IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO. CACGB-012-17
(High Court Civil Case No. CVHGB-003267-15)

In the matter between:

GOFAONE MEDUPE-JONAS **APPELLANT**

AND

ATTORNEY GENERAL (In her representative and legal capacity as the Principal Legal Advisor of the Ministry of Health) **RESPONDENT**

Ms Attorney K Kewagamang with Ms C M Ntobedzi for the Appellant
Ms Attorney N K T Sharp with Mr B Mazinyane for the Respondent

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JUDGMENT

CORAM: LESETEDI J.A.
MAKHWADE J.A.
DAMBE J.A.

LESETEDI J.A.:

1. This is an appeal against a dismissal of the Appellant's delictual claim for damages, on the basis of extinctive prescription.

2. The claim arose from a condition consequent to a total abdominal hysterectomy which was carried out on the Appellant at Sekgoma Memorial Hospital, a government hospital, on the 13th September 2012. She was shortly discharged after the surgery. On the 26th September 2012 she started experiencing urinal leakages. Concerned, she attended at a Gaborone government hospital namely Princess Marina on the 3rd October where she was attended by a doctor who explained to her that the leakage was not urine but "just water from other body parts which had collected where the uterus was, that it was nothing serious, that it will go away on its own." Antibiotics were prescribed and she was advised to return on the 24th October 2012.

3. But after her discharge, the situation did not improve and she saw another doctor at a Medical Centre in Mochudi who advised her "that the cause of leaking urine could be as a result of a cut bladder or ureter during the operation". She was advised to go back to the Sekgoma Memorial Hospital where the operation had been performed.

4. At the Sekgoma Memorial Hospital a catheter was inserted and she was discharged. No explanation was given as to the cause of the leakage despite such explanation having been sought.

5. When the 24th October 2012 came, she returned to Princess Marina Hospital where IVU and cystography diagnostic procedures were conducted. She was then admitted in the gynaecological ward and later discharged with her condition still untreated.

6. Eventually, on the 18th December 2012 plaintiff went back to the Sekgoma Memorial Hospital where two doctors examined her X-ray films and stated that her ureter had been cut during the operation resulting in her suffering from "a vesico vaginal fistula or urethro vaginal fistula".

7. She subsequently contacted the Permanent Secretary in the Ministry of Health to lodge a complaint and a further examination by a specialist gynaecologist at Princess Marina Hospital also suspected a urethro/vesico vaginal fistula.

8. The Appellant sought further treatment, with the condition finally being treated at a hospital in South Africa.

9. All the above are pleaded in her declaration filed in terms of Order 24 of the Rules of the High Court.

10. The action was instituted on the 2nd October 2015 and the originating process served on the Respondent on the 8th October 2015.

11. In her action the Appellant sought delictual damages against the Respondent on the premise that the doctors who carried out the operation at Sekgoma Memorial Hospital owed her a duty of care to ensure that she was provided with a proper and skilled medical treatment including supervision and care in accordance with generally accepted standards. She alleged that the medical personnel had acted negligently and in breach of the aforesaid duty of care in that they, (1) caused a vesico vaginal fistula during the course of performing a routine total abdominal hysterectomy operation; and (2), post the operation, failed to properly attend to the Plaintiff's

injuries caused by the operation. The Appellant further stated in her declaration that the wrongful and negligent conduct of the medical personnel was directly and causally connected to the continuous involuntary discharge of urine, a condition which resulted in her suffering mental and emotional anguish, shock, pain and suffering.

12. The claim was met with a special plea of prescription as well as a plea-over on the merits.

13. The Special Plea was brief and it read:

> "1.1 The alleged cause of action in this suit arose on or about 26th September 2012 when the plaintiff alleges that the 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 6 of the Prescriptions Act (Cap 13:01), the Plaintiff's claim against the Defendant prescribed prior to the filing and issuance of the writ of summons at the High Court."

14. The parties agreed to have the special plea argued on the papers as they stood i.e. the plaintiff's declaration, and the special plea. They

having so agreed, the Respondent was bound by the factual allegations made in the plaintiff's declaration for purposes of determining the special plea.

15. At the hearing in the Court *a quo* it was accepted that the writ was served on the 8th October 2015, not the 2nd December.

16. In a special plea, the onus lies upon the party pleading it to prove its case as a probability.

See: **Van Zijl v Hoogenhout 2005 (2) SA 93 (SCA) at 107.**

17. After hearing argument, the High Court found that the Respondent had proved the special plea and dismissed the plaintiff's claim on the ground of prescription. Hence the appeal.

18. It is common cause that the period of prescription on a claim of this nature is three years, (Section 4(1)(b)(vi) of the Prescriptions Act). The decisive question for determination in this appeal is, when did that three year period start running? That question requires an

evaluation of the respective positions of the parties, these being, the Respondent's contention that it started running on the 26th September 2012 when the Appellant became aware of the condition of urinal leakage, and, the Appellant's contention that the period started to run from the 18th December 2012 when the doctors at Sekgoma Memorial Hospital diagnosed that the cause of her condition was a result of a ureter having been cut during the operation.

19. Section 6(1)(a) of the Prescriptions Act sets the tone for this inquiry. It reads:

> "(1) Extinctive prescription shall begin to run –
>
> (a) in respect of any action 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;
>
> ..."

20. A creditor-debtor relationship arises out of the existence of a debt, *in casu*, a delictual debt. For purposes of Section 6(1)(a) the debt must be due and payable.

21. An important judicial authority on the explanation of when such a debt is due, an authority which has been followed in its own jurisdiction and applied by our courts in the interpretation of Section 6(1)(a), is **Truter v Deysel 2006 (4) SA 168 (SCA) at 177 paras 16-17** where it was held that:

> "16. ...For the purposes of the Act, the term 'debt due' means a debt, including a delictual, which is owing and payable. A debt is due to 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.
>
> 17. In a delictual claim, the requiremenst of fault and unlawfulness do not constitute *factual* ingredient of the cause of action, but are *legal* conclusions to be drawn from the facts."

22. The court proceeded at paragraph 19 to adopt for purposes of prescription the description of a cause of action set out in **Mckenzie**

v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 at p. 23 where Maasdorp JA explained that a cause of action meant "every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his rights to judgment of the court. It does not comprise every piece of evidence which is necessary to prove every fact, but every fact which is necessary to be proved."

23. In the case of **Evins v Shield Insurance Co Ltd 1980 (2) SA 814 A**, Corbett JA comprehensively reviewed and discussed several authorities on the point, including **Mckenzie**'s case *supra*, and concluded that in the context of a claim for damages for bodily injury the ingredients of the plaintiff's cause of action are:

> "(a) a wrongful act by the defendant causing bodily injury, (b) accompanied by fault, in the sense of *culpa* or *dolus*, on the part of the defendant, and, (c) *damnum*, i.e. loss to plaintiff's patrimony caused by bodily injury. The material facts which must be proved in order for the plaintiff to sue (a *facta probanda*) would relate to these three basic ingredients and upon the occurrence of facts the cause of action arises."

24. The plaintiff's claim is based on negligence (*culpa*). That negligence alleged to be a wrongful cutting of the ureter during the operation.

It is apparent from her declaration that at the time she noticed the urinal leakage, the Appellant, a lay person, did not know what the cause of the problem was. That is why, on her pleadings, she went to Princess Marina Hospital where she requested for a diagnosis (paragraph 10 of the declaration). The diagnosis she was given by the doctor at that hospital was that the leakage was not even urine but merely water and an impression was given that this was a normal post-operative occurrence which was not of significant health consequence. Even after, the doctor at the Medical Centre raised the possibility that the leakage could be the result of a cut bladder or ureter and advised her to go back to the hospital which performed the operation, possibly for a proper and informed diagnosis. At this point too, all that existed was mere suspicion of what the cause of the leakage was, but no facts. That suspicion was insufficient to constitute knowledge. See: **Minister of Finance and Others v Gore 2007 (1) SA 111 (SCA).** She did not know for a fact what caused the leakage. See **Links v MEC for Health, Northern Cape 2016 (4) SA 414 (CC) para** 48. She did not yet know for a fact that the doctors who carried out the operation had committed any

wrong upon which a claim for damages could be based. See **Matere v The State [2006] 2 BLR 474 CA at 477.**

25. On her return to Sekgoma Memorial Hospital on the advice of the doctor at Medical Centre, once more no explanation was given by the doctors as to the cause of the leakage. Instead a catheter was inserted and even upon her return to Princess Marina Hospital no proper diagnosis as to the cause of the leakage was made.

26. In the circumstances, as was correctly conceded by the Respondent's Counsel, the Appellant did not know the cause of her condition on the 26th September 2012 or immediately thereafter. She still did not know of the cause of her condition as at the 24th October 2012.

27. It logically follows therefore that if she did not know the cause of her condition the element of causation referred to in the **Evins v Shield Insurance** case *supra*, was not present. If knowledge of that material fact was not present, the element of fault in the sense of negligence or *culpa* could not be proved as a fact. The Appellant

would not have had a cause of action and in the absence of facts establishing a causal link between the injury and the operation.

28. For the reasons, the period of prescription could not have started to run earlier than 18th December 2012 for even if it was to be argued that she might reasonably have been expected to have such knowledge earlier as was hinted at the appeal hearing, that too stood to fail as she acted timeously and persistently in a reasonable manner in quest for the cause of her condition.

29. Calculated from the 18th December 2012, the period of three years would have lapsed much later than the date upon which the running was interrupted by the service, on the Respondent, of the court process on the 8th of October 2015. That form of interruption is provided for under Section 7(b) of the Prescriptions Act. She was therefore within time when she had the originating process served on the Respondent on the 8th October 2015.

30. The Court *a quo* therefore erred in finding against the Appellant on the question of prescription. So the Order of the High Court cannot stand and has to be set aside and the matter remitted back for continuation of trial on the merits. The Judge who heard the case having retired from the High Court Bench, this matter is to be allocated to another Judge for continuation.

31. On a matter related to the continuation of the trial, this Court has noticed that instead of filing an affidavit of facts as required under Order 25 rule 2(a) of the Rules of the High Court, the Respondent filed a verifying affidavit. This is improper. This Court has noticed a worrying trend of this practice and the High Court should be more strict in ensuring that the purpose for which the Rules were made is not undermined by the taking of short-cuts through the filing of verifying affidavits instead of affidavits of fact in which the deponent deposes to those facts upon which evidence is intended to be led in proof of the party's case. Orders 24 rule 2(b)(i) and 25 rule 2(a) require the filing of affidavits "setting out the facts relied upon" and

not "verifying the facts pleaded". The distinction is patent and permits no misconception.

32. The Order this Court makes is as follows:

(a) the appeal is upheld with costs;

(b) the decision of the High Court is set aside and is replaced with the Order that "the special plea of prescription is dismissed with costs";

(c) the case is remitted to the High Court to be allocated to a different Judge for continuation on the merits;

(d) the defendant is given leave to file a proper affidavit of facts in compliance with Order 25 rule 2(a) of the Rules of the High Court.

DELIVERED IN OPEN COURT AT GABORONE THIS 26TH DAY OF OCTOBER 2018.

I.B.K. LESETEDI
[JUSTICE OF APPEAL]

I AGREE

Z. MAKHWADE
[JUSTICE OF APPEAL]

I AGREE

L.I. DAMBE
[JUSTICE OF APPEAL]