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

OF INTEREST; NOT REPORTABLE

Case No: 139/2022

In the matter between:

P[...] S[...] B[...] OBO Z B

Plaintiff

and

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

Defendant

JUDGMENT

KOTZÉ AJ

Introduction

[1] The plaintiff sues, in her personal capacity and as the mother and legal guardian of her minor girl (“Z B”), for general and special damages arising from a brain injury sustained by Z B during her birth at Frontier Hospital.

[2] The matter proceeded through the pre-trial processes, and on the morning of the intended trial, took the eventual form of a stated case. The questions of law stated by the parties in terms of rule 33(1), concern two special pleas: a special plea of prescription of the Plaintiff's claim in her personal capacity, and a special plea of non-compliance with the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002 ("*the Institution Act*"). At the hearing of the matter, the parties agreed that the issues set out in the defendant's special pleas be separated from the remainder of the issues (of liability and quantum). The parties argued the stated case unassisted by heads of argument and judgment was reserved.

[3] In this division of the High Court, by means of rule 8(a) read with 15A(1) of the Joint Rules of Practice for the High Courts of the Eastern Cape Province, opposed motions include stated cases wherein the parties have agreed to enrol same in the opposed motion court. The value of doing so, at the very least to the court, is that parties are obliged by these rules to, firstly, file their respective heads of argument, and secondly, to do so in advance. The benefits of heads of argument received in advance by all concerned, are obvious and need not be stated. Even if a stated case were to proceed in a trial court, a similar practice should be encouraged, at least for the convenience of the court.

[4] Unfortunately, and by no design, the delivery of this judgment was delayed because of a misunderstanding that arose that some of the issues became settled. Following a request from the court for the details of the settled issues, in order to limit this judgment to its still applicable parts, the misunderstanding revealed itself. By then, the need for heads of argument became more pressing, and following communication and a scheduled case management meeting, directives were issued calling upon the parties to submit heads of argument and to consider further aspects of the case. In time, comprehensive heads of argument were submitted and I am grateful for the parties in doing so.

The statement of facts, legal questions and contentions

[5] The parties' written statement handed in and agreed upon in terms of Uniform Rule 33(1), reads (exactly):

THE PARTIES

1. *The plaintiff is P[...] S[...] B[...], who is:*
 - 1.1. *a major, unemployed female person, presently residing at Cumakala Administrative Area, Lady Frere, Eastern Cape;*
 - 1.2. *who was born on 24 March 1985; and*
 - 1.3. *suing in her personal capacity and in her representative as the biological mother of Z[...] B[...] ("ZB"), a girl born on 19 January 2018.*
2. *The defendant is the Member of the Executive Council for the Department of Health, Eastern Cape Province, whose address for the purposes hereof is c/o State Attorney, Fleet Street, Old Spoornet Building, East London.*

AGREED FACTS GIVING RISE TO THE DISPUTE

3. *During March 2022, the plaintiff instituted action against the defendant claiming general and special damages arising out of brain injury which ZB sustained during her birth at Frontier Hospital.*
4. *The common cause facts are that:*
 - 4.1. *from the available literature, medical records and joint minutes that have been prepared and signed by the parties' medical experts, ZB has a brain injury. ZB's condition immediately after birth is indicated in items 6, 7 and 8 of the joint minutes of the parties' pediatricians which items must be read as if specifically incorporated herein;*
 - 4.2. *the plaintiff:*
 - 4.2.1. *reported in Glen Grey Hospital on 18 January 2018 between 19h00 and 20h00. Upon arrival at Glen Grey Hospital she was diagnosed to be in labour;*
 - 4.2.2. *was examined at 20h00 at Glen Grey Hospital and found to be 2 cm dilated. A decision was made to transfer her to Frontier Hospital in Queenstown;*
 - 4.2.3. *was assessed at 21h30 and found to have i) good progress of labour; ii) been 9 cm dilatated with the foetal head 3/5 above the brim; iii) had her membranes ruptured; iv) been draining clear liquor, v); a foetal heart rate of 140 bpm, vi) with no decelerations; and vii) had 2 strong contractions in 10 minutes.*

- 4.2.4. *was assessed at 23h30 and found to i) be 10 cm dilatated with the foetal head 2/5 above the brim; ii) have been draining clear liquor.*
- 4.3. *An ambulance*
 - 4.3.1. *was dispatched at 00h46 to collect the plaintiff from Glen Grey Hospital, on 19 January 2018;*
 - 4.3.2. *arrived at Glen Grey Hospital at 00h56 on 19 January 2018; and*
 - 4.3.3. *arrived at Frontier Hospital at 01h15 on 19 January 2018.*
- 4.4. *ZB:*
 - 4.4.1. *was born asphyxiated on 19 January 2018 after 06h00;*
 - 4.4.2. *suffered cerebral damage during birth;*
 - 4.4.3. *did not cry after birth; and*
 - 4.4.4. *had seizures after birth.*
- 4.5. *the plaintiff was discharged from Frontier Hospital on a date more than a week after ZB's birth;*
- 4.6. *the plaintiff was advised:*
 - 4.6.1. *by a medical doctor who saw her and ZB at the beginning of January 2022 that:*
 - 4.6.1.1. *ZB's had a neurological brain injury;*
 - 4.6.1.2. *the neurological brain injury was occasioned at birth;*
 - 4.6.1.3. *the persons who assisted her during ZB's did not properly manage her labour, alternatively, missed foetal distress so that they did not manage same properly;*
 - 4.6.2. *by her lawyers in January 2022, to sue the defendant for medical negligence and whatever other consequences she may have personally suffered because of the conduct implicated in paragraph 4.6.*

- 4.7. *post birth, but before discharge from Frontier Hospital in January 2018, the plaintiff was counselled and told that ZB would not follow a normal growth trajectory; and*
- 4.8. *on 27 January 2022, the plaintiff delivered the attached letter to the defendant. The letter and proof of postage, is marked A.*

THE DISPUTE

5. *The matter is set down for the determination of the special pleas of:*
 - 5.1. *prescription, in terms of section 11 of the Prescription Act, 1969 (Act No. 68 of 1969, it being contended that the plaintiff's personal claim for damages against the defendant has become prescribed; and*
 - 5.2. *failure to deliver a statutory letter to the relevant official of the Eastern Cape Department of Health with 6 (six) months of the plaintiff's discharge from hospital.*
6. *In the main, the defendant contends that the plaintiff's claim in her personal capacity has prescribed. And that in any event, the plaintiff did not comply with section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 2022, (Act No. 40 of 2002) ("the Act").*

THE PARTIES' CONTENTIONS

7. *The plaintiff contends that the debt became due on and/or her cause of action arose in January 2022 so that:*
 - 7.1. *she was obligated to deliver the statutory notice contemplated in section 3(2) of the Act within 6 (six) months of the debt becoming due and/or her cause of action arising – on 24 January 2022;*
 - 7.2. *she issued the summons against the defendant on within 3 (three) years of the debt becoming due and/or her cause of action arising – on 07 March 2022;*
 - 7.3. *the debt did not become due and/or her cause of action did not arise only when she was discharged from Frontier Hospital;*
 - 7.4. *when she was discharged from Frontier Hospital, she did not know what had caused the condition of ZB, nor did she know that she would sustain her personal neurological injury, at any time thereafter.*
8. *The defendant contends that:*

- 8.1. *the plaintiff was treated at Glen Grey Hospital on 19 January 2018 on which date her cause of action both in her personal and representative capacities arose;*
- 8.2. *within 6 (six) months from 19 January 2018 (by 20 July 2018) the plaintiff' was obligated to deliver her statutory notice in terms of section 3(2) of the Act;*
- 8.3. *within 3 (three) years from 19 January 2018 the plaintiff' was obligated to institute legal proceedings for the recovery of her debt, in her personal capacity, against the defendant;*
- 8.4. *the plaintiff's claim in her personal capacity prescribed by effluxion of time on 20 January 2021;*
- 8.5. *the summons herein was served upon the defendant on 5 June 2022; and*
- 8.6. *the plaintiff did neither of what is contemplated in paragraphs 8.2 and 8.3.*

RELIEF SOUGHT BY EACH PARTY

9. *Insofar as the issues identified for decision:*
 - 9.1. *the plaintiff prays for the dismissal of the special plea with costs, such costs to be inclusive of the costs occasioned by the employment of 2 (two) counsel and that same be payable on scale C.*
 - 9.2. *the defendant prays for an order that:*
 - 9.2.1. *the plaintiff's claim in her personal capacity has become extinguished by prescription; and be accordingly dismissed with costs and*
 - 9.2.2. *the special plea based on failure to comply with the Act, be and is hereby upheld with costs.*

[6] As stated before, part of the directives issued to the parties, invited them to present submissions in their written arguments on further issues.¹ The plaintiff responded to the invitation and presented helpful arguments on the issues. The defendant, however, declined the invitation,² relying on authority to the effect that a court should not deal with issues unnecessary to determining the issues before it,³ and that a court should decide only that which is demanded by the facts.⁴

[7] In *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) at [15] the Constitutional Court held that a court that is called upon to decide a special case under rule 33 is required to decide the question of law presented to it and has no right to travel outside the four corners of the agreed statement and decide a different question that it wishes the parties had submitted to it to decide.

¹ The invitation drew the parties attention to the fact that during its preparation, and before the misunderstanding arose, the court became aware of the following further issues that might assist in the resolution of the matter: (a) whether the provisions of sections 3 and 4 of Act 40 of 2002 are peremptory or directory; (b) whether non-compliance with the above sections is fatal or whether substantial compliance is possible absent an application for condonation; and, (c) what effect, if any, the presence of condonation provisions in section 3(4) of the Act have on (a) and (b). The invitation set out in the directives thus intended the start of a procedure dealt with in *Groenewald NO and Another v Swanepoel* 2002 (6) SA 724 (E) at 726F-I. SEE also *Mamela Taxi Rank (Pty) Ltd v Mamela Taxi Association and Others* (CA 155/2010) [2010] ZAECMHC 31 (28 October 2010) at [23]-[34], and at [33] where the full court said: “*If parties agree on something in addition to the lis then before Court - and seek an order from the court that by consent their agreement be incorporated in a court order - then, and only in that event, such agreement may be made an order by the Court. Put differently, even if the issue is not ventilated either on the papers or in evidence and nor in argument, then the court may make an order on such issue by agreement between the parties. Transvaal Canoe Union v Butgereit and another* 1990 (3) SA 398 (TPD) at 404 D-F and the authorities referred to at 406H.”

² The response in the defendant’s heads of argument, reads “...the issue of substantial compliance does not even arise. It is not an issue before court. It would only arise if this court were being called upon to decide an application for condonation of non-compliance with the Institution Act. That is not the case in this matter.”

³ *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC) ; 2010 (2) SACR 101 (CC) ; 2010 (5) BCLR 391 (CC) (23 February 2010) at [82].

⁴ *City of Cape Town v Aurecon South Africa (Pty) Ltd* (CCT21/16) [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) (28 February 2017) at [35].

[8] In a helpful summary, Makaula J recently said this of rule 33(1) in *Gcam-Gcam v Minister of Police*:⁵

The primary aim of Rule 33 is to facilitate expeditious disposal of litigation. Rule 33(2)(a) requires that the statement agreed upon between the parties by way of a special case submitted to court 'shall set forth the facts agreed upon, the question of law in dispute between the parties and their contentions thereon'. Rule 33(1) and 33(2)(a) demand that in the special case there must be a question of law that the parties require the court to decide on the agreed facts and in the light of their contentions which must be set forth in their agreed statement. Rule 33(5) clearly states that the decision of the court is required to be upon any question or questions of law that the parties have submitted to the court for a decision ... This court is therefore, bound by the facts and the questions of the law decided upon [by] the parties.

[9] The above is instructive, and no matter how tempting it may be, the court is confined to the stated issues. This applies with more force when one of the parties has declined the invitation. I therefore agree with the defendant.

[10] However, that approach cuts both ways. The limitations set out in *Mtokonya* and *Gcam-Gcam*, in my view, also applies to the opposite: once agreed upon, signed and argued, the parties are bound by the four corners of the statement presented to court⁶ (except where the parties withdraw their agreement on certain facts).⁷

The issues

[11] The issues for determination arising from the statement therefore are, firstly, whether the plaintiff's personal claim for damages against the defendant has become prescribed, and

⁵ *Gcam-Gcam v Minister of Police* (926/2018) [2025] ZAECMHC 51 (10 June 2025) at [4].

⁶ *Mtokonya supra* at [15] & [72]; *Van Sensie v Road Accident Fund* (2533/2019) [2025] ZAECQBHC 17 (13 May 2025) at [8]; See also *Ngqeleni v Outsurance Insurance Company Limited* (EL933/2022) [2024] ZAECCELLC 44 (14 November 2024) at [14]; *Gaonamong v Minister of Justice and Correctional Services* (557/2018) [2026] ZANWHC 2 (5 January 2026) at [18].

⁷ *Mtokonya supra* at [16].

secondly, whether the plaintiff failed to deliver a statutory letter to the relevant official of the Eastern Cape Department of Health within six months of the plaintiff's discharge from hospital.

The defendant's submissions

[12] On the issue of prescription, Mr Jikwana, who appeared for the defendant, argued that the plaintiff's claims in both her personal and representative capacities arose on 19 January 2018, being the date of birth of Z B. He placed reliance on *Mtokonya, on President of the Republic of South Africa and Another v Tembani and Others* 2025 (2) SA 371 (CC) and on *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA), that knowledge as contemplated in the Prescription Act does not require knowledge that conduct is wrongful, actionable or of any legal conclusions. He further argued that *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC) is distinguishable from the present case, in that *Links* concerned an application for condonation in terms of the Institution Act. It is further argued, so the arguments are understood, that in *Loni v Member of the Executive Council, Department of Health, Eastern Cape Bhisho* 2018 (3) SA 335 (CC), the court, notwithstanding *Links*, reached a different conclusion. In the present case, he submitted, the plaintiff had knowledge of the necessary facts and should have immediately sought legal assistance.

[13] Concerning the second issue, the non-compliance with the Institution Act, the defendant argued the following three grounds: firstly, that the prescribed notice was not delivered within six months of when the debt fell due, secondly, that the notice does not reference any claim by the plaintiff in her personal capacity and thus cannot constitute notice or demand to support her claim, and thirdly, the letter refers to a "fractured arm" suffered by Z B which is quite clearly incorrect.

The plaintiff's submissions

[14] Relying, mainly on *Links*, Mr Bodlani together with Mrs Nxazonke-Mashiya, appearing for the plaintiff, argued that the plaintiff did not have the necessary knowledge of the facts from which her debt arose, and therefore, could not appreciate that the debt was due and so prescription did not commence. It was further argued that, even if at the time of birth, Z B was

asphyxiated, had cerebral damage, did not cry, and had seizures, unless it was a common cause between the parties that the cause for all these was known by the plaintiff to be the fault of the defendant, that is not enough to inform the plaintiff that something went wrong. It was also argued that although the plaintiff was counselled on her discharge and told that Z B's growth would not follow the normal trajectory, it does not assist the defendant's case because it did not inform the plaintiff what the cause was. Finally, it was submitted that the plaintiff only acquired the necessary knowledge in January 2022 when she consulted a medical doctor who advised her that the wrong was committed by the defendant's employees.

[15] Concerning the second issue, the plaintiff argues that the defendant's recorded contention in the statement was that the statutory notice (in terms of s 3 of the Institution Act) was delivered out of time when it ought to have been delivered within six months from date of 19 January 2018. Therefore, it is impermissible for the defendant, absent any contention in the statement to that effect, to argue that the s 3 notice did not comply with the Institution also because its content (a) failed to set out a claim by the plaintiff in her personal capacity and (b) its content was factually flawed (referring to the "fractured arm" argument).

The general legal principles

[16] Concerning the special plea of prescription, the onus is on the defendant to show that the plaintiff's claims prescribed.⁸ It would seem as if the same onus has been assigned to a defendant who relies on a special plea of non-compliance in terms of the Institution Act.⁹

⁸ *Gericke v Sack* 1978(1) SA 821 (AD) at 827-828, applied in *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) at [41]. See also *Dike v Minister of Police and Another* (404/2022) [2023] ZAECBHC 15 (18 July 2023) at [29].

⁹ *Member of the Executive Council for the Department of Health, Eastern Cape Government v Ndaliso* (CA96/2015) [2016] ZAECGHC 5 (25 February 2016) at [19]-[21] (a judgment by the full court); *N.S v Member of the Executive Council, Department of Health, Eastern Cape* (438/2023) [2024] ZAECBHC 8 (7 May 2024) at [6] & [19]; *Diko v MEC for Health* (583/2018) [2022] ZAECBHC 11 (22 March 2022) at [32]-[33]; *Magadaza v Yaka and Others* (5380/2016) [2018] ZAECGHC 87 (5 September 2018) at [5].

[17] The defendant bears the onus of proving when the debt fell due and when prescription commenced.¹⁰ In *WK Construction (Pty) Ltd v Moores Rowland and Others* 2022 (6) SA 180 (SCA) at [4]-[5], it was formulated as:¹¹

Boiled down to its essentials, the issue on prescription is when the alleged debt was deemed to have become due. This required a finding on when WK Construction had the relevant knowledge or could have acquired the relevant knowledge by exercising reasonable care. This, in turn, required an assessment of what comprised the relevant knowledge. If this was acquired prior to 23 August 2013, the debt had been extinguished by the time action was instituted.

[18] It is not uncommon in professional negligence cases against the state that the state's case is only as strong as it still has witnesses available. In *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) it was said:

[10] This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt. The burden shifts to the plaintiff only if the defendant has established a prima facie case. In Gericke v Sack 1978 (1) SA 821 (A) at 827D – G the court stated:

'(I)t will at times be difficult for a debtor who pleads prescription to establish the date on which the creditor first learned his identity or, for that matter, when he learned the date on which the delict had been committed.

But that difficulty must not be exaggerated. It is a difficulty which faces litigants in variety of cases and may cause hardship — but hard cases, notoriously, do not make good law. It is not a principle of our law that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the burden of proof cannot be altered merely because the facts happen to be within the knowledge of the other party. See R, v Cohen, 1933 T.P.D. 128. However, the Courts take cognizance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in consequence held, as was pointed

¹⁰ *President of the Republic of South Africa and Another v Tembani and Others* 2025 (2) SA 371 (CC) at [105] & [107]; *Minister of Finance and Others v Gore* NO 2007 (1) SA 111 (SCA) at [13].

¹¹ *WK Construction (Pty) Ltd v Moores Rowland and Others* 2022 (6) SA 180 (SCA) at [4]-[5].

out by INNES J., in *Union Government (Minister of Railways) v Sykes*, 1913 A.D. 156 at p. 173, that

less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.

'But the fact that less evidence may suffice does not alter the onus which rests on the respondent in this case.'

[19] As to the chemistry between the Prescription Act and the Institution Act, and what would be necessary for a defendant to satisfy the burden of proof, it was said in *President of the Republic of South Africa and Another v Tembani and Others* 2025 (2) SA 371 (CC) that:

[85] Subject to the requisite actual or constructive knowledge by the creditor, a delictual debt becomes 'due', within the meaning of s 12(3) of the Prescription Act and s 3(2)(a) of the Institution Act, once the debtor's wrongful and deliberate or negligent conduct has caused the creditor to suffer damage. That is when the creditor is entitled in law to institute action for the recovery of damages.

[86] In terms of s 12(3) of the Prescription Act and s 3(3)(a) of the Institution Act, this is subject to the qualification that time does not start to run (that is, the debt is not deemed to be 'due') until the creditor has actual or constructive knowledge of the identity of the debtor and the 'facts from which the debt arises'. The 'facts' do not include that the debtor's conduct was wrongful or negligent or that the creditor has a right to sue the debtor, nor does it include legal conclusions that may be drawn from the facts. This court has cited with approval the proposition that time starts to run against a creditor when it has 'the minimum facts that are necessary to institute action' and that the running of prescription is not postponed until the creditor 'becomes aware of the full extent of its legal rights'.

[20] For present purposes, what was said in *Thembanani* at [85], must be understood within the context and nature of that claim in question. In *Thembanani* the claim concerned a delictual claim for damages against the President, relying on unconstitutional conduct on his part as a component of delictual wrongfulness. In the present matter, the plaintiff's claim arises from 'professional

negligence'. In *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC), the court held:

[42] ... To require knowledge of causative negligence for the test in s 12(3) to be satisfied would set the bar too high. However, in 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...

...

[45] 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 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 s 12(3).

*[46] The respondent did not aver that the applicant had knowledge of the facts that caused his problem. The applicant did aver in the High Court that he did not know before the end of August 2006 the reason for his condition or the cause of his condition. This averment related to both the issue of negligence and the factual element of causation. In *Dr Koning and Mr Ndlovu's* affidavits the respondent did not deny this averment. A firm finding that the applicant did not know what caused his condition as at 5 August 2006 can, therefore, be justifiably made. That was a material fact that a litigant wishing to sue in a case such as this would need to know. This would be the case whether one sued on the basis of a delict or a breach of contract. On this basis it cannot be said that the debt was due before 5 August 2006.*

[47] ... That opinion was given years after the events in issue. Without advice at the time from a professional or expert in the medical profession, the applicant could not have known what had caused his condition. It seems to me that it would be unrealistic for the law to expect a litigant who has no knowledge of medicine to have knowledge of what caused his condition without having first had an opportunity of consulting a relevant medical professional or specialist for advice. That in turn requires that the litigant is in possession of sufficient facts to cause a reasonable person to suspect that something has gone wrong and to seek advice.

[21] Finally, in *Loni*, the court, comparing the facts with those in *Links*, held that:¹²

[32] The objective assessment, which was appropriately applied by both courts, established that a reasonable person in the position of the applicant would have realised that the treatment and care which he had received were substandard and were not in accordance with what he could have expected from medical practitioners and staff acting carefully, reasonably and professionally. On an assessment of the applicant's evidence, it is clear that by December 2000 he had already suffered significant harm (leaving aside the question of osteitis), and it would have been apparent from a reasonable assessment that the pain and suffering which he had endured were a direct result of the substandard care which he had received.

...

[34] When the principle in Links is applied to the present facts, the applicant should have over time suspected fault on the part of the hospital staff. There were sufficient indicators that the medical staff had failed to provide him with proper care and treatment, as he still experienced pain and the wound was infected and oozing pus. With that experience, he could not have thought or believed that he had received adequate medical treatment. Furthermore, since he had been given his medical file, he could have sought advice at that stage. There was no basis for him to wait more than seven years to do so. His explanation that he could not take action as he did not have access to independent medical practitioners who could explain to him why he was limping or why he continued to experience pain in his leg, does not help him either. The applicant had all the necessary facts, being his personal knowledge of his maltreatment and a full record of his treatment in his hospital file, which gave rise to his claim. This knowledge was sufficient for him to act. This is the same information that caused him to ultimately seek further advice in 2011.

The issue of prescription

[22] From a consideration of the above authorities, it would therefore seem that the defendant has to prove: (a) that the plaintiff had knowledge that the brain injury Z B sustained during birth, was as a result of the medical treatment received by her; (b) that the plaintiff had knowledge that the injuries were due to the fault of the defendant (or the medical staff); (c) that such knowledge

¹² See, also, *Loni supra* at [31], where the fullness of the material facts arising from the plaintiff's evidence were set out, in particular, that those facts were labelled as "the uncontroverted evidence".

sufficiently support reasonable grounds for suspecting fault and to cause the plaintiff to seek further advice; and, (d) that since she had acquired all of these and had reason to suspect fault, a period of more than 3 years had lapsed.¹³

[23] In my view, the defendant failed to do so. The relevant parts of the statement (at paragraph 4.6.1) reveals that it was only in January 2022, during a consultation with a medical doctor, that the plaintiff learned that: (a) Z B had a neurological brain injury; (b) the neurological brain injury was occasioned at birth; and (c), the persons who assisted her during Z B's birth did not properly manage her labour, alternatively, missed foetal distress, in that they did not manage same properly.

[24] In *Links* it was said that in order for a party to successfully rely on a prescription claim in terms of s 12(3) of the Prescription Act, he or she must first prove what the facts are that the plaintiff is required to know before prescription could commence running, and that the plaintiff had knowledge of those facts.¹⁴

[25] At best for the defendant, the reliance on paragraph 4.7 of the statement, that '*post birth, but before discharge from Frontier Hospital in January 2018, the plaintiff was counselled and told that Z B would not follow a normal growth trajectory*', falls far short of proving that the plaintiff was possessed of the necessary knowledge in order for prescription to have commenced. In order for the defendant to have succeeded on the strength of paragraph 4.7, the actual content of the counselling received had to be proven (i e something that comes close to that set out in paragraph 4.6.1 of the statement).

¹³ See, for example, *Member of the Executive Council for the Department of Health, Eastern Cape v Gamede* (CA05/2022) [2022] ZAECHMHC 45 (29 November 2022) at [15], where the full court said this: [15] ... *The MEC must then demonstrate that Mr Gamede was in possession of sufficient facts, by no later than 4 February 2014, to cause him, on reasonable grounds, to suspect that it was the fault of hospital staff that had caused him injury so as to prompt him to seek further advice. Until Mr Gamede had this comprehension, he lacked knowledge of the necessary facts contemplated in s 12(3). The MEC did not aver in the plea that Mr Gamede had knowledge of the facts that caused his problem. In replication, Mr Gamede indicates that he only acquired the knowledge of all the facts to constitute the cause of action on 4 August 2016.*

¹⁴ *Links supra* at [24].

[26] But there is a further crucial observation to be made: at paragraph 4.4.1 of the statement, the parties agreed that Z B was born on 19 January 2018; at paragraph 8.1, the defendant's contention records that the plaintiff's personal and representative claims arose on 19 January 2018; yet, at paragraph 4.7, the date is some unknown date after 19 January 2018 but before discharge (being a date '*more than a week after ZB's birth*'). In other words, the defendant cannot rely on both contentions; it is either that the plaintiff's claims arose on 19 January 2018 or on another date (unknown) when she was counselled before discharge.

[27] The authorities above are in agreement that the defendant had to prove when the debt fell due and when prescription commenced, and in the 'professional negligence' context of the present case, has failed to do so, resulting in no burden shifting over to the plaintiff to prove otherwise.

[28] It must be stressed that the defendant, more consistent with *Links* than with *Loni*, did not rely upon the proviso at the end of s 12(3) of the Prescription Act.¹⁵ Therefore, the case of the defendant relied on the actual as opposed to constructive knowledge of the plaintiff.¹⁶

[29] In closing, the defendant has failed to prove that the plaintiff's debt (in both her capacities) arose on 19 January 2018. As a result, the special plea of prescription must fail.

The non-compliance with the Institution Act

[30] The conclusion under the prescription issue has the effect, as the parties during argument also seem to have understood, that the defendant's reliance on the plaintiff's failure to timeously give notice in terms of the Institution Act, should follow suit and must fail. In my view, this is consistent with what the Constitutional Court said in *Tembani* at paragraphs [84] to [86] of the

¹⁵ That is, that '*...a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care*'.

¹⁶ *Tembani supra* at [84]-[86].

relationship between the Institution Act and the Prescription Act, concerning when the debt is ‘due’.

[31] Once more, the parties are bound (absent further agreement) by the four corners of the statement presented to court, which in turn, confines the court’s consideration to the questions of law (or the ‘dispute’) and their respective contentions.¹⁷

[32] The parties specified the ‘dispute’ in terms of paragraph 5.2 of the statement to whether *‘failure to deliver a statutory letter to the relevant official of the Eastern Cape Department of Health with 6 (six) months of the plaintiff’s discharge from hospital’*. The defendant’s contentions in paragraph 8.2 was limited to *‘within 6 (six) months from 19 January 2018 (by 20 July 2018) the plaintiff was obligated to deliver her statutory notice in terms of section 3(2) of the Act’* and in 8.6 to *‘the plaintiff did neither of what is contemplated in paragraphs 8.2 and 8.3’*.

[33] Without repeating what was said above, a stated case requires absolute agreement on the facts, the statement of the questions of law, and requiring the parties, on the strength of these, to record their respective contentions. Should a party seek to depart from, for example, its contentions in the statement, it would be no different than a ‘trial by ambush’ similar to a party departing from his pleaded case.¹⁸

[34] The questions that arise are whether on the non-compliance issue, the defendant is limited to only the question whether the plaintiff was obliged to deliver her s 3(2) notice within six months from 19 January 2018, or whether the further questions, that the s 3(2) notice does not set out a claim by the plaintiff in her personal capacity and that the facts giving rise to the debt is not correctly particularised in terms of ss 2(b), also stand to be decided.

[35] During his address, Mr Bodlani for the plaintiff argued that the defendant was bound by the limitations of its contentions, adding that by the time the special plea was filed, less was clearly known by the defendant (considering the denial of any notice whatsoever). From this, it

¹⁷ Cf footnotes 6 & 7 *supra*.

¹⁸ See, for example, *Mtokonya* at [16], although in the context of a court deciding issues beyond the statement.

was understood to mean that this is why the issue in the statement is more refined than that in the special plea. In reply, Mr Jikwana for the defendant submitted that reference is made in the second special plea, in the alternative at paragraph 5.3, to the issue that the s 3(2) notice did not set out ‘*the nature of the cause of action and or facts upon which the claim is based*’. In his submission, these further issues stand to be decided too.

[36] Even if the further issues are incorporated into the statement by reference to the second special plea, there are no contentions made consistent with the defendant’s submissions. Absent any supporting contentions, the plaintiff was entitled to accept that the refined issues (set out in paragraph 5.2 of the statement) was what it purported to be. Moreover, it can reasonably be accepted that when parties draw their pleadings, they have not had sight of all the evidence, so that once they have, the issues become refined at trial or in a statement.

[37] I therefore find that the above further questions do not arise, and accordingly, the only question is whether the defendant has succeeded or failed to prove that the s 3(2) notice was delivered late, as contended. Following on the conclusion of the first issue in terms of the Prescription Act, the second issue of non-compliance with s 3(2) of the Institution Act, must similarly fail.

[38] Even if I were wrong in this conclusion, I am not persuaded by the argument that the misstatement of the minor child’s injury as a ‘fractured arm’, is cause enough to uphold the special plea of non-compliance with the Institution Act in respect of the plaintiff’s claim in her representative capacity. The purpose of the required notice has been stated on various occasions before and need no extensive repetition: the purpose of the notice is to afford the organ of state the opportunity to investigate claims laid against it, to consider them responsibly and to decide before getting embroiled in litigation at public expense whether to settle the claim.¹⁹ In my view, to uphold the special plea on the strength of the misstatement, disregarding the remainder of the letter, which dealt, in my view, with more ‘valuable’ information for the sake of investigating the contemplated claim, would be a conclusion against the true purpose of the Act. This approach

¹⁹ *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at 126D-E; *Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd* 2010 (4) SA 109 (SCA) at [13].

would accord with the purposive approach our courts have come to endorse,²⁰ and would avoid placing form over substance.²¹

[39] However, and if I were wrong to limit the second issue as I have, the further question that the s 3(2) notice did not notify the defendant of a claim by the plaintiff in her personal capacity, stand on a different footing. It was accepted during argument, with reference to *Gcam-Gcam v Minister of Safety and Security* (187/11) [2017] ZAECMHC 31 (12 September 2017) by Mbenenge ADJP (as he then was), that at this stage ‘...the question whether or not the appropriate functionary has been served ought merely to hinge on the facts of each case, the enquiry being purely factual and requiring no exercise of a discretion; considerations of fairness and prejudice should not come into play during this enquiry. Only when condonation is sought in terms of section 3 (4)(b) should a discretion, hinging on, inter alia, whether the organ of State was not unreasonably prejudiced by the failure to serve the notice on the proper functionary, be exercised.’

[40] The ‘fractured arm’ and ‘no personal demand by the plaintiff’ contentions are distinguishable from one another: the one misstates a fact whereas the other does not state a fact at all. Therefore, had I not reached the conclusion above that the non-compliance issue must be limited, it would seem as if the plaintiff did not comply with the provisions of s 3 of the Institution Act for her personal claim, and that, adopting the reasoning in *Gcam-Gcam* above, condonation might have been necessary.

Costs

[41] Considering that the plaintiff has been successful on both special pleas, I see no reason why the general rule, that costs follow the result, should not be applied. In the statement, the plaintiff prayed that the defendant be ordered to pay costs inclusive of the costs of two counsel on scale C. The employment of two counsel in my view was justified by the plaintiff, taking into

²⁰ See, for example, *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at [25]; *Minister of Police and Others v Samuel Molokwane* (730/2021) [2022] ZASCA 111 (15 July 2022).

²¹ See, for example, *Minister of Safety and Security v Bahle* (362/09) [2015] ZAECMHC 43 (19 March 2015) at [14].

account (a) her risk had the special pleas succeeded, (b) that medical negligence matters such as the present are commonly accepted to warrant the costs of two counsel, and more than that, (c) that the plaintiff had, before the parties agreed to proceed by stated case, intended on proceeding with the trial on all the issues (but for the issue of quantum).

[42] I am, however, not persuaded that the costs of two counsel on scale C is warranted, instead, I intend on allowing senior counsel's fees on scale C, and junior counsel on scale B.

Conclusion

[43] Accordingly, the following order is granted:

- 43.1. The issues of the defendant's special pleas of prescription in terms of Act 68 of 1969 and of non-compliance with the provisions of Act 40 of 2002, are separated from the issues of liability and quantum, the latter being postponed *sine die*.
- 43.2. The defendant's special plea of prescription in terms of section 11 of Act 68 of 1969, is dismissed.
- 43.3. The defendant's special plea of non-compliance with the provisions of section 3 of Act 40 of 2002, is dismissed.
- 43.4. The defendant shall pay the plaintiff's costs occasioned by the dismissal of the special pleas, such costs to be inclusive of the costs of two counsel, where so employed, the costs of senior counsel to be allowed on scale C, and the costs of junior counsel to be allowed on scale B.

C D KOTZÉ

ACTING JUDGE OF THE HIGH COURT

Date of hearing:

27 January 2025

Date of Judgment:

24 February 2026

Date of directives:

20 August 2025 ; 17 September 2025 ; 2 October 2025

Date of case management meeting:

26 September 2025

Date of heads of argument:

3 November 2025 ; 6 November 2025

Appearances:

For the plaintiff : Adv A Bodlani SC with Adv Z Nxazonke-Mashiya, instructed by S Booie & Sons Attorneys (ref: B6/10/21).

For the defendant : Adv T M Jikwana instructed by The Office of the State Attorney, East London (ref: 315/22 – P11 (Mrs Tongo)).