



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Not Reportable

Case no: 27/2020

In the matter between:

ZANEKHAYA MABANDLA

Plaintiff

and

**MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH: EASTERN CAPE PROVINCE**

Defendant

Neutral citation: *Zanekhaya Mabandla v Member of The Executive Council For Health: Eastern Cape Province.*

Coram: NHLANGULELA AJP

Heard: 24 MARCH 2025

Delivered: 09 SEPTEMBER 2025.

Summary: Special plea of extinctive prescription in terms of ss 11 and 12 of the Prescription Act 68 of 1969 – *onus* to prove that the debt became prescribed is on the defendant – not discharged – special plea dismissed with costs.

ORDER

1. The plaintiff's action is dismissed with costs.
2. The costs shall be paid on scale B referred to in Uniform Rule 67A.

JUDGMENT

Nhlangulela AJP

[1] This judgment seeks to address the question whether the plaintiff's action is extinguished by prescription, in terms of s 11 (*d*) read with s 12 (1) and (3) of the Prescription Act 68 of 1969 (the Act).

[2] The provisions of section 11(*d*) of the Act read:

‘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 debt.’

And the provisions of s 12 (3) of the Act read as follows:

‘ ...

(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.’ (My emphasis.)

[3] The defendant’s special plea of prescription arises from the following alleged facts. On 10 January 2010, the plaintiff instituted an action against the defendant for damages in the sum of R15 000 000 arising from an alleged wrongful examination of the plaintiff’s dislocated right shoulder. A notice to defend was filed on behalf of the defendant, followed by a special plea on 14 December 2020. In his particulars of claim, the plaintiff sets out the material facts¹ on which the cause of action is founded by making the following factual allegations: By missing the diagnosis of a shoulder dislocation between 13 May to 30 June 2016, which had been detected by X-ray and physiotherapy, the doctors of St Barnabas Hospital (SBH) and Bedford Orthopaedic Hospital (BOH) failed to prevent complications (*sequelae*) that ensued, which are the anterior shoulder dislocation, Hill Sachs lesion, and greater tuberosity fracture. By the time of referral to BOH on 30 June 2016, the prognosis of the plaintiff’s surgery was already poor; and the delay in performing a *closed reduction* and fixation (ORIF) of the tuberosity fracture and stabilisation of the shoulder (Laterjet) between 2 and 8 August 2016 would not prevent injury to the plaintiff. In and as a result of the omission, the plaintiff suffers from ongoing excruciating pain and his

¹This is the overview of the portions of the plaintiff’s particulars of claim that are relevant to the special plea.

soft tissue structures that maintain the joint function and stability are damaged

[4] The defendant raised a special plea, seeking relief that the plaintiff's action be dismissed on two alternative grounds, firstly that the debt sought to be recovered in these action proceedings became prescribed by the plaintiff's failure to issue summons within three years from the date on which the cause of action arose on 13 May 2016. On that date, he visited SBH for treatment of his injured right arm. Secondly, that on 24 October 2016, he had the knowledge of the identity of the debtor and facts from which the debt arose as envisaged in s 12 (3) of the Act. On that occasion, he had the first consultation with Nkele Attorneys (Attorneys) and shared the X-Ray information obtained on 30 June 2016 from SBH that the plaintiff had a dislocation in the shoulder, together with a fracture of the greater tuberosity of the humerus.

[5] The factual enquiry was canvassed. Only the plaintiff testified. He told the court that on 11 May 2016 he fell at home and injured his right shoulder. On 13 May 2016, he attended SBH, where he was examined by a doctor and received physiotherapy, after which his arm was placed in a sling and he received some rubbing ointment. Five days later, on 18 May 2016, he went back to the hospital to get some prescribed tablets. The next time the plaintiff returned to SBH was on 30 May 2016, prompted by the swelling of the arm. He was put on X-ray and referred to physiotherapy, where his crutches were substituted with a wheelchair to ease constant pain in his right arm. On the same day, he was referred to BOH for further medical examination on 19 July 2016. There, he was informed that there was a

dislocation of his shoulder, put on X-Ray, given pain tablets and discharged due to the unavailability of beds. On 29 July 2016, he returned to BOH. He was admitted and detained there until 8 August 2016, *albeit* without any medical treatment or explanation regarding treatment.

[6] Upon discharge from hospital, and disenchanted by the fact that the dislocation of his shoulder had not been treated at both SBH and BOH, on 24 October 2016 the plaintiff approached Attorneys for legal advice. The Attorneys told him that they would investigate the matter and call him for further consultation. On 23 August 2019, the Attorneys referred him to Dr Pillay of Pinetown for medical examination. The next consultation took place on 29 September 2019 when he was advised that he would be referred to further specialist doctors. Based on that plan, he was examined, on separate occasions, by doctors in Durban, Gauteng, and Mthatha. According to the plaintiff, he acquired knowledge of the facts from his claim, which arose for the first time on 29 September 2019, during a consultation with his Attorneys on a medical report submitted by Dr. Pillay, indicating that a faulty medical examination had been conducted at SBH and BOH.

[7] Pursuant to an objection to a suggestion put to the plaintiff that he obtained knowledge of the facts material to the debt from the first consultation with his Attorneys on 24 October 2016, I overruled the objection for a reason that there would be nothing untoward with the plaintiff telling the court if anything more than an investigation of the cause(s) of the injury was discussed during the consultation. I, thereafter, granted the defendant's application for amendment of the special plea to incorporate the date, 24 October 2016, as the alleged date of commencement of the 3-year prescription period. This, the defendant would still be required

to prove at the trial. I must add, in this regard I align myself with the statement by Govindjee J that the all-important task at hand is for the objector to show that the plaintiff's claim has become prescribed as envisaged in s 12 of the Act.²

[8] In argument, it was submitted on behalf of the defendant that since the debt fell due on 24 October 2016, to avoid prescription summons had to be issued on 23 October 2019, which the plaintiff failed to do. Counsel found attraction to the 24 October 2016 date in that , it was submitted, when the plaintiff visited his Attorneys for the first time, he acquired knowledge of the identity of the debtor (the defendant), and the facts from which the debt arose, being the alleged inadequate treatment of his dislocated right arm by the treating doctors and physiotherapist who worked at the SBH and BOH.

[9] Counsel for the plaintiff submitted that the plaintiff's cause of action did not arise on either the first visit to SBH on 13 May 2016 nor 24 October 2016. He placed reliance on the case of *Links v MEC for Health, Northern Cape Province* ³, arguing that on the interpretation of ss 11 and 12 of the Act, the indebtedness of the defendant was due on 23 August 2019, when the report of Dr Pillay was received by his Attorneys. He urged the court to

² *Member of the Executive Council for Health, Eastern Cape v Diko - Appeal* (ECB) unreported case no CA1/2023 of 15 September 2023 the learned Judge made the following statement, at para.15:

‘On this authority, the argument that the MEC has pleaded one case, namely that the debt became due by no later than 18 December 2009, and led evidence as to another date, four weeks later, may be over-strict. A more generous approach may instead be afforded in respect of consideration of the special plea, so that this court considers whether the MEC has shown that Mr Diko had knowledge of the facts (which the MEC must show he was required to know) on or before 18 July 2015, a date three years prior to service of summons.’

³ *Links v MEC for Health, Northern Cape Province* 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC).

decide the case on the strength of the *Links* case, which he contended was in all fours with the present one.

[10] The facts in *Links* were that on 26 June 2006 the plaintiff went to a hospital with an injured thumb, amputated on 5 July 2006 without having been made aware of the reason for the surgery and discharged from the hospital at the end of August 2006. The Legal Aid was hired to take legal action on his behalf in December 2006, but they delayed for approximately the entire prescription period until that instruction was taken over by a firm of attorneys, which issued a summons on 5 August 2006. Service of the summons took place on 6 August 2006. Faced with a special plea of prescription in terms of s 11 (d) of the Prescription Act, Mr *Link* pleaded that prescription did not commence on or before 5 August 2006 because he did not know the material facts required to institute the action before the end of August 2006 as he was hampered by the fact that he was still detained in the hospital; hence the finding that his claim was still alive when the summons was served on 6 August 2009.

[11] In *Links*, the following was said by the Constitutional Court in paragraphs 34 and 35 about the ‘debt due’ in s 12 (1) of the Act:

‘[34] In *Deloitte* the court said the following about the phrase “**debt due**” in section 12(1) of the Prescription Act:

“This means that there has to be a debt immediately claimable by the [creditor] or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. . . . It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, ie before he is able to pursue his claim.”

[35] In *Gore* the Supreme Court of Appeal said through Cameron and Brand JJA:

“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.”⁴

[12] The question arising is whether the cause of action arose on 13 May 2016 or, if it could not have arisen before 24 October 2016, on 23 August 2019, is the date on which the prescriptive period began to run in terms of s 11(d), read with s 12 (3) of the Act. Determining the date is a question of fact, not law.

[13] Guided by established case law, the term ‘cause of action’ in s 12 (1) of the Act is defined as:

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

[14] For the purposes of s 12 (3) of the Act, the *onus* of proving a special plea of prescription lies with the defendant. In *Links*, the following was said regarding *onus*:

‘... [I]n cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff. Until there are *reasonable grounds for suspecting fault* so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises’.

...

In a claim for delictual liability based on the Aquilian action, negligence and causation are essential elements of the cause of action. Negligence and, as this Court has held, causation have both factual and legal elements. *Until the applicant had*

⁴ Ibid at paras 34 & 35.

⁵ *Truter and Another v Deyssel* 2006 (4) SA 168(SCA) at para17; *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC).

knowledge of facts that would have led him to think that possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in section 12(3).’ (My emphasis.)

[15] Therefore, it being common cause that the cause of action did not arise on 13 May 2016, I accept that the prescription period of three years did not commence to run on 13 May 2016 because the plaintiff merely attended the hospital for the treatment of his injured arm due to a fall. That much puts paid to the issue of prescription under s 11 (d) of the Act.

[16] Regarding the issue of prescription under s 12 (3) of the Act, since the debt is deemed not to have become prescribed, defendant has to show on the balance of probabilities that the plaintiff acquired knowledge on 24 October 2016, or earlier, that the anterior shoulder dislocation, Hill Sachs lesion, and greater tuberosity fracture he is suffering from were caused by the negligent conduct of the doctors of SBH and BOH. There is no such evidence on the record. Instead, the court received uncontroverted evidence from the plaintiff that such knowledge was acquired by him through a medical report written by Dr. Pillay, which his Attorneys revealed to him during a consultation that took place on 29 September 2019. It is improbable that the medical report of Dr Pillay, which was prepared based on a consultation that the doctor had with the plaintiff on 23 August 2019, was in existence on 24 October 2016. Therefore, the cause of action could not have arisen on 24 October 2016. It is clear from the evidence adduced by the plaintiff that the plaintiff acquired knowledge of the debtor's identity and the facts giving rise to the debt within the meaning of s 12 (3) of the Act only on 23 August 2019.

[17] In all the circumstances of this case, I find that the defendant has failed to prove that the prescription commenced to run on 24 October 2016. The actual date of commencement of the 3-year period of prescription is 24 August 2019, which had not yet run its full cycle when the plaintiff issued summons on 10 January 2020. Having put the plaintiff on costs, the special plea falls to be dismissed with costs, at scale B.

[18] In the result, the following order shall issue:

‘The special plea of prescription is dismissed with costs payable at scale B referred to in Uniform Rule 67A.’

Z. M. NHLANGULELA

ACTING JUDGE PRESIDENT OF THE HIGH COURT

Appearing for the plaintiff:	Adv. L. NTIKINCA
Instructed by:	TAA NKELE & SONS INC. MTHATHA.

Appearing for the defendant:	Adv. B. DYKE SC
Instructed by:	SMITH TABATA INC. MTHATHA.