



IN THE HIGH COURT OF BOTSWANA
HELD AT GABORONE

CVHGB-003267-15

In the matter between:

GOFAONE MEDUPE-JONAS

PLAINTIFF

and

ATTORNEY GENERAL

DEFENDANT

**(in her representative and legal capacity as the
Principal Legal Advisor of the Ministry of Health)**

Attorney Ms. N. Mupfuti for the Plaintiff ⁱ

**Attorney Ms. N.K.T. Sharp (for Attorney Ms. Y.K. Sharp) for the
Defendant ⁱⁱ**

R U L I N G

WALIA J.

1. The plaintiff's claim herein arises from a botched surgical procedure on 15th September 2012, at Sekgoma Memorial Hospital at Serowe.
2. On 15th September 2012, she had undergone a total abdominal hysterectomy.

3. She was discharged on 17th September 2012 but on 26th September 2012, she experienced a urine leakage.
4. She was thereafter treated at Debora Retief and Princess Marina hospitals.
5. Her condition worsened and despite being in extreme pain she was discharged from Princess Marina Hospital on 4th October 2012, having been given a supply of adult diapers.
6. She went back to Sekgoma memorial hospital where a catheter was inserted and on 24th October 2012 she was readmitted at Princess Marina Hospital.
7. She then went backwards and forwards between hospitals in Botswana with no improvement in her situation.
8. She was ultimately treated in South Africa but a lot of consequential damages had been done. She suffered embarrassment and her marriage failed.
9. The plaintiff's cause for complaint appears as follows in paragraphs 28 and 29 of her declaration:

“28. As a result of the medical personnel’s actions, the Plaintiff suffered mental and emotional anguish, shock, pain and suffering due to the interference with her privacy and bodily integrity.

29. The continuous involuntary discharge of urine into the Plaintiff’s vagina, would not have occurred had the doctor and/or medical personnel who operated the Plaintiff and others who dealt with her thereafter, exercised the skill, competence and care reasonably expected from professionals. The Plaintiff was owed a duty of care when being operated and in receiving post operation care and supervision.”

10. Her claim is for P2,000,000.00 expressed as:

“damages for mental and emotional anguish, shock, pain and suffering caused by the cutting of Plaintiff’s ureter and/or vagina wall during an operation and for failing to provide timeous and adequate care.”

11. The writ of summons issued on 2nd October 2015, was served on 8th October 2015. Statutory notice under Cap 10:01 had been given on 14th April 2014.

12. The appearance to defend filed on 3rd November 2015 is a denial of negligence.

13. Following leave granted to the defendant to file the plea out of time, the defendant's special plea and plea over were filed on 3rd May 2016.
14. At this stage, it is not necessary to deal with the plea over as this ruling is concerned with the special plea.
15. The special plea is one of prescription, articulated as follows:
 - “1.1 *The alleged cause of action in this suit arose on or about the 26th September, 2012 when the Plaintiff alleges that urine started leaking from the Plaintiff's vagina.*
 - 1.2 *The writ of summons was filed with the High Court on the 2nd October 2015 and subsequently served on the Defendants on the 2nd December 2015.*
 - 1.3 *Resultantly, in terms of Section 4(2), (b), (iv) as read with Section 7 of the Prescriptions Act (Cap 13:01), the Plaintiff's claim against the Defendant prescribed prior to the filling (sic) and issuance of the writ of summons at the High Court.”*
16. At a hearing on 2nd September 2016, it was ordered at the request of the plaintiff, that the special plea be heard before dealing with the plea over.
17. Following orders made on that date, heads of argument were delivered and argument was heard on 7th November 2016.

18. It is the defendants' argument that the cause of action arose on 26th September 2012, when urine started leaking from the plaintiff's vagina.

19. She identifies the following issues for determination:

“2.1 Whether the plaintiff's cause of action arose on the 26th September 2012, the date that she alleges that urine started leaking from her vagina.”

2.2 Whether the Statutory Notice prepared by the Plaintiff on the 11th April 2014 and served on the Attorney General on the 14th April 2014 suspended and or interrupted the period of prescription from running.”

20. The plaintiff, on the other hand, argues that the cause of action arose when the definitive diagnosis of her condition was made.

21. The plaintiff's attorneys say in paragraph 13 of their heads of argument:

“We submit that the cause of action arose on the 18th of December 2012 when Plaintiff underwent an examination by two doctors at Sekgoma Memorial Hospital, and they found that she had vesico-vaginal fistula or urethra-vaginal fistula. The Plaintiff's right to sue arose on the day she found out (with certainty) that she had a fistula.”

22. A number of peripheral matters require attention before consideration of the issue/issues for determination.

23. The first, is the matter of whether or not a statutory notice in terms of Cap 10:03 interrupts prescription. Lengthy debate on the matter is not necessary. The plaintiff has not raised the matter of the statutory notice before me.
24. In any event, authority is legend that such a statutory notice does not interrupt prescription, see, for example **ATTORNEY GENERAL v. MTHULISI TSHUMA (CACGB-098-13)** and **KGOSIETSILE DIGOBE v. ATTORNEY GENERAL (CVHLB-1183-11)** .
25. The defendant has proceeded on the basis that prescription is interrupted by the issuance of proceedings. In terms of section 7(1) (b) of the Prescription Act Cap 13:01 (“the Act”) prescription is interrupted by:
- “service on the debtor of any process whereby action is instituted.”*
26. There is also some debate on the date of service. In her special plea the defendant says that service was effected on 2nd December 2015. The Plaintiff, however, says that the writ of summons was served on 8th October 2015.

27. I agree with the plaintiff. The affidavit of service filed on 15th October 2015, shows that service was indeed, effected on 8th October 2015.
28. The starting point in determining whether or not the special plea succeeds is consideration of the relevant provisions of the Act relating to the period of extinctive prescription in cases of this nature and when prescription begins to run.
29. As regards the nature of the claim, the plaintiff has not expressed her concerns with clarity. The claim is brought variously on grounds of breach of duty of care and negligence in the performance of a surgical procedure.
30. For purposes of this ruling however, nothing turns on the distinction.
31. Section 4(1) of the Act provides, *inter alia*:

“(1) *Extinctive prescription is the rendering unenforceable of a right by the lapse of time.*

(2) *The periods of extinctive prescription shall, subject to the provisions of section 14(2), be the following:*

- (a)
- (b) *Three years in respect of:*
 - (i)
 - (ii)
 - (iii)
 - (iv)
 - (v)
 - (vi) *actions for damages other than those for which another period is laid down in this Act;*
 - (vii)
 - (viii)”

32. Section 6 of the Act provides, inter alia, in relation to when prescription begins to run in cases of damages:

- “(1) Extinctive prescription shall begin to run –
 - (a) in respective of any claim for damages –
 - (i) *where the debtor is known to the creditor, from the date when the wrong upon which the claim for damages is based was first brought to the knowledge of the creditor, or from the date when the creditor might reasonably have been expected to have knowledge of such wrong whichever is the earlier date.”*

33. To restate the parties' respective submissions on when prescription began to run in this case, the defendant says that it began to run on 26th September 2012, when the plaintiff became aware of the urine leakage.
34. The plaintiff says that the effective date was when the definitive diagnosis of her condition was made. In other words, when she was made aware of what was causing her problem. That date was 18th December 2012.
35. Thus, on the defendants' version, prescription had set in when the writ was served on 8th October 2015. On the plaintiff's version, however, the service was well within the three year period.
36. The injury underlying the claim is the leakage of urine, which, following the hysterectomy, started on 26th September 2012. This is common cause.
37. Thereafter, the plaintiff endured visits to numerous hospitals to have the problem attended to. The final visit was to a specialist in South Africa who said that the condition is self- healing. Leakage, however, persists.

38. Each of her visits to different doctors yielded opinions and diagnoses, but the problem persisted and persists and the problem is the leakage of urine, causing trauma in many ways.
39. In terms of the Act, prescription begins to run, in matters of damages, from the date when the wrong is first brought to the knowledge of the claimant. In this case, the plaintiff first became aware of her condition on 26th September 2012. (My emphasis).
40. What followed thereafter were intense efforts to resolve the problem. It would be naïve to suggest that she went from hospital to hospital merely to get a diagnosis.
41. On a proper interpretation of section 6 of the Act, prescription begins to run, where the wrongdoer is known, on the date when the person wronged first becomes aware of the wrong done to him or her.
42. That most certainly is not the date when the nature of the problem, already manifest, is explained to the person wronged in scientific terms.

43. In this case, the plaintiff knew the wrongdoer or wrongdoers and knew exactly what she was suffering from. That is the date when prescription began to run, not when she was given the scientific explanation of what had caused the problem.
44. In cases of botched surgical procedures (and I do not make a finding at this stage, that this was one), the patient, following the deleterious effects of the procedure, sets a chain of events in motion starting with immediate remedial action and ending with, if he or she so decides, gathering evidence in support of a claim for damages.
45. The effective date of the running of prescription then is not the date when a diagnosis is made or when the extent of damages is known, but when the patient first becomes aware of the deleterious effects. The Act permits of no other interpretation.
46. In this case, though not of immediate relevance, it needs to be said that the plaintiff has been dilatory in exercising her rights. It is not entirely inconceivable that the dissatisfactory challenge now mounted against the special plea is motivated by her sloth.

47. The statutory notice to sue was given on 14th April 2014. At that stage, the nature and extent of her damages was known as the claim is essentially what appears in her pleadings.
48. There is no explanation of why the writ of summons only followed in October 2015, more than a year later.
49. The special plea of prescription therefore succeeds and the action is hereby dismissed with costs.

DELIVERED IN OPEN COURT AT GABORONE THIS 12TH DAY OF DECEMBER, 2016.



**L.S. WALIA
JUDGE**

ⁱ MAPHAKWANE & PARTNERS FOR THE PLIANTIFF
ⁱⁱ ATTORNEY GENERAL FOR THE DEFENDANTS