REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 2443-2024

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

DATE SIGNATURE

In the matter between: -

FANNIE ENOS NKOSI **APPLICANT/PLAINTIFF**

and

GEFFREY GIGADA **RESPONDENT/DEFENDANT**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for the hand-down of the judgment is deemed to be 15 July 2026 at 12h30

JUDGMENT

MONENE AJ

Introduction

[1] The applicant, a plaintiff in medical malpractice action proceedings, brought this application praying for a prescription plea raised by the respondent, as defendant in those action proceedings, to be dismissed with costs.

[2] The application is opposed by the respondent, a medical practitioner, who prays that the prescription special plea be upheld, the result of which will be to put paid to the action proceedings.

[3] The factual matrix underlying this application is, in sum, as follows:

3.1 Upon or about 5 September 2018 the applicant, suffering from colon cancer, was admitted to Nelspruit Medi Clinic Private Hospital as a private patient of the respondent.

3.2 He was, on 5 September 2018, surgically operated on by the respondent in some medical procedure called a laparotomy, which, as I understand, included a surgical removal of a cancerous tumor from his large intestines and/or rectal area.

3.3 On 13 September 2018 the respondent performed a second or follow-up surgery called either a re-laparotomy or a colostomy. The medical terms' definitions or understanding thereof is not germane to the determination of the special plea.

3.4 On 2 June 2020 the applicant was medically examined by a specialist urologist, a Dr Pakendorf complaining, as he did since the 2018 surgery, of, inter alia, decreased libido an anejaculation.

3.5 On 15 October 2022 and again on 26 October 2022 the applicant was again examined by Dr Pakendorf for the same conditions.

3.6 On 3 October 2023 the applicant consulted another urologist, a Dr Arie, again raising complications related to his September 2018 medical condition.

3.7 On or about 23 May 2024 he consulted with his legal representatives after which he issued medical negligence combined summons against the

respondent for negligence arising from the 2018 surgery. The summons was ostensibly issued on 28 May 2024.

3.8 The respondent filed a plea to the particulars of claim on 18 October 2024 which plea was pre-fixed with a special plea of prescription, the subject for determination in these proceedings.

3.9 There were subsequent pleadings and exchange of other litigation documents as well as an attempt at striking out the special which was abandoned or fizzled out such that as per applicant's practice note the crisp issue for determination when the matter served before this court was whether the special plea should be dismissed or upheld.

The parties' contesting contentions on the issue

[4] The respondent prays that the special plea of prescription ought to be upheld owing to the following strands of reasoning:

4.1 He contends that all that the applicant complains of leading to his summons such as sterility, erectile and ejaculatory challenges and the like are natural consequences of the 2018 surgeries performed, about which the applicant was aware as he had informed the applicant thereof before the first surgery.

4.2 He contends further that the applicant again became aware of the facts about the linkage between the sequelae he complains of and the 2018 surgery in June 2020 when he was again advised of the link by a urologist, Dr Pakendorf.

4.3 He contends further that the applicant was aware of or ought to have been aware of the factual basis of his claim earliest in September 2018 and latest in June 2020 and that the legal conclusions which were formulated only in May 2024 when the applicant consulted with his attorneys cannot be the starting point of his becoming alive to his claim.

[5] On those constructions therefore the respondent avers that the applicant/plaintiff's claim has prescribed and ought to be dismissed.

[6] The applicant's contention for the dismissal of the prescription special plea is premised on the following reasoning:

6.1 He states that he was not appraised of the allegedly natural consequences of the 2018 surgeries as suggested by the respondent.

6.2 He avers that to the extent that the respondent's 2018 clinical notes as attached to the respondent's answering affidavit speak about him being appraised about what he is currently suffering from post the surgery as a

probable or natural consequence of the surgery, he was not aware of those notes as he never accessed them.

6.3 He pleads no knowledge of the findings of Dr Pakendorf in June 2020 and states that to the extent that there was, in 2020, communication of the factual findings by Dr Pakendorf to his general practitioner communicating the causal link between the September 2018 surgery and his condition, he was never made aware of the contents of that communique.

6.4 He avers further that the first time that he ever became aware of or could reasonably have become aware that he has a medical negligence claim against the respondent was upon consulting with his legal representatives in May 2024.

[7] He thus prays that the special plea be dismissed with costs.

Applying the prescription legal prism to the lis in casu

[8] Section 12 of the Prescription Act 68 of 1969("the Act") provides, inter alia, as follows:

> "*(1) Subject to the provisions of subsection (2) and (3) prescription shall commence to run as soon as the debt is due.*
>
> *(2) …*

(3) A debt which does not arise from contract 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."

[9] In terms of section 11(d) of the Act the period of prescription of a claim or debt as *in casu* is three years.

[10] The question in this matter is when exactly the computation of three years should commence. The respondent says that computation should commence in September 2018 while the applicant avers the computation should start in May 2024. If this court computes with the applicant, then the matter has not prescribed. If it goes with the respondent, then it has prescribed.

[11] In a context where the commencement of computation is when the debt is due, it becomes important to unpack what it means for the debt to be due it being so that the Act speaks to the creditor's knowledge of the debtor and the facts from which the debt arises as the time when the debt becomes due and thence when computation of prescription should commence.

[12] In two decisions on prescription the Supreme Court of Appeal has settled the law on exactly when it is that prescription begins to run or when the debt becomes due:

12.1 In **Truter v Deysel 2006 (4) SA 168(SCA)("Truter") at para 19** Van Heerden JA said:

"*Section 12(3) of the act requires knowledge only of the material facts from which the debt arises for the prescription period to begin running-it does not require knowledge of the conclusions (i.e. that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions.*"

12.2 In **Minister of Finance v Gore N. O 2007(1) SA 11(SCA)("Gore") at para 17** Cameron JA and Brand JJA stated as follows:

"*This court has, in a series of decisions, emphasized that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. 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…'* "

[13] The factual question in this matter is thus when it is that the applicant in *casu*, the creditor, had “the minimum facts that are necessary to institute the action” and/or when can be deemed to have had such knowledge by exercise of reasonable care; knowledge in this case being about the causal link between his current medical complaints and the September 2018 surgery performed on him by the respondent.

[14] I note that in support of his assertion that the applicant knew about the negative sequelae in September 2018 even before the surgery, the respondent has provided his clinical notes which speak to that point. I also note the applicant’s assertion that those notes never came to his attention and his rebuttal that the respondent never communicated the possible negative sequelae of the surgery to him

[15] I further note that the applicant again avers lack of knowledge of the minimum facts about the causal link between the September 2018 surgery and the medical conditions he complains of as articulated in June 2020 by Dr Pakendorf to his general practitioner who had referred him to Pakendorf in the first place.

[16] I am, however, not persuaded, on a preponderance of probabilities that, the respondent would, in September 2018, have only noted the probable negative medical sequelae and chosen not to tell the patient, the person it mattered most

to, about it. In that regard I am more persuaded than not that the respondent appraised the applicant of the consequences he now complains of in September 2018 and that says to me that already in 2018, the applicant was privy to the minimum facts necessary to institute the action, those facts being who performed the surgery and the negative consequences thereof were.

[17] Even if I may be wrong in that balancing of probabilities, which I am certain I am not, the construction of a diagnosis by the urologist, Dr Pakendorf determining the sequelae to be linked to the September 2018 surgery in June 2020 and Dr Pakendorf and the applicant's general practitioner somehow like the respondent not advising their patient of that diagnoses, is in my view clothed in high degrees of improbability. I wonder why all these medical practitioners would find it unnecessary to appraise their patient of his condition, when he consulted them precisely for their diagnoses. The applicant's version about both the September 2018 and June 2020 medical interventions is, in my view, highly improbable.

[18] A further and self-standing consideration is that in line with section 12(3) of the Act, the applicant should be deemed to have had knowledge of the minimum facts undergirding his claim because he could have had access to that knowledge by the exercise of reasonable care per seeking access in the first place to the respondent's medical findings in 2018 and in the second place those of Dr Pakendorf in 2020. He surely cannot be seen as having exercised

reasonable care by allegedly only finding out about the minimum facts available since 2018 only in May 2024 at his legal representatives' offices. Thus, on this leg alone, even if direct knowledge of the minimum facts may be denied, deemed knowledge by the exercise of reasonable care is unassailable

[19] With regard to the applicant's key assertion that he only became aware of the minimum facts at his lawyers' offices in May 2024 I can, in emphasis of the **Gore** ratio that the running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, only again refer to a Supreme Court of Appeal decision of **Classen v Bester 2012 (2) SA 404 (SCA)** wherein Lewis JA at para 15 approvingly observed that in **Truter**, **Gore** and **Yellow Star Properties 1020(Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng 2009(3) SA 577(SCA) [2009] 3 ALL SA** 475 **at para 37**, it had been made abundantly clear that knowledge of legal conclusions is not required before prescription begins to run.

[20] In all the above premises I have no hesitation in agreeing with the respondent's pleaded case that the applicant knew and/or ought, by exercise of reasonable care, to have been privy to the minimum facts about who the debtor is and how the debt arises in September 2018. Additional thereto, I find that, he also knew or ought to have known by exercise reasonable care upon consultation with Dr Pakendorf in June 2020 that he had a claim against the

respondent. In both constructions, the action as instituted 28 May 2024, was way beyond the permissible period of three years.

[21] The result is that the matter has prescribed.

On costs

[22] The applicant instituted the application *in casu* seeking to have the special plea dismissed to pave a way for his action proceedings. It failed. Costs should accordingly follow the event.

[23] Prior to incurring the costs of opposing this application, the respondent incurred cost attendant to defending the action as well. I see no reason why those costs should not be addressed in this application as well, lest another court, amidst a gaping hole of insufficiency of court resources, be needlessly seized therewith, when this court was essentially already seized with a full set of all papers in the matter. The prescription matter was not decided in a vacuum.

[24] The law on prescription, particularly on deemed knowledge by exercise of reasonable care as per section 12(3) of the Act and the absence of a need for knowledge of legal conclusions prior commencement of the running of prescription, is established and was known or ought to have been known by the

applicant/plaintiff prior to engaging in manifestly unmeritorious litigation. This attracts a cost order with some measure of punishment.

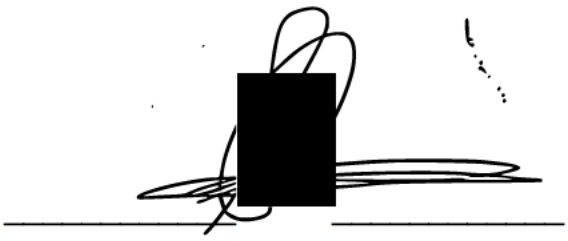
Order

[25] Resultantly I order as follows:

25.1 The respondent/defendant's special plea of prescription is upheld.

25.2 The applicant/plaintiff's claim is declared to have prescribed and is dismissed.

25.3 The applicant/plaintiff is ordered to pay the costs of this application, inclusive of the costs incurred by the respondent/defendant pursuant to defending the main action on scale C.



Malose S Monene

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

APPEARANCES

Heard on	***:***	***16 April 2026***
Judgment delivered on	***:***	***15 July 2026***
For the Applicant	***:***	***Mr Sibiya S S***
	:	***Instructed by: Sibiya SS Attorneys Inc***
	:	***Tel: 060 507 3469***
	:	***Email: sibiyassattorneys@gmail.com***
For the Respondent	***:***	***L Mtukushe***
	:	***Instructed by: Clyde&Co***
	:	***Tel: 010 286 0350***
	:	***Email: Mphengoa.phooko@cydeco.com***
		Ellen.Choma@clydeco.com