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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

DEREK REGINALD PIZANI ..... appellant

versus

THE HONOURABLE THE MINISTER
OF DEFENCE..... respondent.

CORAM: CORBETT, HEFER, GROSSKOPF, VIVIER, JJA, et STEYN, AJA.

DATE OF HEARING : 5 May 1987

DATE OF JUDGMENT: 25 August 1987

J U D G M E N T

CORBETT JA

This, in my view, is an unfortunate case. At this stage the undisputed facts are as follows.

/ During.....

During the relevant period the appellant, a young man aged 21, was a member of the Permanent Force of the South African Defence Force ("SADF"). He held the rank of corporal and was attached to the security section at Defence Headquarters. On 14 September 1983 he attended a "braaivleis" arranged by the officer commanding his unit. The function was held at the Fountains resort near Pretoria. All members of the unit, apart from those on duty, were expected to attend. At some stage appellant and others decided to go to have a swim in the Fountains swimming pool. To do so they had to climb over a fence. While climbing over the fence on his way back appellant tripped and fell. He landed on his left elbow. The following morning appellant's elbow was very painful and he reported sick. At the sick bay he was seen by the Army medical officer on duty, a Dr M Schlosberg, who held the rank of lieutenant. Dr Schlosberg took appellant's arm and moved it into a few positions.

Appellant told him that it was very painful. Dr Schlosberg then informed appellant that his elbow was just badly bruised. He prescribed some anti-inflammatory tablets and instructed appellant to move his arm as much as possible. X-ray facilities were available, but appellant was not referred to the X-ray unit.

Appellant proceeded to carry out Dr Schlosberg's instructions. He took part in drill and physical training and played games. He even tried to concentrate on using his left arm so as to give it as much exercise as possible. He nevertheless continued to suffer severe pain in his left elbow. As a result of this appellant consulted a private medical practitioner, a Dr S Dyson, who happened to be the partner of the district surgeon of Benoni. Precisely when this happened is not clear from the papers. It was probably during October 1983. Dr Dyson arranged for appellant's

elbow to be X-rayed and this revealed a fracture of the radial head. Dr Dyson referred appellant back to Dr Schlosberg, who in turn referred appellant to an army medical officer, Dr Adno, at 1 Military Hospital. Dr Adno, after obtaining further X-ray plates of appellant's elbow, confirmed the diagnosis of a fractured radial head and prescribed, as treatment, a two-week course of physiotherapy.

This treatment was evidently unsuccessful and appellant again consulted Dr Dyson. The latter referred him to an orthopaedic surgeon, a Mr van Rooyen. Mr van Rooyen advised surgery and early in 1984 an operation was performed involving the removal of the radial head of appellant's left elbow and its replacement by a Swanson-type poly-ethylene prosthesis.

On 10 April 1984 appellant instituted an action in the Transvaal Provincial Division claiming damages

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from respondent, the Minister of Defence, in the sum of R25 632,26. It is appellant's case, as stated in the pleadings -

(i) that in treating him Drs Schlosberg and Adno acted in the course and scope of their employment by the respondent;

(ii) that under the circumstances Dr Schlosberg and Dr Adno were each under a duty of care to appellant to examine him in a thorough, professional and competent manner and to exercise due care and skill in their respective diagnoses of his injury and in prescribing a proper course of treatment therefor;

(iii) that Dr Schlosberg failed to examine appellant in a thorough, professional and competent manner in that he should have examined him

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in such a way (including referring appellant for X-rays of his elbow) as to elicit the true nature of his injury, and did not do so; and he failed to treat the injury in a proper manner;

(iv) that Dr Adno, with full knowledge of the facts, failed to examine the appellant in such a way as to elicit the true nature of the harm caused in consequence of Dr Schlosberg's faulty diagnosis and failed to prescribe proper treatment to repair the harm, but instead prescribed a course of treatment which was of no benefit to appellant and, if anything, aggravated his condition;

(v) that in consequence of the breaches of duties of care and the negligence of Drs Schlosberg and Adno appellant was required to undergo the surgery already described and suffered damages

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in the amount claimed, this amount being comprised as follows:

(a)	medical and hospital expenses	R632,26
(b)	general damages for pain and suffering and loss of amenities of life....	25 000,00
		R25 632,26

To appellant's claim, in so far as it is founded on the breach of duty of care and negligence of Dr Schlosberg, the respondent raised the special plea that it was barred by the provisions of sec. 113(1) of the Defence Act 44 of 1957 ("the Act") in that more than six months had elapsed between the date on which appellant's cause of action arose, viz. 15 September 1983, and the date upon which action was instituted, viz. 10 April 1984; and asked that this aspect

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of appellant's claim be dismissed with costs. Respondent also pleaded generally to the merits of appellant's claim as a whole. To this special plea appellant filed a replication in which he, firstly, denied that his cause of action arose on 15 September 1983 and, secondly, pleaded, in the alternative, if it be found that appellant's cause of action arose before 11 October 1983 (ie more than 6 months prior to the institution of action), as follows:

(a) The appellant, being a member at all material times of the SADF, was under regulation 11 of Chapter XV of the General Regulations for the SADF and the Reserve ("the Regulations") by law obliged to accept the arrangements made by the Surgeon General for the provision and administration of any treatment for the injury to his left elbow.

(b) The Surgeon General, acting through duly authorized subordinates, arranged the treatment for the plain-

tiff's injury.

(c) Prior to 11 October 1983 the appellant —

(i) was not aware of the breaches of care and negligence of Dr Schlosberg and/or Dr Adno; and

(ii) because of the provisions of the Regulations, read with the Act and the facts stated in (b) above, was not in law entitled to seek any treatment for his injury other than that arranged for him by the Surgeon General.

(d) It was therefore impossible for the appellant to comply with the provisions of sec. 113(1) of the Act before 11 October 1983.

(e) Alternatively to para. (d), it would be unconscionable conduct for respondent to raise the special plea based on sec. 113(1) of the Act, and he is accordingly debarred from doing so.

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At a pre-trial conference the parties agreed to ask the Court hearing the matter to determine as a separate issue in terms of Rule 33(4) of the Uniform Rules of Court the questions of law arising from respondent's special plea. To this end certain facts were agreed to by the parties. In addition to those facts already recounted, it was also agreed for the purpose of adjudicating the special plea —

(1) that appellant was a "medical layman";

(2) that the diagnosis of the nature of the injury to appellant's elbow and the proper treatment for that injury were matters upon which during the period 15 September to 11 October 1983 only medical practitioners - and not laymen - were qualified to pronounce;

(3) that the treatment received by appellant from Dr Schlosberg was carried out in pursuance of the Act, read with the Regulations; and

/ (4) that.....

(4) that appellant was not aware, prior to 11 October 1983, of the alleged breaches of care and negligence attributed to Dr Schlosberg.

The matter came before ELOFF J, who agreed to adjudicate on the validity of the special plea in terms of Rule 33(4). Appellant gave evidence briefly and the issue was argued. ELOFF J came to the conclusion that the special plea was well-founded and dismissed with costs appellant's claim to the extent that it was founded on the breach of a duty of care owed to him by, and the negligence of, Dr Schlosberg. Appellant appeals to this Court against this decision by virtue of leave given him on application to the Chief Justice.

The relevant portion of sec. 113(1) of the Act reads as follows:

> "No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a

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> period of six months ..... has elapsed since the date on which the cause of action arose....."

It is conceded by appellant's counsel - correctly in my view - that sec. 113(1) makes provision for an expiry period ("vervaltermyn") and that the provisions of the Prescription Act 68 of 1969, more particularly secs. 12 and 13 thereof, have no application. This was decided to be the case in relation to sec. 32(1) of the Police Act 7 of 1958 in the matter of Hartman v Minister van Polisie 1983 (2) SA 489 (A) - there it was the applicability of sec. 13(1) of the Prescription Act that was in issue - and in this regard I can see no difference between sec. 32(1) of the Police Act and sec. 113(1) of the Act (see also Brosens v Minister van Verdediging 1983 (3) SA 803 (T)). The consequence of this is that a plaintiff who has failed to comply with the time limitation of sec. 113(1) is generally debarred from suing and cannot rely upon any of the grounds

which delay the commencement of the running of prescription (see sec. 12 of the Prescription Act) or delay the completion of prescription (see sec. 13 of the Prescription Act). One of the grounds which delays the commencement of the running of prescription is the creditor's lack of knowledge of the identity of the debtor and the facts from which the debt arises. This is provided for in sec. 12(3) which reads:

> "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."

From a general equitable point of view it seems unfortunate that this provision of the Prescription Act, at least, does not apply to expiry periods.

Some amelioration of the guillotine-like effect of an expiry period was, however, provided by the case of

Montsisi v Minister van Polisie 1984 (1) SA 619 (A), in which this Court decided that the principle expressed by the maxim lex non cogit ad impossibilia applied to the expiry period contained in sec. 32(1) of the Police Act 7 of 1958. Montsisi's case concerned a plaintiff who sued the Minister of Police for damages for unlawful assaults alleged to have been committed upon him by members of the South African Police while he was being detained in terms of sec. 6 of the Terrorism Act 83 of 1967. The Court held that it was impossible for the plaintiff to comply with the provisions of sec. 32(1) while he was in detention and that, therefore, the expiry period provided for in sec 32(1) did not run against him so long as he was in detention (see p 638 G-H).

On appeal appellant's counsel also conceded that in the present case the cause of action, in so far as it related to the conduct of Dr Schlosberg, arose on 15 September 1983, the date upon which Dr Schlosberg first examined the appellant.

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In order to avoid the consequences of sec. 113(1) of the Act appellant relies, however, on the principle of impossibility. The basic submission, as formulated in counsel's heads of argument, is as follows:

(a) The provisions of chap. XV of the Regulations and the Military Discipline Code ("MDC") obliged appellant to seek, submit to and give effect to the medical treatment provided by the SADF and made it unlawful for the appellant (without the permission of the SADF first obtained) to seek, submit to or give effect to any medical treatment other than that provided by the SADF.

(b) Prior to 11 October 1983 it was therefore impossible for appellant to have instituted his action because it was impossible for him lawfully to obtain the information without which he, as a layman, could never have known that he had a claim.

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I shall assume in appellant's favour that where and so long as a plaintiff is precluded by law from acquainting himself with the facts which constitute his cause of action and he remains in ignorance thereof, the expiry period contained in sec. 113(1) of the Act does not run against him. This is not the same situation as that which existed in Montsisi's case. In that case circumstances rendered it impossible for the plaintiff to actually institute action. Nevertheless, it is arguable that what I have assumed is a logical and legitimate extension of the principle adopted in Montsisi's case. In order to be able to institute action one must know that one has a cause of action. Consequently if one is prevented by law from ascertaining that one has a cause of action, it may be said that it is impossible for one to institute action.

Having made this assumption in appellant's favour, I must next consider the question as to whether appellant

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was in truth precluded by law from ascertaining the correct facts in regard to his injured elbow. In developing his argument on this aspect of the matter, appellant's counsel referred to chapter XV of the Regulations and in particular to regulations 7, 11, 12, and 13 and contended that it was implicit in these regulations that a "patient" (which includes a member of the Permanent Force) was not entitled to consult a private medical practitioner in order to get a second opinion or to check on the correctness of a diagnosis made by an Army doctor. And since in appellant's case - so the argument ran - the proper diagnosis of his injury was a matter which only a medical practitioner was qualified to undertake, it was impossible for appellant to ascertain the true facts in regard to his injury.

Regulation 7 places upon the Surgeon General a general duty to arrange for the provision to a patient of, inter alia, the medical and hospital treatment which is

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required in respect of an injury from which the patient is suffering in order to effect his recovery. It provides that the Surgeon General, or a medical officer designated by him for the purpose, shall from time to time determine the nature and extent of the treatment required by the patient and may authorize the provision or administration of such treatment. Regulation 11 deals generally with the manner in which the Surgeon General shall provide treatment for a patient. Sub-para (1) places on the Surgeon General a general duty to provide treatment and to exercise control thereover. To this end he is required, as far as it is professionally and administratively possible, to make use of the facilities of the military medical service and such other state medical facilities as may be at his disposal (sub-para (2)). His powers may be delegated to a medical officer designated by him (sub-para 2(a)); treatment may be administered at the patient's residence, a hospital, a clinic, an out-patients'

/ department.....

department of a hospital, the medical officer's consulting rooms or any other designated place (sub-para 2(b)); and in certain instances where military facilities are not available or suitable the Surgeon General may authorize the treatment of the patient at any other designated hospital or institution (sub-para 2(c)). In addition, whenever the Surgeon General considers that the treatment of a patient cannot be undertaken by a medical officer of the South African Medical Corps or a district surgeon or where a second opinion is required, he may designate a medical officer not employed on a full-time basis by the State for the treatment of the patient (sub-para 2(g)); and he may also accept liability on behalf of the State for the cost of any treatment provided to a patient by any practitioner or hospital in a case of emergency (sub-para 2(h)).

Regulation 12 deals with the provision of medical appliances, such as artificial limbs, dentures etc. In terms

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of sub-para (2) of the regulation the Surgeon General determines the specification, type or pattern of medical appliance to be provided for a patient, subject to the proviso that a patient may at his own request be provided with an article of a different specification, etc. on condition (i) that this is approved by the Surgeon General or officer acting on his authority and (ii) that any additional expenses arising from this special provision are recovered from the patient concerned.

Regulation 13 deals with the defrayment of the cost of any authorized treatment or medical appliance and provides generally that such cost is to be met by the State. Provision is made for the payment of fees to practitioners not in the full-time service of the State who treat patients (sub-paras (2) and (3)). It is also provided (in sub-para (4)) that where a patient is treated at a non-military hospital or institution he shall be

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accommodated in a general ward, provided that in certain circumstances a medical officer may authorize at State expense accommodation in a ward other than a general ward; and that —

> "this regulation shall not be construed as prohibiting a member from arranging, in terms of a private agreement between him and the hospital concerned, for the use of such other ward by him or his dependant on condition that such member shall pay any additional expenses arising from such agreement directly to the hosital concerned and that the State shall not be liable therefor."

Appellant's argument is, as I have said, that it is implicit in these regulations that it would be unlawful and a breach of the MDC for a member of the Permanent Force who suffered an injury to consult a private medical practitioner in order to get a second opinion or to check on the correctness of a diagnosis made by an Army doctor. I am

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unable to discern such a necessary implication in the regulations in question. Clearly the regulations make it obligatory for the Surgeon General to provide at State expense medical treatment for an injured member of the Permanent Force; and prescribe that the treatment shall be given by military doctors at military hospitals, etc. It is probably correct to say that it is implicit in the regulations that the patient concerned is in general obliged to accept treatment by military doctors and at military institutions. But this does not preclude him from seeking at his own expense a second opinion from a private medical practitioner. I would emphasize "at his own expense" for it is clear from the regulations that, save in exceptional circumstances, the SADF does not accept financial liability for medical treatment provided privately. The denial of the right of a member of the Permanent Force to consult a private doctor would constitute a serious derogation from his ordinary rights as an individual, especially where

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he suspected that the treatment given to him by the Army doctor might have been incorrect or even negligent, and it would require either an express provision in the Regulations or a clear implication to establish the denial of this right. There is no express provision; and I fail to discern the implication.

This finding strikes at the very heart of appellant's argument based on impossibility. But in addition there does not appear to be any warrant for concluding that appellant's ignorance of his cause of action (prior to 11 October 1983) was in any way attributable to the alleged unlawfulness of obtaining a second opinion from a private practitioner. The fact of the matter is that at a certain stage - we do not know exactly when - appellant did consult a private practitioner, Dr Dyson. From appellant's evidence it seems clear that the reason why he did not consult Dr Dyson earlier was not because of any possible illegality in such

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a course of action, but because he thought, not unnaturally, that the treatment prescribed by Dr Schlosberg would cure his injured elbow. In this connection I refer to the following evidence given in examination-in-chief:

> "Now the issue in this case Mr Pizani, if I may call you that because you are no longer a member of the permanent force, is whether or not it was possible before 11 October 1983 for you to have brought a claim against the army, arising out of the treatment you received from Dr Schlosberg?-
>
> - Well, I did not know there was such a claim. I was under the impression that the treatment would cure my elbow.
>
> Yes, and if you had known...?-- I would have definitely.....
>
> .... would it have been possible for you?-
>
> - Yes it would have been.
>
> Yes. And were you, as far as you were aware, entitled to take any steps other than those you have mentioned to establish whether or not you had a claim before 11 October 1983?-
>
> - No.
>
> / No what?.....

> No what? No you were, or no you were not?-- I do not know, I do not quite.....
>
> Yes. As far as you were aware were there any steps you were entitled to take before 11 October 1983 to establish whether or not you had a claim arising out of Dr Schlosberg's treatment?-- I was not, I do not quite understand that question, what you are saying there.
>
> Well, could you have done anything more than you did?-- No I could not have."

In fact, therefore, the regulations seem to have been an irrelevancy.

In argument before us appellant's counsel also advanced an alternative submission, not foreshadowed in his heads of argument. It was to this effect: that, quite apart from the Regulations, appellant's lack of knowledge prior to 11 October 1983, of his cause of action and the facts founding it, if reasonable, was in itself good ground for holding that compliance with sec. 113(1) had been rendered

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impossible; and that in the circumstances of this case appellant's lack of knowledge had been reasonable. Assuming for present purposes the correctness of the proposition of law inherent in this submission (which seems, in effect, to import the principle contained in sec. 12(3) of the Prescription Act), I am of the view that an insurmountable obstacle in appellant's path are the facts that not only was this ground of alleged impossibility not previously argued, but also that it was not pleaded. In his replication appellant founded the alleged impossibility of complying with sec. 113(1) solely upon the contention that in terms of the Regulations he was precluded in law from seeking any treatment for his injury other than that arranged for him by the Surgeon General. The question whether, apart from the Regulations, appellant could reasonably have ascertained the true facts concerning his injury and the diagnosis made by Dr Schlosberg before 11 October 1983 was not raised on the pleadings and was con-

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sequently not investigated at the hearing before ELOFF J. Had it been an issue on the pleadings the trial of this matter would probably have taken a very different course. It is likely, in particular, that additional evidence would have been placed before the Court a quo. Accordingly, I do not think that it is now open to appellant to raise this argument.

The point concerning unconscionable conduct, raised in the replication, was not separately argued before us. It appears to be based on the same premise as the contention of impossibility, viz. the unlawfulness of appellant seeking treatment and advice from a private medical practitioner, and consequently it must fail for the same reasons.

I am therefore of the view that the Court a quo came to the correct conclusion. I do so with some regret because, as I have already mentioned, there seem to be strong equitable reasons why an expiry period such as provided for by sec. 113(1)

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should be subject to a proviso similar to that afforded by sec. 12(3) for prescriptive periods. But that is a matter for the Legislature.

The appeal is dismissed with costs.

M M CORBETT.

HEFER JA)
GROSSKOPF, JA)
VIVIER, JA)
STEYN, AJA)