REPUBLIC OF SOUTH AFRICA

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

CASE NO: 22932/2014

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

19/10/2016 .....
DATE SIGNATURE

In the matter between:

ALTON PAUL	Plaintiff
and	
ER CONSULTING INCORPORATED	First Defendant
NETCARE OLIVEDALE HOSPITAL (PTY) LTD	Second Defendant
DR GEETESH M VALA	Third Defendant

JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] The plaintiff, a divorcee and unemployed businessman, has instituted action against the defendants, claiming damages which the plaintiff allegedly suffered following upon the death of the plaintiff's son, Cohen Josh Paul ("*Cohen*"), born on 11 September 2009. Cohen died at the Netcare Olivedale Hospital ("*second defendant*") on 26 March 2011.

[2] The plaintiff's alleged damages consists of funeral expenses, past hospital and medical expenses, estimated future medical expenses, past loss of earnings, estimated future loss of earnings capacity, and general damages for pain and suffering, loss of amenities of life and disability.

[3] The second defendant, in its plea, and *in limine*, raised a special plea of prescription. In this regard, and in particular, it is alleged that the plaintiff knew or ought to have known of the debt by no later than 26 March 2011, being the date of death of Cohen. Following upon an order granted by Opperman J on 28 November 2017, the second defendant's special defence of prescription was separated from the remainder of the other issues. Consequently, the only issue for determination before me, is the question

whether the plaintiff's claim against the second defendant only has indeed become prescribed.

[4] The following facts are common cause. Cohen was admitted to the Netcare Olivedale Hospital on 18 March 2011. On admission, Cohen was suffering from extremely high fever. The X-rays revealed that he had bronchopneumonia. Dr G M Vala ("*Dr Vala*"), cited as the third defendant herein, was the treating doctor, and was responsible for all diagnostic procedures and treatment of Cohen during his stay in the hospital. On 20 March 2011, Cohen experienced a traumatic episode, which was accompanied by respiratory failure and cardiac arrest. A subsequent computerized tomography ("*CT*") scan revealed that he was, for all practical purposes, brain dead. A few days later, and on 26 March 2011, Cohen passed away. It was common cause that the summons commencing action against the second defendant was issued on 25 June 2014, and served on the same day. The second defendant's plea of prescription is based on section 10(1) read with section 11(1) of the Prescription Act 68 of 1969 ("*the Prescription Act*"). In his replication, the plaintiff admitted that a period of more than three (3) years has expired, but proceeded to rely on the provisions of section 12 of the Prescription Act.

[5] The only witness for the second defendant was Ms Linda Vhagaloo ("*Vhagaloo*"). She was employed by the second defendant as a manageress. Initially, and in the main, Vhagaloo testified about the procedures of the hospital regarding the admission of patients, the opening, keeping, storage, of

patients' files and hospital records, as well as when nursing staff were required to call in medical doctors.

[6] In short, the evidence was that the patient's file and records were always available with the patient and number in the ward, accessed by medical staff and family visitors in the ward. The records were kept until the patient was discharged or passed away. Thereafter, the records were kept at an out-sourced company away from the hospital. Whilst in hospital, the patient always carried a mast, which is a tag around the body, and contained the patient's I/D band which was the patient's file number. In regard to relevant patient's file in this matter, Vhagaloo testified in regard to the trial bundle. On page six of the document was the post-mortem examination report carried out on the body of Cohen on 26 March 2011, and dated 28 March 2011. The cause of death was given as, "*Consistent with Florid Bronchopneumonia and Diffuse Alveolar Damage*".

[7] More significant, and relevant to the issue for determination in this matter, was the evidence of Vhagaloo, based on the contents of the trial bundle, that: on 15 October 2013, the hospital received from Attorneys Ronald Bobroff and Partners Inc, acting on behalf of the plaintiff, an e-mail in the following terms:

> "*Please find attached hereto extract from clinical* [sick] *noted that relates to Josh Cohen, who was admitted to Olivedale Clinic on the 18 March 2011. We note however that the child received various medication whilst in the paediatric ward. No medicine charts were included in the records obtained. Kindly advise us on the correct procedure to obtain copies of the medicine administration charts. We*

tender the reasonable costs involved to obtain copies of the documentation requested."

On 16 October 2013, the hospital replied, *inter alia*, as follows:

"*Form C as attached may be completed and submitted to the Hospital for further processing. Hospital Manager Bets Welman is copied as per your e-mail (e-mail address details corrected). If Form C had previously been completed, please let us have a copy of same and he will follow up accordingly.*"

On 17 October 2013, Attorneys Ronald Bobroff and Partners Inc replied, *inter alia*, as follows:

"*Please find attached hereto the following:*

1. *PAJA from C.*
2. *Consent form.*
3. *Copy of Mr Paul's Driver's License.*

Our client obtained the records in his personal capacity, and I am not in possession of his request form. Please note that we are in possession of the casualty records and all the nursing notes, doctor's notes and vital sign charts etc. …

Kindly assist us in obtaining copies of the medicine administration charts. We tender the reasonable costs involved to make the copies available."

There were some delays as revealed by the correspondence exchanged. However, on 6 November 2013, Attorneys Ronald Bobroff and Partners Inc addressed an e-mail to the hospital as follows:

"*We acknowledge receipt of the medication administration Charts, for which we thank you. Kindly advise us on the procedure to obtain*

copies of our client's hospital expenses (account), and please advise if you can e-mail same to me."

[8] In cross-examination Vhagaloo readily conceded that she was not yet the Hospital Manager in 2011. A Mr Robert Jordaan who had since left was. As a consequence, other than procedures mentioned above, she had no personal knowledge of what transpired at that stage, including whether Cohen's hospital file had always been available in the ward and to his parents. She had no medical qualifications and therefore unable to comment on clinical processes followed. In regard to Cohen's abridged death certificate as contained in the trial bundle, and issued by the Department of Home Affairs on 28 March 2013, Vhagaloo conceded that the case of death was reflected as being still under investigation.

[9] The plaintiff was equally the only witness for his case. He was divorced from the mother of Cohen. He had two (2) sons, and Cohen was the baby. In March 2011 the latter had no health problems, and had started walking and talking at age 18 months.

[10] On 18 March 2011, and since Cohen had flu-like symptoms and raised temperature, his wife took Cohen to the Olivedale Hospital where he was treated at casualty – after being examined by a doctor. The doctor at casualty ran some tests and recommended that Cohen be admitted for further analyses. That same day, Doctor G M Vala, a paediatrician, (third

defendant), examined the child. Tests were conducted. Dr Vala expressed no real and worrisome concerns.

[11] The next day, namely 19 March 2011, Cohen was fine. His temperature seemed to come down. On Sunday 20 March 2011 the plaintiff visited Cohen in hospital – after lunch. Whilst he was carrying Cohen in the ward, all of a sudden, the baby started shaking. His body went still. His eyes rolled back. According to the plaintiff, there was nobody in the ward. He screamed for help. The nurses came running. They took the child into a room for examination. They told the plaintiff there was nothing to worry about. It was common in children. The doctor came later. He also examined the child. The doctor also assured the plaintiff that seizures were common in children. The doctor ran tests. Cohen was given more medication. He calmed down. The outcome of the tests was awaited. It turned out that Cohen had had a heart attack.

[12] As stated under the common cause facts, Cohen died on 26 March 2011 in hospital. According to the plaintiff, neither the doctor, nurses nor the counsellor in attendance, could tell him the cause of death on the spot. Pursuant to the death of Cohen, the plaintiff testified that he was emotionally and physically disturbed, and was counselled by his church pastor and a psychologist. He decided to seek legal advice.

[13] The plaintiff said that he approached a few law firms, including Wits Law Clinic. He also consulted with law firms like De Broglio and Munroe Flowers and Vermaak and Partners. However, according to the plaintiff, all these legal institutions could not assist him since the histology results were outstanding and the cause of the death was still under investigation. The post-mortem examination report was faxed to him, apparently by Doctor Shirley Portia Moeng, who conducted the examination, and at the plaintiff's request. The plaintiff said that he needed the report because he needed some kind of facts in order to approach the law firms therewith. He became aware of possible negligence on the part of the defendants only after receipt of the post-mortem examination report. I observed that up to this stage of the evidence-in-chief, the plaintiff made no specific mention of dates of the events regarding consultations with the various law firms. However, prior to concluding his evidence-in-chief, the plaintiff testified that it was only in 2013 that Attorneys Ronald Bobroff and Partners Inc could help him. Indeed, it was not in dispute that the summons, dated 24 June 2014, was issued and served by Ronald Bobroff and Partners Inc on 25 June 2014.

[14] In cross-examination, the plaintiff confirmed that between the period 20 March 2011 and 26 March 2011, he had concerns about the cause of death of Cohen, and asked many questions all over. He was not happy with all the answers given, and even approached newspapers. He knew already in 2011 that Cohen had pneumonia, but Doctor Lee, Cohen's regular paediatrician, advised that only the post-mortem examination report would provide all the answers. It was only after he had consulted with Attorneys Ronald Bobroff Inc

that he was told to get the post-mortem examination report. However, he could not, on his own identify the alleged negligence in the report. He obtained the patient's hospital records on his own, and with relative easy, and none of the attorneys he consulted had advised him to obtain these records. By 26 March 2011, the day on which Cohen passed away, he already knew that Cohen had suffered a brain death, and that he had options in this regard, like switching off the life support machines. He also consulted a neurosurgeon at the hospital.

[15] Indeed, it was significant in cross-examination that the plaintiff conceded that he in fact received the post-mortem examination report on 25 June 2011 or a day later, but only consulted Attorneys Ronald Bobroff and Partners some two years later, namely during 2013. I paraphrase his response as to the reasons for the delay:

> "*During that time after Cohen died a part of me also died. And I had to find myself. I had to get help – for myself. I would not be here today if I did not get that help. And I did get it. Because after that I lost my family, I went through a divorce. Instead of losing one child I now do not see my other son. A lot of things transpired. So I cannot give you actual time and dates as to why. But it was a lot of prayer and going to church and being with the right people that me so far. At one stage I was never going to be able to get so far with this. I was not, because I at that time .... Knows, even suicidal. And I cannot for the time that went by, but I can tell you this much, it has been a long journey for me to get here. I am sorry, but ...*"

[16] The plaintiff proceeded to testify in cross-examination that although all the legal firms he approached demanded more information before he could be assisted, they in fact operated differently. As an example, that some of the

attorneys firms required a solid case before they could help him. He however could not return to all these attorneys on receipt of the requested information since he was going through a divorce. He was, however, assisted by a separate lawyer with his divorce. When he did mention his present matter to his "*divorce attorney*", he was advised that his case pending required lawyers who specialized in such cases. He knew that attorneys like De Broglio, Munroe Flowers and Vermaak, and Attorneys Ronald Bobroff and Partners, specialized in cases such as the one under discussion.

[17] When it was put to the plaintiff that his present alleged claim against the second defendant arose by no later than 26 March 2011, being the date of death of Cohen, and that by that time he had all the necessary information to institute proceedings, he disputed this. He awaited the outcome of the autopsy. He could not explain why and when he consulted with Attorneys Ronald Bobroff and Partners already in October 2013, summons was not issued and served. All the plaintiff could say was that the last mentioned firm of attorneys "*requested, a lot of information*". No details were mentioned. The re-examination of plaintiff, as well as a single question raised by the Court, did not reveal much, save that, the plaintiff relied on expert advice, hence the delay, and that both he and his ex-wife, were matriculants when running their catering business prior ot the divorce.

[18] We have here to do clearly with an adult claimant's claim, and not that of a minor, nor on behalf of a minor. The incident was sad. However, I must hasten to revert to the legal principles applicable. Section 12 of the

Prescription Act, which has been the subject matter of numerous legal writings and case law, provides as follows:

> "*(1) Subject to the provisions of subsections (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 the exercising of reasonable care.*" (underlining added)

[19] In the circumstances of the present matter, it was truly not necessary to traverse all the legal principles and case law. This, for obvious reasons – on the facts of the present matter, the plaintiff must fail. The starting point was the obvious. On the credible evidence and common cause facts, there can be no indication that the second defendant, and its staff, in any way prevented the plaintiff, and/or obstructed him, in any way, from accessing knowledge of the existence of the debt. For example, when the medical/hospital records were requested by the plaintiff himself, these were made available without any undue delay. The same applied to the medication administration charts requested by Attorneys Ronald Bobroff and Partners, as stated above. However, the plaintiff, notwithstanding the legal advices of at least two sets of attorneys, and that of the Wits Law Clinic, did nothing for a period of in access of two years. In addition, the hospital records of Cohen were freely available to him. These, and the patient's file, and accessible to the plaintiff and his ex-

wife whenever they visited Cohen in the ward – the visits were continuous and exchanged by the parents. See for now, *Loni v MEC, Department of Health, Eastern Cape* (2018) ZACC2, paragraph [34] p 14. See also *Links v Department of Health* 2016 (4) SA 414 (CC) at paragraph [47] at 429G, and paragraph [49] at 429I-430B. (*Cf Misnum's Heilbron Noller v Nobel STR Central Investments (Pty) Ltd* 1972 (2) SA 1127 (W) at 1128 (A).

[20] Crucially, section 12(3) of the Prescription Act, imposes a positive duty on a creditor to exercise reasonable care in obtaining knowledge of the debtor, as well as the facts giving rise to the debt. See *Gunase v Anirudh* 2012 (2) SA 398 (SCA) at paragraph [14].

[21] In *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) at paragraph [17], the Court said:

> "*This Court had, in a series of directions, emphasized that time begins to run against the creditor when it has the minimum facts that are necessary to institute actions. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'", and "It is well established in our law that:-*
>
> *(a) Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them.*
>
> *(b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.*
>
> *(c) On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge.*
>
> *It follows that belief that is without apparent warrant is not knowledge, nor is assertion and unjustified suspicion, however passionately*

> *harboured; still less, is vehemently controverted allegation or subjective conviction.*"

See also *Truter and Another v Deysel* 2006 (4) SA 168 (SCA) paragraph [16].

[22] More recently, in *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) at paragraph [36], the Court said:

> "*Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from the facts from which 'the debt arises'. Case law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor.*"

See also paragraph [24] of the same judgment for the proposition, *inter alia*, that without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute.

[23] In applying the above principles to the facts of the present matter, the conclusion that the plaintiff's claim has become prescribed, became inescapable, as argued by the second defendant, and quite correctly so, in my view. There are numerous reasons for this determination, as listed immediately below.

[24] For starters, and significantly too, in the replication to the special plea of prescription, the plaintiff readily conceded that more than three years have elapsed, but thereafter baldly contended that his debt was not due before 25

June 2011. In the pre-trial conference held on 1 March 2018, it was conveyed that the plaintiff's case would be that prescription only started to run on 26 June 2011, namely the date on which the post-mortem examination report became available. On the credible evidence, prescription commenced running on 26 March 2011, namely the date on which Cohen passed away, and while the plaintiff and his ex-wife were in attendance at the hospital. On the last-mentioned date, the plaintiff had available to him all the "*facts which a creditor would need to prove in order to establish the liability of the debtor*", (the second defendant) – had he exercised reasonable care, and to determine that he had a claim. In addition, the hospital records were freely available to him. The contention of the plaintiff that he was awaiting the outcome of the post-mortem examination was without merit clearly. In any event, when the report came in June 2011, it simply confirmed that the cause of death was due to bronchopneumonia, and apportioned no blame to anyone. I must also find, as I am bound to do, that the plaintiff's evidence only, to the effect that all the legal firms he consulted, including the Wits Law Clinic, turned him away without so much was highly improbable, in the circumstances of this case. (See and compare *Links, supra* paragraphs [51] to [52], where the Legal Aid Centre was criticized for not assisting properly an indigent and prospective claimant). It is common knowledge that some of the law firms which the plaintiff claimed in evidence turned him away, indeed specialize in litigation of this nature. The entry of Attorneys Ronald Bobroff and Partners into the fray in October 2013, also did not help. This law firm engaged in securing the medication administration records and charts, and later the irrelevant information, such as the plaintiff's medical expenses, when the plaintiff had a

medical aid scheme. These attorneys confirmed at that stage that the plaintiff had previously obtained the casualty records and all other records in respect of the treatment of Cohen for the period 18 March 2011 to 26 March 2011. It is noteworthy once more, that the requested medication administration records were made available to Attorneys Ronald Bobroff and Partners within days of the request. On this basis, if it could hardly be argued that the second defendant did not co-operate with the plaintiff and his attorneys. The fact of the matter is that at that stage, the plaintiff was in possession of the casualty records which should reasonably have enabled him and his legal representatives to properly assess the nature and extent of the treatment, and medical care administered to Cohen. Although a layperson in law, the plaintiff testified that, not only were his ex-wife and himself matriculants, but they also ran a catering business. He was therefore not entirely illiterate. The observation made by the Court in *Links*, *supra*, at paragraph [47], "*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*", is not strictly applicable here. After the death of Cohen, the plaintiff could have, and should have consulted any expert, and from whom he may have chosen to seek a second opinion. Dr P Hansen, a paediatrician neurologist, and Dr Lee were indeed able to advise the plaintiff in regard to the respiratory failure, as well as the likely cause of Cohen's death.

[26] In addition, on the entirety of the credible evidence, and documentation, all the facts underlying the plaintiff's claim, were known, and/or should have been known to the plaintiff by no later than 26 March 2011. When Attorneys Ronald Bobroff and Partners requested from the second defendant the medication administration records in October 2013, the plaintiff's claim was still extant – in the hands of a reportedly specialist firm of attorneys, notably in motor vehicle accident ("*MVA*") negligence cases. However, as noted above, the summons commencing action was only issued and served on 25 June 2014, almost a year after the medication administration charts were made available to the attorneys. There was no plausible and reasonable explanation provided for the delay. Neither was there such explanation forthcoming why the plaintiff could not consult a legal representative immediately after he had received the post-mortem examination report already in June 2011. The courts should not countenance such supine conduct since it is in the interest of justice that there must be finality in litigation, whenever possible. Supine inaction on the part of a creditor in cases of this nature was discouraged by our courts. See for example, *MacLeod v Kweyiya* 2013 (6) SA 41 (SCA) at paragraph [9].

[26] Top sum up. In applying the test of the reasonable man, as well as the legal principles to the facts of the present matter, the unavoidable conclusion on the prospectus of the evidence, is that the plaintiff had actual knowledge of not only the second defendant, but also all the material facts on which his present claim is based long before his claim prescribed. The information was freely available to him, or could have been obtained by him with relative ease

if he had only exercised reasonable care. By the end of March 2011, he knew, or ought to have known that: Cohen was admitted to the second defendant; that Cohen was treated by Doctor Vala and nurses; that on 20 March 2011 Cohen collapsed with respiratory and cardiac arrest; that the CT scan showed that Cohen had features of brain death; that the plaintiff wanted answers, and by 23 March 2011 the plaintiff was already unhappy with the answers provided to him by the nursing staff; that Cohen passed away on 26 March 2011; and that a post-mortem examination would be conducted to confirm the cause of death. Indeed, there were other facts which were known to both the plaintiff and his ex-wife as they were constantly at Cohen's bedside. All this indicated overwhelmingly that the plaintiff had both actual and constructive knowledge, as well as the identity of the debtor (second defendant). He had more than the minimum facts that were necessary to institute legal action. He did not do so. As a consequence, and regrettably, the plaintiff's claim became prescribed on 26 March 2014, or as alleged in the special plea. The summons was only issued and served on 25 June 2014.

CONCLUSION

[27] I conclude based on all the above reasons, that the plaintiff's claim must be dismissed with costs.

ORDER

[28] In the result the following order is made:

1. The plaintiff's claim is dismissed with costs.

D S S MOSHIDI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the plaintiff	Larry Marks
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Instructed by	Whalley and Van der Lith Inc
Date of hearing	19 March 2018
Date of judgment	19 October 2018