IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

DATE: 10 FEBRUARY 2010

CASE NO: 17666/2005

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

CHARLOTTE MARIA BRITS PLAINTIFF

And

B BRAUN MEDICAL (EDMS) BPK DEFENDANT

JUDGMENT

SITHOLE. AJ

(A) INTRODUCTION

[1] On 26 May 2005 the plaintiff instituted an action in this Court against the defendant for damages in the amount of R516 193.74 arising from a personal injury allegedly suffered by her as a result of the surgical implantation of two pins, one after the other, in her knee. The plaintiff is a 78 year old lady and the defendant is a South African company which imports, sells and or distributes a product called "the Huckstep nail" to hospitals and surgeons for use in orthopaedic surgery. I shall refer to this product as "the pin".

[2] The defendant raised a special plea of prescription in respect of the first pin. In terms of a pre-trial minute of a Rule 37 conference held on 8 May 2007, the parties agreed to separate the defendant's special plea (to which the plaintiff replicated) from the rest of the issues in terms of Uniform Rule 33(4). These issues would be postponed *sine die* and only the special plea is set down for separate adjudication.

(B) THE FACTUAL BACKGROUND

[3] On or about April 2001 and at Union Hospital in Alberton, the plaintiff underwent a surgical operation during which a surgeon called Dr Dave Barnes removed her septic knee-prosthesis and implanted a pin to effect an arthrodesis of her knee, which is a recognised function of such pin.

[4] Sometime during October 2001 the said pin got broken while it was *in situ* in plaintiffs knee. Soon thereafter Dr Dave Barnes surgically removed the broken pin at South Rand Hospital in Johannesburg and replaced it with a new, second pin, this time surgically implanted by means of screws.

[5] On 29 May 2002 it was discovered and confirmed in a letter to plaintiffs attorneys that the first pin had broken as a result of a crack in the metal of which it was made.

[6] Sometime during March 2003 the second pin, with which the first had been replaced, also got broken. The plaintiff alleges that the second pin also broke as a result of a crack in the metal of which it was manufactured.

[7] As a result of the above occurrence, on or about June 2003 one Dr Charles Latenbach of Milpark Hospital, Johannesburg, surgically removed the broken second pin and replaced it with a special fixator which was specifically made for the plaintiff.

[8] The issue of prescription relates only to the plaintiffs case in respect of the first pin, in that the defendant, who bears the *onus* of proof, contends that the plaintiff's action had to be instituted during October 2004 (ie before the 9th or at the latest 17 October 2004) to avoid that action from becoming prescribed.

[9] The plaintiff, on the other hand, contends that if anything, prescription started running on 29 May 2002, that is, on the date on which plaintiffs attorneys were informed of the crack in the metal of the pin by the SABS affiliated company called Test-House, and that summons was issued timeously on 26 May 2005, that is, three days before the prescription ran out.

(C) THE ISSUE TO BE DECIDED BY THE COURT

[10] It is clear from the foregoing factual background that this matter involves a special plea of prescription in a delictual action. The question which, therefore, has to be determined by this Court is the precise date on which the period of prescription in respect of the plaintiffs claim began running.

(B) THE EVIDENCE

[11] Counsel for the plaintiff, Mr B P Geach SC, handed up the following documents at the inception of the

trial:

> Exhibit A1 - a pre-trial minute Exhibit A2 - defendant's pre-trial agenda Exhibit A3 - plaintiff's response to the defendant's pre-trial agenda.
>
> Exhibit B - plaintiff's bundle in respect of the special plea Exhibit C - defendant's trial bundle

[12] The plaintiff was thereupon called to take the witness stand to testify for herself.

She testified that she is 77 years old having been born on 28 December 1929; that she knows that this case concerns a pin in her knee; that the pin was inserted into her knee in April 2001 and that in October 2001 it broke; that she does not know why it got broken; that a second pin was inserted to replace the broken one but it also broke; that it is almost four years ago that the second pin broke and yet she does not know why it did so.

[13] Under cross-examination by counsel for the defendant, Mr E J van Vuuren, plaintiff admitted that before the first pin was implanted in her knee she had had fourteen operations on her leg; that *in casu* she has been assisted by her daughter Charlotte Willemse; that in October 2001 her daughter spoke to doctors about the broken pin and that she knew that she has a claim against the defendants.

Upon being asked by the Court how she knew that the pin is broken, she replied that she heard a clapping sound and thereafter she could not step on her foot and that before that happened she could stand on her feet.

[14] The next witness for the plaintiff was Mrs Elsie Magdalena Elizabeth Kruger-Willemse. Her testimony is briefly that: she is an attorney by profession and that she is married to the plaintiffs grandson; during 2001 and 2002 she assisted the plaintiff with her case about the first broken pin; by then she was a candidate attorney at the legal firm Wentzel, Viljoen & Swart Attorneys; she confirmed all the correspondence in exhibit B; she first ascertained whether plaintiff has a claim in respect of the first broken pin; she sent the broken pin to the SABS for testing after it had been removed and replaced; the defendants' attorneys were Lindsay Keller & Partners and one Mr Weideman of that firm denied liability for the broken pin; the firm Lindsay Keller & Partners was, however, prepared to make a 50% contribution towards the costs of having the broken pin tested; it was only on 29 May 2002 that a report of the SABS was sent to her informing her about the cause of the breakage; she determined the cause of action for plaintiffs claim after she had seen the SABS report, that is, after 29 May 2002 and 30 June 2002.

[15] Upon cross-examination she conceded that the SABS report is not that good. It is a flimsy report, she said. She also admitted that the plaintiff knew that the pin is broken and the tests were in respect of the first pin. She conceded that the reason why the pin got broken is not addressed in the SABS report; and that no

agreement for the interruption of prescription of plaintiffs claim was entered into.

On being re-examined by counsel for the plaintiff she confirmed that she has n objection to the "flimsy" report of the SABS which refers to "'n kraak in die metaal van die pen" because only one metal pin was sent in by her for testing.

[16] That was the plaintiffs case and thereupon defendant decided to close its case as well, without leading the evidence of any witness. Argument ensued, with the *onus* resting on the defendant.

(E) THE APPLICABLE LAW

[17] The law which is applicable to the above set of facts is the Prescription Act 68 of 1969, in particular section 12 thereof which states that:

> "**When prescription begins to run**
>
> (1) Subject to the provisions of ss (2) and (3), 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 be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

Apart from the above statutory enactment, the relevant case law is also applicable in this matter.

(F) CONTENTIONS AND SUBMISSIONS ON BEHALF OF THE DEFENDANT

[18] With the Court's leave, counsel for defendant Mr E J van Vuuren, handed up heads of argument and argued, *inter alia*, that:

> 18.1 It is apparent from the defendant's complaints form and the plaintiff's attorney's letter of 8 November 2001 that from the onset the plaintiff certainly knew the identity of the debtor;
>
> 18.2 What remains to be considered is whether the plaintiff had knowledge of the facts from which the debt arises as required by section 12(3) of the Prescription Act;
>
> 18.3 As early as October 2001 the plaintiff knew that the pin had broken. That she further knew that,

in consequence, she required medical treatment which, *inter alia*, included surgical replacement of the pin - her damages.

18.4 The material fact *in casu* relates to the knowledge of the fact that the first pin broke. That this fact was known to the plaintiff:

18.4.1 By 9 October 2001 when she consulted Dr Barnes and when X-rays were taken of the fractured pin.

18.4.2 The aforesaid fact was further confirmed when the broken pin was removed and replaced on 17 October 2001.

18.5 Further confirmation appears from the fact that a complaint was made against the defendant.

18.6 The Court was referred to the following case law for the meaning of the phrase "cause of action" for purposes of prescription:

18.6.1 *Mckenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23;

18.6.2 *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 838D-F; and

18.6.3 *Truter and Another v Deysel* 2006 4 SA 168 (SCA) 174H-175A.

18.7 The running of prescription was not delayed because the plaintiff waited for an expert's report which in itself did not support her case.

18.8 Opinion evidence as to why the nail broke relates to the reasons in the expert's opinion as to why the factual circumstances (the broken pin) exist.

18.9 Moreover, plaintiff's Test House report does not even lay "blame" at defendant's door, which, even if it did, would merely constitute evidence of an expert's views that the defendant was negligent.

18.10 The plaintiff neither discovered nor presented any support for her contention as pleaded that the pin broke as a result of a crack in the metal from which it was manufactured.

18.11 In short, the plaintiff knew and believed, since October 2001 that:

18.11.1 The defendant had supplied the pin that was used in her arthrodesis;

18.11.2 The pin broke; and

18.11.3 She, as a consequence, sustained damages which for instance included her medical expenses.

18.12 Thus on analysis of the facts of the matter, the plaintiffs claim had prescribed. Reference is made to the *Truter* case, *supra,* in support of the proposition that plaintiffs case has prescribed.

18.13 The defendant accordingly submits that its special plea of prescription ought to be upheld with costs.

(G) CONTENTIONS AND SUBMISSIONS ON BEHALF OF THE PLAINTIFF

[19] Counsel for the plaintiff Mr B Geach contended and submitted that the defendant's special plea of prescription ought to be dismissed with costs for the following reasons:

19.1 Whereas the date of the Text House report is 29 May 2002, the date on which defendant's summons was served is 26 May 2005. It follows that such summons was served timeously within three years. This being the case, did prescription start on 25 October 2001 or did it start on 29 May 2002? He asked the rhetoric question.

19.2 That section 12 of the Prescription Act states that prescription starts "as soon as the debt is due" *etcetera.* The submission is made that it was only when the Test House report was released that the plaintiff could be said to have gained knowledge from which the debt arose.

19.3 The Court was referred to the headnotes in the case *Mulungu v Bowring Barclays & Associates (Pty) Ltd and Another* 1990 3 SA 694 (SWA) 697B.

19.4 Counsel concluded that only one pin was sent to the SABS for testing and that it had a crack on it, which could have been a factory fault.

[20] In his reply, counsel for the defendant submitted that there is no dispute about the broken pin and that the Test House report does not put a date to the cracking of the particular pin.

(H) EVIDENTIARY ANALYSIS AND FINDINGS

[21] It is common cause that:

21.1 In April 2001 and at Union Hospital in Alberton the plaintiff had a pin implanted in her knee to effect an arthrodesis of her knee;

21.2 In October 2001 the said pin got broken while it was *in situ* in plaintiffs knee and had to be removed and replaced with another at South Rand Hospital in Johannesburg, which second one also got broken at a later stage;

21.3 The plaintiff, duly assisted by her grandson's wife, went to see her attorneys (Wentzel Viljoen & Swart) in Pretoria in order to have the said pin tested by the South African Bureau of Standards (SABS);

21.4 On January 2002 plaintiff's attorneys wrote a letter to a Mr A P J Marais of the SABS, Pretoria, which letter reads as follows:

> "IS: TOETS VAN STAALPEN
>
> Ons versoek u hiermee om vermelde pen te onderwerp aan metalurgiese toetse. Ons verlang onder andere verslae oor die volgende:
>
> 1. Moontlike produksiefoute;
>
> 2. Installasiefoute;
>
> 3. Misbruik deur Kliënt;
>
> 4. Moontlike redes vir breek van pen;
>
> 5. Impak wat so staalpen kan hanteer;
>
> 6. Materiaal waarvan die staalpen vervaardig is;
>
> 7. Materiaal waarvan die staalpen vervaardig behoort te word en
>
> 8. Enige verdere verbandhoudende inligting
>
> Ons vertrou u vind bovermelde in orde en ontvang ons so gou doenlik 'n verslag van u."

21.5 On 21 February 2002 the plaintiffs attorneys wrote a letter to the plaintiff giving her a progress report as follows:

> "Mevrou,
>
> IS: USELF/B BRAUN MEDICAL (PTY) LTD

Met verwysing na bovermelde aangeleentheid doen ons

graag as volg verslag aan u.

Op 28 Januarie 2002 het ons die pen na die SABS geneem en opdrag gegee dat die pen onderwerp word aan ‘n volledige stel toetse. Meneer Danie Weideman het ons intussen in kennis gestel dat B BRAUN Medical bereid is om ‘n 50% bydrae tot die koste van die toetse te maak.

Ons is tans in afwagting van die verslae vanaf die SABS en stel u in kennis daarvan sodra ons dit tot ons beskikking het.

Ons vertrou u vind bovermelde in orde en kan u ons kontak indien u enige verdere navrae het.”

21.6 In a letter dated 29 May 2002, Mr A P J Marais, Manager: building materials, packaging and fabrication technology of Test House, an SABS-affiliated company, reported to plaintiffs attorneys as follows on the pin in question:

RE: BROKEN MEDICAL INSERT

With reference to, your letter dated 24th January 2002 the following information

1 A medical insert was received by TEST HOUSE. The insert was sealed in a medical paper bag. (See photo 1)

2 The two pieces when fit together does not form a straight line. (See photo 2)

3 The contact surface between the two pieces show polished surfaces, which indicate that the two pieces moved independently. (See photo3)

4 When the two pieces are placed on a horizontal surface a gap is observed on one side. This indicates that material was lost in the time the insert was installed. (See photo4)

5 Damage or marks were observed on both pieces (See photo 5).

6 No tensile stress fractures were observed. The fracture surface is flat and straight.

The breaking of the insert was because of a crack in the metal.

It is not possible to determine what caused the crack in the devise.

Please contact us if you have any questions at 012 4[...] or m[...].”

21.7 On 26 May 2005, subsequent to receiving the Test House report, the plaintiff issued a summons against the defendant for damages arising from a personal injury suffered by her as a result of the surgical implantation of the two pins, one after the other, which pins got broken in her knee.

21.8 The defendant raised the special plea of prescription in respect of the first pin, which is the subject matter of this decision.

21.9 The *onus* to establish the defence of prescription rests on the defendant. [See *Mulungu v Bowring Barclays & Associates (Pty) Ltd and Another* 1990 3 SA 694 (SWA) 697B] [See also *Gericke v Sack* 1978 1 SA 821 (A) 827]

21.10 The prescription issue relates only to the plaintiffs case in respect of the first pin and that the remainder of the plaintiffs case be postponed *sine die.*

[22] Whereas the defendant, on the one hand, contends that the plaintiffs action had to be instituted during October 2004 (ie before the 9th or at least on 17 October 2004) to avoid her action from becoming prescribed, the plaintiff contends that her action was instituted timeously within three years on 26 May 2005 after having come to know of the Test House report of the SABS on 29 May 2002.

[23] The question that falls to be answered by the Court therefore, is: when, in respect of the first pin, did extinctive prescription commence to run? To answer this question one would, of necessity, have to read and understand the provisions of the relevant section of the Prescription Act 68 of 1969 and to take into account the fact that the plaintiffs claim is subject to a three year extinctive period of prescription.

[24] Section 12 thereof reads as follows:

“When prescription begins to run -

(1) Subject to the provisions of ss (2) and (3), 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 be deemed to have such knowledge if he could have acquired it by exercising reasonable care." (Emphasis added)

[25] In *Truter and Another v Deysel* 2006 4 SA 168, paras [11]-[16] at 173B-D and 174C-D, it was held that:

> "Under s 12 of the Act prescription of a debt (which included a delictual debt) began running when the debt became due and a debt became due when the creditor acquired knowledge of the facts from which the debt arose, in other words, the debt became due when the creditor acquired a complete cause of action of the recovery of the debt or when the entire set of facts upon which he relied to prove his claim was in place."

[26] The question arises, when did the plaintiff acquire knowledge of the facts from which the debt arose? Evidence indicates that as early as on 17 October 2001 the plaintiff (duly assisted by her grandson's wife, Mrs Willemse, who described herself as her daughter) had knowledge of the identity of the debtor. This is clear from the Debtors SOP Complaint form which was completed by Mrs Willemse on her behalf.

Furthermore, in a letter dated 8 November 2001 the plaintiff's attorneys wrote a letter to Mr Danie Weideman of the debtor's attorneys, which letter is couched in the following terms:

> "IS: MEV C.M. BRITS / B BRAUN MEDICAL (PTY) LTD
>
> Bovermelde en ons skrywe van 26 Oktober verwys
>
> Ons rig 'n vriendelike versoek aan u om so spoedig moontlik op gemelde skrywe te reageer. Ons berig graag verder aan u dat Mevrou Brits in die tussentyd uit die hospitaal ontslaan is
>
> Ons waardeur u samewerking."

Besides, the plaintiff, under cross-examination admitted, *inter alia,* that in October 2001 her daughter spoke to doctors about the broken pin and that she knew that she has a claim against the defendants.

[27] That being the case, the next question begging for an answer is whether the plaintiff had knowledge of the facts from which the debt arose, as required in section 12(3) of the Prescription Act. In her evidence-in-chief the plaintiff testified that the first pin was inserted into her knee in April 2001 and that in October 2001 it broke and that she does not know why it got broken. This, in my considered opinion, is indicative of the fact that in October 2001 the plaintiff had knowledge that the pin in question had broken. This is why she sought medical treatment to have the pin replaced. Evidence of plaintiffs knowledge of the broken pin is also clear from a radiological report dated 9 October 2001 and compiled by Dr Antonet De La

Rey. Such knowledge on the part of the plaintiff was further confirmed when the broken pin was removed and replaced on 17 October 2001. The completion of the complaint form referred to in paragraph 26, *supra*, is also further evidence of the knowledge of the fact that the first pin broke.

[28] In the *Truter* case *supra,* in paragraph [19] at 174H-175B the Supreme Court of Appeal held, further, that for purposes of prescription "cause of action" means every fact from which it is necessary for the plaintiff to prove in order to succeed in his claim. It does not comprise every piece of evidence which is necessary to prove those facts; that an expert opinion that certain conduct has been negligent is not itself a fact, but rather, evidence (see paragraph [20] at 175B).

[29] *In casu* plaintiff knew from the time the first pin got broken that she had a potential claim against the defendant. This is clear from the answers she gave during her cross-examination. Such knowledge was not dependent on the Test House report by experts of the SABS. Neither was the running of prescription delayed because the plaintiff awaited such report, which, in any event, is not supportive of her case.

[30] The expert opinion evidence, *in casu,* as to why the pin broke relates to the reasons, in the opinion of an expert, as to why the factual circumstances (the broken pin) exist. Moreover, the Test House report does not lay any blame whatsoever at the defendant's door. Had it done so, it would, in any event, merely constitute evidence of an expert's opinion that the defendant is negligent and not a fact, as per authority of the *Truter* case, *supra* in paragraph [20] at 175B.

[31] Besides, a conspectus of the pleadings, ie the plaintiff's particulars of claim, indicates that plaintiff has neither discovered nor presented any support for her contention, as pleaded, that the pin in question broke as a result of a crack in the metal of which it was fabricated.

[32] It was further held in the *Truter* case, *supra,* in paragraph [21] at 175E-F that the plaintiff in that case had not lacked capacity to appreciate that a wrong had been done to him, and the running of prescription could therefore not be delayed on that ground. If one applies this finding to the present case, Mrs Brits had also not lacked capacity to appreciate that a delictual wrong had been done to her (even if she was assisted by her grandson's wife, Mrs Willemse). So, prescription had to take its course without let or hindrance.

[33] Again, in the *Truter* case, *supra,* it was held further in paragraph [22] at 175G-175A, that in accordance with the "once and for all" rule a plaintiffs cause of action was complete as soon as he sustained some damage, not only in respect of the damage actually sustained, but also in respect of any damage yet to be sustained. On the authority of this finding, there is no doubt in my mind that the "once and for all" rule is equally operative, without variation, *in casu.*

(I) CONCLUSION AND ORDER

[34] In the light of the foregoing evidentiary analysis and the applicable case law (mainly the *Truter* case, *supra)* I am constrained to arrive at the ineluctable conclusion that, on the facts, the plaintiff had since October 2001 had knowledge and was aware that:

34.1 The defendant had supplied the pin which was used in an operation of the debridement of her left knee joint and arthrodesis;

34.2 The said pin broke in plaintiffs knee sometime in October 2001 and had to be replaced;

34.3 The plaintiff consequently sustained damages which included her medical expenses;

34.4 Plaintiff's claim in respect of the pin in question prescribed in October 2004, which prescription started running in October 2001 as soon as she acquired knowledge of the facts from which the debt arose and not after knowing the contents of the Test House report;

34.5 Accordingly the defendant's special plea of prescription has to be upheld.

[35] In the result, the following order is hereby made:

The defendant's special plea of prescription is upheld with costs and the plaintiff's case is postponed *sine die.*

M N S SITHOLE

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

JUDGE OF THE NORTH GAUTENG HIGH COURT

17666/2005/sg

Heard on: 16 May 2007

For the Plaintiff: Adv B Geach

Instructed bv: Messrs Wentzel Viljoen & Swart, Pretoria

For the Defendant: Adv E J van Vuuren

Instructed bv: Messrs Macintosh Cross & Farquharson, Pretoria

Date of Judgment: