



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

REPORTABLE

Case no: CA1/2023

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH, EASTERN CAPE**

Appellant

and

PERM BANGILIZWE DIKO

Respondent

JUDGMENT ON APPEAL

Govindjee J

[1] To succeed with a special plea of prescription in cases involving medical negligence, it must be shown that the other party had knowledge of sufficient facts so as to cause them, on reasonable grounds, to suspect fault on the part of the medical staff, and consequently to seek legal advice.¹ This appeal concerns the reduced

¹ *Links v Department of Health, Northern Province* 2016 (5) SA 414 (CC) ('Links') paras 42, 45: 'Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the

burden of proof to establish a prima facie case when a party raises prescription and the knowledge of the facts lies within the realm of knowledge of the other party, who fails to adduce evidence or seriously challenge the evidence presented.

Background

[2] The respondent ('Mr Diko') was involved in a motor vehicle collision on 9 December 2009. He sustained a right-sided femoral fracture and received treatment at hospitals in Bizana and Mthatha. The femoral fracture was treated and stabilised with a Kuntscher nail on 18 December 2009. Mr Diko was discharged on 21 December 2009 and received follow-up treatment as an outpatient until 3 February 2010. During 2018, he claimed R4,5 million from the appellant ('the MEC') for damages allegedly caused by hospital staff acting negligently within the course and scope of their employment.² The claim was based on breach of contract, alternatively breach of a duty of care, based on a similar factual underpinning. It is alleged that the treatment received, or lack thereof, had resulted in a shortening of the right leg, and associated

claimant cannot be said to have knowledge of the facts from which the debt arises ... Until the applicant had knowledge of facts that would have led him to think that possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in s 12(3).'

² The particulars of claim detail the allegedly negligent treatment as follows:

- '13.1 The treatment rendered and / or, alternatively, surgical procedure performed by the defendant was completely inadequate in that: -
 - 13.1.1 The [Kuntscher] nail [used to stabilize a femoral fracture] was too thin;
 - 13.1.2 The nail was too short;
 - 13.1.3 The nail was not inserted deep enough;
 - 13.1.4 Image intensification was not utilised when the nail was inserted;
- 13.2 The defendant rendered the treatment and / or performed the surgery incorrectly as a wrong intramedullary device was utilised;
- 13.3 The defendant rendered the treatment and / or performed the surgery without doing the necessary investigations;
- 13.4 The defendant rendered the treatment and / or performed the surgery without the plaintiff's properly informed consent;
- 13.5 The defendant failed to properly investigate the various other advantageous and less damaging treatment options particularly for the type of injuries sustained by the plaintiff;
- 13.6 The defendant rendered the treatment and / or performed surgery at a time when interlocking intramedullary nailing of the femoral fracture should have been the treatment of choice for the following reasons: -
 - 13.6.1 By insertion of interlocking screws, a rotational deformity is prevented;
 - 13.6.2 With a stable interlocking construct leg shortening will not occur;
 - 13.6.3 The interlocking device is much stronger and will minimise complications such as bending of the nail;
 - 13.6.4 Insertion of interlocking nail in both the femur and tibia is a long standing and reliable orthopaedic procedure.'

complaints, ('the injuries') so that a complex surgical procedure, with the risk of associated complications, was now required.

[3] The MEC's first special plea raised prescription.³ The second special plea was based on non-compliance with the statutory obligation to give notice of institution of proceedings timeously.⁴ Mr Diko, citing ss 12(1) and 12(3) of the Prescription Act, 1969⁵ ('the Act'), replicated that he only became aware of the facts giving rise to the debt after consulting with his attorney of record following receipt of a report from Dr Olivier on 12 June 2018, so that, for purposes of the Act and the statutory notice, the debt only became due on that date.⁶

[4] Both points were separated for determination in terms of Uniform Rule 33(4). The MEC, accepting that she bore the onus, led only the evidence of Dr Osman, a specialist orthopaedic surgeon. No agreed facts were placed before the court and Mr Diko led no evidence.

The evidence

[5] Dr Osman had obtained Mr Diko's patient history from him. The essence of his evidence was as follows:⁷

³ In particular:

2.1.1 the plaintiff's alleged claim is a debt that became due by no later than 18 December 2009;

2.1.2 the plaintiff's summons and particulars of claim dated 3 June 2018 was served on the defendant on or about 19 July 2018;

2.1.3 the plaintiff's alleged debt for the purposes of his claim has accordingly prescribed by virtue of section 12(1) read with section 11(d) of the Prescription Act 68 of 1969.'

⁴ Section 3(2) of the Institution of Legal Proceedings against Certain Organs of State Act, 2002 (Act 40 of 2002).

⁵ Act 68 of 1969. Section 12(1) provides that, subject to the provisions of subsections (2), (3) and (4), prescription commences 'as soon as the debt is due'. Section 12(3) reads as follows:

'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.'

⁶ Given the replication, it may be accepted that, while this may have facilitated the proceedings before the court *a quo*, there was no obligation on the MEC to file a rejoinder: J Saner *Prescription in South African Law* (2022) (LexisNexis) SI 33 at fn 2106, p3-373.

⁷ Dr Osman's report, accepted by the trial court into evidence, adds that 'Bedford Hospital recognised that there was a problem post fixation. It was noted that the wrong nail was inserted. He was advised to return for follow up management (sic)'.

‘...after discharge, he went to a nearby clinic for removal of sutures. And thereafter while he was mobilising with a pair of crutches he noticed that the right lower limb was shortening. And he was quite clear that time that something was not right and upon noticing the same, he attended Bizana Hospital where he mentioned to them that his limb was shortening. They then referred him to Bedford Hospital. He was assessed there, he was given pain medication, they confirmed that there was a problem with the fixation. And he was given an appointment date and asked to return to Bedford Hospital for further treatment. Prior to this appointment date, he went back to Bizana Hospital because his lower limb was starting to bend. He was assessed and he was asked to attend Bedford Hospital for further management. Unfortunately due to financial constraints he could not go back for this follow up and therefore did not attend further treatment at Bedford Hospital...he noticed the shortening very quickly, about two weeks following this surgery. And he noticed bending one month after the surgery...and this bending ceased approximately one year after the surgery...’

The judgment

[6] The court *a quo* dismissed the special pleas raised with costs, including the costs of two counsel. The trial judge highlighted that the MEC was obliged to show that Mr Diko was in possession of sufficient facts to cause him on reasonable grounds to think that the injuries were due to the fault of the medical staff. Yet the MEC had not referred to hospital records to substantiate that Mr Diko had actual knowledge that there was a problem with the fixation ‘or that his having been told that there was “a problem” with the fixation in relation to what might be of relevance in the hospital records, ought to have given him reasonable grounds to suspect fault on their part so as to have caused him ... [to seek] advice regarding the possibility of a damages claim against the defendant arising from that disclosure’.⁸

[7] The assessment of the evidence continued as follows:

⁸ The crux of the finding is reiterated later in the judgment, as follows:

‘... even assuming I must accept that he was told that there had been “a problem” with the fixation, what about this information or knowledge on his part would have been an indication for him that the staff may have been negligent in carrying out the procedure. Also, the fact of his complications, as obvious as they may have been to him, would not have suggested to him that the treatment administered to him was incorrect or inadequate and most certainly not that the hospital had used a wrong pin that is contraindicated in orthopaedic practice. His situation is similar in my view to *Links* in which the court held that that plaintiff could not reasonably have known, without seeking the opinion of a specialist, that the care administered to him was substandard.’

'It seems to me that even if the plaintiff had been told that there was "a problem with the fracture fixation" ... this does not equate to the defendant showing that he was "in possession of sufficient facts to (have caused him) on reasonable grounds to think that his injuries were due to the fault of the medical staff" ... while he might have been expected to know that something was amiss ... how was he supposed to know that a wrong nail had been inserted or that it is contraindicated in orthopaedic practice.'

[8] The trial court was concerned about the reliability of the oral evidence it had heard. It found it implausible that the hospital staff would have told Mr Diko that he had received substandard treatment. The medical records themselves were scant and did not support a case of actual knowledge of insertion of a wrong pin. On this assessment of the evidence, the MEC had not shown that Mr Diko had either actual or constructive knowledge of the identity of the debtor or of the facts giving rise to the debt more than three years before the action had been instituted.

Grounds of appeal

[9] The learned judge in the court *a quo* granted leave to appeal on the basis that the failure to cross-exam Dr Osman seriously, coupled with Mr Diko's failure to testify, would likely be assessed differently by another court and result in a changed outcome based on deemed knowledge. In addition, the matter was not so complex as to warrant costs of two counsel.

[10] Part of the notice of appeal is focused on the trial court's finding that the MEC had not succeeded in discharging the onus to show Mr Diko's actual or constructive knowledge of the identity of the debtor. It may be accepted that this issue is inextricably bound to the issue of Mr Diko's knowledge of the facts from which the debt arises based on the exercise of reasonable care. The crux of the challenge is his failure to testify, particularly in circumstances where the relevant facts were peculiarly within his knowledge, as well as the failure to challenge Dr Osman's evidence seriously through cross-examination, including by not rebutting facts particularly within his knowledge. It is argued that the court *a quo* failed to give adequate weight to the principle that less evidence will suffice to establish a prima facie case where a party fails to explain facts

within his exclusive knowledge. The MEC also submits that the trial court erred by elevating the knowledge to be obtained by Mr Diko to include information indicating the negligence of the treating medical staff.⁹ The finding related to the unreliability of the evidence led, based on a language barrier and use of an interpreter during consultation, was also challenged as speculative.

Analysis

[11] Courts must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.¹⁰ Prescription in the context of s 12(3), it must be remembered, is aimed at penalising negligent inaction, rather than innocent inaction.¹¹ The plea of prescription, as circumscribed by Mr Diko's replication, requires a determination of two issues: firstly, what were the facts which Mr Diko was required to have knowledge of before prescription could commence running; and, secondly, when did he acquire actual or deemed knowledge of such facts.¹² The burden is on the MEC to prove this aspect.¹³ Before addressing these matters, it is necessary to make some remarks about whether the MEC ought to be held strictly to the pleaded date of inception of prescription, as argued by the respondent.

[12] As to precisely what the debtor is to allege and prove when raising prescription, there appears, with respect, to be a subtle tension between the SCA's position as expressed in *Gericke v Sack*,¹⁴ the Constitutional Court's position in *Links v*

⁹ A similar argument was considered in *MEC for Health, Eastern Cape v NH obo A* [2022] ZASCA 181 ('NH') paras 13 and 14.

¹⁰ Section 39(2) of the Constitution of the Republic of South Africa, 1996 ('the Constitution'); See *Links* above n 1 para 26, highlighting the link with s 34 of the Constitution. On that authority, the appeal implicates both the constitutional right to have access to court and the right to security of the person: para 22.

¹¹ *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) ('*Macleod*') para 13.

¹² See the judgment of Van Zyl DJP in *Minister of Police v Zamani* [2021] ZAECHC 41 ('*Zamani*') para 8.

¹³ *Gericke v Sack* 1978 (1) SA 821 (A) ('*Gericke*') at 826H – 827D.

¹⁴ *Ibid* at 827H-828B: "It was the respondent who challenged the appellant on the issue that the claim of damages was prescribed – this he did by way of special plea five months after the plea on the merits had been filed. The onus was clearly on the respondent to establish this defence. He could not succeed if he could not prove both the date of the inception and the date of completion of the period of prescription ... It follows that if the debtor is to succeed in proving the date on which prescription begins to run he must allege and prove that the creditor had the requisite knowledge on that date. The fact that the appellant has alleged since her replication that she learned the respondent's identity only on 17 February 1971 does not relieve the respondent of the task of proving that she acquired that knowledge on 13 February 1971 – the date on which he relies."

Department of Health, Northern Province ('Links'),¹⁵ which the SCA has confirmed as embodying the clear position in our law,¹⁶ and recent decisions of that court placing reliance on the *Gericke v Sack* approach.¹⁷ This has implications both for the precision with which a special plea of prescription should be pleaded and the strictness with which the proof offered by the debtor will be assessed, also on appeal.¹⁸

[13] The judgment of the court a quo in *Links* establishes the facts of that matter. Notably, the MEC's first special plea, which was upheld by that court, alleged that 'the cause of action arose on 26 June 2006 and that the summons was only issued on 6 August 2009, three years and two months later' (own emphasis).¹⁹ Instead of restricting themselves to the pleaded date, the Constitutional Court reframed the enquiry as follows:²⁰

'The question for determination is whether the applicant's claim had prescribed by 6 August 2009 when he served summons ... The respondent bears the onus to prove that the applicant's claim had prescribed by the given date. In order for the respondent to prove that, he must show that prescription began to run against the applicant's claim not later than 5 August 2006. This is so because the period of prescription applicable is three years. In the context of s 12(3) the respondent must show what the facts are that the applicant was required to know before prescription could commence running. The respondent must also show that the applicant had knowledge of those facts on or before 5 August 2006.' (own emphasis).

[14] The Constitutional Court, alive to the date relied upon by the respondent in its affidavits (26 June 2006), added as follows:²¹

¹⁵ *Links* above n 1 para 24.

¹⁶ See *WK Construction (Pty) Ltd v Moores Rowland and Others* [2022] ZASCA 44; [2022] 2 All SA 751 (SCA) ('*WK Construction*') para 37.

¹⁷ See, for example, *Greater Tzaneen Municipality v Bravospan 252 CC* [2022] ZASCA 155 ('*Greater Tzaneen Municipality*') para 13; *Lancelot Stellenbosch Mountain Retreat v Gore NO* [2015] ZASCA 37 para 12. In *Brits v Kommandantsdrift CC and Others* [2022] ZASCA 41 para 17, the SCA framed the position as follows: 'Thus, it fell upon Brits to allege and prove the date upon which Meyer Jnr, on behalf of the CC, became aware of the facts that underpinned its claim, as well as the identity of the debtor. Alternatively, Brits had to prove the date on which the CC would have acquired the relevant knowledge had it exercised reasonable care.' Cf *WK Construction* above n 16 para 5.

¹⁸ *Greater Tzaneen Municipality* above n 17 para 14: the municipality failed to prove that prescription had commenced on the pleaded date and was not permitted to advance a different case on appeal.

¹⁹ *Links v MEC, Department of Health, Northern Cape Province* [2013] ZANCHC 26.

²⁰ *Links* above n 1 paras 4, 41.

²¹ *Links* above n 1 para 44. It is trite that affidavits in motion proceedings constitute both the pleadings and the evidence: *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) para 43.

‘The question is, therefore, whether the respondent discharged the onus to show that *on 26 June or at any date on or before 5 August 2006* the applicant had knowledge of all the material facts from which the debt arose or which he needed to know in order to institute action.’

[15] On this authority, the argument that the MEC has pleaded one case, namely that the debt became due by no later than 18 December 2009, and led evidence as to another date, four weeks later, may be over-strict. A more generous approach may instead be afforded in respect of consideration of the special plea, so that this court considers whether the MEC has shown that Mr Diko had knowledge of the facts (which the MEC must show he was required to know) on or before 18 July 2015, a date three years prior to service of summons.²²

What are the facts from which the debt arose?

[16] Section 12(1) of the Act provides that prescription begins to run when a debt ‘is due’. In the present context, this refers to a delictual debt which is owing and payable.²³ That in turn requires the creditor to have acquired ‘a complete cause of action for the recovery of the debt’, as explained in *Truter*.²⁴

‘... 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.’

[17] The focus is on the ‘combination of facts that are material for the plaintiff to prove in order to succeed with his action’.²⁵ Time begins to run ‘when [the creditor]

²² This approach was adopted in *NH* above n 9 para 19.

²³ *Truter and Another v Deyssel* 2006 (4) SA 168 (SCA) (*‘Truter’*) para 16.

²⁴ *Ibid.*

²⁵ See *Links* above n 1 para 32 and following and the authorities cited. In the case of an Aquilian action for damages for bodily injury, the basic ingredients of the cause of action are a wrongful act by the defendant causing bodily injury; fault and loss to the plaintiff’s patrimony, caused by the bodily injury: *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838H – 839A. The material combination of facts are those that would enable a court to arrive at legal conclusions regarding the constituent elements of a delictual cause of action: *Truter* above n 23 para 17 and the authorities cited.

has the minimum facts'²⁶ that they would need to prove, if in issue, in order to support a favourable judgment.²⁷ Knowledge of the relevant legal conclusions, including that the known facts constitute negligence, is not required.²⁸ As *Mr Du Toit*, for the MEC, pointed out, such matters are not facts, and neither is the evidence necessary to prove the essential facts (the *facta probantia*).²⁹ An expert's conclusion that a particular set of facts constitutes negligent, wrongful conduct is evidence, and not itself a fact.³⁰

[18] The alleged factual causes of Mr Diko's injuries are indispensable primary facts to be gleaned from his particulars of claim, which contain the constituent elements of his claim.³¹ Mr Diko pleaded the *facts* from which he sought to draw the conclusion that the MEC acted negligently.³² Put differently, these are the facts which, if proved, would result in legal liability:³³

'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.'

[19] The particulars of claim allege actions, alternatively a failure to act, on the part of employees of the MEC in breach of an agreement, alternatively in breach of a legal duty of care. As reflected in an earlier footnote, the factual allegations in respect of negligent treatment centre around the bent Kuntscher nail (including problems with its

²⁶ *Minister of Finance and Others v Gore* NO 2007 (1) SA 111 (SCA) ('Gore') para 17. The running of prescription is not postponed until such time as the creditor is in a position to prove their case 'comfortably' or to have certainty regarding the legal position and the debtor's obligations.

²⁷ *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23. A complete cause of action does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

²⁸ *Truter* above n 23 as cited in *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) ('Mtokonya') para 47.

²⁹ *MEC for Health, Western Cape v MC* [2020] ZASCA 165 ('MC') para 7.

³⁰ *Truter* above n 23 para 20.

³¹ *MC* above n 29 para 10; See *Zamani* above n 12 para 18.

³² *Zamani* above n 12 para 18: what was required were the material facts from which the legal conclusion of the elements of wrongfulness and fault in a delictual claim may be drawn. It would have been insufficient for him to allege negligence without also detailing the factual grounds of such negligence. It is those facts which the plaintiff must have knowledge of, as opposed to knowledge that those facts support a conclusion of negligence.

³³ *Mtokonya* above n 28 para 45.

girth, length and depth of insertion) and the related, allegedly deficient, surgical procedure followed.

[20] This is not to suggest that Mr Diko would have to have knowledge 'of all the facts underlying the cause of action as pleaded, or of all of the alleged facts as they appear from the pleadings.'³⁴ That would unnecessarily set the bar too high, bearing in mind that knowledge of the minimum combination of facts necessary to institute action suffices. Rather, for purposes of s 12(3), the relevant facts extend to include such facts that would cause the creditor to reasonably believe that a constituent element of the delict in question was present.³⁵

Was there actual or deemed knowledge of the facts from which the debt arose?

[21] Practically speaking, and drawing from his particulars of claim, the questions to be asked are whether Mr Diko knew that the wrong nail had been utilised or that the surgical procedure was defective, or that other 'advantageous and less damaging treatment options' had not been properly investigated. While it was unnecessary for him to know, conclusively, that there had been such errors, he was required to have 'knowledge of' sufficient facts of the treatment administered to reasonably have placed him in a position to form a 'belief', and to investigate the matter further.³⁶

[22] It is these aspects of the particulars of claim that raise a variety of 'sufficient facts to cause the creditor on reasonable grounds to think that the injuries were due to the negligence of the medical staff'.³⁷ In *Loni*, this was framed as being 'facts which would cause a plaintiff, on reasonable grounds, to suspect that there was fault on the part of the medical staff and that caused him or her to "seek further advice"'.³⁸ It is

³⁴ See *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 212F – H, as cited in *Zamani* above n 12 para 17.

³⁵ *Zamani* above n 12 para 20.

³⁶ See *Zamani* above n 12 para 21. The meaning of the terms in question are considered in para 23, below.

³⁷ *Links* above n 1 para 42.

³⁸ *Loni v Member of the Executive Council for Health, Eastern Cape* 2018 (3) SA 335 (CC) ('*Loni*') para 23. In *Member of the Executive Council for the Department of Health, Western Cape v Daki* 2021 JDR 1884 (WCC) ('*Daki*') para 16, a full court added that 'until the respondent had knowledge of facts that would have led her to think that possibly there had been negligence and that this had caused the disability, she lacked knowledge of the necessary facts contemplated in section 12(3).

those facts, rather than appreciation of any legal consequences, such as that the facts support a conclusion of negligence, which Mr Diko must have actual or deemed knowledge of for prescription to commence.³⁹

[23] Accepting that these are the primary facts, the enquiry turns to Mr Diko's actual knowledge, or deemed knowledge, of such facts.⁴⁰ As to what constitutes 'knowledge', there must be justified, true belief, going beyond opinion or supposition.⁴¹ A belief in this sense is more than a suspicion and less than the product of personally witnessing or participating in events, or of being the recipient of first-hand evidence. It extends to a belief that is engendered by, or inferred from attendant circumstances.⁴²

[24] The requirement 'exercising reasonable care', in the s 12(3) proviso, requires 'diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation and significance of those facts'.⁴³ Mr Diko is deemed to have the requisite knowledge, so that the debt is due, at the point that a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arose.⁴⁴

[25] What is the level of proof expected of the MEC considering that the issue relates to a matter squarely within the knowledge of Mr Diko? The judgment of Stratford JA in *Ex Parte The Minister of Justice: In re Rex v Jacobsen & Levy* provides guidance:⁴⁵

'It is not, however, in every case that the burden of proof can be discharged by giving less than complete proof on the issue; it depends upon the nature of the case and the relative ability of the parties to contribute evidence on that issue. If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence "calls for an answer" then, in such case, he has produced *prima facie* proof, and, in the absence of an

³⁹ *Zamani* above n 12 para 18.

⁴⁰ *MC* above n 29 para 8. On a strict application of *Links*, it is arguable that the MEC's pleaded case, read with Mr Diko's replication, was not based on the proviso to s 12(3), so that the only issue is whether the MEC discharged the onus to show that Mr Diko had (actual) knowledge of all the material facts from which the debt arose or which he needed to know in order to institute action: *Links* above n 1 para 44.

⁴¹ *Gore* above n 26 para 18.

⁴² *Ibid* para 19. For an application of the principle, see *Zamani* above n 12 para 21.

⁴³ *Drennan Maud Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 209F – G/H.

⁴⁴ *Ibid*.

⁴⁵ *Ex Parte The Minister of Justice: In Re Rex v Jacobsen & Levy* 1931 AD 466 at 478-479.

answer from the other side, it becomes conclusive proof and he completely discharges his *onus* of proof.

[26] It must be accepted that less evidence suffices to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party.⁴⁶ As reflected in the judgment granting leave to appeal, the trial court erred in failing to consider this principle in the context of Mr Diko's failure to testify. To the extent that the court was reluctant to rely on Dr Osman's evidence based on a language barrier, this concern was speculative and misplaced considering the evidence at hand. It is accordingly open to this court to reject fully or in part the trial court's findings and assessment of evidence, and to reach its own conclusions.⁴⁷

[27] A failure to adduce evidence in a civil case does not, on its own, justify a finding in favour of the other party.⁴⁸ It remains necessary for a court to conclude that, having regard to the absence of an explanation, that party's version is more probable than not.⁴⁹ As Schmidt notes:⁵⁰

'When a litigant fails to adduce evidence about a fact in issue, whether by not giving evidence himself or by not calling witnesses, it goes without saying that he runs the risk of his opponent's version being believed. If he bears an evidential burden and does nothing to discharge it he will necessarily suffer defeat. The fact that the evidence is not adduced to contradict an opponent's version does not necessarily mean, however, that the version will be accepted. Whether it is accepted depends on the probative strength of the opponent's evidence, that is to say on whether it really was strong enough to cast an evidential burden on the side failing to present evidence.

[28] Both the MEC and the court *a quo* made reference to *Galante v Dickinson*⁵¹ in respect of the alleged errors in the assessment of the evidence. But that decision was concerned with a motor vehicle collision where *two alternative explanations* of the

⁴⁶ *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173.

⁴⁷ *R v Dhlumayo* 1948 (2) SA 677 (A) paras 10, 11.

⁴⁸ PJ Schwikkard and TB Mosaka *Principles of Evidence* (5th Ed) (2023) (Juta) chapter 31.5 – 663.

⁴⁹ See *Marine and Trad Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A).

⁵⁰ CWH Schmidt *Law of Evidence* (SI 21) (May 2023) para 3 2 4 1. Also see the judgment of Leach JA in *Koukoudis and Another v Abrina 1772 (Pty) Ltd and Another* 2016 (5) SA 352 (SCA) ('*Koukoudis*') para 49.

⁵¹ *Galante v Dickinson* 1950 (2) SA 460 (A) at 465.

cause of the accident were roughly *equally open on the evidence presented*. It was in those circumstances that the party who had failed to give evidence on matters within his knowledge was disfavoured. The decision appears to be inapposite and the matter may be considered based on Dr Osman's uncontested evidence of what he heard from Mr Diko. The probative strength of Dr Osman's evidence must still be assessed to determine whether it was strong enough to cast an evidential burden on Mr Diko.⁵² Following Schmidt, it is ultimately the application of the relevant standard of proof to all the facts of the case that determines whether Mr Diko's failure to give evidence will be fatal.⁵³

[29] The MEC seemingly went as far as it could to discharge its burden by leading Dr Osman's evidence as to his consultation with Mr Diko. The highpoint of Dr Osman's evidence, correctly identified by the trial court, was that Mr Diko knew sometime during 2009 / 2010 that there was a 'problem with the fixation'. The crux of the matter is whether that evidence, bearing in mind the reduced expectation, called for an answer so that it constituted *prima facie* proof that became conclusive when Mr Diko did not take to the stand.

[30] An adverse inference should not be drawn from a party's failure to testify where it appears from evidential material before the court that the testimony would merely serve to corroborate evidence already given.⁵⁴ An inference also cannot be drawn when the case against the party failing to give evidence, or to call a witness, is weak.⁵⁵ This is because the failure to have testified could have been motivated by the absence of any threat to counter, rather than fear that unfavourable evidence might be elicited.⁵⁶

[31] In the present circumstances, the only risk run by Mr Diko was that the MEC's version as to his knowledge of the facts from which the debt arose, or ability to acquire

⁵² See *Goliath v MEC for Health, Province of the Eastern Cape* [2013] ZAECHC 72.

⁵³ *Ibid.* Also see Schmidt above n 50.

⁵⁴ *Ntsomi v Minister of Law and Order* 1990 (1) SA 512 (C), as cited in Schmidt above n 50.

⁵⁵ See *Koukoudis* above n 50 para 49: whilst less evidence may well suffice to establish a *prima facie* case where the issue is peculiarly within the knowledge of the opposing party, that cannot convert a case founded upon pure speculation and faulty inferential reasoning into a *prima facie* case.

⁵⁶ *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (A) at 133-134 as cited in Schmidt above n 50.

such knowledge by exercising reasonable care, would be accepted. That version was in any event predicated on Mr Diko's own history of events, as presented to Dr Osman during their consultation. Dr Osman's brief testimony in court followed the lines of his report, which was before the court and, being based on Mr Diko's own recollection of events, contained little that was new. That being the sum total of the MEC's case, it would also be inappropriate to draw an adverse inference where the case against Mr Diko was rightly assessed as being weak.

[32] Mr Diko, it must be remembered, was involved in a motor vehicle collision that caused a right-sided femoral fracture that was treated. That accident would have been uppermost in his mind as the source of the medical problems that followed. Considering the solitary evidence led, it may be accepted that Mr Diko, having been discharged from hospital, noticed a shortening of his right lower leg. That observation was subsequently confirmed by staff at Bizana Hospital, who referred him to Bedford Hospital. There he received pain medication and asked to return for further treatment on an appointed date. Importantly, 'they confirmed that there was a problem with the fixation'. That was indeed nothing more than confirmation of something painfully within his knowledge, namely that the treatment he had received had not solved the problem which had started with the accident on 9 December 2009, caused his hospitalisation on 11 December 2009 and his operation on 18 December 2009. His lower limb subsequently started to bend. He had noticed the shortening about two weeks after surgery, and the bending a further two weeks later, but did not return to Bedford Hospital for further treatment.⁵⁷

[33] Mr Diko was constrained to plead that he did not have the requisite knowledge as envisaged in s 12(3) of the Act, given that the claim had prima facie prescribed by time he decided to institute action.⁵⁸ That notwithstanding, and bearing in mind the MEC's reduced burden of proof, there is no basis to conclude that it was necessary for Mr Diko to have lead evidence in rebuttal considering the limited extent of the

⁵⁷ Dr Osman's testimony made no reference to Mr Diko being informed about 'a wrong nail'. The history upon which he relied, drawn from Mr Diko and as summarised in his written report, also omits such reference. The court a quo was accordingly justified, for the reasons appearing in that judgment, in placing no weight on this reference in the concluding portion of Dr Osman's written opinion.

⁵⁸ According to the full court in *Zamani*, this is an important aspect to be considered as part of the assessment of evidence and application of the burden of proof: *Zamani* above n 12 para 22.

evidence on behalf of the MEC.⁵⁹ This evidence does not demonstrate actual knowledge, in the form of a justified, true belief inferred from attendant circumstances, of the facts from which the debt arose. As will be explained, nor can it be said to demonstrate deemed knowledge.

[34] It is difficult to criticise Mr Diko for having failed to keep the appointment made for him at Bedford Hospital. On the accepted facts, he did not do so purely, and unfortunately, because of financial constraints.⁶⁰ He accepted his lot and it cannot be said that a reasonable person in his position would have done differently. A diligent evaluation and consideration of the significance of being told that there was ‘a problem with the fixation’ by a reasonable person in his position would, on balance, not have resulted in the facts from which the debt arose, implicating the MEC as the debtor, being deduced. There are, after all, many possible reasons for disability and the fact that the plaintiff was not a person with medical knowledge cannot be ignored.⁶¹ As was the case in *Daki*, there is an insufficient factual basis to conclude that Mr Diko had reasonable cause to suspect that the injuries, particularly ‘the problem with the fixation’, were due to the conduct of the hospital staff that had treated him after the accident.⁶² The MEC has failed to meet the burden, even on a reduced basis, as set by *Links* and the cases that have followed.

[35] To the extent that this conclusion may seem to blur the lines with an assessment of negligence on the part of the hospital staff, this appears to be a necessary consequence of the closeness of the respective enquiries.⁶³ A similar argument, based on the High Court’s reference to the word ‘fault’, was rejected in *NH*, the SCA concluding as follows:

⁵⁹ See *Macleod* above n 11 para 11.

⁶⁰ The reports of Dr Olivier and Dr Osman, included in the papers, reveal that Mr Diko left school at the end of grade 10 and was a bricklayer who was unable to work as such after the accident.

⁶¹ *Daki* above n 38 para 17; *Links* above n 1 para 47.

⁶² *Daki* above n 38 para 20. Also see *MC* above n 29 para 5.

⁶³ Also see *WK Construction* above n 16 para 41: ‘In the light of these facts, it can be concluded that *WK Construction* must have had a reasonable suspicion of possible negligence on the part of Mazars. It did act on that suspicion by contacting an accounting firm to give expert advice. In my view, this amply satisfies the test in *Links* and the other cases for the requisite knowledge causing prescription to commence running.’

‘In my view, the appellant has not discharged the onus of showing that the respondent knew, or ought to have reasonably suspected, on an objective assessment of the facts, that she received negligent treatment at the hospital, and that the disability suffered by her minor child was the result of that negligence. It cannot be said that the respondent had knowledge of the facts that would have led her to think that the medical staff at [the] hospital were negligent, and that her child had cerebral palsy as a result.’

[36] The MEC failed to establish a *prima facie* case and, consequently, no adverse inference can be drawn from Mr Diko’s failure to testify. The MEC has not demonstrated on a balance of probabilities that Mr Diko had knowledge of the facts from which the debt arose more than three years before summons was served. Nor can it be said that, at that point in time, the known facts would have caused him, on reasonable grounds, to have ‘suspected that there was fault’ on the part of the MEC, so as to cause him to seek further advice.⁶⁴ On these facts, it cannot be said that he could have acquired sufficient knowledge by exercising reasonable care by that time, so that the s 12(3) proviso is triggered. These conclusions align closely with the reasons advanced by the trial court in arriving at the same outcome.

Costs

[37] An appeal court will not readily interfere with the exercise of the discretion of a trial judge in awarding costs, even in circumstances where it would itself have made a different order.⁶⁵ Absent demonstrated misdirection or irregularity, the trial court’s decision to award costs of two counsel was an exercise of judicial discretion and must stand.

[38] This court has a discretion whether to allow the fees of two counsel in respect of the costs of the appeal. Considering the amount involved, the limited extent and nature of the issues in dispute and the short record, it cannot be said that was a reasonable precaution.

⁶⁴ *Loni* above n 38 para 23; *WK Construction* above n 16 para 38.

⁶⁵ See, for example, *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 670D-F.

Order

[39] The following order is issued:

1. The appeal is dismissed with costs.

A GOVINDJEE
JUDGE OF THE HIGH COURT

NONCEMBU J
I agree

V P NONCEMBU
JUDGE OF THE HIGH COURT

TILANA-MABECE AJ
I agree

S T TILANA-MABECE
ACTING JUDGE OF THE HIGH COURT

Heard: 11 September 2023

Delivered: 15 September 2023

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