LAW OF DAMAGES – MEDICAL NEGLIGENCE – CAUSE OF ACTION AND COMMENCEMENT OF PRESCRIPTION

Truter and Venter v Deysel [2006] SCA 17 (RSA)

1 Introduction

This judgment by Van Heerden JA (Harms, Zulman, Navsa and Mthiyane JJA concurring) illustrates the application of certain basic principles of the South African law of damages relating to causes of action, the commencement of prescription, future damage and the "once and for all" rule (see generally on this Visser and Potgieter *Law of damages* (2003) 135 *et seq*). The effect of the judgment is that the victim of alleged medical negligence was left blind and without a delictual remedy since his action was judged to have become prescribed.

It is not that easy to assess the court's reasoning and the application of the law to the facts. Although there are proper grounds on which the judgment may be supported, it still leaves one feeling somewhat uneasy because of the possibility that justice was not done and that a different outcome would also have been sustainable *in casu* without doing violence to the applicable legal principles. In any event, this case will certainly not make it easier for wronged patients to sue negligent medical practitioners.

2 Facts

In April 2000 the respondent, Deysel, instituted action in the Cape High Court against the appellants, two medical practitioners, Truter and Venter for damages arising from a personal injury allegedly sustained by him as a result of surgical procedures performed on his right eye by the said doctors in the period July 1993 to September 1993. Unsurprisingly, the appellants raised a special plea of prescription. The court (*per* Mlonzi AJ) dismissed the special plea with costs on 2 November 2004. The sole issue before the trial court, and indeed also the Supreme Court of Appeal, concerns the date on which prescription started to run in respect of Deysel's possible claim for damages. In terms of section 11(d) of the Prescription Act 68 of 1969, this claim is generally subject to a three-year extinctive prescription period. According to the special plea, Deysel's summons was served on Truter and Venter on 17 April 2000. Thus, concluded Van Heerden JA, if the date on which the three-year prescription period commenced running was *before* 17 April 1997, any claim which Deysel may have had would have become prescribed and the special plea should have been upheld (para 3).

It was, for the purposes of the special plea only, common cause that the foreseeable and actual consequence of the surgical procedures performed by Truter

and Venter were decompensation of the cornea of Deysel's right eye, necessitating a corneal graft operation which was performed by a Dr Burger on 12 December 1996. This, in turn, developed complications involving the onset of infection of a corneal stitch and ultimately led to an evisceration of Deysel's right eye on 23 April 1997. As Deysel had, at the time of the operations in 1993, already lost his left eye, he was thus rendered totally blind (paras 3–4). In his trial particulars Deysel alleged (and it was admitted for the purposes of the special plea) that throughout all the surgical procedures, the defendants could and should have known that "repeated surgery irreparably damages the endolethial cells lining the cornea, and that it was reasonably foreseeable that it could and probably would lead to bullous kerotopathy" (para 5). It was further alleged to have been reasonably foreseeable that this would in turn require a corneal graft and, if not uncomplicated, eventual loss of the eye if an infection were to set in.

Already in July 1994, Deysel wrote to the Medical and Dental Council lodging a complaint against Dr Truter (para 6). However, no action was taken against Truter. In 1995 Deysel appointed attorneys to investigate and prosecute a malpractice claim against Truter and Venter arising from their treatment of him in 1993. These attorneys obtained professional reports from two experts in the field of ophthalmology. However, none of these medical experts concluded that an inference of negligence on the part of Truter and Venter was justified (para 8). Deysel was referred to other eye specialists as well but obtained no medical opinion that he would be able to prove negligence to sustain a damages claim (para 9). Eventually Deysel sought an opinion from a Dr Steven. The latter expressed the view that the operations performed by Truter and Venter had been perfromed too quickly one after the other, without giving the cornea time to clear and heal, and that this constituted negligence on the part of the said doctors. This was apparently the first positive expert report obtained by Deysel. It was on the basis of this report that summons was finally issued on behalf of Deysel in April 2000 (para 10).

3 The court's reasoning

The court referred to section 12(1) of the Prescription Act which reads as follows:

> "When prescription begins to run
>
> (1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.
>
> (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
>
> (3) A debt 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."

The court found that there was no suggestion that Truter and Venter prevented Deysel from coming to know of the existence of the debt (as contemplated in s 12(2)) and Deysel certainly knew "the identity of the debtor(s)" from the outset (para 12). The vital question before the court *a quo* was thus whether Deysel had actual or deemed knowledge of "the facts from which the debt arises", as required by section 12(3), prior to 17 April 1997.

Van Heerden JA found that for the purposes of the Prescription Act, the term "debt due" means a debt, including a delictual debt, which is owing and payable. A debt is due in 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 (para 16, referring to *Evins v Shields Insurance Co Ltd* 1980 2 SA 814 (A) 838D–H; *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 1 SA 525 (A) 532H–I; Loubser *Extinctive prescription* (1996) 80–81 para 4.6.2). The judge then made a crucial finding for the purposes of this case (para 17, referring, *inter alia,* to Loubser para 4.6.1):

> "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: 'A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.' [quotation from Loubser] . . . 'Cause of action' for the purposes of prescription thus 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.'" (paras 17 and 19).

Van Heerden JA opined (para 20) that, in the light of the authorities, the presence or absence of negligence is thus not a fact – it is apparently a conclusion of law to be drawn by the court in all the circumstances of the specific case (see *Mkhatswa v Minister of Defence* 2000 1 SA 1104 (SCA) 1112H). An expert opinion that a conclusion of negligence can be drawn from a set of facts is also not a fact – it rather amounts to evidence. Since section 12(3) of the Prescription Act requires knowledge only of the material *facts* from which the debt arises for the prescriptive period to begin running, it does not require knowledge of the relevant legal conclusions (that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions. The court further distinguished the decision in *Van Zijl v Hoogenhout* [2004] 4 All SA 427 (SCA). In the latter case, Heher JA (para 19) held that, where the prescription statute speaks of prescription beginning to run when a creditor has knowledge, "it presupposes a creditor who is capable of appreciating that a wrong has been done to him or her by another". The plaintiff in *Van Zijl* was found on the facts to have lacked capacity for many years to appreciate that a wrong had been done to her and that this had therefore delayed the commencement of the running of prescription. By contrast, observed Van Heerden JA, in the present case it is abundantly clear that Deysel believed and appreciated from as early as 1994 that a wrong had been done to him by Truter and Venter (para 21).

The court then confirmed (see para 22) the complicated and in some instances controversial so-called "once and for all" rule, namely that a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action (see generally Visser and Potgieter 135 *et seq* for a full discussion with reference to the authorities). Therefore, argued the court *in casu*, a plaintiff's cause of action is complete as soon as some damage is suffered, not only in respect of the loss already sustained by him or her, but also in respect of all loss sustained later. Applying this principle to the facts of the present case,

Deysel's cause of action was complete and the debt of Truter and Venter became due as soon as the first known harm was sustained by Deysel, notwithstanding the fact that the loss of his right eye occurred only later (para 23). The court observed that according to Deysel's own evidence, from at least the time of his initial complaint to the Medical Council in July 1994 (paras 24–26):

> "He knew the details of the operations performed on him by Drs Truter and Venter and that he had suffered harm. He also knew that the two doctors were required to exercise reasonable care and skill in treating him; indeed his unremitting and oftrepeated complaint was that they had failed to do so, as a result of which he had undergone a multiplicity of medical and surgical procedures and had suffered permanent damage to his remaining eye. He knew that he had a potential claim against Drs Truter and Venter, hence his instructions to the first set of attorneys in 1995 to investigate such a claim. As is clear from the sequence of events described above, all the facts and information in respect of the operations performed on Deysel by Drs Truter and Venter in 1993 were known, or readily accessible, to him and his legal representatives as early as 1994 or 1995. Neither Deysel nor Ms Pienaar was able to point to any new fact which was given to either Dr Lecuana or Dr Steven which had not been presented to the previous medical experts for their opinions and which had not been known or readily accessible to Deysel and his representatives before 17 April 1997 (ie more than 3 years before the date on which he instituted action). Indeed, the 'negative indicators' which apparently eventually led Dr Steven to conclude that there had been negligence on the part of Drs Truter and Venter were dealt with in the reports of medical experts previously consulted. Thus, neither Dr Lecuana nor Dr Steven revealed or furnished any new facts to Deysel: they merely advanced an opinion, in the form of a conclusion that there had been negligence, which opinion was based on the same facts which had been available prior to 17 April 1997 and which had been furnished to the other experts."

The appeal was accordingly allowed, indicating that the special plea of prescription succeeded.

4 Evaluation

As stated, the court's reasoning *in casu* is not unconvincing and certainly not manifestly incorrect. The implication is that Deysel should have been advised to run the risk of issuing a summons somewhat prematurely while still seeking a favourable expert medical opinion to prove an allegation of professional negligence. Instead he appears to have been advised, or decided on his own, to run a different but much more dangerous risk, namely *not* to issue a summons pending the complicated and challenging search for a medical opinion favourable to him in this important matter. In the final analysis, the delay associated with the non-issuing of a summons was lethal to a possible claim and his legal costs were in any event wasted. The plaintiff was thus apparently not well advised in this matter, but it is not necessary or possible to consider here whether he may have a claim against one or more of his legal advisers for any incorrect advice they may have given negligently.

Despite its merits, it is submitted, however, that the court's reasoning *in casu* is not unassailable. For example, the court's confident assertion that "unlawfulness" and "negligence" are not "facts" as contemplated in section 12 of the Prescription Act lacks logical cogency – and is not really supported by the authorities on which the court purports to rely. *Mkhatswa v Minister of Defence* 2000 1 SA 1104 (SCA) para 23 to which the court specifically refers, does not support its conclusion. In that judgment Smalberger JA observed that "whether

or not conduct constitutes negligence ultimately depends upon a realistic and sensible judicial approach to all the relevant facts and circumstances that bear on the matter at hand". Correct as this *dictum* may be, it clearly does not go so far as to declare that negligence is not a "fact" anymore because a sensible juridical approach is used to determine negligence.

Even if unlawfulness and negligence are "legal" conclusions drawn from certain other facts (and there can be little doubt that this approach is basically sound), it is unrealistic or inaccurate to argue, as the court appears to do, that such conclusions are not "facts" themselves. How can the existence or non-existence of negligence not be a "fact"? The identification of negligence is the result of applying legal criteria to human conduct, but the legal criteria for negligence should not be confused with the factual outcome of the application of such criteria to a given situation. It would amount to the same type of error if it is argued that a court's judgment in a case is not a fact but merely its legal conclusions from facts presented to it.

Furthermore, section 12(1) of the Prescription Act certainly does not restrict the very general concept of "facts from which the debt arises" to only certain types of facts so that the presence or absence of negligence is no longer a fact. In any event, the existence and content of a medical opinion, while it may be tendered as evidence, is also a "fact" and a very relevant one too. Loubser, on which the court partially relies (as quoted above), adds that facts must enable *a court* to arrive at certain legal conclusions – the test is apparently not whether the facts permit *a plaintiff* to draw the relevant conclusions. But with no expert medical opinion alleging professional negligence, how could any court or plaintiff ever come to a conclusion regarding the alleged negligence of Truter and Venter?

The court's highly technical approach *in casu* is not compatible with the general latitude displayed in its earlier judgment in *Van Zijl v Hoogenhout* [2004] 4 All SA 427 (SCA). The court does not settle the matter by referring to the fact that Deysel felt that a wrong was done to him, that he was familiar with the operations performed on him and that the new medical evidence did not add any fact to what was already available (paras 24 and 25). The court's arguments (quoted above) that Deysel knew that the two doctors were required to exercise reasonable care in treating him and that he knew he had a potential claim against them (para 25), probably go too far and even sound somewhat artificial. This knowledge ascribed to Deysel would not take his "potential claim" any further.

It is suggested that the court could have found proper grounds to dismiss the appeal against the special plea of prescription *in casu.* The court could, for example, have found that the plaintiff was not aware and could not reasonably have been aware of the presence of negligence as a fact as contemplated in section 12(1) of the Prescription Act. The fact that Deysel subjectively felt himself to be the victim of a delict can hardly be relevant in the sense explained by the court. The court could have argued that the absence of a favourable medical opinion from which an inference of negligence could be drawn, was indeed also a "fact" as contemplated in section 12(1). All this would probably have ensured a more satisfactory outcome than to leave Deysel blind and without a legal remedy because no court may enquire into what happened to him.

It would be interesting to speculate on how the Constitutional Court would approach a hypothetical appeal against this judgment on the basis that the inappropriate upholding of a defence of prescription violated Deysel's right to

have the merits of his dispute dealt with by a court in conflict with section 34 of the Constitution, or possibly constitutes an unwarranted limitation of his right to bodily integrity as referred to in section 12(2) of the Constitution. It is not far-fetched to speculate that there could be a reasonable prospect of success regarding such a challenge.

PJ VISSER
University of Pretoria