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Confusion in the prescription of medical negligence claims?

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For 10 years[i] it seemed as if the law relating to the commencement of the running of prescription in medical negligence matters was clear and settled. And indeed, it was by the decision in 2006, by the SCA in *Truter v Deysel*[ii] ("*Truter's* case"). Then, 10 years later, came the case of *Links v MEC Department of Health Northern Cape Province*[iii] (*Links'* case), in the Constitutional Court.

The problem which arises, when the two cases are compared, is that the facts in each are virtually indistinguishable[iv], but the outcomes are diametrically opposed. Furthermore, *Truter's* case was never overruled by *Links'* case.

In essence, both cases revolved around an interpretation of section 12(3)[v] of the 1969 Prescription Act (the "Act"). And both cases had to decide what "facts" was necessary for the plaintiff to have knowledge of in order to trigger the onset of prescription.

In *Truter's* case Mr Deysel finally obtained an expert medical opinion - more than three years after the procedures on his eyes had rendered him blind - that there had been medical negligence. In the Links case, Mr Links finally obtained an expert medical opinion, also more than three years after his thumb had been amputated following treatment for a dislocation, that the plaster cast which had been applied earlier on, being too tight, had caused a compartment syndrome to develop, eventually necessitating the amputation. The opinion was to the effect that the application of a too tight plaster cast had been negligent.

In both cases action was instituted within three years of the respective opinions being obtained, but more than three years after the series of procedures in *Truter's* case, and more than three years after the amputation in *Links'* case.

In *Truter's* case it was concluded that the phrase "cause of action" for the purposes of prescription means:

"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."[viii]

In light of the authorities quoted by the court[x], it had little difficulty in coming to the decision that an expert opinion that a conclusion of negligence can be drawn from a particular set of facts, is not itself a fact, but rather evidence.[xi]

To the precisely opposite effect, the CC in *Links'* case said that:

"Without advice at the time from a professional or expert 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 the 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."[xii]

In short, the decision in the *Links* case is, without having overruled the ratio in *Truter's* case[xiii], directly at odds with it. And

the two are, as can be seen from above, not essentially distinguishable on their facts.

As the CC is the highest court in the land, it has the final say as to what the common law is. It would therefore appear as if prescription in some (but not all) medico-legal claims, it would seem, commences on receipt of an opinion from an expert that there has been negligence.

Unfortunately, the waters appear to have been further muddied by the decision in *Ntokonyana v Minister of Police*.[xiv] As with the situation in *Truter's* and *Links'* cases, in *Ntokonyana's* case, summons was only issued more than three years after the appellant's allegedly unlawful arrest and detention, but less than three years after he received an opinion from an attorney that the arrest and detention were indeed unlawful. The CC said, in upholding a special plea of prescription:

"Whether the police's conduct against the applicant was wrong and actionable is not a matter capable of proof. In my view, therefore, what the applicant said he did not know about the conduct of the police namely whether their conduct against him was wrongful and actionable was not a fact and, therefore, falls outside of section 12(3)…

Knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a legal conclusion and is not knowledge of a fact."[xv]

In so doing the court, as already noted, confirmed the long line of decisions to the same effect in the SCA,[xvi] all of which underpinned the statement in *Minister of Finance v Gore N.O.* that *"…time begins to run against the creditor when it has the minimum facts which 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."*[xvii]

Given the contents of the cases discussed above, what type of knowledge, precisely, is required to trigger the commencement of prescription remains, for the present, therefore, a matter for debate. In light of the conclusion in *Links'* case, coming as it does from the Constitutional Court, it could be that a plaintiff can wait until he or she has a definitive medical opinion that there has been negligence. Until such time prescription will not commence to run. However, in light of the decision by the CC in *Ntokonyana's* case and the extant, and not overruled, decision in *Truter's* case, prescription against a plaintiff in a medico-legal claim will start to run when that plaintiff is in possession of the facts (an opinion that there has been negligence not being such a fact).

Precisely in what circumstances each particular approach is to be applied; is by no means clear.

In these circumstances, and until the position is clarified, practitioners will be well advised, when contemplating the institution of an action, to make sure action is instituted within three years of the plaintiff having acquired knowledge of the minimum facts necessary to institute action. It will be imprudent to wait for an expert report (especially in medical negligence matters) and to calculate the start of the prescriptive period from that date.[xviii]

For more information please visit: https://store.lexisnexis.co.za/categories/law/civil-procedure-373/prescription-in-south-african-law-skuZASKUPG670.

[i]From 2006 to 2016.
[ii]2006 4 SA 168 (SCA). The SCA decision overturned the contrary finding of Mlonzi J in *Deysel v Truter* 2005 5 SA 598 (C).
[iii]2016 5 BCLR 656 (CC).
[iv]For a detailed exposition of the facts in each case, see Saner *"Prescription in South African Law"*, LexisNexis, Durban, p 3-124 (*Truter's* case) and p3-128 (*Links'* case). And for an analysis of the law of prescription applicable in medico-legal cases see Saner *"Medical Malpractice in South Africa"* LexisNexis, Durban Chapter 10 p10-1.
[v]Section 12(3) of the 1969 Prescription Act reads as follows: *"12(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of a 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."*

[vi]Act 68 of 1969.

[vii]In *Truter's* case the question before the court was whether the respondent had actual or deemed knowledge of "the facts from which the debt" arose prior to the date on which his right eye had been surgically removed. If he did, then the date on which he acquired those facts would be the date on which the three-year period of prescription would have started to run. In *Links'* case the question for determination was whether the plaintiff's claim had prescribed by 6 August 2009 when he served the summons. The amputation was carried out on 5 July 2006.

[viii]*Truter's* case, paragraph 19 and following the dicta to the same effect in *McKenzie v Farmers Co-Operative Meat Industries Ltd* 1922 AD 16 23.

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[x]For example, *Van Staden v Fourie* 1989 3 SA 200 (A) 216D-E.

[xi]See, in very similar vein, *Yellow Star Properties 1020 (Pty) Ltd v MEC Department of Development Planning and Local Government, Gauteng* [2009] 3 All SA 475 (SCA), paragraph 37.

[xii]*Links'* case, paragraph 47.

[xiii]In fact, to add to the confusion, *Truter's* case was, far from being overruled, quoted with approval in Links' case at paragraph 30.

[xiv][2017] ZASCA 33.

[xv]*Ntokonyana's* case, paragraph 41-43. Prior to this passage (at paragraph 37), the court had said that the knowledge section 12(3) requires of a creditor to trigger prescription is knowledge of the facts from which the debt arises. *"It does not require knowledge of legal opinions or legal conclusions on the availability in law of a remedy."*

[xvi]These cases are: *Minister of Finance v Gore N.O.* [2007] 1 All SA 309 (SCA); *Claasen v Bester* 2012 5 SA 404 (SCA); *Yellow Star Properties 1020 (Pty) Ltd v MEC Department of Development Planning and Local Government, Gauteng* [2009] 3 All SA 475 (SCA); *Van Zijl v Hoogenhout* [2004] 4 All SA 427 (SCA); 2005 2 SA 93 (SCA); *Van Staden v Fourie* 1989 3 SA 200 (A); *ATB Chartered Accountants (SA) v Bonfiglio* [2011] 2 All SA 132 (SCA); *Mkhatswa v Minister of Defence* 2000 1 SA 1104 (SCA); *MacLeod v Kweyiya* 2013 6 SA 1 (SCA).

[xvii][2007] 1 All SA 309 (SCA). This statement was quoted in Ntokonyana's case (at paragraph 48), as was the pronunciation to precisely the same effect in *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 3 SA 577 (SCA), paragraph 37.

[xviii]For a full discussion and comparison of *Truter's*, *Links'* and *Ntokonyana's* cases, see Saner *"Prescription in South African Law"*, LexisNexis, Durban, p 3-124 to p 3-136. The findings, reasoning and conclusions in *Truter's* case were, just to add more grist to the mill (and mud to the waters) emphatically endorsed in *Kekana v Road Accident Fund* [2018] ZASCA 75 (see Saner above, p 3-126).

ABOUT THE AUTHOR

John Saner SC (MA (cum laude) LLB (Wits) has been a member of the Cape Bar for 30 years and has specialised in medical negligence litigation for the past 20 years. As a result, he has been at the forefront of developments in this field of practice and the law and has seen and experienced the changes and rapid increase in medical negligence litigation in those years. He has extensive practical experience in every aspect of medical malpractice law from case selection through to appeals and everything in between, including inquests and disciplinary proceedings. John took silk in 2014 and continues to practice and litigate solely in the medical negligence field, as a member of the Cape Bar from his base in Tampa, Florida, USA. John is also author of *Medical Malpractice in South Africa*, *Prescription in South African Law* and *Agreements in Restraint of Trade* published by LexisNexis South Africa.

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