NOT REPORTABLE

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

Case No. 583/2018

In the matter between:

PERM BANGILIZWE DIKO Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, EASTERN CAPE PROVINCE Defendant

JUDGMENT

HARTLE J

[1] In an action against the defendant for damages arising from the claimed medical negligence of the staff at the Bedford Orthopedic Hospital, Mthatha, in treating the plaintiff by stabilizing a femoral fracture with a Küntscher nail, the defendant raised special pleas of prescription and non-compliance with the provisions of section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, No. 40 of 2002 ("ILPACOSA") respectively.

[2] The special pleas came before me on trial.

[3] The plaintiff was injured in a motor vehicle accident on 9 December 2009 and was thereafter taken to the St. Patrick's Hospital in Bizana where it was established that he had sustained a right sided femoral fracture.

[4] Two days after he was transferred to the Bedford Orthopedic Hospital in Mthatha where he later, on 18 December 2009, underwent an operation to stabilize the fracture by the insertion of a Küntscher nail intramedullary into the affected femur ("the procedure"). He was discharged on 21 December 2009.

[5] It is not in contention (as between the expert witnesses) that after the procedure he presented with certain complications entailing a leg length discrepancy, a bowing of his femur, varus deformity, and (possibly) an external rotational deformity of the affected limb.

[6] Although not admitted in her plea, Mr. Du Toit who appeared for the defendant noted further in heads of argument filed on her behalf during argument that the experts "are now in agreement" that these problems experienced by the plaintiff are due to the wrong intramedullary nail having been inserted at the Bedford Hospital on 18 December 2009 when the procedure was performed.[1]

[7] This fact, *viz* that a wrong nail had been inserted, is among the alleged factual causes of the complications suffered by the plaintiff referred to in his particulars of claim and it is his actual knowledge of this significant fact *inter*

[1] This submission appears to be premised on a plain reading of the experts' reports concerning what in their respective opinions caused the plaintiff's complications. There are however no joint minutes. I invited the parties before delivering this judgment to indicate if I might have missed any document in the trial bundle in which such an agreement had been recorded, but nothing was supplemented.

alia, or whether he had constructive knowledge thereof, that is central to a determination of the special pleas.[2]

[8] Seeking to hold the defendant accountable for the damages suffered by him due to the claimed incorrect procedure having been followed and the *sequelae* thereof, the plaintiff issued out the present action, but only on 11 July 2018. Service of the summons was effected on the state attorney on 19 July 2018, and on the defendant on 23 July 2018, ostensibly more than eight years after the procedure was performed.

[9] The premise for the defendant's first special plea is that the plaintiff's debt arose, in accordance with her pleaded case, "by no later than 18 December 2009" (this being the date on which the procedure was performed) and had prescribed three years along from that date by virtue of the provisions of section 12 (1) read with section 11 (d) of the Prescription Act, No. 68 of 1969 ("the Prescription Act").

[10] As a precursor to the action, the plaintiff served a demand in terms of the provisions of section 3 (2) (a) of the ILPACOSA, but only on 12 June 2018, leading the defendant to also raise her second special plea that the required statutory notice was not served timeously in compliance with the relevant provisions of the act within six months from the date on which the "debt became due," her case for the purposes of this special plea also premised on the basis that

[2] The premise of the plaintiff, that "as a result of receiving incorrect and inadequate treatment for his right femoral fracture at the Hospital, he suffered damages" is cited by the defendant in both special pleas as being central to her understanding of what the plaintiff's debt is ("the alleged debt"), and when it became due and/or when his cause of action arose. I have therefore proceeded on the assumption that the primary fact that a wrong pin was inserted, and the other closely related pleaded facts bearing on the factual cause of the plaintiff's complications, taken together with the more obvious pleaded facts that the plaintiff would need to prove to establish the liability of the defendant in a claim such as this one, is where the determination begins. It is these facts that the plaintiff was required to know before prescription could commence running and which the defendant had to show he had actual or constructive knowledge of, on or before 18 July 2015 (3 years before the summons was served). See Links v Department of Health, Northern Province 2016 (4) SA 414 (CC) at [24].

the plaintiff's debt became due, and his completed cause of action arose, on 18 December 2009 when the damage causing procedure was performed.

[11] The plaintiff did not bring an application to condone his alleged failure to have served the notice timeously (it certainly was served out of time in relation to the date on which the procedure was performed) but chose instead to file a replication.[3] To both special pleas he replied that he only became aware on 12 June 2018 of *the facts giving rise to the debt*[4] after consulting with his attorneys of record following receipt of the medical report by Dr. Olivier.[5]

[12] Although the plaintiff's complications ostensibly arose from the procedure performed on a date that preceded the service of the summons by a period of more than eight years, this date relied upon by the defendant is not necessarily determinant of when prescription began to run in the unique circumstances of the matter.

[3] A plaintiff faced with a special plea that the statutory notice was served late has the election, pursuant to the provisions of section 3 (4) of the ILPACOSA, to apply for condonation of such failure.
[4] As indicated in footnote 2 above, read in the context of the defendant's special plea, we are here concerned with knowledge of the facts of the "alleged debt."
[5] The report on the face of it elucidates the factual cause of all the plaintiff's problems post-surgery, more especially the primary fact that a wrong nail had been inserted.

[13] As a starting point, section 12 of the Prescription Act, No. 69 of 1969, provides as follows concerning *when* prescription begins to run:

> "(1) Subject to the provisions of subsections (2), (3), and (4),[6] prescription shall commence to run *as soon as the debt is due*.
>
> (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
>
> (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

[6] Subsection (4) deals with debts based on the commission of an alleged sexual offence. Subsection (2) is not of application and does not concern us either as this deals with a situation where a debtor wilfully prevents a creditor from coming to know of the existence of the debt. Subsection (3) is of relevance for present purposes and prevents prescription from running where a creditor does not have knowledge of the identity of the debtor or of the facts from which the debt arises *until* such time as he does have knowledge of these two aspects. The debt is deemed to be due for purposes of establishing when prescription begins to run as contemplated in section 12 (1) in two scenarios: one where it can be shown that he acquired actual knowledge of the identity and of the facts from which the debt arises (presumably on a given date), and secondly, where constructive knowledge of the identity of the debtor and of the facts from which the debt arises ought reasonably to be imputed to him supposedly on the date that it is claimed he could reasonably have acquired knowledge of the two aspects, that is knowledge of the identity of the debtor and of the facts from which the debt arises. The proviso in the subsection assists a debtor faced with a plea of lack of knowledge aforesaid, to have it imputed to the creditor in circumstances where he/she could have acquired it by exercising reasonable care. The distinction between the two scenarios is helpfully explained in Mtokonya v Minister of Police 2017 (11) BCLR 1443 (CC) at [32] – [34] as follows:

> "Section 12(1) makes provision for the general rule. That is that prescription commences to run as soon as the debt is due. However, it says that this is subject to three exceptions which are to be found in subsections (2), (3) and (4). The first exception, in subsection (2), is that prescription does not commence to run against a creditor if the debtor wilfully prevents him or her "from coming to know of the existence of the debt" until he ie the creditor "becomes aware of the existence of the debt". So, under subsection (2) it is not every time a creditor does not know of the existence of a debt that prescription does not commence to run. It is only in those cases where the debtor is wilfully preventing or has wilfully prevented the creditor from "coming to know of the existence of the debt". One cannot therefore use the exception in subsection (2) to say that in all cases in which a creditor does not know of the existence of a debt prescription does not commence to run.
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> [33] There is a reason why the exception in subsection (2) applies only where the reason for the creditor's lack of knowledge of the existence of the debt is a result of the fact that the debtor has been wilfully preventing the creditor from coming to know of the existence of the debt. It is that, if the reason the creditor does not know of the existence of the debt is that the creditor has failed to acquire that knowledge by exercising reasonable care when he otherwise could have acquired it by exercising reasonable care, then the debt will have become due and prescription will have commenced running.
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> [34] The second exception, in subsection (3), is that a debt is "not deemed to be due until the creditor has knowledge of" two things. The first is knowledge of the identity of the debtor. The second is knowledge "of the facts from which the debt arose". However, this exception is itself subject to another exception provided by way of the proviso in subsection (3). The exception reads: "Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care". So, if a debtor delivers a special plea of prescription and the creditor seeks to meet it by saying prescription did not run because, before a certain date, he did not have knowledge of the identity of the debtor or of the facts from which the debt arose, the debtor can come back and say: but you could have acquired that knowledge before that date if you had exercised reasonable care but you failed to exercise such care and, therefore, prescription did commence to run before that date."

The first deeming provision and the proviso in section 12(3) pose very distinct enquiries although there may be an overlapping of facts. (MEC for Health, Western Cape v Coboza [2020] ZASCA 165 (10 Dec 2020) at [8]). See also Gericke v Sack 1978 (1) SA 821 (A).

be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

(Emphasis added.)

[14] The ordinary period for the prescription of a debt such as the plaintiff's is three years *from the date on which the debt became due*.[7]

[15] The provisions of section 3 of the ILPACOSA pertaining to the defendant's second special plea are also relevant for present purposes. Subsection (3) (a) mirrors those of the Prescription Act regarding the circumstances under which a debt is regarded as being due and when the clock starts running for purposes of giving the requisite notice. The relevant provisions read as follows:

> **"3. Notice of intended legal proceedings to be given to organ of state.** —
>
> (1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless—
>
> (*a*) the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or
>
> (*b*) ….
>
> (2) A notice must—
>
> (*a*) within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and
>
> (*b*) briefly set out—
>
> (i) the facts giving rise to the debt; and
>
> (ii) such particulars of such debt as are within the knowledge of the creditor.
>
> (3) For purposes of subsection (2) (*a*)—
>
> (*a*) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving

[7] See 10 (1), read with section 11 (d) of the Prescription Act.

> rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and
>
> (*b*) a debt referred to in section 2 (2) (*a*), must be regarded as having become due on the fixed date.[8]

[16] Before it can be determined when a debt has accrued for purposes of prescription running (in respect of either special plea), it is necessary to determine *what the facts are* that a plaintiff is supposed to have knowledge of in order to trigger the running of prescription, this apart from knowing the identity of the debtor.[9] These facts are the facts that are *material* to the debt.[10]

[17] A debt is due when a creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.[11]

[18] In Minister of Finance and Others v Gore[12] the Supreme Court of Appeal emphasized that the prescriptive time begins to run against the creditor when she/he/it "has the minimum facts (within its knowledge) that are necessary to institute the action."[13]

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[8] I include subsection (3) (b) because Mr. Malunga (who appeared for the plaintiff) thought that the "fixed date" referred to therein related to the date that a debtor relies upon as constituting the date of inception of the extinctive prescription period. "Fixed date" is however defined in section 1 as meaning the commencement date of the ILPACOSA and is to be read together with section 2, which deals with the transitional arrangements of the act. Its provisions simply have no application in the manner contended for by him.

[9] Links, *Supra*, at par [24]. See also Loni v MEC, Department of Health, Eastern Cape Bhisho 2018 (3) SA 335 (CC) which summarises at para [23] what was found in Links regarding the two requirements to be established.

[10] Links, *Supra*, at para [30] read together with the authorities relied upon and cited in paras [30] – [35].

[11] Truter and Another v Deysel 2006 (4) SA 168 (SCA) at para 16.

[12] 2007 (1) SA 111 (SCA) at para 17.

[13] Gore, *Supra*, at para 17.

[19] In the context of a medical negligence claim, the meaning of the phrase "knowledge of the facts from which the debt arises" includes knowledge of facts showing that the defendant, in treating the plaintiff, failed to adhere to the standards of skill and diligence expected of the practitioner in the former's position.

[20] In Links[14] the Constitutional Court emphasized what form the full-fact knowledge should take in a claim such as the plaintiff's for professional negligence:

> "[42] "…(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.
>
> [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 section 12(3)."

[14] *Supra.*

[21] In this respect the Constitutional Court remarked upon the improbability that a lay person would without a professional medical opinion know what caused the adverse outcome even if the outward manifestation thereof might be somewhat obvious to him:[15]

> "[47] …..*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.*[16]
>
> **(**Emphasis added)

[22] In order to glean what the alleged wrong, resultant injury and damage it is that the plaintiff seeks to requite by the present claim it is necessary to refer, firstly, to the grounds of negligence relied upon by him in his particulars of claim.

[23] In this respect he pleaded that:

> "13.2 The defendant rendered the treatment and/or performed the surgery incorrectly as a wrong intramedullary device was utilized;

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[15] In Links the applicant's thumb had been amputated. That would have been obvious to him but not the reason for the amputation which he could not reasonably have known without seeking a medical opinion. *In casu* certain of the plaintiff's injuries and complications would also have been manifestly plain to him, such as the shortening and bowing of his leg. The fact that he was in pain would have been another red flag that something might be seriously amiss. His imperfect gait might also have suggested that something was not right and that this had a natural association with the procedure, but it was only after his attorneys sought medical advice, so he pleaded, that he acquired actual knowledge of all the facts giving rise to the debt (more especially that the staff at the hospital were negligent and had rendered incorrect and inadequate treatment for the fracture).

[16] This aspect of the Links matter was reiterated by the Constitutional Court in Loni at para [23]. In Links the court held that the applicant would have to had "knowledge of (the) facts (which) would have led him to think that possibly there had been negligence and that this caused the disability" which he was unable to acquire before seeking professional medical advice. In Loni the court reiterated its "main finding" in Links in its dictum at par 42. "Earlier on I rejected the applicant's version that, prior to his discharge from hospital, he had no knowledge that his thumb had been amputated. However, even if he had known, as we find that he had known that he had lost his thumb, he still didn't know what had caused the need for the amputation." In the present situation it is evident at least from the plaintiff's replication that he had no knowledge what caused his pain, or the shortening or bowing of his leg, much less that it might have been due to the negligence of the hospital staff.

13.3 The defendant rendered the treatment and/or performed the surgery without doing the necessary investigations;

13.4 The defendant rendered the treatment and/or performed the surgery without the plaintiff's properly informed consent;

13.5 The defendant failed to properly investigate the various other advantageous and less damaging treatment options particularly for the type of injuries sustained by the plaintiff;

13.6 The defendant rendered the treatment and/or performed surgery at a time when interlocking intramedullary nailing of the femoral fracture should have been the treatment of choice for the following reasons:

13.6.1 By insertion of interlocking screws, a rotational deformity is prevented;

13.6.2 With a stable interlocking construct leg shortening will not occur;

13.6.3 The interlocking device is much stronger and will mimimize complications such as bending of the nail;

13.6.4 Insertion of interlocking nail in both the femur and tibia is a long standing and reliable orthopaedic procedure."

[24] As an aside, it is apparent from the plaintiff's notice in terms of rule 36 (9)(a) and (b) filed in respect of Dr. Olivier, specialist orthopedic surgeon, that he assessed the plaintiff on 29 January 2018 (which date coincides with date of the

report itself) and provided a comprehensive opinion which, from its context, formed the premise for the essential allegations in the particulars of claim underpinning the plaintiff's claim.[17]

[25] The complications which the plaintiff pleads in his particulars of claim ensued after the claimed unsuccessful procedure on the implicated date are the following:

> "12.1 Significant degree of length discrepancy as the plaintiff's right leg is now short by 6cm;
> 12.2 Severe mal-union which measure 23 degrees;
> 12.3 External rotational deformity measuring approximately 30 degrees;
> 12.4 The Kuntscher nail bent;
> 12.5 Significant degree of mature bone formation surrounding proximal aspect of the Kuntscher nail."

[17] Dr. Olivier opined in his report as follows regarding why the procedure amounted to "incorrect and inadequate treatment" ostensibly after taking a history from the plaintiff, conducting an examination himself and reviewing radiographs of his pelvis, hip joints, right femur, and knee:

> "2….
> In this particular case the claimant was treated by means of the insertion of a Kuntscher intramedullary nail. This method of stabilization is completely outdated.
> The orthopaedic surgeon who invented the Kuntscher nail inserted the nail initially during November 1939. This procedure was abandoned during the late 1970s, as new technology emerged which resulted in a much better outcome. The stabilization method of choice would be an interlocking nail.
> It is my view that, had the client realized that the procedure is completely outdated, he would not have opted to undergo this operation.
> 3. As indicated earlier, the wrong intramedullary device was utilized. The 0standard treatment for femoral fractures is to insert an interlocking intramedullary nail."

After setting out the advantages of using an interlocking intramedullary nail which a Küntscher nail does not offer, he observes that the former construct is regarded to be a longstanding and reliable orthopaedic procedure, and that the insertion of such a device is performed daily and over the many hospitals in all the provinces. He adds that it is "unusual" to encounter a case such as the plaintiff's where a Küntscher nail was inserted. The wrong internal fixation was however not his only worry. As far as he was concerned the procedure was also inadequately performed (see par [25] above regarding the pleaded aspects). In his view the complications could have been prevented by inserting the nail properly. He also observed that the post-operative procedure was inadequate and particularly laments the absence of radiographs that would have confirmed whether the procedure had been performed adequately and or whether the treatment which he underwent was effective. In this respect he points to the value of requesting regular x-rays during the post-operative period in order to verify that fracture union has occurred and that the internal fixation has not migrated.

[26] The plaintiff pleads (also ostensibly on the basis of Dr. Olivier's report) that the procedure was "completely inadequate" and relies on the following shortcomings in the putative stabilization of the fracture for such premise:

> "13.1.1 The nail was too thin;
> 13.1.2 The nail was too short;
> 13.1.3 The nail was not inserted deep enough; and
> 13.1.4 Image intensification was not utilized when the nail was inserted."

[27] He further relies on the following complaints and *sequelae* to justify his claim for damages, some obvious to the eye, others ostensibly based again on the expert report:

> "14.1 Plaintiff is symptomatic with regards to shortening of the right, which is 6cm shorter than the left leg;
> 14.2 Requires crutches to ambulate and cannot walk or stand for prolonged periods of time;
> 14.3 Finds it difficult to climb a flight of stairs and perform the activities related to his previous employment;
> 14.4 Walks with a visible limp and uses crutches to assist when ambulating;
> 14.5 Presents with severe signs of completely unacceptable mal-union;
> 14.6 Scars on the mid lateral aspect of the right thigh which measures 16cm in length;
> 14.7 Has significant varus deformity of the right thigh;
> 14.8 Has external rotational deformity which measures approximately 30 degrees;
> 14.9 Circumference of the right thigh measures approximately 3cm less as compared with normal opposite side;
> 14.10 Significant degree of mature bone formation surrounding proximal aspect of the Kuntscher nail."

[28] For the rest he pleads the necessity for complicated and complex future treatment and surgical procedures (again ostensibly based on medical opinion and

particularized in minute detail) and costs the anticipated expenses to remediate his situation, which head of damages he claims together with general damages and past and future loss of income.

[29] The defendant in his plea-over denied that the plaintiff was not provided with appropriate medical treatment and care. In respect of the procedure undergone by him, she pleaded that this "achieved a satisfactory reduction of the fracture" and constituted medical treatment and care as was required. She also asserted that the plaintiff was provided with appropriate post-op and outpatient treatment care following the procedure. She further denied that the surgical procedure led to any complications or that these arose as a result of any commission or omission on the part of the hospital staff that renders her liable in law to pay damages to him.[18]

[30] I have already alluded above to what the plaintiff said in his replication arising from the allegation that the debt purportedly accrued on 18 December 2009. He claims that prescription only commenced running on 12 June 2018 which is the date upon which he became aware of the identity of the debtor and the facts giving rise to the debt "after consulting with his attorneys of record, following receipt of Dr Olivier's report."

[31] The defendant filed no rejoinder to the plaintiff's replication.

[32] When the trial commenced on 17 November 2021 the parties had agreed to separate the issues arising from the special pleas from the issues of liability and quantum and, pursuant to the provisions of rule 33 (4), I granted such an order. The agreement that they had reached in the case management processes

[18] As indicated in paragraph [6] above, however, her denials (which I have deliberately expressed in the past tense), have been overtaken by the parties' experts finding common ground in the cause of the plaintiff's complications.

concerning what issues I was required to determine - recorded in the trial and roll call preparation checklists respectively, as well as in their joint practice note, were stated to be the following:

> "2.1 Whether the plaintiff's claim against the defendant has prescribed by virtue of section 12(1) read with section 11(d) of the Prescription Act 68 of 1969; and
>
> 2.2 Whether or not the plaintiff has complied with section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002."[19]

[33] The defendant correctly accepted that she bore the duty to begin and the onus to prove her special pleas.[20] Having agreed that the determination of the relevant issues would require oral evidence to be led, she adduced the testimony of Dr. Osman, a specialist orthopedic surgeon, and thereafter closed her case. The plaintiff led no evidence.

[34] I should point out that there were no agreed facts placed before the court. The documentation placed before me compromising of the medical records up to the date of the plaintiff's discharge from the Bedford Hospital after the procedure went in on the customary basis that they are what they purport to be. Dr. Olivier's report was not officially admitted into the record as evidence although I was presented with a bundle of expert reports (comprising of those of the two specialist orthopedic surgeons) and informed from the bar that the parties are *ad idem* regarding what caused the plaintiff's complications referred to therein.

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[19] The parties appeared to be on the same page that the fate of the second special plea was dependent on what I found regarding the first special plea. I was not prevailed upon to make a declaration concerning when the plaintiff's claim became due, but he reserved his right in the replication to apply for condonation in terms of section 3 (4)(a) of the ILPACOSA should it be necessary to do so ultimately and in due course.

[20] See Gericke v Sacks, *Supra*, in which it is stated that in respect of a plea of prescription the onus is on the party raising prescription as a defence to prove both the date of inception of the prescriptive period (that is when prescription begins to run *as envisaged in section 12 (1)*), as well as the date of completion of the extinctive period.

[35] The absence of evidence in support of the facts relied upon by the plaintiff in his replication (in relation to when and how he says he first learned of the facts giving rise to the existence of his claim) or any rebuttal of Dr. Osman's testimony suggesting his having obtained knowledge of the necessary facts earlier than when he claims to have come to learn of them after consulting his attorney on 12 June 2018, made it difficult for me to contend with. Added to this, the somewhat bold approach adopted by Mr. Malunga (who appeared on his behalf together with Mr. Mphalwa) not to have pertinently challenged key aspects of Dr. Osman's testimony under cross examination to the effect that the plaintiff had actual knowledge of the primary facts or, alternatively must be deemed to have known three years before summons was served of the fact that there was, to use his words, a "problem" with the fixation which should have prompted him in a certain direction, posed a certain conundrum for me.

[36] In this respect Mr. Malunga, after closing the plaintiff's case without calling him, submitted that it had been unnecessary to adduce his testimony by reason of the fact that an important admission had been elicited from Dr. Osman during cross examination that effectively negated the defendant's *pleaded* case of prescription. That case, which the plaintiff had been called upon to meet, so he submitted, was that the debt arose, and prescription commenced to run, on the same date of the surgical procedure.[21]

[37] It is apparent that Dr. Osman became involved in the matter shortly before the trial. He examined the plaintiff on 7 October 2021 at the request of the defendant and produced a report dated 11 October 2021. The defendant's notice in terms of rule 36 (9)(a) and (b) giving cover to the report that was held up at the

[21] The defendant pleaded that "the plaintiff's alleged claim is a debt that became due *by no later* than 18 December 2009". I gather from the manner in which the defendant's case was conducted however that she probably meant to say that it was at the earliest with effect from 18 December 2009 that the debt accrued.

trial as constituting his opinion was served on the plaintiff's attorneys only on 28 October 2021 and filed with the registrar days before the trial was due to commence, on 2 November 2021.

[38] When he testified, the focus of his evidence was on what the plaintiff had communicated to him when he examined him *on 7 October 2021*, which evidently purported to establish the premise for the defendant's case (unheralded in the view of plaintiff's counsel due to the absence of any rejoinder filed) that the plaintiff either knew or must have known sooner than receiving Dr. Olivier's report, that the complications suffered by him pursuant to the fixation procedure were due to the fault of the medical staff at the Bedford Hospital in inserting the wrong nail.

[39] According to Dr. Osman's testimony the history given to him by the plaintiff was to the effect that after the procedure and whilst he was mobilizing at home with a pair of crutches approximately two weeks in after the fixation, he noticed a shortening of his affected leg. He emphasize the fact that the plaintiff was "clearly" aware that something was "not right".[22]

[40] The plaintiff acted on this by reporting the leg discrepancy at St. Patrick's, whereupon he was referred back to the Bedford Hospital where the procedure had initially been performed. At the latter hospital he was assessed and given pain medication. It was "confirmed" to him, so Dr. Osman related, (although he did not elaborate by whom, or when, or under what circumstances) that there was a "problem" with the fixation and an appointment date was given to him for further treatment. (What such treatment entailed in the knowledge of the plaintiff was also not expounded upon.)

[22] In his report he states that the plaintiff "*categorically* reported that he noticed shortening of his leg two weeks post-surgery and bending one month after".

[41] Prior to this date, the plaintiff went back to St. Patrick's because he was in pain. Dr. Osman attributed the pain to the fact that his lower limb was starting to bend, which physical manifestation the plaintiff was also plainly aware of as was stated to have been confided in him by the plaintiff at the time of the medical examination.

[42] He was assessed at St. Patrick's and requested to attend at the Bedford Hospital for further management, but unfortunately due to financial constraints, could not make it there.

[43] Dr. Osman claims that the information listed under the "summary" in his report was also obtained from the plaintiff himself. This reasserts that he was aware two weeks after the surgery of the obvious shortening of his leg, and within one month after the procedure, that it had started to bend.

[44] He further expressed the opinion, based on the plaintiff's reporting to him that the progression of the bending had ceased approximately a year after the surgery, that this is probably when the fracture must have healed. He explained in this regard that once a fracture has united, the shortening stops its progression. Based on this norm he proposed that worst case scenario the plaintiff would have been aware at this outer limit (a year after the procedure), that the fixation was substandard.[23]

[45] Despite the defendant's special plea of prescription asserting that the extinctive prescription began to run on the same day of the procedure, Dr. Osman readily conceded under cross examination that the plaintiff would not have had

[23] I assume that he meant by this that the worst extent of the harm that could come must have been realised by then.

knowledge on that date that the treatment rendered to him by the fixation was substandard in any way.

[46] Dr. Osman's report was tendered into evidence. His opinion, which he confirmed under oath reads, in respect of the salient features of this matter, as follows:

> "Due to the delayed union the nail started bending which has resulted in the varus deformity and a 3cm shortening of the right lower limb.
>
> Bedford Hospital recognized that there was a problem post fixation. It was noted that the wrong nail was inserted. He was advised to return for follow up management however due to financial constraints he did not return to Bedford Hospital.
>
> Between 2010 and 2021 he did not undergo any further follow up treatment or physiotherapy. He now presents with a short limp gait and an obvious varus deformity of the right femur. He is dependent on a crutch to mobilize outside. The varus deformity may contribute to osteoarthritic changes in the knee."

[47] Under the caption "Loss of Amenities of Life" he acknowledges a significant loss but qualifies this with the remark that this "could have been rectified had (the plaintiff) returned to Bedford hospital for follow up treatment."

[48] It is relevant to mention incidentally that Dr. Osman confirmed that he had relied during his consultation with the plaintiff on the services of his secretary to translate for him from isiXhosa to English and *vice versa*. He acknowledged that his assistant's primary language was isiZulu and the plaintiff's isiXhosa but was not of the impression that this had led to any misunderstanding between himself and the latter as to the salient matters under discussion between them. The plaintiff is further hard of hearing and lip-read what Dr. Osman's assistant

communicated to him.

[49] In placing emphasis on what the plaintiff categorically knew about the complications, manifestly evident in the shortening of his leg, the bowing of his femur and the pain suffered by him *inter alia* (this apart from the actual knowledge at his disposal which Dr. Osman suggests was conveyed to him about "a problem with the fracture fixation"), the implication laid bare is that the plaintiff ought reasonably to have known that there was a problem with the fixation that should have led to him having done something about it, but that something appears to have been the expected pursuit (in Dr. Osman's opinion) of follow up treatment which the plaintiff consciously chose to forsake for financial reasons.[24]

[50] It is immediately evident that Dr. Osman's allusion to the hospital staff's "recognition" that a wrong nail was inserted or that there was a problem post fixation, was not attributed to the opinion or say so of any staff member at the hospital. Indeed, he concluded in his opinion rather vaguely that "(i)t was noted that the wrong nail had been inserted" without clarifying what was noted, who noted it and whether the plaintiff had been told in so many words (and by whom at the hospital and when) that this mistake had factually caused his complications or was attributable thereto. Neither were any records of the hospital referred to by the defendant in substantiation of the suggestion that the plaintiff acquired actual knowledge that there was a problem with the fixation, or that his having been told that there was "a problem" with the fixation in relation to what might be of relevance in the hospital records, ought to have given him reasonable

[24] This may signal contributory negligence on the plaintiff's part, but the evidence ought to show in an enquiry like this that what it is suggested he should have known would have caused him "to seek legal advice" as a step in the realisation that there was actionable fault leading him in the direction ultimately of taking legal steps thereanent. Perhaps the testimony meant to suggest that if he had pursued follow up treatment the knowledge may have suggested itself to him, or the suspected wrong would have been confirmed to the plaintiff somehow had he kept the appointment, but this in my view is a different enquiry to the one at hand.

grounds to suspect fault on their part so as to have caused him, not to have sought further treatment, but rather advice regarding the possibility of a damages claim against the defendant arising from that disclosure.

[51] It seems to me that even if the plaintiff had been told that there was "a problem with the fracture fixation" (this is what Dr. Osman recorded under "History") this does not equate to the defendant showing that he was "in possession of sufficient facts to (have caused him) on reasonable grounds to think that his injuries were due to the fault of the medical staff."[25] As was found in Links,[26] whilst he might have been expected to know that something was amiss, or that the procedure had not being effective in fixing the fracture and that he developed deformities and disabilities in a short space thereafter (because these features would have been readily apparent to him), how was he supposed to know that a wrong nail had been inserted or that it is contraindicated in orthopedic practice. Dr. Olivier when he consulted with the plaintiff ostensibly did not discern what he reported – which findings correlate to the essential facts underpinning the plaintiff's claim, only from a history taken from the plaintiff, neither from his physical examination of him. The hospital records were sparse and unhelpful, a concern shared by Dr. Osman. He may or may not have known from the hospital records what pin was inserted (it was certainly not suggested that the plaintiff personally knew what kind of pin was used or the implications of its use over other more effective devices), but most of Dr. Olivier's observations (that answer the question *why* the plaintiff is suffering from the complications which he does) were evidently informed by the radiographs, which he ironically suggests in his report are essential after a fixation (but were notably and negligently absent in the case of the plaintiff's post-operative management) to confirm the procedure's effectiveness, to monitor fracture union and to ensure

[25] Links, *Supra*, at par [42].
[26] *Supra*, at paras [46] – [50].

that the internal fixation has not migrated.

[52] Mr. Malunga did not challenge or interrogate Dr. Osman's evidence to the effect that the plaintiff had been informed (or reportedly knew) before the first re-referral to the Bedford Hospital that there had been a "problem" with the fixation (or to find out what that problem was in his client's understanding) or that the reason for such referral had been to ameliorate *that* situation.[27] Neither was there any objection to Dr. Osman's evidence when he brought forth the narrative of the plaintiff in this respect.

[53] In his closing submissions Mr. Malunga submitted that the plaintiff had only to meet the case on the pleadings and criticized the defendant for straying beyond the ambit of how she had pleaded. He submitted that, since the evidence that the defendant had placed before the court did not support *that case*, the issue of whether the claim had prescribed or not on the "given date" (18 December 2009) fell to be decided in his client's favour without further ado.

[54] Mr. Du Toit on the other hand criticized the plaintiff for not adducing any evidence and urged upon me to draw a negative inference against him in this respect. He submitted that Dr. Osman's uncontested evidence made short shift of the plaintiff's case raised in his replication that he only became aware of the minimum facts giving rise to the debt (that is that the defendant had rendered incorrect and inadequate treatment for the fracture) after having been advised by his attorney on 12 June 2018 of the import of Dr. Olivier's report.

[27] Despite the submission in Mr Du Toit's heads of argument to the effect that the plaintiff was supposedly "informed that the incorrect pin was inserted intramedullary" and that he had been "required to return to the hospital so that a procedure could be followed to replace the pin with the proper pin" the pinnacle of Dr Osman's evidence is that the plaintiff told him that he, the plaintiff, had been informed (and therefore knew) that there was "a problem" with the fixation that required him to come back to the hospital for further treatment.

[55] Based on Dr. Osman's uncontroverted evidence, he contended that the objective facts from which the debt arose (excluding considerations of whether the impugned conduct was wrongful and actionable as this does not constitute a fact, but rather a conclusion of law falling outside the ambit of section 12 (3) of the Prescription Act)[28] were well known to the plaintiff as appeared from his client's unchallenged account at the latest within a year of the procedure, from which point prescription (at the very latest according to his submission) would have begun to run and which would entail therefore that the plaintiff's claim had prescribed long before summons was served.

[56] Mr. Malunga argued conversely that I should find that the plaintiff could only have become aware of the minimum facts giving rise to the debt after having been apprised by his attorney of the import of Dr. Olivier's opinion, although the plaintiff was not called to confirm as much, neither was Dr. Osman's report handed in as evidence.[29]

[57] Before I examine what the evidence shows or doesn't show, it is necessary to especially examine the supposition put forward by Mr. Malunga that the plaintiff was entitled to ignore the evidence by Dr. Osman as to the plaintiff's purported knowledge of the existence of the facts giving rise to the debt beyond the pleaded inception date of prescription ("the given date") in the absence of the defendant having filed a rejoinder to the plaintiff's replication to suggest that she intended to rely on the proviso to section 12 (3) of the Prescription Act.[30]

[58] The selfsame argument was raised in both Loni v Member of the Executive

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[28] See Mtokonya v Minister of Police *Supra* at [36].

[29] Elsewhere I have adverted to the fact that the reports of the experts were drawn into the enquiry by virtue of the common cause findings of the specialists and were also extensively referred to during the hearing.

[30] Mr. Malunga did not suggest that the same constraints would have applied in respect of the defendant's reliance on the plaintiff's reported actual knowledge.

Council of the Department of Health of the Eastern Cape Government ("the full court matter") [31] and in Kriel v Meyer & Others,[32] with both courts alluding to the form of the pleadings as well as the incidence of the onus pertaining to a special plea of prescription.

[59] In Kriel v Meyer the court, adverting to the approach adopted by the then Appellate Division in Gericke v Sacks,[33] found there to be no substance in counsel's submission (on behalf of the plaintiff in that matter) that there should if the debtor wished to rely upon the proviso in section 12 (3) have been a rejoinder filed alleging the circumstances under which the plaintiff had failed to exercise the requisite care.[34] To the contrary the court held that:

> "In my view, there is no substance to this submission. The form the pleadings in the present matter took is "to all intents and purposes identical to that of the plea and replication in the matter of *Gericke v Sack* 1978 (1) SA 821 (AD) where in reply to a special plea of prescription filed by defendant plaintiffs filed a replication denying that the debt had prescribed and alleging that they had only become aware of the identity of the defendant at a later date, with the consequence that the debt was not rendered unenforceable by lapse of time. No rejoinder was filed by defendant. At 828A–C Diemont JA stated as follows:
>
> "[T]he Act specifically provides that prescription begins to run only when the debt becomes due and that it is not deemed to become due until the creditor has knowledge both of the identity of the debtor and of the facts from which the debt arises. It follows that if the debtor is to succeed in proving the date on which prescription begins to run he must allege and prove that the creditor had the requisite knowledge on that date. The fact that the appellant has alleged in her replication that she learned the respondent's identity only on 17 February 1971 does not relieve the respondent

[31] (CA 338/2015) [2016] ZAECGHC 101 (13 October 2016) at paras 28 - 34.
[32] [2011] JOL 28018 (E) at pages 23 – 29.
[33] *Supra*, at 828A-C.
[34] The court (at page 23 in the judgment) outlined the argument that it was prevailed upon to decide as follows:

> "Much argument was addressed to me concerning the form of the pleadings as well as the incidence of the onus. Mr *Louw* submitted that, inasmuch as plaintiff in his replication had raised the issue of his lack of knowledge of the identity of the owner of the dogs and had averred that such knowledge had only been acquired by him on 1 June 2003, third defendant, if it wished to rely upon the proviso contained in section 12(3) should have filed a rejoinder alleging that plaintiff had failed to exercise the requisite reasonable care. In the absence of such rejoinder, so Mr *Louw* submitted, third defendant was precluded from relying upon any alleged failure by plaintiff to exercise reasonable care in his ascertainment of the identity of the owner."

> of the task of proving that she acquired that knowledge on 13 February 1971 – the date on which he relies.
>
> The criticism advanced in argument of the trial Judge's ruling on the question of onus therefore fails and *the respondent must show on the evidence when Mrs Gericke learned or was deemed to have learned the respondent's identity*."[35]
>
> (Emphasis added)

[60] The court thereupon proceeded to the objective enquiry postulated by the proviso having regard to all the surrounding circumstances as to whether the plaintiff in that matter should have been held to have had knowledge, in that case of the identity of the debtor, and concluded on the evidence that he should not have been deemed to have acquired the knowledge necessary for the debt to become due and for prescription to begin to run as had been found in Gericke v Sack, the facts of the matter before it differing markedly from those before the appellate court. The court ostensibly came to this conclusion simply on the basis of what section 12 (3) of the Prescription Act prescribes, and with reference to the accepted test in this respect:

> "The question to be decided therefore is whether plaintiff must be held to have had knowledge of third respondent's identity *by virtue of the operation of the deeming provision in section 12(3) of the Prescription Act* (see *Gericke v Sacks, supra*, at 830C; see too *Brand v Williams* 1988 (3) SA 908 (C) at 910A–B; *De Klerk & 'n ander v Groter Kroonstad Plaaslike Oorgangsraad* 1999 (2) SA 870 (O))."[36]
>
> (Emphasis added)

[61] In Loni (the Full Court matter)[37] the same counsel who appeared on behalf of the plaintiff in Kriel v Meyer raised the point again that the defendant in that matter was precluded from relying on the proviso at the end of section 12 (3)

[35] At page 24 of the judgment.
[36] At page 24 of the judgment. See also the court's discussion of the reasonable man test outlined at pages 25-6 of the judgment.
[37] Loni (Full Court), *Supra*, at par [30].

where this had not been foreshadowed in her pleadings, this time successfully. With reference to the then recent remark in Links[38] that, absent a reliance on the proviso in the pleadings (in that instance in an opposing affidavit in an application for condonation in terms of the ILPACOSA) counsel in that matter had been out of line in placing reliance on the proviso for the first time in his written submissions, the full court accepted that it was not open to the respondent in that matter to invoke its provisions and suggested that "a pleader faced with a denial of knowledge of the identity of the debtor and of the facts from which the debt arises *would be well advised in future to raise the proviso to section 12 (3) in his pleadings*."[39]
(Emphasis added)

[62] The Full Court was however constrained to note that this stance adopted by the Constitutional Court in Links (that absent a pleaded basis no reliance could be placed on the proviso) had been reached without reference to Gericke v Sacks and that its dictum "is "clearly contrary" to the decision of the appellate court in this respect.[40]

[63] Despite this observation, the Full Court nonetheless took its cue from Links on this point, holding that it was not open to the debtor to rely on the unpleaded proviso at the end of section 12 (3), yet went on to determine on the established

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[38] Links *Supra*, at par [44]. The dictum in question is expressed as follows:

> "In his opposing affidavit in the High Court the respondent did not rely upon the proviso at the end of section 12(3). Both Dr Koning and Mr Ndlovu said nothing that would bring the respondent's defence within the proviso. Nor could they have. Both lacked personal knowledge of the applicant's treatment. Therefore, to the extent that counsel for the respondent may have sought to rely upon that proviso in his written submissions, the reliance was misplaced. This is so because that was not the case the respondent had advanced in the affidavit. The respondent's case as set out in those affidavits was simply that the applicant's cause of action arose on 26 June 2006 and the applicant had knowledge of all the relevant facts on that day. The question is, therefore, whether the respondent discharged the onus to show that on 26 June 2006 or at any date on or before 5 August 2006 the applicant had knowledge of all the material facts from which the debt arose or which he needed to know in order to institute action"

[39] Loni (Full Court), *Supra*, at [34].

[40] I mention incidentally that the matter in Links had its origin in an opposed application for condonation in terms of the provisions of the ILPACOSA, as opposed to the special plea having been determined by way of a trial as in the present matter and Kriel v Meyer. The taboo in invoking the proviso may therefore have been expressed in the context that the evidence before the court below was obviously required to be set out in the papers which constituted the evidence before it but fell short in this respect.

facts that the appellant did have the requisite knowledge for the purposes of section 12 (3) by no later than July 2001.

[64] In this respect the court proceeded from the following premise in getting to its conclusion:

> "The question for determination is whether the appellant's claim had become prescribed by 20 June 2012 when the summons was served. In order for the respondent to discharge the onus in respect of prescription it must show that prescription began to run against the appellant's claim by no later than 19 June 2009, being three years prior to the service of summons. To do this he would have to show what the facts are which the appellant was required to know before prescription could commence running and that the appellant had knowledge of those facts before 19 June 2009. (See **Links** *supra* p. 423 para [24].)"[41]

[65] In dismissing an application for leave to appeal against the finding of the Full Court in Loni, the Constitutional Court, with reference to Links, confirmed what is required for a party to successfully rely on a prescription claim in terms of section 12 (3) of the Prescription Act as follows:

> "In Links, this Court found that in order for a party to successfully rely on a prescription claim in terms of section 12(3) of the Prescription Act, he or she must first prove "what the facts are that the applicant is required to know before prescription could commence running" and secondly, that "the applicant had knowledge of those facts".

[66] By applying the objective assessment approach to the facts of the matter before it, the Constitutional Court in Loni found that the courts below had correctly established that a reasonable person in the position of the applicant would have realized that the treatment and care which he had received was sub-

[41] Loni (Full Court), *Supra*, at [35].

standard and not in accordance with what he could have expected from medical practitioners and staff acting carefully, reasonably, and professionally.[42]

[67] The court in MEC for Health, Western Cape v Coboza[43] dismissed an appeal against the court *a quo's* dismissal of a special plea of prescription in a situation where the MEC in that matter failed to plead with reference to the primary facts upon which the plaintiff's claim was founded when he knew the primary facts informing him of the existence of the debt or should reasonably have known them. The MEC in that matter failed to testify and purported to make capital of the plaintiff's concession in his testimony that he had been informed at a certain stage where the supposed problem lay and what was needed to remediate this. This absence in the pleadings of the relevant primary facts upon which the respondent's claim was founded caused the court to observe that "prescription had been raised in the air" without reference to such relevant primary facts. The court held that "(b)ecause these facts were not pleaded, it could obviously not be determined when the respondent knew the primary facts or should reasonably have known them" and that the plea of prescription was therefore "an exercise in futility."[44] It concluded that the court *a quo* should have dismissed the special plea on this ground alone.

[68] Coboza reminds us of the need to plead carefully, but special pleas of prescription are rarely pleaded elegantly. A court cannot of its own motion take notice of prescription. A party wishing to rely on such a defence must obviously

[42] *Supra*, at par [32]. It seems that the issue of whether the respondent was precluded from invoking the proviso did not feature before the Constitutional Court yet it concluded what it did ultimately on the basis of what the applicant should reasonably have known. This is quite different from a finding on the facts that the applicant had actual knowledge of the primary facts.
[43] *Supra*, at [13].
[44] *In casu* the primary facts were not identified either yet by the time of the trial it appeared to be accepted that the fact especially at the forefront of the enquiry was that a wrong pin had been inserted and that this was the reason for all the plaintiff's woes.

do so in the pleadings[45] and, I would venture to suggest, raise it in accordance with the rules of pleading. In Links the comment made about the absence of the any reliance by the MEC for Health upon the proviso at the end of section 12 (3) was made in passing in assessing the evidence (which had featured not in a trial but in an opposed application) and to highlight the fact that its utility had been raised, not on the papers specific to the relied upon facts, but by counsel introducing it for the first time in written submissions, also "up in the air" as it were.

[69] That in my view is quite a different thing from saying that as a general rule a party cannot ask a court to apply the provisions of section 12 (3) in a trial because there was no rejoinder filed in which the basis for its applicability has been foreshadowed. Prescription was properly raised on the pleadings *in casu*. The plaintiff proposed facts that he would rely on to say that contrary to the defendant's expectation that the debt arose on the same day as the damage causing event (not an unreasonable premise to begin with), he acquired actual knowledge of the identity of the debtor and the facts that he is required to know as to the existence of his debt on a date much further along after the procedure. The defendant did not necessarily have to file a rejoinder since she had already adopted a contrary stance (in her special pleas) to the effect that in her estimation prescription began to run much earlier. The stark lines of their respective positions were therefore fairly obvious from the pleadings. I also do not agree with Mr. Malunga's submission that she is required to plead an actual inception date (that would bind her on her pleadings). Rather what she is required to plead and prove is an inception date within the meaning of section 12 (1), in other words the most likely moment when the debt accrued in law. The period of prescription for a delict is three years so the objective would be to show by when, in relation to when the debt accrued, the plaintiff ought to have served his summons. This

[45] Section 17 of the Prescription Act.

is because section 12 (3) states clearly that prescription does not begin to run *until* the debt is due.

[70] It is not unusual in matters such as these incidentally, where the defence of prescription has been raised, for the debtor to plead an outer limit, and then for the evidence to reveal some sort of give or take in this respect, much as happened *in casu* in respect of Dr. Osman's concession that the plaintiff would unlikely have known of the factual cause of his complications on the same day as he underwent the procedure to fix the fracture or that the hospital staff were likely negligent. For the rest, once the bare fact basis has been pleaded, and the evidence is presented, section 12 (3) by operation of law suggests the basis for the deeming provision in the first part, and the proviso at the end, to be applied to the established facts. The subsection informs the determination of when the plaintiff had actual knowledge of the primary facts or objectively should reasonably have had knowledge thereof. In Coboza the court observed that there may be some overlapping of facts, but that it is important to bear in mind that these are distinct enquiries.[46] The court's approach in Gericke v Sacks also demonstrates this important distinction quite clearly.

[71] Since the defendant's case *in casu* was one predicated on the assertion that the inception date of the running of the prescription coincided with the date of the impugned procedure itself, with nothing further having been said in response to the plaintiff's replication or any reliance having been placed by her upon the proviso at the end of section 12 (3) to suggest when or under what circumstances the plaintiff ought reasonably to have acquired knowledge of the primary facts, Mr. Malunga suggested that Dr. Osman's concession that the plaintiff could certainly not have acquired such knowledge on the date on which she asserted in

[46] *Supra*, at par [8].

her special pleas prescription began to run, is decisive of the matter.

[72] He referred me to the matter of Ndaliso v Member of the Executive Council of the Department of Health of the Eastern Cape Government, Bhisho[47] which he contended was on "all fours" with the present matter.[48] Ndaliso's action also involved a claim for damages arising from alleged medical negligence where the defendant's special plea of prescription was met by the plaintiff's assertion that the injury suffered by him - entailing the tip of the K-wire removed from his knee being lodged there when the procedure to remove the wire itself was performed, was an ongoing one from the moment of the initial open reduction and fixation procedure until its removal seven years later when the foreign body was discovered and surgically removed and that, prior to that moment, he did not have the necessary knowledge of the identity of the debtor and the facts from which the debt arose. In the result, so he submitted, prescription only commenced to run at the point of discovery and surgical removal.

[73] Under cross examination it had been suggested to the plaintiff in Ndaliso that if he had returned to the hospital within two weeks as had been prescribed (post-surgery) his knee would have been x-rayed and the K-wire tip discovered and removed.

[74] What is significant in Ndaliso (and constituted Mr. Malunga's bull point in *casu*) is that the court was critical of the fact that despite the onus being on the MEC to plead and prove her special plea, she had failed to "call to aid the proviso in section 12 (3)."[49] The court noted the obligation on the defendant to do so with

[47] [2019] JOL 40772 (EL).

[48] I do not agree that Ndaliso is on all fours with the plaintiff's matter in the sense that there both the plaintiff and the defendant adduced testimony, with the plaintiff giving an account that was obviously aimed at avoiding any suggestion that he knew, or could reasonably have known, of the existence of the debt.

[49] Citing Loni (the Full court), Supra, as well as the seminal dictum by Diemont JA in Gericke v Sack *Supra* at 828A-C.

reference to the passage referred to above in Links (the Full Court matter), cited with approval by the Constitutional Court in Loni.

[75] Applying these principles to the facts of the matter, the court concluded that the factual allegation of the plaintiff that he did not know that the K-wire tip was in his knee until June 2011 (when he underwent the procedure to remove it) "was also not gain-said" and that he was not shown to have had sufficient facts causing him, on reasonable grounds, to think that the injury that he continued to experience was due to the fault of the Frere Hospital staff.

[76] Cognizant of the fair trial right of the plaintiff implicated the court in Ndaliso found that:

> "[22] … the special plea of prescription must fail. This is not the case where the plaintiff's right of access to court entrenched in section 34 of the Constitution should give way to the limitation that the defendant intends imposing on those rights. I am also of the view that a rigid application of section 12(3) of the Prescription Act in the circumstances of this case would result in an injustice."

[77] It is evident even from the conclusion above, that had the court not found that the defendant had failed on the first deeming provision in section 12 (3) that it may well have been inclined to have regard to the proviso as well in determining the possibility that the plaintiff could have been regarded as having had constructive knowledge of the essential facts. It was however self-evidently unnecessary to go that route.

[78] A careful study of the judgment in Gericke v Sack and those endorsing the appellate division's approach in this respect demonstrate quite unequivocally to my mind that a court is expected by virtue of the deeming provision and the

proviso respectively in section 12 (3) of the Prescription Act to apply its provisions to the facts found proven in any given scenario in order to reach a conclusion (informed by such enquiries) as to when the debt in each case fell due which would clarify when in fact prescription would have begun to run.

[79] That brings me to my next point which is that the plaintiff cannot dictate that any admissible evidence adduced towards such objective can simply be ignored by the court. The plaintiff's attorney could have sought particularity regarding the peculiar circumstances under which the defendant would influence the determination and if she intended to rely on either exception referred to in section 12 (3)[50] or why, despite the plaintiff's replication, she still intended to persist with her special pleas of prescription. The plaintiff could also have objected when the evidence came in, but in my view, he would ignore the evidence actually adduced against him in this respect at his own peril especially if that evidence reveals a *prima facie* case that he had actual or constructive knowledge of the identity of the debtor and the facts giving rise to his claim. It would also be risky in my view for a plaintiff not to seek to persuade a court (by evidence) that any inaction on his part was innocent and not negligent inaction. Whilst he bears no onus to prove that his claim has not prescribed, the reality is that an objective assessment of his conduct applies. He would therefore do well to place sufficient facts before the court to avoid the conclusion being drawn that he did not in all the circumstances exercise reasonable care in acquiring

[50] Had the plaintiff requested further particularity it is doubtful that the defendant would have replied that she intended to call Dr Osman. Evidently the defendant saw an opportunity only after he consulted with the plaintiff for purposes of the medical examination days before the trial to reveal what the plaintiff had told him. It is quite unusual for a debtor to base his claim on knowledge obtained after the fact and in a more or less privileged situation such as pertains here. This was not a forensic enquiry. His attorney was not present and no official translator assisted. The plaintiff was not made aware what he would be asked or informed that his answers might form the basis of an as yet unimagined aspect of the special plea based on the purported fact that he knew or was supposed reasonably to have known of the identity of the debtor and existence of the facts from which the debt arises. He no doubt related to Dr Osman as a doctor and it is not inconceivable that he may have related information to him that had been suggested to him by his own attorney and which informed his understanding of what his case was about.

knowledge of either or both the identity of the debtor and the facts giving rise to his claim.

[80] I am constrained to remind the parties of the necessity in determining special pleas based on prescription for evidence or agreed facts to be placed before the court.[51] The determination cannot be made in a vacuum and certainly not on the basis of a one-sided trial such as happened here because the plaintiff's counsel was of the view that the proviso to section 12 (3) could not be invoked. In MEC for Health: Eastern Cape v Mbodla,[52] the Supreme Court of Appeal the court found that it was not conducive for the issue of prescription to be resolved as a question of law alone. In Kriel v Meyer the court noted the importance of surrounding circumstances relevant to the creditor's conduct to be considered in the enquiry concerning whether there he failed to exercise reasonable care within the meaning of the proviso.[53] In Mtokonya it seems that the parties may also have floundered by articulating their stated case in such a way that the desired objective of determining whether the claim had prescribed or not eluded them in the end.

[81] That leads me to the question whether the defendant has shown (by the uncontroverted evidence of Dr. Osman which I am inclined to accept) and the common cause facts that the plaintiff acquired actual or constructive knowledge of the identity of the defendant and the facts giving rise to the debt under the circumstances and at the relevant times adverted to by him in his testimony.

[82] I have already dealt above with the concerns that I have in paragraphs [50] – [51]. Firstly, regarding the suggestion that I should find that the plaintiff had

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[51] Road Accident Fund v Ntoni [2016] JOL 35460 (ECG) at par [9].

[52] [2014] ZASCA 60 (6 May 2014) at [5] – [6] with particular reference to par [8] where the court noted that the matter before the high court should not have been disposed of on affidavit given the extreme consequence of a decision either way on prescription.

[53] *Supra*, at pages 25-29 and especially the authorities there referred to by the court in applying the deeming provision in section 12 (3), including Brand v Williams 1988 (3) SA 908 (C) at 913B-C.

actual knowledge of the identity of the defendant and the facts giving rise to the debt, whatever the plaintiff may have relayed to Dr. Osman was within his knowledge, the evidence in this respect is not clear neither can it safely be relied upon in my view. What is not clear is what the plaintiff was told by the hospital staff regarding the procedure. It would have been no mean feat for the defendant to have called the treating or consulting doctor and to have pointed in the medical records to a note substantiating what exactly he had been told or why he was asked to return to the hospital for further treatment. And what further treatment? This may have informed what exactly he knew at that point regarding his condition, but it is most implausible in my view that the hospital staff told him then that the treatment rendered was substandard in any way. The medical records on their own are scant and do not support the defendant's case that the plaintiff had actual knowledge of the fact that a wrong pin had been inserted and inadequately at that.

[83] Ultimately the defendant relied on a history furnished to a specialist by a layperson in a language that is certainly not his first language, given in a medical context. The timing of the knowledge attributed to the plaintiff is also questionable. A court would be more interested in knowing what he knew at the relevant time, not now, many years after the fact when his own knowledge could quite conceivably have been infused by what his attorney or Dr. Olivier informed him regarding the minutia of his case and trial that was imminent at the time of his medical examination.

[84] But even assuming I must accept that he was told that there had been "a problem" with the fixation, what about this information or knowledge on his part would have been an indication for him that the staff may have been negligent in carrying out the procedure. Also, the fact of his complications, as obvious as they may have been to him, would not have suggested to him that the treatment

administered to him was incorrect or inadequate and most certainly not that the hospital had used a wrong pin that is contraindicated in orthopedic practice. His situation is similar in my view to Links in which the court held that that plaintiff could not reasonably have known, without seeking the opinion of a specialist, that the care administered to him was substandard. The same applies to the other indications that all was not well with his leg. He could not reasonably have gleaned on his own that a wrong pin had been inserted and inadequately at that, neither would these manifestation on their own have caused him to make enquiries along the line whether the staff might possibly have been negligent in carrying out the procedure.

[85] In the result the defendant has not succeeded in showing on the evidence that the plaintiff had either actual or constructive knowledge of the identity of the debtor or of the facts giving rise to the debt, and the special pleas of prescription must accordingly fail.

[86] In the result I issue the following order:

1. The special pleas raised by the defendant are dismissed, with costs, such costs to include the costs of two counsel.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 17 November 2021

DATE OF JUDGMENT: 22 March 2022

*Judgment delivered electronically at 09h30 on this date by email to the parties.

APPEARANCES:

For the plaintiff: Mr. Y Malunga together with Mr. T Mpahlwa instructed by Cinga Nohaji, East London (ref. Mr Nohaji)

For the defendant: Mr. P Du Toit instructed Norton Rose Fullbright South Africa Inc., c/o Smith Tabata, East London (ref. Ms. M Demmer)