IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO. EL 478/2012
CASE NO. ECD 1178/2012

In the matter between:

BONISILE CHRIS NDALISO Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL OF THE DEPARTMENT OF HEALTH OF THE EASTERN CAPE GOVERNMENT, BHISHO Defendant

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JUDGMENT

MBENENGE JP:

[1] The plaintiff suffered a fracture of his right patella after having been involved in a motor vehicle accident during September 2004. He was initially admitted to the Cofimvaba Hospital but later transferred to Frere Hospital, East London, on or about 21 September 2004. At Frere Hospital the plaintiff was treated by means of an open reduction and internal fixation.[1] He was discharged from Frere Hospital on or about 29 September 2004. Seven years down the line, during or about June 2011, a small steel fragment that lodged in the plaintiff's knee (otherwise referred to as the k-wire) was removed by Dr Naidu at Laverna Hospital, KwaZulu-Natal.

[2] Consequent upon the removal of the k-wire by Dr Naidu the instant action was launched on 18 May 2012, the plaintiff's cause of action being, *inter alia*, that, whereas they could and should have done so, the medical and hospital staff employed at Frere Hospital failed to-

[1] Treatment whereby a k-wire is inserted into the anatomy of a patient

(a) prevent the lodging of the k-wire in the plaintiff's knee alternatively, failed to remove the same from the knee, during the procedure undertaken on him alternatively, failed to prevent the k-wire from being left in the knee; or

(b) have x-rays taken after the internal fixation had been performed.

[3] It is alleged by the plaintiff that the treatment received at Frere Hospital was below the agreed standard of treatment, alternatively, below the duty of care resting on the medical and hospital staff concerned. In particular, they failed to exercise the skill and diligence required of hospital and medical staff employed at the said hospital.

[4] The defendant resisted the claim by specially pleading in *limine* that-

(a) the claim had become prescribed in terms of section 11(a) of the Prescription Act[2] in that the action had not been instituted within 3 years from September 2004; and

(b) the plaintiff had not complied with section 3(4)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act.[3]

[5] The defendant otherwise denied liability on the merits, contending that the treatment meted out to the plaintiff was of the requisite**,** acceptable standard.

[6] The defendant's special plea attracted the delivery of the plaintiff's replication wherein the plaintiff contended that the injury he had suffered was ongoing until such time during June 2011 when the piece of k-wire was discovered and surgically removed and that, therefore, prior thereto he did not have the necessary knowledge of the identity of the debt and the facts from which the debt arose; prescription could thus not have run until June 2011. No rejoinder was thereupon filed by the defendant.

[7] At the commencement of the trial, and at the behest of the parties, I granted an order separating the issues raised in the special plea and plea over from that of *quantum*, and stood over *quantum* for determination on a future date.

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[2] 68 of 1969.
[3] 40 of 2002 (Legal Proceedings Act). Section 3(4)(a) of the Act reads as follows:

> "If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure."

[8] As the trial unfolded the parties made common cause of the fact that the tip of k-wire removed by Dr Naidu had in fact lodged in the plaintiff's knee during the operation performed on him by the medical and hospital staff at Frere Hospital during September 2004. This left for determination the issues whether-

(a) the plaintiff's claim has become prescribed by effluxion of time;

(b) the plaintiff gave timeous notice of his intention to launch the action against the defendant for purposes of the Legal Proceedings Act;

(c) the lodging of the tip of the k-wire in the plaintiff's knee is attributable to negligent conduct on the part of the hospital and medical staff employed at Frere Hospital; and

(d) the negligence resulted in harm for which the defendant is liable to compensate the plaintiff.

[9] The plaintiff testified that after the surgical operation on him had been performed, he was eventually discharged. He returned to the hospital and had plaster of paris and stitches removed. He also underwent physiotherapy. Despite the healing of the operation wound he continued experiencing pain.

[10] Under cross-examination it was suggested that had the plaintiff returned to the hospital some two weeks as directed, his knee would have been x-rayed and the k-wire lodging in his knee discovered and removed. The plaintiff responded that he complied with every instruction and prescription of the hospital for him to report back even though he could not recall the relevant dates. He was questioned about the absence of records supportive of his attendance at the hospital about two weeks after 6 June 2005. He remained adamant that he had complied with all instructions. He could proffer no explanation regarding the absence of supportive records.

[11] Dr Olivier explained the mechanism of how, in practice, orthopaedic surgeons go about inserting a k-wire into the anatomy of a patient and how the sharp tip thereof gets cut so as to avoid damage to surrounding tissue. He explained that the cutting is accompanied by substantial force that could cause the tip of the k-wire to be flung in

almost any direction. The standard procedure, he added, is to cover the tip before it is cut off with the idea that the piece of metal when cut off lands in the swab thereby avoiding the wire being deposited in the open wound or injuring others in the theatre. He further explained that if for any reason the tip of the metal is not found in the swab an immediate search for it is conducted for which purpose a portable x-ray or imaging device is used to ensure that at least the piece of metal is not deposited in the area of the operation wound.

[12] Prof Vlok, an expert called on behalf of the defendant, supported Dr Olivier's testimony in all material respects. Regarding the taking of x-rays in theatre he said:

> "The norm is you take x-ray beforehand, you examine your patient, you take your x-rays and you say I want to remove that and you make a note of what you want to remove. Then you go to theatre and you plan and one of the planning is you must have your equipment. You must have all your tools there to remove those things. You must have an x-ray there if possible and it is not always there. … You have to organise the x-ray beforehand and then you do what you want to do and afterwards you take all the instrumentation that you take out, you put it there and you say that is what I've seen, this is what I've got out, do I miss some parts."

[13] A joint expert report recording that Dr Olivier and Prof Vlok were in agreement that the presence of the broken tip of the k-wire located in the patellar tendon/ soft tissue and extra-articular had not been the cause of the plaintiff's chronic pain was filed of record. This report was followed by one wherein it is recorded that Prof Vlok was of the opinion that the presence of the k-wire that had lodged in the plaintiff's knee had not been the main cause of the plaintiff's chronic pain and that according to Dr Olivier the presence of the foreign body was responsible for the significant pain necessitating surgical removal. Dr Olivier distanced himself from the initial joint report insofar as it stated that the presence of the foreign body had not caused the plaintiff chronic pain. The circumstances in which the initial joint report was signed were explained by Dr Olivier during his testimony and not gain-said by the defendant, hence this court was urged to rely on the amended joint minute.

[14] During testimony the professor eventually conceded that, for as long as the tip of the k-wire lodged in the plaintiff's knee, pain would have been caused, but explained that his opinion was that the main cause of the pain was the patella fracture and the exostosis. In this regard he said:

"Ja, I honestly think that the main cause of his pain is his patella fracture and exostosis, but I can never say the other doesn't make a small contribution."

[15] During the cross-examination of Prof Vlok the following responses were elicited:

"Mr Louw: …a sharp item like the tip of the k-wire is something that is very very likely to be causing pain?

Prof Vlok: …yes I will agree with you on that….I will admit that the thing can give a sharp pain here and there, but I can't pull the two apart and say the one is doing this and the other one is doing that."

[16] Prof Vlok further mentioned that a note should have been made in the hospital record to show that the k-wire tip was missing. The cross-examination and responses thereto make this plain in the following terms:

"Mr Louw: Now you seem to agree about the necessity when cutting the tip of the k-wire to immediately find it…?

Prof Vlok: For sure

Mr Louw: And if you don't find it, would you agree with Dr Olivier that then you make note in the hospital record to show that the tip is missing?

Prof Vlok: Yes I would do that."

[17] The onus regarding the issues raised in the special plea rests on the defendant,[4] whilst that of proof regarding the merits of the claim rests on the plaintiff.

[18] Section 12(3) of the Prescription Act provides:

"(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and 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.**" (Emphasis supplied)

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[4] *Links v MEC for Health, Northern Cape* [2016] ZACC 10 BCLR 656 (CC); 2016 (4) SA 414 (CC); see also *Gericke v Sack* 1978 (1) SA 21 (A), where Diemont JA said:

> "The 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 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."

Also see *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC), para [181].

[19] In *Links*[5] it was held:

> "[42] … in cases including 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] 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)."

[20] *Links* (*supra*) was cited with approval in *Loni v Member of the Executive Council of the Department of Health of the Eastern Cape Government*,[6] where it was held:

> "In these circumstances the pleader faced with a denial or knowledge of the identity of the debtor or the facts from which the debt arises would be well advised in future to raise the proviso to section 12(3) in his pleadings."[7]

[21] The defendant did not call to aid the proviso to section 12(3). The factual allegation of the plaintiff that he did not know the presence of the tip of the k-wire in his knee until June 2011 was also not gain-said. The plaintiff 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.

[22] For all these reasons, 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.

[23] The special plea based on the Legal Proceedings Act must suffer the same fate. The notice contemplated in that Act was issued timeously, approximately within a month of the plaintiff having become aware of the cause of action against the defendant. The wording of the letter also passes muster and, for all intents and purposes, constituted the notice contemplated in the Legal Proceedings Act. There

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[5] *Supra*, at paras [42] and [45]

[6] Judgment of the full court of the Eastern Cape Division, Grahamstown by Eksteen J (concurred in by Roberson *et* Makaula JJ) delivered under case number CA338/2015 on 13 October 2016; Cf *Loni v Member of the Executive Council, Department of Health, Eastern Cape Bhisho* (CCT54/17) [2018] ZACC 2; 2018 (3) SA 335 (CC); 2018 (6) BCLR 659 (CC) (22 February 2018)

[7] *Ibid* at para [34].

was therefore no need for the plaintiff to seek condonation in terms of section 3(4)(a) of the Legal Proceedings Act.

[24] I now to turn to consider the merits. The court must have regard to the probabilities and the credibility of the various witnesses and any document relevant in determining the outcome.[8]

[25] As pointed out above, it ended up being common cause between the parties that the standard procedure to be adopted when performing an internal fixation making use of a k-wire was not followed in that there was no indication of any x-ray of the plaintiff's knee having been taken immediately after the tip of the k-wire had gone missing. That procedure accords well with logical reasoning.[9] In the circumstances of this case, there had to be a search for the missing tip of the k-wire, including viewing the operation site with x-rays from various angles in order to find the missing piece of metal. In the event of the metal not being found, a note to that effect had to be made in the hospital records. None of all this was done.

[26] The evidence of the plaintiff corroborated by Dr Olivier established that the tip of a k-wire, which is a particularly sharp piece of metal, will cause pain when left in a joint such as the plaintiff's knee, especially when the joint is put under pressure. That conclusion, too, accords well with logical reasoning.

[27] The defendant's counsel, Mr *Sishuba*, suggested, during argument, that the change in Prof Vlok's stance in relation to the cause of pain was fraught with disingenuousness. I do not share this view. I do not have reservations about the shift in Prof Vlok's approach to the case. Medical experts may obviously change their opinion after consideration of another point of view.[10] A change of opinion based on a good reason on receipt of fresh information is respected rather than criticised by the court,

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[8] *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) 440 D-G.
[9] *Bolitho v City of Hackney Health Authority* [1997] UKHL 46; [1998] AC 232 (HL (E)), cited with approval in *Michael and Another v Linksfield Park Clinic (Pty) Ltd* (1) [2002] All SA 348 (A).
[10] *National Justice Comparia Naviera v Prudential Assurance Co Ltd ('The Ikarian Reefer')* [1932] 2 Lloyd's Rep 68, 81 (COL2).

provided that the reasons for the amendment are sound.[11] In this instance the reason for the change of approach is well understood, as indeed it was sufficiently explained.

[28] The staff and medical practitioners who operated on the plaintiff ought to have been aware of the risks associated with leaving a sharp piece of k-wire in the plaintiff's knee and did not exercise the requisite duty of care to reduce the risk of harm to the plaintiff; they acted negligently and the negligence caused harm to the plaintiff. The harm consisted in the sharp pain the plaintiff experienced over several years and the medical treatment the plaintiff underwent to remove the tip of the k-wire in 2011, and the pain and discomfort associated therewith.

[29] It has been argued that I should show my displeasure principally at the manner in which the trial was conducted by the defendant's team who made no concession even at a time when the experts had reached agreement. At that point it remained for the parties to argue the matter. It had all along been available to the parties to canvass these issues much earlier at a meaningful pre-trial conference even as part of judicial case flow management, which was not done. I am therefore not inclined to award a punitive cost order for the reason advanced. Nor am I inclined to award a punitive cost order purely by reason thereof that at the start of the trial the defendant caused its expert to leave East London at the end of the first day and was thus unable to cross examine Dr Olivier. I am of the view that an ordinary cost order should make up for this show down.

[30] I therefore make the following order:

(a) The defendant's special plea is dismissed with costs.

(b) The defendant is held liable to compensate the plaintiff for the harm caused to the plaintiff through the negligence of the medical and hospital staff of the Frere Hospital in September 2004, being-

(i) the experiencing of sharp pain in his knee joint for the period spanning September 2004 and June 2011; and

[11] *Telles v Southwest Strategic Health Authority* [2008] EWHC 292 (QB).

(ii) the costs of removing the tip of the k-wire from the plaintiff's knee as well as the pain and discomfort associated therewith and the recovery after such removal.

(c) The defendant shall pay the plaintiff's taxed or agreed party and party costs incurred to date, such costs to include-

(i) the costs reserved on 29 October 2018;

(ii) the costs of Dr Naidu and more particularly his attendance at court on 08 June 2018; and

(iii) the qualifying expenses of Dr Olivier.

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S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

Counsel for the applicant	:	Mr *S S W Louw*
Instructed by	:	Niehaus Mc Mahon Attorneys East London
Counsel for the respondent	:	Mr *M H Sishuba*
Instructed by	:	The State Attorney East London.
Date heard	:	29 and 30 October 2018; 01 and 02 November 2018, and 09 November 2018
Date judgment delivered	:	22 January 2019