NOT REPORTABLE

CASE NO: I 3891/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

EBERHARD WOLFGANG LISSE **PLAINTIFF**

and

THE MINISTER OF HEALTH AND SOCIAL SERVICES **DEFENDANT**

CORAM: **SCHIMMING-CHASE, AJ**

Heard on: 11 July 2011

Delivered on: 23 August 2011

JUDGMENT

SCHIMMING-CHASE, AJ

[1] The matter presently at issue in this action is a special plea of prescription raised by the defendant. Evidence of the plaintiff as well

as his expert witness, a chartered accountant was led on the issue. The common cause facts for purposes of adjudication follow.

[2] The plaintiff, a specialist obstetrician and gynaecologist was previously employed by the defendant as a medical officer from 1989 to 2003, and later as a specialist. He resigned in 2003 and commenced his private practice in January 2004. He then applied to the defendant during 2004 for permission to engage in the treatment of patients and to perform medical procedures at State hospitals under the jurisdiction of the defendant in terms of section 17 of the Hospitals and Health Facilities Act, 36 of 1994 ("the Act"). On 5 April 2004, the defendant refused the application of the plaintiff. However between January and April 2004, before his application was declined, he consulted with state patients, particularly those on the Public Service Employer Medical Aid Scheme (*"PSEMAS"*) in anticipation of being granted leave to engage in the treatment of patients and to perform medical procedures at State Hospitals.

[3]

[4] On 20 April 2004, the plaintiff launched a semi urgent application to this court to review and set aside the decision of the defendant to refuse his application. This application was dismissed. The plaintiff thereafter launched a further review application in the normal course, and this court on 8 December 2004, set aside that decision. The defendant then noted an appeal to the Supreme Court against that judgment and order. The Supreme Court dismissed the

appeal and confirmed the order of this Court on 23 November 2005. The defendant was also ordered to issue the plaintiff with a written authorisation to engage in the treatment of patients and to perform medical procedures at State hospitals in terms of the Act within 30 days.

[5] The defendant issued the plaintiff with the certificate only on January 2006, but prior thereto the defendant gave permission to the plaintiff in terms of the Act to perform procedures and/or engage in the treatment of patients in State hospitals and State health facilities with effect from 17 December 2005.

[6] On 21 November 2008, the plaintiff instituted this action in which he claims damages for his loss of income resulting from him being prevented by the defendant from being able to fully practise his profession and in particular to perform procedures and/or engage in the treatment of patients in State hospitals and State facilities, for the period 5 April 2004 to 16 December 2005, during which he was unable to fully practise his profession.

[7] The plaintiff instituted this action on two alternative bases, which claims at this stage of the proceedings do not require full particularisation, save to point out that his claim is based in negligence, based on the breach by the defendant of its duty of care, alternatively constitutional damages.

[8] The special plea raised by the defendant reads as follows

> *"1. In paragraphs 3 and 4 of the amended particulars of claim, the plaintiff indicates that he was informed by an official of the defendant's ministry on 5 April 2004, that the application he had made with the defendant,, in terms of section 17 of the Hospitals and Health Facilities Act for permission to engage in the treatment of patients and perform medical procedures at State hospitals under the jurisdiction of the defendant had been refused.*
>
> *2. Plaintiff then sets out in paragraph 9, the duties the defendant allegedly had, in terms of section 17 of the Act, in respect of the application lodged by the plaintiff.*
>
> *3. In paragraph 11 of the particulars of claim, plaintiff alleges that the defendant was negligent.*
>
> 4. *In paragraph 13 of the particulars of claim, plaintiff alleges that he suffered damages in the sum of N$440,302.00 for the period 5 April 2004 to 16 December 2005 when plaintiff was not able to*

use the facilities of the defendant.

5. *In paragraph 14 of the particulars of claim, plaintiff again relies on the period 5 April 2004 to 16 December 2005 for the losses suffered during this period when he was not able to make use of the facilities of defendant.*

6. *Plaintiff's cause of action is accordingly founded on events that arose on 5 April 2004.*

7. *Plaintiff accordingly had knowledge of his cause of action as from 5 April 2004.*

8. *Summons in this matter was served on the defendant, only on 21 November 2008.*

9. *Plaintiff's action has accordingly prescribed on terms of the provisions of section 11(d) of the Prescription Act no 68 of 1969."*

[9]

[10] It is argued on behalf of the defendant that the plaintiff's cause of action in respect of his claim arose on 5 April 2004, and that regard should be had to the period for which damages is claimed, namely for the period 5 April 2004 to 17 December 2005, because this was the period during which the plaintiff was not authorised to use the health

facilities applied for as a result of the defendant's refusal to permit him to do so. It is further submitted that section 12(3) of the Prescription Act, 68 of 1969 ("the Prescription Act") is to be applied in this instance.

[11] That subsection provides that a debt which does not arise from contract shall not be deemed to be due until the creditor had 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.

[12]

[13] In this regard, counsel for the defendant submitted that as the identity of the debtor is not in issue, it is clear that the date on which the alleged wrong and the facts from which the *"debt"* arose was committed was on 5 April 2004, when the plaintiff's application was refused. That is also the date when any legal duty to prevent the loss arose, and from which date the plaintiff's cause of action in delict also arose.

[14] The argument on behalf of the plaintiff is that the plaintiff's cause of action only arose once the Supreme Court dismissed the defendant's appeal, alternatively that the plaintiff's cause of action only became completed when he was able to establish the amounts he lost as a result of the alleged negligence after being granted his certificate. In this regard, the plaintiff testified that he only became

aware during October 2006 that his income had increased, after which he consulted with his expert to calculate the difference between what he earned after the certificate was granted by the defendant compared to what he earned without the certificate. It is also common cause that the plaintiff practised for some time in the employ of the State, and that the majority of his patients would have been State patients under the PSEMAS medical scheme.

[15] It is further argued by counsel appearing for the plaintiff that in respect of section 12(3) of the Prescription Act, the plaintiff only had knowledge of the facts from which the debt arose when:

(a) firstly he knew that he had been unlawfully denied permission to practise in State hospitals in terms of section 17 of the Act; and

(b) secondly, when he was able to determine that he had indeed suffered loss of income.

[16] It is also argued that the plaintiff was aware that he had been refused permission to practise in State hospitals when he was advised of the decision as from 5 April 2004, but that the plaintiff's further knowledge of the facts giving rise to the debt only became known to him at a much later date. Only when he commenced practising in the State hospital from 17 December 2005 and in the ensuing months,

was the plaintiff able to determine what his income levels were, taking into account the fact that he was now able to practise in State hospitals. Thus only by comparing his income for the period 5 April 2004 to 16 December 2005, with his income after he was able to practise in State hospitals from 17 December 2005 to November 2006, was it possible for the expert to determine the difference between the two figures for purposes of calculating the plaintiff's loss of earnings in respect of his exclusion from State hospitals.

[17] Accordingly, so it is argued, the facts upon which the debt arose were only fully known to the plaintiff as of October 2006 when he had been practising in the State hospitals for a period of at least 10 months, and when he could obtain the assistance of his expert to do the relevant calculations. His cause of action was only completed then and therefore prescription only began to run against the plaintiff from October 2006, as a result of which it is submitted that the claim has not prescribed.

[18] In addition, it was submitted that in determining whether the proviso to section 12(3) of the Prescription Act would apply, the test is whether the plaintiff could have acquired the knowledge that the defendant had acted negligently or wrongfully by exercising reasonable care. For this purpose, a *diligens paterfamilias* had to be postulated in the plaintiff's group or particular circumstances and the question has to be asked whether such a person would have sought

out that knowledge within the time constraints.

[19] It is also argued on behalf of the plaintiff that the plaintiff's cause of action is based upon a continuing wrong resulting from the conduct of the defendant. For this contention, reliance was placed on the case of Barnett and Others v Minister of Land Affairs and Others 2007 (6) SA 313 (SCA) at paras 20 and 21. In Barnett and Others, a case involving the eviction of certain persons from a conservation area, a distinction was drawn between a single completed wrongful act – with or without continuing injurious effects and a continuous wrong in the course of being committed. (See page 321 C-D). The concept of a continuous wrong is well recognised and essentially results in a series of debts arising from moment to moment, as long as the wrongful conduct endures. (See e.g. Slomowitz v Vereeniging Town Council 1966(3) SA 317 A; applied in Barnett and Others at page 321 E).

[20] Finally it was argued that in any event there has been a judicial interruption of prescription in terms of section 15(1) of the Prescription Act which provides that the running of prescription shall, subject to the provisions of subsection (2), be interrupted by service on the debtor of any process whereby the creditor claims payment of the debt. In this regard reliance was placed on the case of Cape Town Municipality and Another v Allianz Insurance Co Ltd 1990 (1) SA 280 (C) at 334G, where it was held *inter alia* that:

(a) it is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun are instituted as a step in the enforcement of a claim for payment of the debt, and

(b) that a creditor prosecutes his claim under that process to final executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also where the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in a supplementary action instituted pursuant to and dependent upon that judgment.

[21]

[22] Counsel for the plaintiff submitted that accordingly, by instituting the urgent application in 2004, and the review application in the ordinary course, the plaintiff initiated an action, judgment in which finally disposed of some elements of the claim. These elements, so the argument goes, related to the question of the defendant's liability insofar as the defendant's conduct was negligent and/or wrongful in refusing the plaintiff access to practice in State hospitals. It also initiated a process in terms whereof legal certainty was obtained in regard to whether or not in so acting, the defendant had violated the plaintiff's constitutional rights in terms of Article 18 of the Namibian Constitution. Therefore the action the plaintiff now

brings is a supplementary action instituted pursuant and dependent upon the judgment of the Supreme Court on liability. For that reason, it was submitted that prescription was interrupted for the period April 2004 until final judgment was handed down in that matter on 23 November 2005.

[23] The sole issue to be determined concerns the time at which prescription begins to run in respect of the plaintiff's claim for damages.

[24]

[25] Under section 12 of the Prescription Act, prescription of a debt (which includes a delictual debt) begins running when the debt becomes due and a debt becomes due when the creditor acquires knowledge of the facts from which the debt arises, in other words, the debt becomes due when the creditor acquires a complete cause of action for the recovery of the debt or when the entire set of facts upon which he relies to prove his claim is in place. (See Evins v Shield Insurance Co Ltd 1980(2) SA 814 A at 838 D-H).

[26] In Truter and Another v Deysel 2006(4) SA 168 SCA, the Supreme Court of Appeal in South Africa dealt with a similar argument in so far as it was submitted with regard to a medical negligence claim that until the plaintiff had sufficient detail concerning the negligent conduct in the form of an expert medical opinion, the plaintiff in terms of section 12(3) does not have knowledge of the

facts from which the debt arises.

[27] At paragraph 17 of that judgment, the Court held that 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. For purposes of prescription, *"cause of action"* meant every fact which it was necessary for the plaintiff to prove in order to succeed in his claim. It did not comprise evidence which was necessary to prove those facts. (At paragraph 19). It was further held that an expert opinion that conduct had been negligent was not itself a fact, but rather evidence. (At paragraph 20).

[28] I am in respectful agreement with the legal principles applied in Truter v Dreyer. Applied to the facts of this case the plaintiff on his own version became aware of the *"debt"* and the facts from which the debt arose on 5 April 2004.

[29] The plaintiff testified that he became aware that the defendant's actions were wrongful on 5 April 2004 when his application was refused. Thus he knew by then of the identity of the debtor and of the facts from which the debt arises. If one takes into account that he had 3 years from this date to institute his claim, his evidence to the effect that he was only in November 2006 able to compare his income between the period 5 April 2004 to 16 December

2005 with income he earned from 17 December 2005 to November 2006 is noteworthy. In my view, by November 2006 the plaintiff was able to determine the quantum of his claim, but the legal basis relating to the merits of the claim, he knew of in April 2004 already.

[30] To my mind, the plaintiff had ample opportunity to institute his claim within that 3 year period. The expert opinion on quantum was provided in November 2006 and would still have been within the prescription period commencing from 5 April 2004, and the plaintiff would have been at liberty to in the course of his action amend the claim for damages in terms of the Rules of Court. Instead, he waited until November 2008.

[31] I also do not find the argument that this action is a supplementary action instituted pursuant and dependent upon the judgment of the Supreme Court on liability to have merit.

[32] The review application launched by the plaintiff related to the enforcement by him of his right to administrative justice. This action is a private action in delict requiring the Court to determine whether the defendant owed a duty of care to the plaintiff to act fairly and reasonably and whether that duty was breached. I am of the opinion that although a finding that the defendant's decision was administratively unfair may assist the plaintiff in proving negligence and/or a breach of statutory duty, it does not mean that his cause of

action in negligence only arose for the first time in November 2005 when the Supreme Court ruled in his favour, or in October 2006 when he was able to properly calculate the quantum of his loss. After all, the period for which damages are claimed is from 5 April 2004 to 16 December 2005. In my view the facts relating to negligence or lack thereof is separate from the question whether the decision is administratively unfair.

[33] In Knop v Johannesburg City Council 1995 (2) SA 7 (AD), the Court dealt with the question whether a public authority is liable in damages for negligence in exercising its statutory functions. At 22C, Botha JA opined that in our law, there is no justification for treating the distinction between quasi judicial and purely administrative functions as the touchstone for determining a public authority's liability for loss caused by the negligent exercise of statutory powers. At 24H, he stated the following:

> *"In the present case, if it is assumed that the Council was negligent in exercising its statutory functions, the question whether it is liable in damages to the plaintiff must depend on the answer to the question whether its conduct was wrongful."*

[34] In Steenkamp v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC), the Constitutional Court of South Africa considered whether financial loss caused by improper performance of a statutory

or administrative function should attract liability for damages in delict. In particular the Court considered whether a successful tenderer whose award is later set aside by a Court on review may claim delictual damages from the Tender Board for out of pocket expenses incurred subsequent to and in reliance on the award, and whether the Tender Board owed the initially successful tenderer a legal duty of care. Although it was held that the Tender Board did not owe the successful tenderer a duty of care, the Court did recognise the principle that if a duty of care existed and was breached, a delictual claim would be founded.

[35] Thus in my opinion the duty of care did not arise for the first time after the Supreme Court decision was delivered on 23 November 2005. It would have arisen when the decision was taken.

[36] The above cases also show that a litigant does not need to wait until his remedy of judicial review has been exercised to finality, and the decision set aside, in order to then institute an action for negligence either separately or as a supplementary action. The main question in the action based in delict is, did the defendant breach his legal duty of care to *inter alia* act fairly, impartially and apply its mind when it refused the defendant's application, and was that failure wrongful or unlawful. This question is not answered when the decision is set aside but when the decision was made. The plaintiff had 3 years from that date to institute an action, or even apply for a declarator. He restricted himself to an application for judicial review.

[37] On the facts, the decision of the defendant was set aside in this Court on 8 December 2004, and confirmed by the Supreme Court on 23 November 2005. These decisions in my view did not found for the first time an action based in negligence, but may well be evidence of negligence. Calculating from 5 April 2004 when the decision was taken, the plaintiff also obtained 2 judgments in his favour during the 3 year period. Still, he did not institute his claim.

[38] Instead, he waited until he could properly calculate the quantum of damages and now attempts to found his cause of action from

October/November 2006, when on his own evidence, he knew that the decision taken against him was negligent in April 2004 already. To my mind the plaintiff's argument is opportunistic, and ignores that his cause of action in delict was established much earlier. As earlier mentioned, there was nothing preventing the plaintiff from instituting his action within the three year period commencing on or about 5 April 2004 and amending his damages claim once he received the information from his expert. Furthermore, the plaintiff can also not deny that he knew that he would have suffered loss in his fledging private practice when his application was refused, because on his own version, he relied on income from State patients on the PSEMAS medical scheme when he commenced practising for his own account because he was previously employed by the defendant.

[39] As regards the argument that there has been a judicial interruption of prescription, I also hold the view that it has no merit. The once and for all rule requires that all claims generated by the same cause of action be instituted in one action. (See Evins v Shield Insurance Co Ltd *supra)*. The review accordingly did not interrupt prescription and it was open to the plaintiff to institute his action in delict instead of restricting himself to the judicial review remedy.

[40] I also hold the view that the argument that the plaintiff's cause of action is based on a continuous wrong arising from a series of debts arising from moment to moment, in so far as it may be applicable in this matter, only assists the plaintiff for a short period, namely from 16 December 2005, being the cut off date in respect of the period for which he claims damages. Thus only about 3 weeks of his claims would not have prescribed if the continuing wrong principle is applied. This was also conceded by the defendant's counsel in argument.

[41] Accordingly, the plaintiff's claim has indeed prescribed, save for the period between 16 December 2005 to 21 November 2008, when summons was issued and served. The defendant being substantially successful would be entitled to costs.

[42] In the result I make the following order:

(a) The special plea is upheld with costs save for the period between 16 December 2005 to date of issue of summons.

a. The costs are to include the costs of one instructing and one instructed counsel.

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SCHIMMING-CHASE, AJ

ON BEHALF OF PLAINTIFF	Adv AW Corbett
Assisted by:	Mr M Kutzner
Instructed by:	Engling, Stritter & Partners
ON BEHALF DEFENDANT	Adv G Narib
Assisted by:	Mr Knupe
Instructed by:	Government Attorney