THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 043/2005

Reportable

In the matter between

DR RENE TRUTER	First Appellant
DR JAN A VENTER	Second Appellant

and

MARTHINUS ALBERTUS DEYSEL	Respondent

Coram**:**	Harms, Zulman, Navsa, Mthiyane et Van Heerden JJA
Heard:	24 February 2006
Delivered:	17 March 2006
Summary:	*Prescription Act 68 of 1969 - s 12(3) - commencement of running of prescription in respect of claim for damages for medical negligence – meaning of* 'knowledge of …the facts from which the debt arises' *for purposes of s 12(3) in the context of such a claim*

Neutral citation: This judgment may be referred to as *Truter v Deysel* [2006] SCA 17 (RSA)

JUDGMENT

VAN HEERDEN JA:

[1] In April 2000, the respondent, Mr Marthinus Albertus Deysel instituted action in the Cape High Court against the appellants, Dr Rene Truter and Dr Jan Venter for damages arising from a personal injury allegedly sustained by him as a result of a series of medical and surgical procedures performed on him by Drs Truter and Venter in the period July 1993 to September 1993. Drs Truter and Venter raised a special plea of prescription which was, in terms of Uniform rule 33(4), set down for separate adjudication. The High Court (Mlonzi AJ) dismissed the special plea with costs on 2 November 2004. The present appeal against this order is with the leave the High Court.

[2] The sole issue before the trial court, and indeed also before this court, concerns the time at which prescription started to run in respect of Deysel's claim for damages against Drs Truter and Venter. In terms of s 11(d) of the Prescription Act 68 of 1969 ('the Act'), this claim is subject to a three-year extinctive prescription period. According to the special plea, Deysel's summons was served on Drs Truter and Venter on 17 April 2000. Thus, if the date on which the three-year prescription period commenced running was before 17 April 1997, then any claim which Deysel may have had would have become prescribed and the special plea should have been upheld.

[3] For purposes of the adjudication of the special plea, the facts averred in Deysel's particulars of claim, as amplified by his trial particulars, were taken to be admitted. The six operations which gave rise to Deysel's claim were the following:

DATE	**OPERATION**	**PERFORMED BY**
5 July 1993	Extra-capsular cataract extraction and posterior lens implantation	Dr Truter
15 July 1993	Emergency irridectomy to correct iris prolapse	Dr Truter
5 August 1993	Irrigation of residual lens material	Dr Truter
25 August 1993	Posterior laser capsulotomy	Dr Truter
7 September 1993	Anterior vitrectomy and Removal of lens material	Dr Venter
± 21 September 1993	Insertion of new intra-ocular lens	Dr Venter

[4] It was also alleged and, for the purposes of the special plea only, was common cause, that the foreseeable and actual consequence of these procedures performed by Drs 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.

[5] It should be noted that, in his trial particulars, Deysel made the following allegations (which were admitted for the purposes of the special plea):

> 'Throughout all the surgical procedures, the Defendants [Drs Truter and Venter] 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. It was further 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.'

[6] As early as 27 July 1994, Deysel wrote to the Medical and Dental Council ('the Council'), lodging a complaint against Dr Truter. In this letter, he recounted the operations performed upon him by Drs Truter and Venter, complained of the conduct of Dr Truter and asked the Council to investigate the matter 'as I feel there was no need for five operations plus all the pain and suffering and unnecessary sums of money for one cataract'. He also mentioned that, according to a Dr Mouton, who had given him an opinion of the condition of his eye at the request of a Dr Claassen, under whose care he had been placed, there was 'permanent damage to the eye'.

[7] After asking for and receiving from Dr Truter her account of how she had treated Deysel, the Council responded to Deysel in writing on 20 July 1995, attaching a copy of Dr Truter's explanation, and stating that –

'After careful consideration the Committee is of the opinion that there has not been conduct which can be said to have been improper or disgraceful, and resolved that no further action be taken'.

[8] In 1995, Deysel appointed attorneys Malcolm Lyons Munro and Sohn to investigate and prosecute a malpractice claim against Drs Truter and Venter arising from their treatment of him in 1993. These attorneys obtained professional reports from two experts in the field of ophthalmology, namely Professor Murray, the Head of the Department of Ophthalmology of the University of Cape Town, and Dr Sacks, an ophthalmic surgeon. Both these experts were provided with all the relevant medical records and other documents, including Deysel's letter of complaint to the Council; Dr Truter's report to the Council; the Council's response to Deysel; Dr Truter's and Dr Venter's clinical notes and a medical report dated 9 November 1994 by a Dr Kruger, another ophthalmic surgeon whom Deysel had consulted for a second opinion. In addition, Dr Sacks was provided with a letter dated 16 October 1995 by the abovementioned Dr Claassen, also an ophthalmologist, who had treated Deysel's right eye on various occasions from late 1993 to July 1995, setting

out the detail of his findings in respect of Deysel's right eye. None of these medical experts concluded that an inference of negligence on the part of Drs Truter and Venter was justified. Apart from Drs Kruger and Claassen, Deysel was referred to yet another eye specialist, a Dr Mouton, in June 1994. This doctor ascribed the reduction in Deysel's visual acuity to 'previous chronic macular oedema'. A fourth expert consulted by Deysel in February 1996, a Dr Woods, concluded that 'he had reduced vision probably due to changes in the cornea' and that 'it appeared from my initial assessments that nothing could be done to improve his vision'.

[9] After Deysel's right eye had been removed by Dr Burger in April 1997, he made further complaints about Drs Truter and Venter to, inter alia, the Council and the MEC for Health in the Western Cape. New attorneys appointed by him in 1998, D Butlion and Associates, obtained a further medico-legal report, this time from a Professor Stulting, the Head of the Department of Ophthalmology of the University of the Orange Free State, who was provided with the same documentation previously submitted to the other experts. Professor Stulting's very detailed report, dated 7 June 1999, concluded as follows:

'it is my humble and honest opinion that Mr Deysel will not be able to prove that the conduct of any of the abovementioned doctors, namely, Dr Truter, Prof Venter or Dr Burger, fell short of the standard of care expected from a medical expert, such as an

ophthalmologist, and that such negligent conduct caused the loss of Mr Deysel's right eye.'

[10] According to evidence given by a Ms Pienaar, who was at the relevant time employed by firm of attorneys who ultimately took over Deysel's matter, Deysel told her in late 1999 about a certain Dr Lecuana, an ophthalmologist at the University of Cape Town, whom he had heard (and to whom he had spoken about his problems) on a radio talk show. In early 2000, Ms Pienaar consulted with Dr Lecuana, who in turn referred her to a Dr Steven. Ms Pienaar's evidence makes it clear that the same set of facts and documents which had been presented to the experts previously consulted were presented to Drs Lecuana and Steven. However, Dr Steven had expressed the view that the operations performed by Dr Truter and Venter had been done 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. As Ms Pienaar put it, 'that was the first positive expert report that I could obtain', and it was on the basis of this report that summons was issued on behalf of Deysel in April 2000.

[11] The relevant section of the Act (s 12) 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.'

(Emphasis added.)

[12] There is no suggestion that Drs Truter and Venter prevented Deysel 'from coming to know of the existence of the debt' (s 12(2)) and Deysel certainly knew 'the identity of the debtor(s)' from the outset. The crisp 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 s 12(3), prior to 17 April 1997.

[13] In the High Court (and on appeal before us), counsel for Deysel contended that, in the context of a medical negligence claim, the meaning of the phrase 'knowledge…of the facts from which the debt arises' includes knowledge of facts showing that the defendant, in treating the plaintiff, failed to adhere to the standards of skill and diligence expected of a practitioner in the former's position. Thus, it was submitted, until the plaintiff has sufficient detail – frequently, if not invariably, in the form of

an expert medical opinion – showing that the defendant failed to exhibit the necessary degree of diligence, skill and care and in what respects he or she failed to do so, the plaintiff does not, in terms of s 12(3), have 'knowledge of the facts from which the debt arises'.

[14] Applied to the facts of this case, Deysel's counsel argued that the first time that Deysel or his legal representatives were made aware that the known facts (the conduct of Drs Truter and Venter) constituted negligence was when Dr Steven gave advice to that effect to Ms Pienaar shortly before the issue of summons. There was no evidence to suggest that Deysel had been dilatory in not consulting with Dr Steven at an earlier stage or that he had acted unreasonably in endeavouring to obtain assistance from the various other sources set out above. Thus, the argument continued, prescription did not start to run in respect of Deysel's alleged claim until such time as Dr Steven's opinion was obtained and the special plea had no merit.

[15] The High Court upheld this contention, stating:

'It is not legally conceivable how a malpractice case will see its day in a South African court of law without the litigant obtaining knowledge of [a] medical expert that indeed the symptoms complained about or the resultant consequence is indicative of some degree of incompetence or negligence constituting the wrongful act.'

Mlonzi AJ thus held that, because Deysel had only received a favourable expert medical opinion in 2000, prescription only commenced running at that stage.

[16] I am of the view that the High Court erred in this finding. For the purposes of the 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.[1]

[17] 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*

[1] See, for example, *Evins v Shields Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-H and *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H-I. See further MM Loubser *Extinctive Prescription* (1996) para 4.6.2 at pp 80-81 and the other authorities there cited.

delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.'[2]

(Emphasis added.)

[18] In the words of this court in *Van Staden v Fourie*:[3]

'Artikel 12(3) van die Verjaringswet stel egter nie die aanvang van verjaring uit totdat die skuldeiser die volle omvang van sy regte uitgevind het nie. Die toegewing wat die Verjaringswet in hierdie verband maak, is beperk tot kennis van "die feite waaruit die skuld ontstaan".'

[19] '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.'[4]

[20] As contended by counsel for Drs Truter and Venter, 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*. As indicated above, the

---

[2] Loubser op cit para 4.6.1 at p 80 and the authorities there cited, in particular *Evins v Shield Insurance Co Ltd* at 838H-839A.

[3] 1989 (3) SA 200 (A) at 216D-E (per EM Grosskopf JA), cited with approval by Harms JA (with whom Scott JA concurred), in the context of a special plea of prescription raised against a claim for damages for professional negligence, in *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 213C.

[4] Per Maasdorp JA in *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23, cited with approval by Corbett JA in the *Evins* case at 838D-F.

presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by the court in all the circumstances of the specific case.[5] Section 12(3) of the 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 (ie that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions.

[21] Mlonzi AJ appears to have relied on the judgment of this court in the recent case of *Van Zijl v Hoogenhout*[6] for her conclusion that knowledge of fault is a requirement for the commencement of the running of prescription. In my view, she erred in so doing. The *Van Zijl* case is entirely distinguishable from the present case. In the *Van Zijl* case, Heher JA 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'.[7] The plaintiff in the *Van Zijl* case 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

[5] See, for example, *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA) para 23 at 1112H.
[6] [2004] 4 All SA 427 (SCA).
[7] Para 19.

of prescription.[8] By contrast, 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 Drs Truter and Venter.[9]

[22] In accordance with the so-called 'once and for all' rule, a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action. Therefore, 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.[10]

[23] Applied to the facts of this case, Deysel's cause of action was complete and the debt of Drs 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 later.

[24] According to Deysel's own evidence, from at least the time of his initial complaint to the Council in July 1994, he knew the details of the operations performed on him by Drs Truter and Venter and that he had

---

[8] Para 44.

[9] It is perhaps also necessary to point out that the High Court apparently misconstrued the relevant passage from the majority judgment in the *Drennan Maud* case as providing authority for the proposition that '*knowledge of fault was considered as the required knowledge in a professional negligence case*'. As submitted by counsel for Drs Truter and Venter, the phrase '*design fault*' used by Olivier JA (at 205E-F) was plainly a reference to a *defect* in the design, not to fault in the sense of culpability.

[10] See *Evins v Shield Insurance* at 836A-B and *Drennan Maud & Partners v Pennington Town Board* at 211F-G. See also Loubser op cit para 4.6.2 at 81ff.

suffered harm. He also knew that the two doctors were required to exercise reasonable care and skill in treating him; indeed his unremitting and oft-repeated 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.

[25] 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.

[26] 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.

[27] Lastly, insofar as the court a quo relied on English medical-negligence case law as an aid to the interpretation of the knowledge requirement in s 12(3) of the Act, I am of the view that it was incorrect in doing so. Not only do the English cases concern the interpretation and application of the English Limitation Act of 1980, which differs materially from the South African Act in both content and origin, but such cases are also, as illustrated convincingly by counsel for Drs Truter and Venter, eminently distinguishable on their facts from the present case and are, in addition, not necessarily consistent. Counsel for Deysel tried to persuade us otherwise, but to no avail.

[28] It follows that the appeal must succeed.

[29] The following order is made:

(a) The appeal is upheld with costs.

(b) The order of the Cape High Court is set aside and replaced with the following order:

'*The special plea of prescription is upheld and the plaintiff's action is dismissed with costs*'.

B J VAN HEERDEN
JUDGE OF APPEAL

CONCUR:

Harms JA
Zulman JA
Navsa JA
Mthiyane JA