

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case no: 2020/41018

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
_____	_____
DATE	SIGNATURE

In the matter between:

A[...] N[...]

Plaintiff

And

LIFE SPRINGS PARKLAND CLINIC

First Defendant

DOCTOR MAREK RADZIEJOWSKI

Second Defendant

This judgment has been delivered by uploading it to the caselines digital data base of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties. The deemed date and time of the delivery is

JUDGMENT

Sutherland DJP:

- [1] The plaintiff has alleged in his claim that the defendants, the first being a hospital and second being a surgeon, are liable to pay damages owing to their negligence in treating him which negligence resulted in much pain and suffering. The second defendant has framed an exception to the case brought. The first defendant has entered a notice to oppose but has not yet pleaded. The exception articulates, in effect, a plea of prescription. That is the sole issue put before this court.
- [2] On the excipient's argument prescription ran from 26 January 2016. If this is correct that claim has indeed prescribed. The plaintiff's case is that prescription began to run only from 19 October 2020, safely within three years before the issue of summons in November 2020. The enquiry is, thus, into what knowledge the plaintiff had in 2016 and whether that satisfies the test for a due debt, was in respect of which the plaintiff was '...in possession of sufficient facts to cause [the plaintiff] on reasonable grounds to think that the injuries were due to the fault of the medical staff' and in consequence thereof, '...to cause [the plaintiff] to seek further advice'.¹
- [3] The facts are of course those as alleged in the particulars of claim, taken as read. The plaintiff's leg was treated on 27 June 2011 by the defendants after he was injured in an industrial workplace incident. The treatment included a skin replacement graft. The condition of the leg remained problematic as it was chronically infected. This endured for years. In 2016 he was treated by other doctors, who, upon opening the wound found that a surgical swab had

¹ *Links v Department of Health 2016 (4)SA 414(CC) at para [42]*.

been left in the wound. The presence of this swab is the core element in the cause of action pleaded.

[4] The critical aspect of the claim is articulated in para 4.1 of the particulars of claim:

‘4.1 The aftermath of the procedure was caused by the Defendant negligent conduct in the breach of their aforesaid duties of care and/ or alternatively contractual obligations in all, a number or one of the following aspects:

4.1.1 He failed to ensure that the Plaintiff’s leg is properly cleaned, stitched and dressed.

4.1.2 He failed to take extra caution and diligence when treating the wound.

4.1.3 He negligently left a bandage swab into the left leg of the Plaintiff and failed to apply himself with the expected highest of care and skill.

4.2 The second Defendant’s operative care of the Plaintiff constituted a negligent breach of the aforesaid duties of care and or alternatively contractual obligation in that the Defendant should, by exercising the degree of skill, care and diligence to be expected of them, that during the procedure of cleaning and dressing the wound, damage was caused to the leg of the Plaintiff.

4.3 The Defendant should have removed and or avoided the cloth swab from the Plaintiff’s leg at the time of his attendance to the Plaintiff and his failure in this regard was negligent.’

[5] The question arises whether the knowledge possessed by the plaintiff at this moment triggered the running of prescription.

[6] He first saw an attorney on 5 October 2017. On 18 June 2018 a letter of demand was dispatched by his attorney. The argument advanced by the plaintiff is that until medical information had been gathered, he had insufficient information to sue. In argument the example of this medical information was said to be the radiology report. Thus, on this premise he only obtained what he needed on 17 October 2020, the date he alleges that prescription began to run.

[7] In my view the contentions advanced on behalf of the plaintiff confuse the knowledge of the essential facts with the marshalling of the evidence needed to substantiate the allegations of fact.

[8] In *Loni v MEC for Health, Eastern Cape*, the Constitutional Court dealt with this type of issue thus:

[33] The applicant was discharged from hospital for the second time during July 2001. Upon his discharge, he still experienced pain in his leg and was limping. He was given his hospital file. There is no evidence of what transpired, or of the applicant's actions, between 2001 and 2008. In 2008 he consulted a number of medical practitioners and was eventually advised that he was disabled. In 2011 he was advised by Dr Olivier that the medical staff at the hospital had been negligent. The applicant submits that he was only able to consult independent medical professionals in 2008 after he had secured medical insurance.

[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.

[35] It is clear that long before the applicant's discharge from hospital in 2001 and certainly thereafter, the applicant had knowledge of the facts upon which his claim was based. He had knowledge of his treatment and the quality (or lack thereof) from his first day in hospital and had suffered pain on a continuous basis subsequent thereto. The fact that he was not aware that he was disabled or had developed osteitis is not the relevant consideration.²

[9] It was suggested on behalf of the plaintiff that these passages support the contention that the patient needs to have the medical data before the critical state of knowledge can arise. This is an incorrect reading of the text.

Knowledge per se is not to be elided with the source of the knowledge. On the

² 2016 (3) SA 335 (CC) at paras [33] to [35].

facts in Loni, the patient could obtain the knowledge from the medical file, but in the case of the plaintiff, he needed no file to inform him that leaving a surgical swap in his leg and treating him for a further four's years without discovering that blunder was the explanation for his suffering.

[10] In *Mtokonya v Minister of Justice*, the Constitutional Court addressed this issue:

[62] We decline the invitation by Counsel for the applicant to hold that the meaning of the provision in section 12(3) [of the Prescription Act] that a debt shall not be deemed to be due until the creditor has "knowledge . . . of the facts from which the debt arises" includes that the creditor must have knowledge of legal conclusions, i.e. that the conduct of the debtor was wrongful and actionable. We decline it for a variety of reasons. I mention a few. The text of section 12(3) does not support the contention, especially as section 12(3) makes it clear that it refers to knowledge "of the facts from which the debt arises". That is apart from knowledge of the identity of the debtor.

[63] Furthermore, to say that the meaning of the phrase "*the knowledge of . . . the facts from which the debt arises*" includes knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law would render our law of prescription so ineffective that it may as well be abolished. I say this because prescription would, for all intents and purposes, not run against people who have no legal training at all. That includes not only people who are not formally educated but also those who are professionals in non-legal professions. However, it would also not run against trained lawyers if the field concerned happens to be a branch of law with which they are not familiar. The percentage of people in the South African population against whom prescription would not run when they have claims to pursue in the courts would be unacceptably high. In this regard, it needs to be emphasised that the meaning that we are urged to say is included in section 12(3) is not that a creditor must have a suspicion (even a reasonable suspicion at that) that the conduct of the debtor giving rise to the debt is wrongful and actionable but we are urged to say that a creditor must have knowledge that such conduct is wrongful and actionable in law. If we were asked to say a creditor needs to have a reasonable suspicion that the conduct is or may be wrongful and actionable in law, that would have required something less than knowledge that it is so and would not exclude too significant a percentage of society'.

[11] In the result the exception by the second defendant must be upheld.

[12] The costs should follow the result.

[13] ***The Order***

- (1) The exception is upheld.
- (2) The Plaintiff shall bear the costs of the exception.

Roland Sutherland
Deputy Judge President, Gauteng
Division, Johannesburg

Heard: 30 January 2024

Delivered:

Appearances:

For the Plaintiff: MB Tshabangu (with rights of appearance)
of MB Tshabangu Incorporated

For the Second Defendant: Adv E Botha
Instructed by Macrobert Incorporated.