OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE NORTH WEST HIGH COURT
MAHIKENG

CASE NO.: 818/14

In the matter between:

V M obo T M — **1ST Plaintiff**

B S — **2ND Plaintiff**

and

MEC OF HEALTH- NORTH WEST — **Defendant**

CIVIL MATTER

DATE OF HEARING : 07 NOVEMBER 2016

DATE OF JUDGMENT : 10 FEBRUARY 2017

FOR THE PLAINTIFF : Adv. Linda Retief

FOR THE DEFENDANT : Adv. K E Masoga

JUDGMENT

KGOELE J:

[1] The first plaintiff is the biological mother of the minor child T M and acts in her personal and representative capacity of the minor child T. The second plaintiff is the biological father of the minor child and acts in his personal capacity. I will interchangeably refer to the first and second plaintiffs as "**Plaintiffs**" and where necessary as first and second plaintiff respectively.

[2] The defendant is the Premier of the North West Province alternatively the Member of the Executive Committee for the Department of Health, in his or her representative capacity as nominal defendant for all the claims arising against the Bodibe New Clinic and the General De La Rey Hospital. All references herein to the defendant are intended to include a reference to the aforesaid defendants in the alternative.

[3] The plaintiffs instituted an action against the defendant for damages allegedly caused by a breach of a duty of care in respect of the medical and or professional services provided by the employees of the Bodibe New Clinic (**the Clinic**) and/or the General De La Rey Hospital (**the hospital**).

[4] The parties agreed in terms of Rule 33(1) of the Uniform Rules of Court (**the Rules**) to state the facts of this matter for the adjudication of the Court. Their stated case was couched as follows:-

1.

"1.1 The issues of the special plea raised by the defendants, the issue of liability and that of quantum be separated in terms of rule 33(4) of the Uniform Rules.

1.2 That the aspect for adjudication, which is set down on the 7th of November 2016, will be to determine whether the defendant's special plea of the 7th of October 2014 be upheld with costs.

1.3 That the adjudication of the special plea be resolved by way of a stated case.

Now, wherefore the parties wish to state that:

2.

2.1 Background:

2.1.1 The plaintiff is **V M** ("V"), born on the […] May 1987, who acts in her personal and representative capacity as the natural mother and legal guardian of T M ("T"), her minor son,

2.1.2 The second plaintiff is **B S,** born on the […] January 1983, who acts in his personal capacity only ("B").

2.1.3 The plaintiffs instituted action against the defendant in delict for the breach of a duty of care in respect of the medical and/or professional services provided by the employees of the Bodibe Neo Clinic ("the clinic") and/or the General De La Rey Hospital ("the hospital").

2.1.4 In terms of the plaintiffs' particulars of claim the first plaintiff sought the medical services and/or professional from the defendant at the clinic and/or the hospital for the delivery of T.

2.1.5 Furthermore, the plaintiffs' particulars of claim allege that the defendant breached its duty of care, supra, and as a direct result thereof:

2.1.5.1.1 The first plaintiff suffered a third degree tear, passing stools through her vaginal wall.

2.1.5.1.2 T suffered HIE, which left his with severe permanent brain

injury (cerebral palsy).

2.1.5.1.3 The second plaintiff suffered from alleged emotional shock as a direct result of the injuries to the first plaintiff and T..

2.1.6 The defendant raises a special plea of prescription in the respect of the damages claimed for the first and second plaintiff.

2.1.7 The plaintiffs replicated to defendant's initial special plea and raised the following material issues:

2.1.7.1 That the defendant failed to differentiate the special plea of prescription in respect of the first plaintiff in her personal and representative capacity;

2.1.7.2 That the knowledge of the debt which had arisen against the defendant had, in accordance with section 12(3) of the Prescription Act 68 of 1969 only arisen on the 10th of May 2012, being the date upon which the plaintiffs received a copy of the clinical records from the defendant;

2.1.7.3 That the special plea of prescription against the first plaintiff in her representative capacity on behalf of T. did not find application; and

2.1.7.4 That the prayers for the dismissal of both the first and second plaintiff's claim could not be differentiated between the dismissal of their claims in their personal and/or representative capacity.

2.1.8 The defendant has not served an amended Plea.

2.2 **Admitted and common cause facts:**

2.2.1 The locus standi of the first plaintiff is admitted.

2.2.2 On or about the 28th of September 2009 at approximately 13h30, the first

plaintiff, who was 40 weeks gestationed, was admitted to the clinic for clinic services during her labour and birth of T.

2.2.3 On her admissions, as aforesaid, at approximately 13h30 she was 2cm dilated.

2.2.4 The first plaintiff's water ruptured at approximately 17h30 and the presence of meconium drainage in the amniotic fluid was noted and recorded.

2.2.5 The first plaintiff's contractions and fetal heart rate was not monitored by a Cardiotocography during any stage of her labour whilst in care of the clinic.

2.2.6 At approximately 21h30, the first plaintiff was transferred to the hospital for further management of her labour and was duly admitted for the reasons of prolonged latent phase of labour.

2.2.7 During her admission and whilst receiving professional services, the first plaintiff's contractions and fetal heart rate was not monitored by Cardiotocography.

2.2.8 T. was born at 00h30 on the morning of 29 September 2009 with an Apgar of between 7 and 10/10.

2.2.9 During the first plaintiff's labour, the first plaintiff did not receive an episiotomy and suffered a third degree tear.

2.2.10 During the first plaintiff's labour, the defendant's employee's detected presence of meconium and that T. was diagnosed with hypoxic ischemia after his delivery.

2.2.11 The first and second plaintiffs' cause of action, in their personal capacities arose on the 29th of September 2009, that summons in respect of the first and second plaintiff's claim in their personal and representative

capacity was served upon the defendant on the 1st of July 2014.

2.2.12 That prior to issuing the summons, the plaintiffs incompliance with section 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 was delivered to the defendant.

2.2.13 The defendant did not raise a special plea of non-compliance in terms of section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

2.2.14 The plaintiffs caused a medico-legal report by Dr Candice Harris, general practitioner and neo-natal nurse to be served in terms of rule 36(9)(a) and (b) ("the report").

2.2.15 The report's purpose, inter alia, establish negligence against the nurses of the defendant in respect of the first plaintiff.

2.2.16 The expertise of Dr Candice Harris has been admitted.

2.2.17 Negligence in respect of the defendant's nurses has been alleged in the report in relation to the first plaintiff's claim in her personal capacity.

2.3 **Other facts:**

2.3.1 The first plaintiff on or about the 29th of September 2009 was 21 years old, single and unemployed.

2.3.2 The first plaintiff attended the clinic and the hospital to give birth to her first child, this being her first pregnancy (primagravida), the defendant contends that during the plaintiff labour the foetal heart beat rate was monitored by hand held Doppler and foetuscope.

2.3.3 During labour and during the care at the hospital of the defendant, the first plaintiff suffered from a rectovaginal fistula, which was surgically repaired, which required further management.

2.3.4 The first and second plaintiffs sought the legal advice of the attorney of record Adele van der Walt of Adele van der Walt Incorporated at the end of 2010 to enquire whether they had a claim in their personal capacities and in their capacities as the legal guardians of T. against the defendant.

2.3.5 As an administrative action in all medical-legal matters which may or may not be brought against the State, the first and second plaintiffs' legal representative caused a notice in terms of section 3(1)(a) of Act 40 of 2002, to be sent to the defendant.

2.3.6 The date upon which it was authored was the 14th of December 2010 and it was sent per registered mail on the 13 of January 2011.

2.3.7 On the 27th of January 2011, the defendant confirmed that he had received the letter of the 14th of December 2010.

2.3.8 To investigate the facts including the cause and knowledge and nexus to inter alia, the first plaintiff's and second plaintiff's damages and if such lay at the feet of the defendant, Adele van der Walt caused a letter to be addressed to the clinic and the hospital requesting copies of clinical records. The clinical records were eventually, received by her offices on the 10th of May 2012.

2.3.9 The date being the 10th of May 2012, is the date upon which the first and second plaintiffs indicate in their replication that they became aware of the full facts and the knowledge that the defendant indeed was or could be a creditor in a damages claim. The defendant does not agree.

2.3.10 On the 2nd of October 2016 and the contemplation of litigation, the first and second plaintiffs obtained a copy of a medico-legal report by Dr Candice Harris, a neo-natal nurse who had to comment on when the nurse of the defendant's hospital and at what stage in the episiotomy had to be done in order to prevent the extent of the first plaintiff's tear, authored a report.

2.3.11 Ms Harris, supra, came to the following conclusion in her report, which

conclusion and opinion the defendant has not at this stage admitted.

2.4 **Disputed facts:**

2.4.1 The date upon which the first and second plaintiffs' debt arose (knowledge of all the facts) against the defendant.

2.4.2 According to the defendant's special plea and at paragraph 6 thereof:

"6.The debt allegedly (own emphases) owed by the defendant became due (knowledge of all the facts) on the 29th of September 2009."

2.4.3 In the premises, the defendants contend that the date of the cause of action being the 29th of September 2009 is also the date upon which the debt became due against the defendant. And in that premises, the claim has prescribed in that more than three years after the debt became due the summons was served against the defendant.

2.4.4 The plaintiff in its replication contends, inter alia, that"

2.4.4.1 The cause of action arose on the 29th of September 2009;

2.4.4.2 The date of the cause of action and the debt arising are not the same insofar as:

*"1.3.2. The plaintiffs, in their respective capacities, only possess the requisite knowledge of the identity of the defendant **and** of the facts (own emphasis) from which the claim arose on the 10th of May 2012.*

1.4. The plaintiffs' claim against the defendant, supra, is a damages claim which constitutes a debt in terms of the Prescription Act 68 of 1969 ("the Act").

1.5. Chapter 111 of the Act is applicable.

1.6. According to section 12(3) of Chapter 111 of the Act:

'12(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.'

1.7. In the premises, the debt against the defendant only became due on the 10th of May 2012 and would the prescribe on 9th of May 2015.

1.8. The plaintiffs served their summons against the defendant on the 1st of July 2014."

2.4.5 The defendant's failure to raise a special plea in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 is a failure to allege that the date of cause of action being the 29th of September 2009 is indeed the date upon which the debt arose. Defendant disputes this.

2.4.6 That the defendant's special plea fails to differentiate between the first plaintiff's capacity upon which a plea of prescription is relied upon.

2.4.7 The defendant's failure to differentiate in which capacity, in respect of the first plaintiff has raised a special plea of prescription, has rendered its prayer "Wherefore the defendant prays for the dismissal of the first and second plaintiff's claims with costs", is not competent in the circumstances."

[5] At the hearing of the matter, in addition to the submission made by both legal representatives, the following documents were handed in by agreement between the parties:-

- An affidavit by plaintiff's attorney of record Adele Annie Van der Walt;
- Notice in terms of Act 40 of 2002 which has been annexed to the affidavit of Adele as Annexure AVDW1 – AVDW3;
- Letter from the Department of Health to Adele dated 26 March 2012 received on 10 May 2012 and marked Annexure AVDW4 to her affidavit;
- Letter from the Department of Health to Adele dated 27 January 2011;
- A constitutional Court of South Africa case of Dirk Links v MEC of Health, Northern Cape CCT29/15.

They were accepted under cover of an Index labelled:- "**Court Bundle**" and was marked Exhibit "B".

[6] I proceed to consider the arguments that were addressed to me. The submissions by both Counsels revolved around a crisp question relating to Prescription. I was further informed that the following forms the parameters upon which I should decide the issue:-

- The Stated Case as handed in and marked Exhibit "A";
- The special plea raised found in the trial bundle on paginated pages 31-33;
- The plaintiff's replication found in the trial bundle on paginated pages 53-57;

- A bundle labelled "**Court Bundle**" which contained Annexures as described in paragraph 5 of this judgment marked Exhibit "B".

[7] Advocate Retief appearing on behalf of the plaintiffs' urged the Court from the beginning of the submissions that this Court should always keep in mind the following when analysing the issue before Court:-

- That the defendant is clothed with the onus of proving that the matter has prescribed;
- The defendant's special plea of prescription fails to differentiate between the first plaintiff's claim in her personal and her representative capacity;
- That the defendant indicated in paragraph 2.1.8 of Exhibit A (Stated Case) page 4 thereof that the defendant did not serve an amended plea.

[8] The crux of the submissions made by Counsel for the plaintiff is that there are no facts in the Stated Case which the defendant had shown or proven to support their submission that the plaintiff's claim has prescribed. She submitted that the defendant's contention that the circumstances which gave rise to the first and second plaintiff's claim occurred on the 29th September 2009 and therefore the debt allegedly owed by the defendant became due on the 29th September 2012 is misplaced. She further argued that their contention that the claims prescribed because the summons were served on the defendant on 1st July 2014 more than three years after the debt became due, is not the correct comprehension of Section 12(3) of the Prescription Act 68 of 1969 (**the Prescription Act**) as interpreted by our Courts.

[9] Advocate Retief further submitted that the facts of this case shows that the plaintiff's claim both in their personal and representative capacities have not prescribed because they only possessed the requisite knowledge of the identity of the defendant and of all the facts from which the claim arose on the 10th May 2012 even though the cause of action arose on the 29th September 2009.

[10] Advocate Retief relied heavily on Section 12(3) of the Prescription Act which provides:-

> "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".

[11] In support of her arguments she quoted several paragraphs in the case of **Dirk Links v MEC of Health, Northern Cape,** a Constitutional Court **Case CCT29/15** delivered on **30th March 2016**. Amongst others she quoted **paragraph 42** thereof wherein it was held:-

> "There is a further problem with the submissions in that it presupposes that any explanation given to the applicant by the medical staff would have identified medical error as the actual or even a potential cause of his injuries. It is not necessary for a party relying on prescription to accept liability. To require knowledge of causative negligence for the test in Section 12(3) to be satisfied would set the bar too high. However, in 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 which the debt arises".

[12] In applying the law to the facts of this matter plaintiffs' Counsel submitted that the date which this Court must look upon is the moment the plaintiffs' attorney of record was placed in possession of the medical records, which is the 10th May 2012. Her reasoning is that the letter which is found in Annexure "B" from the defendants' Department wherein the requested records were attached is dated 26th March 2012 was received by the plaintiffs' attorney of record on the 10th May 2012.

[13] Lastly, Advocate Retief submitted that the defendants' case is exacerbated by the fact that they failed to raise a second special plea in terms of the Institution of the Legal proceedings against Certain Organs of the State Act 40 of 2002. This, the defendant did not do, and so argued the defendant's Counsel, the only inference that can be drawn from the defendant's conduct is that the defendant did not also believe that the debt arose on the 29th September 2009.

[14] Advocate Masoga on behalf of the defendants submitted that the plaintiffs' reliance on the Constitutional case quoted above and the submissions made do not at all address the concern the defendant has, which is, when was the plaintiff's legal representative place in possession of the instruction to sue by the plaintiff.

[15] He argued that in the affidavit which is contained in Exhibit B, the attorney of record indicated that the plaintiff consulted her at the end of 2010, and they are not even specific with the dates, which is crucial in determining prescription. The notice was sent in January 2011 and Advocate Masoga

further submitted that it begs to question what the plaintiffs and their attorney were doing in the period of 16 months between the date of the notice and when the summons were served on the 1st July 2014.

[16] According to Advocate Masoga, the first plaintiff was discharged on the 15th October 2009. She had ample time to deal with the requesting of the hospital records. Further that, taking into consideration from what they say that she did consult her attorney in 2010, it means that the legal representative also did not do what was necessary within a reasonable time. In the 16 months referred to above, so say the defendant's Counsel, the attorney could have taken the matter to Court to compel the hospital to produce the records since they alleged that the defendant was not responding to their letter, in order to avoid the matter being prescribed. The letters they wrote could not extend the time for prescription to run.

[17] Advocate Masoga finally submitted that the matter should be dismissed with costs as according to them it has prescribed on the 29th September 2012.

[18] It is common cause that the plaintiff's claim against the defendant is damages claim which constitute a debt in terms of the Act and section 1(1) of the Prescription Act and Section 12(3) which has been relied upon by the plaintiff is applicable. I fully agree with the plaintiffs' Counsel that the Constitutional Court case she referred to settles the law in as far as interpreting the words contained in Section 12(3) of the Prescription Act to wit, "**Knowledge of the facts from which the debt arose"**.

[21] As far as the law is concerned regarding the issue of Prescription, I can do no better than to quote **paragraph 24** of the **Dirk Links** matter already quoted above which succinctly summarised what the defendant must do:-

"The question for determination is whether the applicant's claim had prescribed by 6th August 2009 when he served summons. That in turn depends upon the interpretation of the provision of section 12(3) of the Prescription Act and the application of that provision to the facts of this case. The respondent bears the onus to prove that the applicant's claim had prescribed by the given date. In order for the respondent to prove that, he must show that prescription began to run against the applicant's claim not later than 5 August 2006. This is so because the period of prescription applicable in three years. In the context of section 12(3) the respondent must show what the facts are that the applicant was required to know before prescription could commence running. The respondent must also show that the applicant had knowledge of those facts on or before 5th August 2006.

[22] In **Truter and Another v Deysel [2006] ZASCA 16; 2006 (4) SA 168 (SCA)** the Supreme Court of Appeal dealt with the meaning of the phrase "debt due". It said in paragraph 16:-

"For the purpose of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the 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".

In the **paragraph 17** the Court further said:-

"In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts"

[23] Although Counsel for the defendant did not make any remarks about the Constitutional case, an understanding of the defendant's Special Plea is to the effect that the plaintiffs had all the information they need to constitute a claim on the 29 September 2009, when the cause of action arose. The plaintiff on the other hand says it is on the 10 May 2012 when their attorney received the records.

[24] But the Constitutional Court decision quoted above which the plaintiffs relied upon supports the interpretation by the plaintiff's Counsel and even takes it further than that. In **paragraph 45** the Constitutional Court remarked:-

> "In a claim for delictual liability based on the Acquilian action, negligence and causation are essential elements of the cause of action. Negligence and, s 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).

[25] And more importantly in **paragraph 47** it remarked:-

> "The opinion given by Dr Reyneke was that the amputation of the applicant's thumb and loss of function of the left hand "was most probably due to the plaster of parish that was too tight, and not removed soon enough… when ischemia occurred" That opinion was given years after the events in issue. Without advice at the time from a professional or except in the medical profession, the applicant could not have known what had caused his condition. 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 specialists 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".

[26] It is clear from the authorities quoted above that the Court does not only have to look at the *facta probanda* (cause of action) but also to look at the causal connection when dealing with interpretation of Section 12(3) of the Prescription Act.

[27] The plaintiffs' attorney of record indicated in his affidavit that she received the medical records on 10 May 2012. Defendant did not file any opposing affidavit to counter these factual averments but simply elected to just deny that fact in the stated case without any supporting document. This denial flies against their letter which is dated 26 March 2012 which was written to the plaintiff's attorney of record wherein the records were attached. I do not see any basis for their denial if they dispatched the records on the 26 March 2012 for even though we can back date the date from which the plaintiff's ought to have received the records to any date near the 26 March 2012, whatever computation that maybe will not make any difference to the interpretation of the plaintiffs.

[28] The submission that the plaintiffs do not address the concern that the defendant raised to the effect that they are not specific as to when they placed their attorney of record with the instructions to sue is ill-conceived as well. Firstly, as correctly submitted by the plaintiff's Counsel, this issue is not found anywhere in the stated case nor in the documents that served as the parameters from which I had to analyse the issue before Court. Secondly, **paragraph 6** of their special plea reads as follows:-

"The debt allegedly owed by the defendant became due (Knowledge of all the facts) on the 29th of September 2009".

[29] Thirdly, nowhere in the papers is any dispute regarding the receiving of the letters the plaintiffs' attorney of record is referring to in her affidavit is made. Contrary to what the defendants' Counsel submitted, the plaintiff explained through paragraph 4 of the affidavit of their attorney of record several attempts to get the records in time but to all in vain. It is not upon the defendant to now at this belated stage expect from the plaintiffs an explanation why it took so long to get the records and/or issue the summons.

[30] The crucial question to be answered from all the above is therefore, whether the defendant discharged the onus to show that on the 29th September 2009 the applicant had knowledge of all the material facts from which the debt arose or which they needed to know in order to institute an action. 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. Accordingly the defendant failed to discharge the onus that plaintiff had knowledge of all material facts from which the debt arose on 29 September 2009. I therefore fully agree with the plaintiff's Counsel that correct date to start computing is the 10th May 2012. The plaintiff's claim has not prescribed.

[31] I choose not to analyse in depth the last aspect of this issue which the plaintiff raised that the special plea fails to differentiate between the first plaintiff's claim in her personal and in her representative capacity despite the fact that it has merit, simply because of the finding that I had already made above. To do so will be just to embark on an academic exercise. In

the premises, the defendant's prayer for the dismissal of the plaintiff's claim (in both capacities) with costs is not competent in the circumstances of this matter.

[32] Consequently the following order is made:-

32.1 The defendant's Special Plea is dismissed with costs.

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A M KGOELE
JUDGE OF THE HIGH COURT

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