

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, BHISHO]**

CASE NO.: 438/2023

In the matter between: -

N[...] S[...]

PLAINTIFF

and

**MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF HEALTH, EASTERN CAPE**

DEFENDANT

JUDGMENT

NORMAN J:

- [1] The plaintiff instituted a damages claim in both her personal capacity and in her representative capacity on behalf of her minor child, IS. She alleged negligence on the part of the employees of the defendant when rendering medical treatment to her on 14 March 2015, at the Cecilia Makiwane Hospital, during labour and birthing process of her baby which resulted in her baby suffering from permanent cerebral palsy. She claimed a total of R28 million. On behalf of the minor child she claimed R27 million for future hospital care, medical and related expenses; future loss of earnings, general damages and for caregivers for the minor child. She also claimed an amount of R1 million, which she claims for special and general damages suffered by her personally.

- [2] Defendant pleaded denying liability and raised two special pleas in relation to the plaintiff's personal claim. These proceedings relate to the determination of those special pleas.

Statutory Notice special plea

- [3] The first special plea is that the plaintiff failed to comply with the provisions of section 3(1)(a) of the Institution of Legal Proceedings Against Organs of State Act 40 of 2002 ("the Act"). The complaint is that in terms of the Act, a creditor must give an organ of state notice in writing of his intention to institute legal proceedings within six (6) months from the date on which the debt became due. The defendant alleged that the statutory notice was not served within the six (6) months period as prescribed by the Act. On that basis the defendant contended that the plaintiff is precluded from instituting the action against her.

Prescription of the plaintiff's personal claim

- [4] The second special plea is that of prescription. The defendant alleged that the plaintiff's claim for damages against the defendant, in her personal capacity, has prescribed because it related to the events that occurred on or about 14th day of March 2015 at the Cecilia Makiwane Hospital, East London, Eastern Cape, when the employees of the defendant attended to and or/ administered treatment to the plaintiff. The defendant contends that the three (3) year period within which the plaintiff ought to have issued the summons had lapsed. On that basis the defendant prayed that the plaintiff's personal claim be dismissed with costs.

Plaintiff's replication

- [5] Plaintiff replicated to the special pleas and denied both the prescription and the non-compliance with the statutory notice pleas. She stated that she only became aware of the debtor on 22 May 2023 when she consulted with her attorneys of record. She contended that the three-year period would only expire on 22 May 2026. After consulting with her attorneys a statutory notice was served on the Head of Department for Health. She attached a copy of the relevant notice dated 26 May 2023 and proof of service by email on 30 May 2023. She prayed for the dismissal of the special pleas.

Hearing proceedings

- [6] Mr Bodlani SC together with Mr Zilwa appeared for the plaintiff. Mr Rili appeared for the defendant. Mr Rili applied for the separation of the special pleas from the merits. That application was consented to by Mr Bodlani and was accordingly granted. Mr Rili submitted that because the defendant had raised the two special pleas it bore the onus to allege and prove both prescription and the non-compliance with the statutory notice. The parties further agreed that since the facts necessary to prove prescription will have a bearing on the statutory notice special plea, the defendant's success on the prescription point would also resolve the statutory notice special plea in her favour, and the converse would apply.

Defendant's evidence

- [7] Defendant led the evidence of Ms Ntombokuqala Zangqa. She has been employed by the Department of Health, Eastern Cape since 2014. She is based at the Cecilia Makiwane Hospital ("the hospital") as an Assistant Director: Patient Administration. She has held that position since 2019. Her duties entail, amongst others, handling of the requests from various persons for documentation and also attending to the releasing of such documents to the requesters. She testified that she received the first request on behalf of the plaintiff from VZLR Attorneys on 27 May 2019. According to the register of the hospital the requested medical records on behalf of the plaintiff were collected on 22 May 2020 by VZLR attorneys. It appeared on the records that although VZLR attorneys were informed on 19 November 2019 that the records were ready for collection they collected them only on 22 May 2020.
- [8] She testified that she never received a request from the plaintiff's attorneys of record, S. Booi & Sons Attorneys. It was put to her that the plaintiff alleged that she only became aware of the debtor on 22 May 2023 when she consulted with her attorneys of record. Her response was that the plaintiff was definitely correct that she would have become aware of the debtor only during May 2023. That was the end of her evidence. There was no cross-

examination of this witness by Mr Bodlani. The defendant closed her case. Plaintiff also closed her case.

Submissions

[9] Mr Rili submitted that in the light of the concession made by the defendant's witness, Ms Zangqa, that the plaintiff only became aware of the debtor only in May 2023, he was leaving the matter in the hands of the court.

[10] Mr Bodlani submitted that the court must have regard to the 22 May 2023 date, conceded by the defendant's witness, and the registrar's stamp on the combined summons which bears 06 July 2023, as the date of institution of the action. Those dates, he submitted, demonstrate that the claim was instituted within the 3 year period and had thus not prescribed. He further submitted that in the light of the concession made by the defendant's witness and the agreement reached by the parties on the statutory notice point, the court should dismiss both special pleas with costs.

[11] Thereafter the court issued an order dismissing both special pleas with costs, such costs to include costs occasioned by the employment of two counsel. The reasons for the order follow hereinunder.

Discussion

[12] There is evidence of one witness Ms Zangqa. Her evidence remains uncontroverted. She gave direct evidence about matters that fall within her duties as an employee of the defendant. I am satisfied that she gave reliable and satisfactory testimony. I accordingly accept her evidence.

[13] Section 11(d) of the Prescription Act 68 of 1969 ("the Prescription Act") provides that save where an Act of Parliament provides otherwise, the period of prescription for any other debt shall be three (3) years. Those are the debts that do not fall within the provisions of section 11 (a), (b), or (c). In the plaintiff's case and looking at the nature of the debt, the period of prescription is three years.

[14] As a general rule, prescription begins to run as soon as the debt is due¹. It is therefore expected that a debtor would immediately claim the debt from the creditor in legal proceedings and the creditor would be expected to perform immediately². A debt will prescribe after a three (3) years unless various circumstances provided for in, *inter alia*, section 13 of the Prescription Act, apply. In this case none of those circumstances find application.

[15] A debt, whether *ex contractu*, *ex delicto* or otherwise is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts giving rise to such debt provided that a creditor who could have acquired the knowledge by exercising reasonable care is deemed to have such knowledge.

Section 12(3) of the Prescription Act 68 of 1969 provides:

“12 When prescription begins to run

(1)

(2)

(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.*”

[16] It is for the party that raises prescription to allege and prove the date on which the creditor acquired knowledge of the debtor's identity and the date on which the creditor acquired knowledge of the facts from which the debt arose. The word 'debt' does not refer to the cause of action but more generally to the claim. The defendant may, in the alternative allege and prove the date on

¹ **Santam Ltd v Ethwar** [1999] 1 ALL SA 252 (A); 1999 (2) SA 244 (SCA).

² See **Uitenhage Municipality v Moloi** 1998 (1) ALL SA 140 (A); 1998 (2) SA 735 (SCA).

which the creditor could with the exercise of reasonable care have acquired the relevant knowledge³.

[17] In this case, the defendant's witness conceded that the date alleged by the plaintiff, 22 May 2023, as the date when she acquired knowledge of who the debtor was, was correct. It is, in my view, apt to employ the maxim: "*Cadit quaestio*". That date is crucial in both the determination of the prescription of the three year period and the six months period for the service of the statutory notice.

[18] In ***Mothupi v MEC, Department of Health, Free State***⁴ Leach JA writing for the court found as follows the court dealt with the object of the provisions of section 3 of Act 40 of 2002 Leach JA stated at paragraph 12:

"[12] But more importantly, the respondent does not allege that it has suffered any prejudice. The object of a provision such as s 3 is to enable the State, a large and cumbersome organisation, to investigate claims so as to consider whether to settle or compromise a claim before costs escalate unnecessarily, or to properly prepare its defence – which may be frustrated if it is unable to investigate relatively soon after the alleged incident occurred. In the present case, however, the identity of the medical practitioner who administered the spinal anaesthetic which the appellant alleges led to her paraplegia, is not only known but an affidavit from her, in which she disputes any negligence on her part, has been filed of record. In these circumstances, the respondent cannot allege that the underlying purpose of the notice provisions has not been met or that it has been prejudiced by the lack of receiving notice."

³ See Amler's Precedents of Pleadings page 294; see also ***Drennan Maud & Partners v Town Board of the Township of Pennington*** 1998 (2) ALL SA 571 (SCA); 1998 (3) SA 200 (SCA).

⁴ ***Mothupi v MEC, Department of Health, Free State*** (20598/2014) [2016] ZASCA 27 (22 March 2016).

[19] Ms Zangqa did not allege that the defendant suffered any prejudice whatsoever. The concession made went to the heart of the issues to be determined and it materially affected the outcome of the special pleas. Absent information that contradicted the facts stated by the plaintiff in the replication and in the light of the concession made under oath, I am satisfied that the defendant failed to discharge the onus resting on her. I also find that the defendant failed to prove that the plaintiff's personal claim had prescribed. It follows that, (in line with the agreement between the parties and taking into account the concession made and the date when the notice was issued), the defendant failed to prove that there was non-compliance by the plaintiff with the provisions of section 3(1)(a) of Act 40 of 2002. In the result, both special pleas raised by the defendant must fail.

ORDER

[20] I accordingly make the following Order:

- 1. The defendant's special plea of prescription is dismissed with costs.**
- 2. The defendant's special plea in relation to non-compliance with the provisions of section 3(1)(a) of the Institution of Legal Proceedings Against certain Organs of State Act 40 of 2002, is dismissed with costs.**
- 3. Such costs shall include costs occasioned by the employment of two (2) counsel.**

T.V NORMAN
JUDGE OF THE HIGH COURT

APPEARANCES:

For the PLAINTIFF	:	ADV BODLANI SC with ADV ZILWA
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Matter heard on : 06 MAY 2024

Judgment Delivered on : 07 MAY 2024