

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Matheus Nekwiyu and Minister of Health and Social Services Government of the Republic of Namibia	Plaintiff 1 st Defendant 2 nd Defendant	Case No: HC-MD-CIV-ACT-DEL-2020/01252
		Division of Court: Main Division
		Decided on papers: 23 April 2021
Heard before: Honourable Mr. Justice Usiku, J		Delivered on: 24 May 2021
Neutral citation: <i>Nekwiyu v Minister of Health and Social Services and Another</i> (HC-MD-CIV-ACT-DEL-2020/01252) [2021] NAHCMD 251 (24 May 2021)		
Order:		
<ol style="list-style-type: none">1. The special plea of prescription is dismissed.2. The defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay the plaintiff's costs occasioned by the special plea. Such costs include costs of one instructing and one instructed counsel.3. The matter is postponed to 07 July 2021 at 15:15 for a Case Management Conference Hearing.4. The parties are directed to file a joint case management report on or before 30 June 2021.		

Reasons for order:**USIKU, J**Introduction

[1] The matter for determination is a special plea raised by the defendants. The special plea states that the plaintiff's cause of action is based on an alleged wrongful and unlawful conduct on the part of the defendants' employees, which took place on 23 March 2017 and that the plaintiff had knowledge of those events since 23 March 2017 and that the cause of action had therefore prescribed as summons was served on the defendants on 05 May 2020.

[2] The court granted the parties' request that the special plea be dealt with, before hearing the merits of the matter and that the special plea be determined on the papers before court without the need of oral argument. For the above reasons the special plea was argued on the pleadings only.

Background

[3] In the main action, the plaintiff claims damages resulting from a death of his minor child, on 23 March 2017, after having been vaccinated by employees of the defendants at the Katutura State Hospital.

[4] According to the pleadings, the child was bitten by a dog and was taken to the hospital for treatment. At the hospital, an anti-rabbies and anti-tetanus vaccine was administered on the child and the child returned home. After arrival, it was discovered that the child had trouble breathing and was returned to the hospital. At the hospital the child was declared dead on the same day, 23 March 2017.

The special plea*Defendants' contention*

[5] In their special plea, the defendants plead that the alleged wrongful and unlawful conduct on the part of the defendant's employees took place on or about 23 March 2017. The child died

on the same day as a result of the alleged wrongful and unlawful conduct. The summons was served on the defendants on 05 May 2020. The date of service is more than 3 years after the date of the alleged wrongful and unlawful conduct. Therefore, the plaintiff's claim has prescribed in terms of s 10 read with s 11 of the Prescription Act 68 of 1969.

[6] Counsel for the defendants submits that the plaintiff ought to have held a subjective belief on 23 March 2017, when the child died after the vaccination, that the vaccine was the cause of the death. Counsel urges the court to take judicial notice that the cause of death should be specified on the death certificate, as a person cannot be buried without a death certificate being produced and that the death certificate lists the cause of death. The defendants' counsel therefore submits that once the cause of death is specified on the death certificate, then the plaintiff, at that point, had an objective view in respect of which he could institute legal action.

[7] The defendants' counsel further contends that the medical records which the plaintiff received on or about 14 May 2019 relate to evidence as opposed to the minimum facts necessary to institute the legal action. The defendants' counsel therefore argues that the special plea be upheld.

Plaintiff's contention

[8] The plaintiff denies that his claim has prescribed. The plaintiff pleads that he had no full knowledge of the facts from which the debt arose prior to his receipt of the medical records on 14 May 2019. The plaintiff only became aware of the cause of action against the defendants on 14 May 2019 when the plaintiff received full medical records pertaining to the treatment and ultimate death of the child.

[9] Counsel for the plaintiff submits that on 23 March 2017, the plaintiff did not know the cause of the child's death, save that the child died after receiving medical treatment at the hospital. The plaintiff made numerous efforts, specified under para 10 of the particulars of claim, to obtain the relevant information from the defendants. It was only on or about 14 May 2019 that such information was delivered to the plaintiff. The plaintiff contends that the 14th of May 2019 is the date on which the cause of action arose.

Legal principles

[10] Section 10 of the Prescription Act provides that a debt shall be extinguished by prescription after the lapse of the period that applies in respect of the prescription of such debt. Section 11(d) provides that the period of prescription of debts in respect of any other debt, shall be 3 years.

[11] In terms of s 12(1), prescription commences to run as soon as the debt is due. Section 12(3) provides that, 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. A creditor is deemed to have such knowledge if he could have acquired it by exercising reasonable care.

Analysis

[12] It is trite law that a party who raises prescription must allege and prove the date of the inception of the prescription.¹ As a general rule, prescription begins to run as soon as the debt is due. The debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and the facts giving rise to such debt. A creditor who could have acquired knowledge of the identity of the debtor and the facts giving rise to the debt by the exercise of reasonable care is deemed to have such knowledge.

[13] Applying the aforesaid legal principles to the present facts, I am of the view that, it is for the defendants, as the parties raising prescription, to prove the date on which the plaintiff acquired knowledge of the facts that the alleged wrongful and unlawful conduct on the part of the defendants' employees, caused the death of the child.

[14] In my view, the defendants have failed to discharge the *onus* on it to show that the plaintiff had acquired knowledge of the cause of the child's death on 23 March 2017.

[15] In my opinion the plaintiff has raised a valid answer to the defendants' allegation of prescription, to the effect that his debt could not have become due on 23 March 2017 when treatment was administered on the child and the child died, but such debt became due only on or about 14 May 2019 when the plaintiff received full medical records pertaining to the treatment

¹ *Gericke v Sack* 1978 (1) SA 821.

and the ultimate death of the child.

[16] In the circumstances of this matter, I hold that prescription started running as from 14 May 2019, when the plaintiff received full records pertaining to the treatment and ultimate death of the child.

[17] For the foregoing reasons, the defendants' special plea of prescription falls to be dismissed with costs.

[18] In the result, I make the following order:

1. The special plea of prescription is dismissed.
2. The defendants are ordered, jointly and severally the one paying the other to be absolved, to pay the plaintiff's costs occasioned by the special plea. Such costs include costs of one instructing and one instructed counsel.
3. The matter is postponed to 07 July 2021 at 15:15 for Case Management Conference.
4. The parties are directed to file a joint case management report on or before 30 June 2021.

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendants:
Mr B Khoa Legal Assistance Centre Windhoek	Adv T Chibwana Office of the Government Attorney Windhoek