THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1087/2019

In the matter between:

THE MEC FOR HEALTH, WESTERN CAPE **APPELLANT**

and

MPUMELELO SIDWELL COBOZA **RESPONDENT**

Neutral citation: *MEC for Health, Western Cape v Coboza* (1087/2019) [2020] ZASCA 165 (10 December 2020)

Coram: VAN DER MERWE, MOLEMELA and DLODLO JJA and SUTHERLAND and UNTERHALTER AJJA

Heard: 23 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 10 December 2020.

Summary: Extinctive prescription – s 12(3) of Prescription Act 68 of 1969 – involves two enquiries in respect of facts from which the debt arises (primary facts) – first: determination of primary facts – second: ascertainment of when primary facts were known or should reasonably have been known.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Baartman J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Van der Merwe JA (Molemela and Dlodlo JJA and Sutherland and Unterhalter AJJA concurring)

[1] On 8 July 2016, the respondent, Mr Mpumelelo Sidwell Coboza, instituted an action in the Western Cape High Court, Cape Town against the appellant, the Member of the Executive Council for Health, Western Cape. The respondent alleged that he had suffered damages in the amount of R4 750 000 as a result of the negligence of the medical staff employed by the appellant at specified provincial hospitals. In a special plea, the appellant contended that the respondent's claim had prescribed and that he had failed timeously to comply with the provisions of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. By agreement, Baartman J determined the special plea separately. She dismissed it with costs, but granted leave to the appellant to appeal to this court.

[2] The following common cause facts provide the background for the adjudication of the appeal. During May or June 1998, the respondent underwent a surgical procedure at Somerset Hospital to drain a rectal abscess. For this purpose, a spinal anaesthetic was administered. Subsequent to this procedure, the respondent experienced pain in the area where the spinal anaesthetic had been administered and found it difficult to walk. During 1998 and 1999 he attended Tygerberg Hospital on various occasions for treatment of these

symptoms. On 15 July 1999, the respondent underwent further surgery at Tygerberg Hospital, where a T7/T8 laminectomy was performed. Following this, he was treated at Karl Bremer Hospital for a period of three months. However, his neurological condition continued to deteriorate. Despite the performance of a further surgical procedure at Tygerberg Hospital on 27 September 2005, when a cysto-peritoneal shunt was introduced, the respondent's condition worsened further. By November 2005 he tragically was in an irreversible paraplegic condition.

[3] In the light of the conclusion that I have reached, it is not necessary to consider the alleged non-compliance with the Institution of Legal Proceedings Against Certain Organs of State Act. The plea of prescription focused on the epidural anaesthesia that had been performed during May/June 1998. The appellant pleaded that by September 2005 at the latest, the respondent had been 'in possession of sufficient facts to cause him, on reasonable grounds, to think that the cause of his walking difficulties could possibly be attributed to the fault of the medical staff who drained his abscess'. This was the foundation of the appellant's averment that prescription had commenced to run during 1998 or 1999 or, at the latest, during September 2005. Therefore, so the plea of prescription concluded, the respondent's claim had prescribed well before the summons was issued.

[4] At the hearing of the special plea, the parties placed a statement of agreed facts before the court. The appellant correctly accepted the onus to prove prescription but led no evidence. Only the respondent testified. The gist of his evidence was that until January 2016 he had been unaware that he might have a claim based on substandard medical treatment. He did concede, however, that he had been informed during 1998 that 'the problem lay with the spinal anaesthetic and that there was water on his spinal cord that needed to be drained'.

[5] In the light of the allegations in the special plea, the appellant regarded this concession as decisive of the matter. The court a quo was not persuaded. It said:

'This is not the equivalent of knowing that the negligent application of the anaesthetic had caused the water on his spine.

. . .

There is no basis to suggest that the plaintiff knew or had reasonable grounds to suspect that the negligent application of the spinal anaesthetic had caused the water on his spine.'

[6] Prescription begins to run when the debt in question is due, that is, when it is owing and payable. Section 12(3) of the Prescription Act 68 of 1969 provides:

'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.'

[7] In the present matter only the requirement of knowledge of 'the facts from which the debt arises' needs to be considered. These are the minimum essential facts that the plaintiff must prove in order to succeed with the claim. See *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) paras 16, 18, 19 and 22; *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) para 17 and the footnotes thereto; *Mtokonya v Minister of Police* [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC) para 48. Legal conclusions, such as the invalidity of a contract or that the delictual elements of negligence or wrongfulness have been established, are not facts. Neither is the evidence necessary to prove the essential facts. See *Truter v Deysel* paras 17 and 20 and *Mtokonya* paras 44-45 and 50-51.

[8] Once the facts from which a debt arose (primary facts) have been determined, the enquiry turns to the plaintiff's knowledge of the primary facts. Section 12(3) therefore brings into play a further set of facts. They inform the determination of when the plaintiff had actual knowledge of the primary facts or objectively should reasonably have had knowledge thereof. Although there may be some overlapping of facts, it is important to bear in mind that these are distinct enquiries.

[9] The facts in *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) provide an illustration of this. There the plaintiff permanently lost the use of his left hand and forearm subsequent to medical treatment. The Constitutional Court had to determine whether the plaintiff's medical negligence claim had prescribed. In para 46 of the judgment reference was made to an essential primary fact,

namely the factual cause of the plaintiff's condition. It was not alleged that the plaintiff had actual knowledge thereof at the relevant time. Paragraph 47, therefore, dealt with when the plaintiff ought reasonably to have had knowledge of this primary fact. The question was whether the plaintiff had for more than three years prior to the service of the summons been in possession of sufficient facts to cause him on reasonable grounds to think that his injuries were due to the fault of the medical staff and to seek advice. In *Links* this question was answered in the negative. The same question, I venture to say, was answered in the affirmative in *Loni v MEC for Health, Eastern Cape (Bhisho)* [2018] ZACC 2; 2018 (6) BCLR 659 (CC); 2018 (3) SA 335 (CC). It is not my understanding that the Constitutional Court in either *Links* or *Loni* considered that the legal conclusion as to negligence constitutes one of the primary facts from which the debt arises.

[10] It follows that the court a quo erred in requiring knowledge of negligence as a prerequisite for the running of prescription to commence. Importantly, however, regard had to be had to the alleged factual causes of the respondent's paralysis. These were indispensable primary facts. They had to be gleaned from the respondent's particulars of claim. What had to be decided was whether the debt relied upon in the particulars of claim, had prescribed.

[11] The particulars of claim related the medical procedures and treatment that I have alluded to in para 2 above. After alleging that the appellant's servants 'had an obligation to provide plaintiff with professional medical advice, service and treatment with the skill, diligence and care reasonably required of doctors in their respective fields of specialisation and of hospital employees', the particulars of claim proceeded as follows:

'In breach of the duty of care owed by defendant and/or his servants to plaintiff, defendant and/or his servants were negligent in failing to timeously administer the appropriate treatment reasonably required by plaintiff when he attended the said hospitals subsequent to the surgery of May/June 1998, in circumstances where timeous intervention would have salvaged his neurological condition.

As a consequence of these delays and defendant's breach of the duty of care owed to plaintiff, plaintiff suffered neurological damage and was rendered a motor and sensory incomplete paraplegic.'

[12] It is quite clear that the respondent alleged that the failure to timeously administer the appropriate treatment subsequent to the surgery of May/June 1998, had caused his condition. Even if the particulars of claim could be read generously to include the May/June 1998 spinal anaesthetic as a cause of his paraplegic condition, they clearly alleged much more. However, the particulars of claim did not specify the 'appropriate treatment' nor when it should timeously have been administered.

[13] The appellant could have acquired this particularity under various provisions of the Uniform Rules of Court, but did not. The consequence was that prescription had been raised in the air, without reference to the relevant primary facts upon which the respondent's claim was founded. Because these facts were not pleaded, it could obviously not be determined when the respondent knew the primary facts or should reasonably have known them. In the result the determination of the plea of prescription was an exercise in futility. The court a quo should have dismissed the special plea on this ground and it is on this basis that the appeal must fail.

[14] The appeal is dismissed with costs.

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C H G VAN DER MERWE
JUDGE OF APPEAL

Appearances:

For appellant:	B Joseph SC, with him N Kahn
Instructed by:	State Attorney, Cape Town
	State Attorney, Bloemfontein
For respondent:	C Webster SC
Instructed by:	Jonathan Cohen & Associates, Cape Town
	Matsepes Inc., Bloemfontein