being one of prescription.

[2] The first of these two pleas provoked the present interlocutory application which initially sought an order to the effect that the applicant's non-compliance with section 3(2)(a) of the Act be condoned, together with ancillary relief. However, when the matter came before me as an opposed application, Mr. Dugmore, who appeared for the plaintiff, moved an application for an amendment of the orders then prayed which application was not opposed by Mr. Dukada SC (who, together with Mr. Kunju, appeared for the defendant). The amendment was accordingly granted. With such amendment, the orders sought are:

> "1. That the Plaintiff is hereby declared to have complied with the notice requirements contemplated in Section 3(1)(a) read with Section 3(2)(a) of the Limitation of the Institution of Legal Proceedings Against Certain Organs of State Act No. 40 of 2002 in respect of his claim under Case No. 2701/11
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> 2. Alternatively, and in the event that it is held that the Plaintiff has not so complied, that Plaintiff's non-compliance with Section 3(1)(a) read with Section 3(2)(a) of the Limitation of the Institution of Legal Proceedings Against Certain Organs of State Act No. 40 of 2002 in respect of his claim under case No. 2701/11 is and be condoned.
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> 3. The Defendant be ordered to pay the costs of this application together with the reserved costs occasioned by the postponement on 19 October 2012.
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> 4. Further and/alternative relief."

[3] The application is opposed by the defendant who has not filed an answering affidavit but has rested his case on legal argument as

formulated in a notice in terms of Rule 6(5)(b)(iii). In this notice the defendant has raised the arguments that the plaintiff's claim has prescribed and that the grounds advanced the by the plaintiff in his founding affidavit do not exist in law. The defendant has contended in this regard that the debtor and the full facts giving rise to the plaintiff's claim became known to the plaintiff as early as 25 June 2006, that is the day upon which he received medical treatment at Bedford Hospital. In addition, the defendant has raised the question of non-compliance with the relevant provisions of the Act.

[4] The essence of the plaintiff's version as set forth in his founding affidavit may be summarized as follows: as a consequence of an injury he sustained in a motor vehicle accident he was admitted to the Nelson Mandela Academic Hospital for treatment. This apparently occurred on 25 June 2006. During April 2011 he consulted with his attorney to whom he "*conveyed the facts which gave rise to the incident*". On having received these instructions, his attorneys obtained a medico/legal opinion from one Dr. Olivier, a copy of which is attached to the founding affidavit. This report was received on 2 August 2011. The defendant has, in his aforesaid notice, objected to the use of this document by the plaintiff on the basis that it was not confirmed under oath by the doctor. In my view, this is of no consequence. The plaintiff has confirmed under oath that he received such an opinion and I am of the view that I am accordingly entitled to take into account, for the purposes of this application, the content of such report. This is particularly so in view of the fact that it is a question of the plaintiff's knowledge, and when he acquired such knowledge, that is in issue in this matter.

[5] In his founding affidavit the plaintiff stated:

> "Until I was advised by my Attorney under the circumstances I will set out below, I did not realize that I may have a claim for damages against the Respondent. I also did not know that, in terms of the Act, a person is not entitled to institute a damages action against the Respondent unless notice of such intended action had been given within certain prescribed time limit (sic)."

[6] He was advised by his attorney to institute action and to, thereafter, invite the defendant to consent to such institution despite the late notification. His attorney accordingly, and by way of a letter dated 2 June 2011, invited the defendant so to consent. By way of a further letter, also dated 2 June 2011, notice was served on the respondent purportedly in terms of the provisions of the Act.

[7] From the report of Dr. Olivier it appears that the plaintiff was initially admitted to the aforementioned hospital but was referred to the Bedford Orthopedic Hospital, although the clinical notes that he relied on from the hospital did not apparently confirm that he was in fact so referred. The plaintiff suffered a proximal tibial plateau fracture consequent upon a motor vehicle accident. He was apparently treated conservatively and his leg was placed in plaster. He was informed that he should return to the clinic some 6 weeks later.

[8] On 19 July 2006 a further entry was made but it was not clear as to whether X-rays were requested. A further entry was made in the clinical notes on 2 August 2006 indicating that the applicant was apparently then referred for X-rays. The final entry in the hospital's clinical notes was

made on 23 August 2006 and indicated that the plaintiff was, on that date, referred for physiotherapy.

[9] According to Dr. Olivier, when he examined the plaintiff he ascertained that he could not stand for long periods of time and was unable to walk fast. He furthermore could not perform activities such as squatting or negotiating uneven surfaces. He stated further that "*The patient furthermore gives the history that he is aware that there is a deformity present of his left leg since the cast was removed*." He noted that there was a 1.5 cm shortening of the left leg and that there was wasting of the quadriceps muscles. The doctor added:

> "It is my opinion that the patient sustained a split condylar fracture of the medial tibial plateau. The fracture was produced by a varus force and the fracture can be described as an avulsion fracture. Due to a valgus force avulsion occurred of the medial tibial plateau causing a fracture which extends from the lateral aspect of the tibial spine and extends inferiorly to the junction of the medial metaphysis and diastasis. It should be noted that this fracture was not a comminuted fracture.
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> It is my opinion that the patient should have undergone an open reduction and internal fixation. If an adequate open reduction and internal fixation had been performed the injury would have been associated with a favourable outcome. It should be noted that this was a simple split type of fracture without comminution and good to excellent results are reported in up to 80%."

[10] The relevant portions of section 3 of the Act are the following:

"3 Notice of intended legal proceedings to be given to organ of state

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless-

(a) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) the organ of state in question has consented in writing to the institution of that legal proceedings-

(i) without such notice; or

(ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(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.

(3) For purposes of subsection (2) (a)-

(a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) a debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.

(4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that-

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

[11] It is common cause in this matter that the prescriptive period applicable to this debt is 3 years from the date upon which the debt became due. The plaintiff however relies on the provisions of section 12(3) of the Prescription Act[1]. The relevant provisions of that Act are 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.
>
> (2)….
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> (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."

[12] As stated earlier, the plaintiff now seeks a declarator to the effect that he has indeed complied with the notice requirements contemplated in the Act. He seeks this order on the basis that he only acquired knowledge of the facts giving rise to the debt during April 2011 or on 2 August 2011 when he received the opinion from Dr. Olivier. Because section 3(2)(a) of the Act requires such notice to be served on the defendant within 6 months "*from the date on which the debt became due*", it is necessary to determine when, for the purposes of the Act, the debt became due. This, in turn, requires an examination of the plaintiff's allegations that he only became possessed of the requisite knowledge of the facts giving rise to the debt on one or other of the above dates.

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[1] No. 68 of 1969

[13] It should be noted that neither of the special pleas are before me. What is before me is a request for a declarator that the plaintiff has complied with the notice provisions as contained in the Act. If I hold in favour of the plaintiff in this regard, this would clearly have the effect of defeating the first special plea. Whether such a finding would have the effect of defeating the second special plea is a matter with which I am not concerned. However, such a finding, based as it must be on a conclusion that the plaintiff only acquired the requisite knowledge of the facts of the matter on the above-mentioned dates resulting in the debt falling due on one or other of them, would surely have the effect of undermining the second special plea due to the similarity of the wording in section 3(3)(a) of the Act and section 12(3) of the Prescription Act[2].

[14] Because of the similarity of the wording between these two subsections, in my view the cases which deal with section 12(3) of the Prescription Act must be regarded as being highly persuasive when dealing with section 3(3)(a) of the Act.

[15] In this regard Mr. Dukada has relied heavily on the case of **TRUTER AND ANOTHER v DEYZEL**[3]. In that case the plaintiff underwent eye surgery during 1993 as a result of which he suffered a complete loss of vision in his right eye and ultimately lost the eye itself. Because, as at the time of the operations in 1993 he had already lost his left eye, the plaintiff was thus rendered totally blind.

[16] During 1994 he made a complaint to the Medical and Dental Council in this regard. He complained of the conduct of the medical

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[2] Sibiya v The Premier of the Province of KwaZulu-Natal [2008] 1 All SA 295 (N) at paragraphs 40 and 41

[3] 2006 (4) SA 168 (SCA)

practitioners concerned and requested that an investigation be held into the matter as, as he stated, "*I feel there was no need for five operations, plus all the pain and suffering and unnecessary sums of money for one cataract*". During 1995 he appointed attorneys to assist him in investigating and prosecuting a malpractice suit against the doctors concerned. During the ensuing years he obtained, in conjunction with his attorneys, various medical reports all of which, in effect, indicated that there was no basis for such an action. The last of these reports was obtained from a Professor Stulting and was dated 7 June 1999.

[17] Undaunted, the plaintiff in that matter proceeded to obtain a further report from a certain Dr. Steven who concluded that there was negligence on the part of the doctors who performed the eye surgery. On the basis of this report, summons was issued. Not surprisingly, a special plea of prescription was taken by the defendant and, because the plaintiff relied on the provisions of section 12 of the Prescription Act, the sole issue which came before the court was as to the time when prescription started to run in respect of the plaintiff's claim for damages. The crisp question was, accordingly, as to whether or not the plaintiff in that matter "*had actual or deemed knowledge of "the facts from which the debt arises", as required by s 12 (3), prior to 17 April 1997*."[4]

[18] The SCA found in these circumstances that all the relevant facts and information in respect of the operations performed on the plaintiff in that matter:

> "were known, or readily accessible, to him and his legal representatives as early as 1994 or 1995. Neither Deysel nor Mrs. Pienaar was able to point to

[4] Truter's case at paragraph 12

> any new *fact* which was given to either Dr. Lecuana or Dr. Steven, which had not been presented to the previous medical experts for their opinions and which had not been known or readily accessible to Deysel and his representatives before 17 April 1997 (i.e. more than 3 years before the date on which he instituted action). Indeed, the 'negative indicators', which apparently, eventually, led Dr. Steven to conclude that there had been negligence on the part of Drs. Truter and Venter, were dealt with in the reports of medical experts previously consulted."[5]

[19] The SCA thus concluded as follows:

> "Thus, neither Dr. Lecuana nor Dr. Steven revealed or furnished any new *facts* to Deysel: they merely advanced an opinion, in the form of a conclusion that there had been negligence, which opinion was based on the same facts which had been available prior to 17 April 1997 and which had been furnished to the other experts."[6]

[20] Mr. Dukada has submitted that I should disregard the case of **SIBIA v THE PREMIER OF THE PROVINCE OF KWAZULU NATAL**[7] on which Mr. Dugmore has placed much reliance in this matter. He has made this submission on the basis that the Sibiya case was decided some two years after the Truter case was reported and yet no reference was made to it in the Sibiya case.

[21] In the Sibiya case the plaintiff underwent a caesarean section during the course of which a needle was left in her abdomen. This procedure was undertaken on 22 November 1995. The summons was served on 22 November 2005, clearly more than 3 years after the

[5] Truter at paragraph 25
[6] Truter at paragraph 26
[7] Supra, footnote 2

procedure complained of. In it the plaintiff claimed damages against the servants of the defendant. Similar special pleas were taken in that matter to those taken in this. The plaintiff testified that after she had been discharged from the hospital she had experienced vaginal bleeding on various occasions and had sought medical assistance from the very same hospital that had undertaken the procedure. Although X-rays were, on occasion, taken, she was never shown them nor was she informed as to the cause of the bleeding. She was at no stage advised that there was a needle in her abdomen. During June or July 2004 further X-rays were taken and she was informed that she should undergo a further operation. She refused to do so. It was thereafter that she went to a different hospital and, after another set of X-rays were taken, she was advised that there was a needle in her abdomen.

[22] On the evidence the court concluded that the defendant had failed to prove that the plaintiff had actual or deemed knowledge of the identity of the debtor and of the facts which gave rise to the debt before 22 July 2005. The learned judge stated:

> "There is no suggestion that she suspected or could have suspected that there was a needle in her abdomen, not is it suggested that she could reasonably have suspected that."[8]

[23] In the present matter it is so, as has been submitted by Mr. Dukada, that there is a dearth of information as to the plaintiff's situation from August 2006 until he approached his attorney in April 2011. One might have expected him to have explained the nature and extent of the pain he suffered during the course of this period of time and whether or not he

[8] Sibiya at paragraph 34

had received any form of medical treatment. It is also so that Dr. Olivier has stated that when the plaintiff presented to him, the plaintiff indicated his awareness of a deformity of his leg subsequent to the removal of the plaster cast.

[24] On the other hand, however, there is no denial of the facts as set forth by the applicant in his founding affidavit. On his evidence, he had no inkling whatsoever prior to receipt of the report from Dr. Olivier as to the facts relating to the malunion of the bones in his lower leg as a consequence of a failure by the hospital staff to undertake the proper procedure. This, in my view, is not a legal conclusion but is a factual situation. There is nothing to suggest that the plaintiff should, having exercised reasonable care, have come to know of the facts giving rise to the negligent conduct on the part of the hospital staff. The deformity of his leg and the onset of pain over a period of some years may well have indicated to him that he might be suffering from a natural consequence of the injury which he sustained despite the conservative procedures carried out at the hospital. There is no indication however that he ought to have realized that this deformity and the onset of pain over the intervening years was indicative of anything less than optimal care having been administered to him by the hospital staff.

[25] This is compounded by the fact that the hospital appears to have kept very cryptic and unsatisfactory clinical notes as to what diagnosis was indeed made and what treatment was administered to the plaintiff on the various occasions he attended the hospital, as reflected by Dr. Olivier. In this regard Dr. Olivier stated:

> "The fracture was not adequately described in the clinical notes. It was simply described as being a fracture of the proximal left tibial plateau. An adequate diagnosis was therefore not made."

[26] In many other respects the doctor has criticized the sparse and inadequate note taking by the hospital staff and the fact that the plaintiff's condition was not followed up on at regular intervals. Mention was also made in the report of the fact that the clinical notes make no mention as to whether or not X-rays were requested. In Dr. Olivier's view, had such X-rays been requested it would have been clear that there was a significant inferior displacement of the bone.

[27] In my view, this matter is distinguishable from the Truter matter in that it is clear from the report in that matter that the plaintiff was aware, or at least believed, from the outset that he had received less than adequate treatment. Hence, very shortly after the procedures, he made the complaint to the Medical and Dental Council. Furthermore, after the rejection by the Medical and Dental Council of his complaint, he proceeded vigorously with his quest to obtain a medical opinion which was favourable to his cause. It is quite understandable in these circumstances as to why the SCA concluded that he was fully aware of the facts of the matter and the identity of the debtor at a time shortly after the impugned procedures had been concluded.

[28] The present matter is very different. The hospital treatment given the plaintiff and the evidence (in the form of the clinical notes) as to such treatment is clearly lacking in the extreme and unlikely to inform a layman of the fact that the plaintiff received less than optimal treatment.

There is furthermore nothing to suggest that during the period after the plaster cast was removed and the receipt of the report from Dr. Olivier, the plaintiff ought to have been alerted to the fact that he had not received optimal treatment. To my mind, the fact that he experienced progressive pain and was aware of the deformity, together with his difficulty in squatting etc., could not have been sufficient, without more, to have indicated to him, as a layman, that sub-optimal treatment had been administered.

[29] This case is, in my view, akin to the Sibiya matter. Even if the Truter case was not dealt with by Moleko J in that matter, I do not see that it can make any difference as, as I have indicated, it is clearly distinguishable on the facts.

[30] In my judgment the debt became due for the purposes of the Act at the earliest when the plaintiff consulted with his attorney and was advised that he had a claim, namely during April 2011. It being common cause that the plaintiff, through his attorney, delivered a letter to the defendant on or about 2 June 2011 which, in all other respects, complied with the provisions of the Act, I am of the view that there has been due compliance with the Act. In the circumstances, the plaintiff is entitled to the declaratory order.

[31] With regard to the question of costs which were reserved on 19 October 2012, the parties have agreed that these costs are to be regarded as costs in the cause.

[32] The following order will accordingly issue:

1. **The Plaintiff is hereby declared to have complied with the notice requirements contemplated in Section 3(1)(a) read with Section 3(2)(a) of the Limitation of the Institution of Legal Proceedings Against Certain Organs of State Act No. 40 of 2002 in respect of his claim under Case No. 2701/11;**

2. **The defendant is ordered to pay the costs of this application;**

3. **The costs occasioned by the postponement on 19 October 2012 and which were reserved, are to be costs in the cause.**

JUDGE OF THE HIGH COURT

HEARD ON : 27 November 2012
DELIVERED ON : 13 December 2012

COUNSEL FOR PLAINTIFF : Mr Dugmore
INSTRUCTED BY : Nonxuba Inc.

COUNSEL FOR DEFENDANT : Mr Dukada Sc
: with Mr Kunju
INSTRUCTED BY : State Attorney