



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

Case No.:6267/2019

In the matter between:

LOUIS SAMUEL PLAATJIES

Plaintiff

and

**MELOMED PRIVATE HOSPITALS t/a
GATESVILLE PRIVATE HOSPITAL**

First Defendant

DOCTOR WILLIAM DDAMULIRA

Second Defendant

**JUDGMENT IN SPECIAL PLEA OF PRESCRIPTION
DELIVERED ELECTRONICALLY ON 23 SEPTEMBER 2024**

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The second defendant ("*Dr Ddamulira*") has raised a special plea of prescription against the medical negligence claim of the plaintiff which was initially instituted on 28 March 2019 only against the first defendant ("*the hospital*"). On 14 April 2021,

Dr Ddamulira was joined as second defendant pursuant to a joinder application which was granted by this court unopposed, and thereafter amended particulars of claim were delivered on 3 May 2021. The hospital did not participate in these special plea proceedings, and accordingly, any reference to the 'parties' is a reference to the plaintiff and Dr Ddamulira.

B. THE FACTS

[2] In terms of the agreed statement of facts between the parties, the following facts are common cause. On 4 August 2016 the plaintiff was admitted to the hospital for treatment of a gunshot wound which he sustained whilst on duty as a police officer. He was admitted to the casualty unit at approximately 03h26, and after an X-ray examination which indicated that a CT scan should be considered, he was admitted into the surgical ward for further assessment, after which he was referred to Dr Ddamulira telephonically, still on 4 August 2016. It is further common cause that Dr Ddamulira assessed the plaintiff at 7h30 on 4 August 2016, and requested a CT scan which was performed later that morning.

[3] At approximately 4h00 on 5 August 2016 the plaintiff was transferred to the ICU for preoperative resuscitation and stabilization, where he was to remain until 15 September 2016. Between 5 August 2016 and 18 August 2016, he was sedated, intubated and ventilated.

[4] On 5 August 2016 at approximately 7h30 Dr Ddamulira performed an exploratory laparotomy on him in the hospital's theatre. On 7 August 2016 Dr Ddamulira returned the plaintiff to theatre and performed a relook laparotomy. On 16 August 2016 another doctor performed a right bronchoscopy on him. On 1 September 2016, Dr Ddamulira performed a reverse ileostomy procedure, after which the plaintiff was transferred to Intercare for rehabilitation and, was eventually discharged on 23 September 2016.

[5] After his discharge, on 1 October 2016, the plaintiff attended a follow-up consultation with Dr Ddamulira at his private rooms which are located at the hospital, and confirmed that he was receiving physiotherapy. On that occasion he complained of some itching and headaches. After the consultation, he was discharged from the care of Dr Ddamulira.

[6] On 6 July 2017, the plaintiff again consulted with Dr Ddamulira at his private rooms, where a hernia was diagnosed, and Dr Ddamulira performed an incisional hernia repair. On 18 July 2017, Dr Ddamulira removed the plaintiff's staples and then again discharged the plaintiff from his care.

[7] On 10 May 2018, the plaintiff consulted Dr Ddamulira again at his private rooms with complaints of chronic heartburn and abdominal cramps. A CT scan was performed on 20 May 2018, and on 25 May 2018, Dr Ddamulira performed an incisional hernia repair and a cholecystectomy (gall bladder removal) on the plaintiff at the hospital. On 30 May 2018 the plaintiff was discharged from follow-up as an outpatient. On 5 June 2018, the plaintiff's staples were removed by Dr Ddamulira. The plaintiff was due for another follow-up at Dr Ddamulira's rooms on 3 July 2018, but never returned.

C. THE CLAIM

[8] In essence, the plaintiff claims that, after being assured by the said doctor on 4 August 2016 that "*the bullet had gone straight through*", he was kept in the surgical ward without proper monitoring, during which time his sugar levels spiked to dangerous levels on account of his diabetic status. As a result, on 6 August 2016 he developed septicaemia which caused his kidneys to start failing, and he was taken to ICU where it was discovered he had suffered intestinal damage. According to him, as a result of the complications he was placed in a medically-induced coma for 17 days, and since the incident he has had to undergo 3 further surgeries to solve the problems that ensued from his admission and subsequent poor treatment.

[9] The following was stated in his original particulars of claim:

“7.3 The plaintiff upon arriving at the surgical ward, was assessed by the Doctor on duty (whose name and further particulars are unknown to the plaintiff), this assessment was done without the use of X-rays or scans, but merely by pressing on the plaintiff’s stomach.

7.4 The plaintiff was then informed by the above mentioned Doctor that he will be fine as the bullets went straight through.”

[10] In the amended particulars, the allegedly unknown doctor on duty was identified as Dr Ddamulira, and the same averments stated in paragraph 7.3, 7.4 and 8.1 to 8.3 below are repeated as against him.

[11] As regards negligence, the original and the amended particulars plead identical averments against the hospital and alternatively Dr Ddamulira, as follows:

“8.1 They failed to ensure correct and sanitary working conditions during the treatment of the plaintiff;

8.2 They failed to take the necessary steps and/or to provide the necessary treatment in order to prevent the onset of further infection in the plaintiff during and/or after completion of the treatment;

8.3 They failed to properly alternatively timeously monitor the plaintiff’s condition during his treatment and all admission.”

[12] Dr Ddamulira pleads that the cause of action arose more than three years prior to the institution of the claim against him and accordingly that the claim has been extinguished by prescription in terms of section 12(3) of the Prescription Act 68 of 1969.

He states that by 20 June 2017, the plaintiff knew his identity and was in possession of all the facts from which the alleged debt arises, or ought by the exercise of reasonable care to have obtained the knowledge of such facts.

[13] The plaintiff did not deliver a replication to the special plea. By means of an agreed statement of facts, the parties agreed to refer the issues arising in the special plea to oral evidence. Dr Ddamulira and the plaintiff were the only witnesses who gave oral evidence. Before considering the evidence, it is best to have regard to the relevant case law.

D. THE RELEVANT LAW

[14] The commencement of extinctive prescription is dealt with in section 12 of the Prescription Act which provides as follows:

“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) 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.”

[15] As I have indicated, section 12(3) is the relevant provision in this case, and specifically, that the plaintiff did not have has 'knowledge of the identity of the debtor and of the facts from which the debt arises', although the former of these two exceptions was abandoned, as discussed below.

[16] The parties agree that the second defendant bears the burden of proving when the plaintiff acquired the knowledge in question, as set out in *Gericke v Sack*.¹

[17] The commencement of the running of prescription in terms of section 12 is determined with reference to the time when the debt is recoverable, that is, when the creditor acquires a right to claim, and conversely, the debtor has the obligation to perform.²

[18] In *Truter and Another v Deyssel* the Supreme Court of Appeal stated that a debt, including a delictual debt, is due for purposes of the Act, when –

“... the creditor 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.”³

[19] A delictual debt is generally due as soon as a delictual cause of action arises.⁴ In turn, a 'cause of action' means “*the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a*

¹ *Gericke v Sack* 1978 (1) SA 821 (A) at 826H to 827D.

² *The Master v I L Back and Co Ltd and others* 1983 (1) SA 986 (A) at 1004G.

³ *Ibid* at para [16]. This dictum was cited with approval in *Links v Member of the Executive Council, Department of Health, Northern Cape Province* (CCT 29/15) [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) (30 March 2016) at para [31].

⁴ Loubser, *Extinctive Prescription* at page 80.

delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault."⁵

[20] As regards the combination of facts that a plaintiff must have, it was emphasised in *Links* that the facts are those "facts which are material to the debt"⁶ (the *facta probanda*). A fact is a material fact if it would be necessary for a plaintiff to prove it, if traversed, in order to support his or her right to judgment. The facts are accordingly determined, as a point of departure, with reference to the constituent elements of the plaintiff's claim.

[21] It does not mean that the creditor must have knowledge of all the facts underlying the cause of action as pleaded, or of all of the alleged facts as they appear from the pleadings.⁷ The facts also do not include the evidence necessary to prove each fact (the *facta probantia*). 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

[22] Section 12(3) also does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from "the facts from which the debt arises".⁹ Knowledge that the conduct of the debtor is wrongful or negligent, which is a legal conclusion and not a fact, is not required before prescription begins to run.¹⁰ Similarly, the presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by the court in all the circumstances of the specific case.¹¹

⁵ *Truter* fn 10 at para [17]. See also *Links* supra fn 3 at para [32], and *Loubser op cit* at page 80.

⁶ *Supra* fn 3 para [32].

⁷ *Drennan Maud and Partners v Pennington Town Board* [1998] ZASCA 29; 1998 (3) SA 200 (SCA) at 212 F – H.

⁸ *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23 and *Evins* fn 6 at 838 D – H. See also *Ascendis Animal Health (Pty) Ltd v Merck Dohme Corporation and others* 2020 (1) BCLR 1 (CC) at para [52].

⁹ *Mtokonya* para [36].

¹⁰ *Mtokonya* para [45].

¹¹ *Truter* paras [19] and [47].

[23] Once a special plea of prescription is raised, there are two enquiries to be made, although there may be some overlaps between the two.¹² First is the determination of the primary facts, and secondly, of the knowledge or deemed knowledge thereof. This means that once the facts from which the debt arose (the primary facts) have been determined, the enquiry turns to the creditor's knowledge of the primary facts.

[24] It must be borne in mind that prescription in the context of s 12(3) is aimed at penalizing negligent inaction, rather than innocent inaction.¹³

E. EVALUATION

[25] As I have indicated, the plaintiff did not deliver a replication to the special plea. Prior to his oral evidence, the only explanation for why he failed to timeously join Dr Ddamulira as a party was that he did not know his identity. This was evident, firstly, from the particulars of claim to which I have already adverted, where the previously unknown doctor on duty was later identified in the amended particulars as Dr Ddamulira, at paragraphs 7.3, 7.4 and 8.1 to 8.3.

[26] The second source regarding the allegedly unknown identity of Dr Ddamulira was the affidavit supporting the application for joinder, which was deposed by the plaintiff's attorney of record Mr Jeffrey George Braysher, and which stated as follows:

“7. On the 22nd of January 2020 the [hospital] delivered a letter to ourselves via email indicating that they had undertaken investigations into the matter and had obtained reports that [Dr Ddamulira] is in fact the negligent party in the action as he was the surgeon and treating physician of the plaintiff at their establishment at the time and that they would obtain copies of the expert reports in due course. A copy of the said letter is annexed

¹² *MEC for Health, Western Cape v M C* [2020] ZASCA 165 (SCA) paras 6 -7.

¹³ *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) ('*Macleod*') para 13.

hereto as Annexure “B”, I do not attach the reports hereto as they were provided to our offices on a “without prejudice” basis.

8. It was upon receipt of the abovementioned correspondence that it came to our attention that [Dr Ddamulira] is not employed by the [hospital] and is a separate “debtor” for the purposes of the Prescription Act or otherwise, as the incident occurred on 4 August 2016. The [hospital] has subsequently, on or about the 20th of July 2020, filed its plea in which they clearly plead that [Dr Ddamulira] was not under their employ at the time of the incident, a copy of which is attached hereto as annexure “C”.
9. The gist of why I did not originally cite [Dr Ddamulira] as the Second Defendant in the matter is that [Dr Ddamulira] was not known to the plaintiff at the time of the treatment received or thereafter and most logically, it appeared that [Dr Ddamulira] was in the employ of the [hospital] and the negligence stemmed from the post-operative care, however mistaken the plaintiff may have been.
10. Upon receiving the [hospital] plea, it was observed that [Dr Ddamulira] is a negligent party in the matter.”

[27] Although it was not part of the special plea pleadings, the joinder affidavit was confirmed under oath and deposed, no less, by an officer of court, namely the attorney of record representing the plaintiff. Despite argument to the contrary, it constitutes relevant evidence under oath, which the Court is entitled to take into account. Otherwise, it would make a mockery of the administration of justice as well as the profession of being an attorney if a deponent, no less a legal representative, were permitted to disavow averments he made under oath, without more, because it no longer suited his case. In any event, there was no attempt in these proceedings by the

said legal representative to amend or comment on the allegations contained in the joinder affidavit - whether by written or oral evidence, if they so wished - once its contents were highlighted during the examination of both witnesses and during opening and closing argument in these proceedings. And upon my enquiry, I was informed that the said legal representatives continue to represent the plaintiff in these proceedings.

[28] What appears from paragraph 9 of the joinder affidavit is that one of the reasons Dr Ddamulira was not originally cited as the second defendant is that his identity was not known to the plaintiff at the time of the treatment received by the plaintiff or thereafter. The remaining reasons cited in the joinder affidavit are dealt with later, at the appropriate time. The plaintiff's version of the alleged unknown identity of Dr Ddamulira was not withdrawn or amended before these proceedings, whether by means of a replication or by clarification in the agreed statement of facts between the parties. In fact, even in the agreed pre-trial minute between the parties which was signed on 8 July 2024 shortly before the hearing, the issue of the alleged unknown identity of Dr Ddamulira was taken into account in the discussion regarding who bore the onus and duty to begin in these proceedings.

[29] As a result, Dr Ddamulira gave detailed oral evidence regarding his interactions with the plaintiff, both before and after his discharge on 23 September 2016, to show that his identity was well-known to the plaintiff. With the evidential support of his medical notes, he testified that the plaintiff continued to attend at his practice for various reasons and treatment, notably on 20 June 2017 when an incisional hernia was diagnosed, and surgical repair thereof was conducted on 6 July 2017. There were also other visits by the plaintiff beyond that date, culminating on 5 June 2018, which Dr Ddamulira points out was some ten months before the summons was issued. It was during the cross examination of Dr Ddamulira that the plaintiff disavowed any reliance on the alleged lack of knowledge of his identity, and later during the plaintiff's evidence in chief. Accordingly, it is taken as common cause in this judgment that the plaintiff was aware of the identity of Dr Ddamulira when he instituted his claim on 28 March 2019, although this issue is later addressed in relation to another aspect of this case.

[30] Before examining the facts from which the debt arises, it is necessary to set out some relevant aspects arising from the oral evidence, which essentially augment the agreed set of facts between the parties. The first is a visit by the plaintiff to Dr Ddamulira on 20 June 2017 when an incisional hernia was diagnosed, and surgical repair thereof was conducted on 6 July 2017, with the staples removed on 18 July 2017. The next visit thereafter was on 10 May 2018, where an incisional hernia and gall stones were diagnosed, and surgery was performed on 25 May 2018, with the staples removed on 5 June 2018. During the cross examination of Dr Ddamulira, it was disputed that the plaintiff returned on 3 July 2018 for a follow up examination. There was also undisputed evidence that a third hernia repair was conducted upon the plaintiff on 25 July 2019, although it was at a different hospital and by different medical staff.

[31] In determining the material facts that sustain the plaintiff's claim, the primary indicators are his pleadings. At paragraphs 7.3 and 7.4 of both the original and amended particulars, the plaintiff sets out the averments sustaining the alleged wrongful conduct which, in summary is firstly that on 4 August 2016 the doctor on duty assessed him without the use of X-rays or scans, but merely by pressing on his stomach, and thereafter assuring him that the bullet had gone straight through. The exact same averments are made in the amended particulars, save that Dr Ddamulira is named as the doctor on duty. However, he states that contrary to the initial advice he had received from Dr Ddamulira, by 6 August 2016 he had developed septicaemia which caused his kidneys to start failing, and he was taken to ICU where it was discovered he had suffered intestinal damage.

[32] According to the plaintiff, it was as a result of the above complications that he was placed in a medically-induced coma for 17 days. The parties agree that the plaintiff was sedated - what the plaintiff refers to as a medically-induced coma, which is disputed - until 18 August 2016. By then, the plaintiff had undergone an exploratory laparotomy on 5 August 2016 and a relook laparotomy on 7 August 2016. In addition, a

reverse ileostomy was conducted on 1 September 2016 before his discharge on 23 September 2016.

[33] The above facts are the essence of the plaintiff's cause of action as pleaded, and they indicate that his cause of action arises from events that occurred during his hospitalization between August and September 2016. Seen in this light, the events that occurred beyond his discharge date of 23 September 2016 amount to evidence necessary to prove the essential facts, which does not amount to essential facts for the claim.¹⁴ It must be remembered that legal conclusions, such as the delictual elements of negligence, are not material facts. On the plaintiff's own version, his entire experience of hospitalization from 5 August 2016 was contrary to the initial advice that he was given by Dr Ddamulira on 4 August 2016 - that he had only sustained what is colloquially referred to as a 'flesh wound' - and accordingly, by the time he was discharged there were indications of complications.

[34] However, the facts indicate that there were subsequent complications, although the exact time of their onset is not clear. What is common ground is that the plaintiff returned to Dr Ddamulira almost a year later, on 20 June 2017, complaining of discomfort in his abdomen, and an incisional hernia was diagnosed. Dr Ddamulira explained during his evidence that the incisional hernia would probably be caused by the abdominal sheath not being able to hold together after stitching and could also be caused by weight problems of the patient, bearing in mind that the plaintiff in this case was admitted with a gunshot wound. The plaintiff confirmed the diagnosis of hernia that Dr Ddamulira gave on that day, and that it needed repair.

[35] It is relevant in this regard that at paragraph 7.9 of both the original and the amended particulars, the plaintiff states that, since his hospitalization in August and September 2016, he has had to undergo three subsequent surgeries, namely the hernia repairs. This is another indication that the hernia repairs did not constitute material facts and that they were consequences thereof.

¹⁴ See *Truter v Deyssel* paras 17 and 20, and *Mtokonya* paras 44-45 and 50-51.

[36] Furthermore, the fact that the plaintiff returned to Dr Ddamulira on 20 June 2017 is a clear indication that, even in his mind he understood that there was a connection between what he was now complaining about, namely the abdominal discomfort, and his previous treatment. He confirmed as much in his evidence, in addition to stating that his workplace required him to return to the treating doctor in the case of an injury on duty. It is significant that the hernia was diagnosed a year after his discharge.

[37] Given what I have set out above, I am of the view that, at the latest by 20 June 2017 the plaintiff was in possession of all the facts necessary for his claim, and that his cause of action had matured. According to the plaintiff's own evidence, from, at the earliest 23 September 2016, and at the latest 20 June 2017, he knew the details of the operations performed on him and that he had suffered harm. He also knew that the hospital staff and Dr Ddamulira were required to exercise reasonable care and skill in treating him. All the facts and information in respect of the operations performed on him, specifically by Dr Ddamulira, and on which he pertinently relies for his claim, were known, or readily accessible to him and his legal representatives as early as 20 June 2017. There are no new facts, within the contemplation of section 12(3), alleged by him after that date.

[38] To apply what was stated in *Links*, by 20 June 2017 the plaintiff "*had knowledge of facts that would have led him to think that possibly there had been negligence and that this had caused his hernia complications*"¹⁵. In the same case, the Constitutional Court held that knowledge by the applicant of what had caused his condition was a material fact that a litigant wishing to sue in a case such as this would need to know.¹⁶

[39] But unlike in *Links*, there is no evidence here that the plaintiff received any additional or different medical information regarding his medical condition beyond June 2017. The fact that he was subsequently diagnosed with an incisional hernia on two

¹⁵ *Links* at para [45].

¹⁶ *Links* para [46].

subsequent occasions does not elevate those events to *facta probanda*. Rather, they are *facta probantia*.

[40] The fact that there are no new material facts that arose after 20 June 2017 is further indicated by the fact that, even after amendment of his pleadings, his cause of action continues to rely on conduct that occurred during his hospitalization and treatment between August and September 2016. Moreover, the plaintiff's pleadings have never been amended to include any other material facts beyond 20 June 2017. In fact, his case is pertinent that, the incisional hernia, which was first diagnosed in 20 June 2017, was a consequence of what had transpired a year prior. There is furthermore no suggestion from the evidence that Dr Ddamulira prevented the plaintiff from 'coming to know of the existence of the debt'. Far from it, because the plaintiff initiated the consultations with Dr Ddamulira on every occasion after his discharge, which took place without complaint.

[41] During his evidence, the plaintiff relied on two bases for only joining Dr Ddamulira in 2021. The first is that it was not until his attorneys received a letter dated 22 January 2020, that he realized that Dr Ddamulira was not employed by the hospital. The letter, which was from the hospital's legal representatives to the plaintiff's legal representatives, stated as follows in this regard:

“6. We further wish to point out, for the sake of clarity, that our client is not responsible, vicariously or otherwise, for the conduct of [Dr Ddamulira] or the treatment provided by him to your client. Dr Ddamulira is an independent practitioner who is not employed by our client.”

7. Regarding a joinder of Dr Ddamulira to these proceedings, in light of our client's expert opinions, it is not incumbent upon our client to join him to the proceedings. The onus is on your client to prove which party, if any, is responsible for his damages. We are satisfied

that the available expert evidence demonstrates that your client will not succeed in proving that our client is liable for your client's damages."

[42] I do not find the plaintiff's assumption that Dr Ddamulira was employed by the hospital to be unreasonable. After all, all his encounters with Dr Ddamulira took place at the hospital precinct, which is where the latter's private rooms are located. And he never personally received any medical bills from Dr Ddamulira since it was common cause that they were sent directly to the Workman's Compensation and to his medical aid.

[43] However, the plaintiff was legally represented from the time he instituted his claim, and the summons was signed by counsel on his behalf. The alleged assumption that Dr Ddamulira was employed by the hospital must therefore be attributed to the plaintiff's legal representatives. That this is so is supported by the contents of the joinder affidavit, which was deposed by the plaintiff's attorney, stating that *"it came to our attention that [Dr Ddamulira] is not employed by the [hospital]"*. Although it is not specified who is referred to by 'our' attention, it stands to reason that the deponent, who is a legal representative, is included.

[44] There is otherwise no explanation provided for the circumstances under which the assumption regarding the status of Dr Ddamulira's employment came to be formed. The issue is relevant for purposes of applying the proviso in section 12(3), that a creditor shall be deemed to have knowledge of the identity of the debtor and of the facts from which the debt arises if (s)he could have acquired it by exercising reasonable care. The exercise of reasonable care by a lay litigant is not the same as that which may be expected of a trained legal representative. Unlike the plaintiff who is not legally trained, the legal representatives bore a duty to ascertain and thereafter advise their client regarding who the correct party to sue is, which, in turn, requires reasonable care to be taken when issuing summons. That issue remains unexplained.

[45] But, regardless of the recklessness of the assumption regarding the employment status of Dr Ddamulira, the more fundamental question is whether the employment status of Dr Ddamulira amounts to “*the identity of the debtor and/or of the facts from which the debt arises*” within the contemplation of section 12(3) of the Prescription Act. The case law indicates that it is not.

[46] Knowledge of the employment status of Dr Ddamulira amounts to knowledge of a right to sue him. Section 12(3) does not require a creditor to have knowledge of a right to sue the debtor.¹⁷ It is rather the facts which a creditor would need to prove in order to establish the liability of the debtor that are required. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights.¹⁸

[47] An important consideration in this regard is that in the original particulars, the plaintiff sought relief only against the hospital in circumstances where it was claimed that the hospital acted through its duly authorized employees who were acting in the course and scope of their employment, alternatively in fulfillment of the hospital’s vicarious obligation.¹⁹ From a reading of paragraph 7.3 and 7.4 of the particulars, there is no doubt that one of the individuals whose conduct and negligence is relied upon, is that of Dr Ddamulira. It is he who is alleged to have conducted an assessment without X-rays or scans and opined that the plaintiff would be fine. It is not unreasonable to conclude from those averments that the intention, from the institution of the claim in 2019 was that that Dr Ddamulira should be held liable for that conduct. Why then did the original particulars not seek liability against him on a jointly and severable basis? The question is even more pressing when regard is had to the concession by the plaintiff that he knew the identity and particulars of Dr Ddamulira when the papers were issued in 2019.

¹⁷ *Mtokonya v Minister of Police*.

¹⁸ *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA).

¹⁹ See paragraph 3 of the original and amended particulars of claim.

[48] In those circumstances, it is strange that liability was not alleged on the basis of vicarious liability, on the basis of joint and several liability. In circumstances where, as the plaintiff claims, the employment status of Dr Ddamulira was not known to him, that is the course one would have expected of him and his legal representatives. The fact that the plaintiff mistakenly believed that the hospital employed Dr Ddamulira does not explain why the original claim was not sought against the hospital and its employees on a jointly and severable basis. That, after all, is the point of joint and several liability in circumstances involving an employer and employee.

[49] It would be different if this was an instance where liability of the perpetrator was excluded by statutes, as was the case in *MEC for Education, Kwazulu-Natal v Shange*²⁰, where it was held that prescription could not commence running until the creditor had knowledge of the fact that they cannot sue the perpetrator but must sue the employer. Likewise, the facts of this case are distinguishable from an instance where liability for one debtor relies on the finding of liability against another.²¹ All of this lends credence to the argument of Mr Brown who represents Dr Ddamulira that the failure to institute the 2019 claim on a joint and several basis appears to have been an omission by the plaintiff's legal representatives, which remains unexplained.

[50] The other basis on which the plaintiff sought to rely on the letter of 22 January 2020 was by claiming that it was his source for the discovery of Dr Ddamulira's negligence. A similar averment was made in the joinder affidavit, where it was stated that the letter revealed that Dr Ddamulira was the negligent party in relation to the plaintiff's claim. During cross examination the plaintiff conceded that the letter says no such thing. The concession was well-made, because the letter neither states that Dr Ddamulira was the negligent party in relation to the plaintiff's claim, nor that the expert reports had pointed to him as the negligent party.

²⁰ *MEC for Education, Kwazulu-Natal v Shange* 2012 (5) SA 313 (SCA).

²¹ See for example *WK Construction (Pty) Ltd v Moores Rowland & others* 2022 (6) SA 180 (SCA).

[51] Ms Ipser, who represents the plaintiff sought to argue that paragraph 7 of the joinder affidavit meant that the plaintiff's attorneys had received expert reports which indicated that Dr Ddamulira was in fact negligent. Firstly, paragraph 7 clearly states that it was the letter received on 22 January 2020 that indicated that the hospital had obtained reports to the effect that the Dr Ddamulira is in fact the negligent party in the action. As I have already observed, there is no such statement in the letter. And accordingly, the averment, which was made under oath by the plaintiff's attorney, was incorrect. What the letter did state at paragraph 3 was that the hospital's expert reports *"are unwavering in their conclusions that our client and its nursing staff acted entirely appropriately throughout your client's hospitalization at its facility"*. Similar statements were made in paragraph 4 thereof. Later, at paragraph 8 the letter stated as follows:

"We are obtaining instruction from our client to provide your client with a copy of the expert reports we have obtained, on a without prejudice basis, to demonstrate that there is no culpability on its part."

[52] It is clear from the above contents of the letter that the expert reports were not attached to the letter of 22 January 2020. There was no evidence regarding when the expert reports were dispatched by the hospital to the plaintiff's legal representatives. Accordingly, to the extent that the plaintiff sought to rely on the letter of 22 January 2020 for when it discovered Dr Ddamulira's negligence, that was not established by the evidence.

[53] Neither was the plaintiff's allegation contained at paragraph 10 of the joinder application, that he 'observed' Dr Ddamulira's negligence from the hospital's plea which was delivered on 20 July 2020. I note in any event that this averment did not go as far as to claim that the negligence was discovered for the first time in that plea, but merely that it was observed. The hospital's plea does not support such a claim. As I have already indicated, the deponent to the affidavit did not testify in these proceedings. The plaintiff could not give any clarity in this regard. I note in any event that, despite the plaintiff's alleged discoveries in January and July 2020, the joinder of Dr Ddamulira was

only effected on 14 April 2021, and no explanation has been furnished regarding this further delay.

[54] But yet again, the question that arises is whether the alleged discovery of Dr Ddamulira's negligence from the hospital, whether in January or July 2020, constituted "facts from which the debt arises". The case law is clear that the conclusion of negligence from known facts does not constitute facts from which the debt arises within the contemplation of section 12(3) of the Prescription Act.²² Neither do legal conclusions which include issues of fault, wrongfulness or causation.²³

[55] The next basis stated during the plaintiff's oral evidence for his failure to timeously join Dr Ddamulira concerns events that transpired during May 2018 whilst he was in hospital for the repair of an incisional hernia and a cholecystectomy (gallbladder removal). The plaintiff testified that he overheard a nurse called Mandla telling another patient that he (Mandla) had been in trouble and nearly lost his job because of alleged substandard nursing care that was accorded to the plaintiff in 2016, and the nurse had been subsequently required to write a report of events surrounding the issue. The nurse had not said anything further, and the plaintiff had not felt comfortable in asking any questions because he had gained the impression that the nurse felt the freedom to make those comments because he thought the plaintiff was sleeping. The plaintiff testified that he understood this information to mean that there was possible negligence concerning the treatment and care that he had received at the hospital during his hospitalization in 2016. Furthermore, he had concluded from that conversation that there may have been negligence on the part of the nursing staff, but he did not gain the impression that Dr Ddamulira was implicated.

[56] I was informed that the plaintiff did not seek to rely on the contents of what he overheard, but only sought to rely on the conversation for purposes of calculating prescription, and accordingly the considerations of hearsay evidence do not directly

²² *Trutter v Deyse* 2006 (4) SA 168 (SCA) paras 19 and 20.

²³ *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) paras 36, 44 to 45.

arise. What is relevant with regard to the timing of this conversation, according to the timeframes agreed between the parties, is that it would have been between 25 and 30 May 2018. Then, after his discharge on 30 May 2018 the plaintiff attended a follow-up consultation with Dr Ddamulira on 5 June 2018, where the staples were removed. The plaintiff was due for another follow-up on 3 July 2018, and failed to present himself.

[57] In his evidence in chief the plaintiff stated that the reason he had not attended his follow-up appointment on 3 July 2018 was because of what he had overheard in May 2018. However, during cross examination, he stated that this answer was a mistake. He had forgotten to mention that, after his discharge on 30 May 2018, he had visited his family General Practitioner (“GP”) who had advised him to obtain a second opinion, and this is the reason he never returned to Dr Ddamulira on 3 July 2018. Much is made on behalf of Dr Ddamulira regarding this change of versions. This is understandable, because, by tendering the earlier evidence, the plaintiff sought to distance himself from any further association with Dr Ddamulira after the alleged overheard conversation involving the nurse.

[58] Even if the plaintiff’s changed version is true - that he rather visited a family GP - it does not explain why he did not raise the issue with Dr Ddamulira on 5 June 2018 when he returned to have his staples removed, especially if he had no reason to believe that Dr Ddamulira had caused played any part in the alleged substandard care. When confronted with this question, the plaintiff claimed that Dr Ddamulira did not have a good bedside manner. Even if that is true - and it is disputed on behalf of Dr Ddamulira - the plaintiff could not explain why he failed to make any further enquiries regarding the alleged overheard conversation with anyone else, including the nurse in question. It is relevant in this regard that the plaintiff explained that nurse Mandla had relayed the overheard information because a neighbouring patient had enquired why the plaintiff was “*so popular amongst the nurses*”. All the more reason to expect the plaintiff to have delved further into the matter by approaching nurse Mandla after his discharge in May 2018, or any of the other nurses to whom he was popular. He could not explain why he failed to follow up on the matter. He also could not confirm whether the alleged report by

nurse Mandla was requested by his legal representatives in preparation for the institution of his claim. What is clear is that no mention of this issue is made in the papers.

[59] I also observe that the plaintiff did not go as far as to allege that the family GP had advised him that there had been wrongdoing, whether by the hospital or Dr Ddamulira. Nor was there any evidence regarding whether a second opinion was indeed obtained and what it was.

[60] Whether or not the plaintiff's evidence is to be believed, there is no evidence that he discovered anything during that stage which can explain why Dr Ddamulira was belatedly joined as a defendant. In his own evidence, what occurred in May 2018 did not lead him to believe that Dr Ddamulira had done any wrongdoing. This is also borne out by the fact that there was no amendment to his pleadings to add reliance on the allegedly overheard conversation, or an any alleged second opinion following consultation with the GP. There was also no mention made of the alleged investigation involving nurse Mandla in the papers. The issue was not even mentioned in the joinder affidavit, which one would have expected if it was a reason for the late joinder.

[61] But even if Dr Ddamulira had been implicated in the allegedly overheard conversation, or as a result of a second medical opinion resulting from the GP's advice, that would not have amounted to knowledge of material facts, but of negligence, which amounts to a legal conclusion. The conclusion is therefore irresistible that no material facts, within the contemplation of section 12(3) of the Prescription Act, were discovered by him during that period. I am accordingly of the view that the second defendant has discharged its *onus* to establish the date on which the plaintiff obtained actual or constructive knowledge of the debt was, at the latest, 20 June 2017.

[62] In closing, I am alive to the provisions of section 34 of the Constitution of the Republic of South Africa 108 of 1996, in terms of which everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public

hearing before a court or, where appropriate, another independent and impartial tribunal or forum. It is not the effect of this judgment to impede that right as regards the plaintiff because his claim may continue against the hospital. In any event, what is clear from the facts of this judgment is that the joinder of Dr Ddamulira was granted based on false or incorrect averments, which have not been rectified, and which were made by an officer of this Court.

[63] Not only is it in the interests of justice that such a situation should be rectified – although admittedly that is not the point of these proceedings, but there are also considerations of fairness which must be taken into account, according to the express provisions of section 34. Dr Ddamulira too is clothed with the rights accorded in terms of section 34. But most importantly, the very the purpose of section 12(3) of the Prescription Act is to strike a fair balance between the need for a definite date beyond which a person can no longer pursue their claim if they failed to act diligently, taking into account the need for legal certainty and finality²⁴, and the need to ensure fairness in cases where a rigid application would result in injustice²⁵. I am of the view that it would result in injustice if the claim against Dr Ddamulira were permitted to continue in the circumstances of this case.

F. COSTS

[64] There is no reason why costs should not follow the result. The special plea of the second defendant has been successful. It was argued that, since the cause for the prescription appears to be based on advice given to the plaintiff by his legal representatives to only sue the hospital instead of considering the joint and several nature of the liability involved, that the plaintiff should not be mulcted with costs. At the same time, it was also argued that, if the special plea should be unsuccessful the plaintiff's legal representatives should be ordered to pay costs *de bonis propriis* because it was they who misled the second defendant's legal representatives into

²⁴ *Loubser op cit* at p52.

²⁵ *Links op cit*, para 26.

believing that the basis for the belated joinder was the alleged lack of knowledge of the identity of Dr Ddamulira which was subsequently and belatedly abandoned during oral evidence.

[65] I have considered these arguments. This matter has a long-running history, with the amended particulars having been delivered in April 2021. Thereafter, there was opportunity to amend the pleadings after consultation between plaintiff and his legal representatives, via correspondence between the parties, or via replication by the plaintiff. Furthermore, as I have already mentioned, even at pre-trial stage and when the parties agreed to a statement of facts, the issue of the unknown identity of Dr Ddamulira was not rectified. None of the allegations made in the joinder affidavit were ever sought to be rectified or amended before these proceedings. Dr Ddamulira too is an individual litigant who is entitled to not be placed out of pocket for defending a claim, whose basis was mostly abandoned at the eleventh hour.

[66] Nevertheless, I consider it unfair to award costs on a *de bonis propriis* against the plaintiff's legal representatives basis without affording them opportunity to make representations, and without warning that such costs were sought against them.

G. ORDER

[67] In the circumstances, the following order is made:

- a. The second defendant's special plea of prescription is upheld;
- b. The plaintiff's claim against the second defendant is dismissed;
- c. The plaintiff is to pay costs of the second defendant on an attorney and client scale.

N. MANGCU-LOCKWOOD

Judge of the High Court