



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case No: 513/2021

In the matter between:

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

APPELLANT

and

N H obo A

RESPONDENT

Neutral citation: MEC for Health, Eastern Cape v N H obo A (513/2021) [2022]
ZASCA 181 (15 December 2022)

Coram: DAMBUZA ADP, MOCUMIE and CARELSE JJA and CHETTY
and SALIE-HLOPHE AJJA

Heard: 15 November 2022

Delivered: 15 December 2022

Summary: Extinctive prescription – s 12(3) of the Prescription Act 68 of 1969
– inquiry as to what constitutes knowledge of sufficient facts giving rise to a claim
against a hospital – whether the claimant only acquired such knowledge upon
consulting with a legal practitioner.

ORDER

On appeal from: Eastern Cape Division of the High Court, Bhisho (Mjali J sitting as court of first instance):

- 1 The appeal is dismissed.
 - 2 There is no order as to costs.
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JUDGMENT

Chetty AJA (Dambuza ADP, Mocumie and Carelse JJA and Salie-Hlophe AJA concurring)

[1] On 9 April 2018 the respondent, N H, instituted an action in the Eastern Cape Division of the High Court, Bhisho (high court) against the appellant, the Member of the Executive Council for Health, Eastern Cape. The action was brought in her personal capacity and as the mother and natural guardian of 'A', a boy born on 11 May 2012 at the St Barnabas Hospital, Libode, Eastern Cape. The respondent, in her representative capacity, sued the appellant for an amount of R29 106 761.00 for damages, alleging that as a result of the negligence of the hospital staff, her minor child now suffers from cerebral palsy. Included in the amount was the respondent's claim, in her personal capacity, of R500 000.00 for emotional shock, trauma, pain and suffering.

[2] On receipt of the summons, the appellant filed a special plea contending that the respondent's claim, in her personal capacity, had prescribed in that she had failed to timeously comply with the provisions of section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). The appellant pleaded that the respondent instituted the action on 12 April 2018 having given notice

of her intention to do so on 20 February 2018. The appellant contended that the respondent ought to have instituted her action within six months of 18 May 2012, the date when the cause of action arose.¹ Put differently, the appellant contended that the respondent instituted her action more than five years from the date when she ought to have given notice in terms of s 3(2). In the result, it was contended that the respondent's claim in her personal capacity, had prescribed.

[3] In response thereto, the respondent applied for condonation for non-compliance in terms of s 3(4)(a) of the Act. The appellant opposed the application contending that the respondent failed to satisfy the requirement of s 3(4)(b)(i) of the Act as her 'debt' had become extinguished by prescription. The high court determined the special plea separately, dismissing it with costs. The matter comes before this Court with leave of the high court. In this Court the appeal was not opposed, with the respondent electing to abide the decision of this Court.

[4] The issue for determination is the date from when prescription began to run against the respondent's personal claim for emotional shock. The starting point is the provisions of s 12 of the Prescription Act 68 of 1969 (Prescription Act) which provides that prescription begins to run when a debt becomes due. Section 12(3) states that 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'.

[5] The answer as to when the debt became due requires a two-pronged inquiry. The first is when the respondent acquired the relevant knowledge, or could have acquired the relevant knowledge, by exercising reasonable care regarding the identity of the debtor. Secondly, what are the facts that the respondent was required to know before prescription could commence. In carrying out this inquiry, the high court determined the matter on the basis of the affidavits before it. No oral evidence was led in the interlocutory application.

¹ The appellant's case as to the date when it alleged prescription began to run vacillated between the date of birth of the minor child (11 May 2012) and the date when the respondent and the baby were discharged from hospital (18 May 2012). Nothing turns on the difference between the two dates.

[6] On the basis of facts which were common cause, the high court found that on 10 May 2012 the respondent was admitted to St Barnabas Hospital and after a 'complicated labour', she gave birth to her baby. At the time of her delivery, the respondent was not informed by the doctors or the nursing staff at the hospital, who were responsible for her care and that of her new born baby, that there were any complications during the delivery that could impact adversely on the health of her baby. The respondent remained in hospital for a week after the delivery, during which time her baby was kept in the nursery. She recalled that her baby did not cry at the time of birth. It is not clear from the papers what significance attaches to this fact. Clearly, on the basis of the respondent's affidavit, she was unaware of the significance (if any) of this fact, nor does the appellant seek to explain this phenomenon. Moreover, the appellant has not shown how this could have constituted the basis for the respondent having knowledge of 'the identity of the debtor', or that it constituted a 'relevant fact' for the purposes of s 12(3). It bears noting that the respondent had a limited school education and could hardly be expected to be *au fait* with medical symptoms reflective of any pediatric abnormality.

[7] A medical report dated 20 September 2018 prepared by Dr Mugerwa-Sekawabe, a specialist obstetrician and gynaecologist, who reviewed the respondent's medical records from the hospital and consulted with her, notes that while the new born baby was not placed on oxygen or drips, the baby 'looked floppy and dull'. The appellant did not seek to explain whether this feature was brought to the attention of the respondent by the doctors or nurses at the time, or what its significance could be in respect of her appreciating the 'facts giving rise to the debt'.

[8] The medical report of Dr Mugerwa-Sekawabe indicates that the respondent has never had the minor child assessed by a paediatrician. There is no evidence of the child's physical or mental development shortly after birth and prior to reaching the age of six years. The only insight into the minor child's condition is gleaned from the respondent's founding affidavit where she stated:

' . . . I accepted that A's abnormality was due to an unanticipated and unavoidable event at the time of his birth. I am a lay person in respect of legal matters and medical issues. I accepted that the staff at the hospital where I was treated at the time knew what they were doing and acted appropriately.'

Elsewhere in her founding affidavit the respondent stated that as a layperson, with little or no knowledge of legal or medical issues, she 'did not believe that the hospital staff had anything to do with the outcome of [my] baby. I accepted it as an unavoidable fact following a complicated labour'. This version of the respondent was not gainsaid by the appellant, nor was the appellant able to refute this version with reference to anything contained in the hospital records, which were in its custody. The high court found that the respondent, in the circumstances, resigned herself into believing that her child's 'abnormality was unavoidable and that there was nothing untoward by those who cared for her during the delivery'.

[9] On the respondent's version, she met a lady in January 2018 in Libode, Eastern Cape, who 'also had a baby with cerebral palsy'. The appellant contended that on the basis of this averment, the respondent was aware at the time when she met the unknown lady in Libode, that her own child was disabled and had cerebral palsy. It is uncertain whether by this stage the respondent had any appreciation of what cerebral palsy was, or the possible causes thereof. What is apparent from the pleadings is that after exchanging her experiences with the lady, the respondent was advised to contact Nonxuba Attorneys with a view to claiming damages arising out of the alleged negligent treatment her baby received, resulting in her baby having cerebral palsy.

[10] Soon thereafter the respondent arranged a consultation with her attorneys. On 1 February 2018, at the consultation, the respondent explained the history of her pregnancy and delivery. After the consultation, the attorney informed the respondent that she was of the view that the hospital staff were negligent in not rendering proper care to the respondent and her baby, resulting in the baby sustaining brain damage, leading to cerebral palsy. The respondent instructed the attorney to institute a claim on her behalf against the hospital.

[11] According to the respondent, she became aware for the first time that her child's cerebral palsy was due to the negligence of the staff at St Barnabas Hospital after consulting with her attorney on 1 February 2018. On this basis, she contended that 1 February 2018 was the effective date for the purposes of s 3(3)(a), the date when she had knowledge of the identity of the organ of state as the debtor, and the facts giving rise to the debt. Accordingly, the respondent's attorney gave notice on 20 February

2018 to the appellant in terms of s 3 of the Act of the respondent's intention to institute a claim for damages.²

[12] The high court's finding that the respondent was illiterate and a layperson is not challenged by the appellant. The high court concluded that the respondent's admission that she had a difficult labour, that her child did not cry at birth and that she remained in hospital for a week after the birth, did not 'on its own imply knowledge of the facts giving rise to the claim'. The respondent, at no stage prior to consulting with her attorney, entertained the possibility that the hospital staff were negligent, thereby forming a basis for a claim against the appellant.

[13] In determining that the respondent first became aware on 1 February 2018 that she had a claim for damages against the appellant, the high court reasoned that '[U]ntil there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arise[s]'. It is in this respect that the appellant contends that the high court erred, presumably by reference to the word 'fault'.

[14] The appellant relies on the finding in *Mtokonya v Minister of Police*³ (*Mtokonya*) that what is required to satisfy the requirement in s 12(3) of the Prescription Act is knowledge of the bare facts from which the debt arises. Knowledge of wrongfulness and causation are irrelevant.⁴ In particular, counsel for the appellant contended that prescription began to run against the respondent at the time of the birth of her child. As a result, the respondent was obliged to give notice in terms of s 3(1) of Act 40 of 2002 not later than six months from the date of the birth of her child.

[15] The appellant relied on the following paragraphs in *Mtokonya* in support of its argument:

'[37] The question that arises is whether knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a fact. This is important because the knowledge that section

² The respondent's attorney initially gave notice in terms of s 3 of the Act to the incorrect organ of state. That defective notice was subsequently rectified, and condonation was sought in that regard. The high court's order granting condonation for the defective notice is not challenged on appeal to this Court.

³ *Mtokonya v Minister of Police* [2017] ZACC 33; 2018 (5) SA 22 (CC).

⁴ *Ibid* para 36: 'Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from "the facts from which the debt arises".'

12(3) requires a creditor to have is “knowledge of facts from which the debt arises”. It refers to the “facts from which the debt arises”. It does not require knowledge of legal opinions or legal conclusions or the availability in law of a remedy.

...

[67] The second judgment accepts that knowledge whether the conduct of the police against the applicant was wrongful and actionable is not knowledge of a fact but of a legal conclusion. This means that the applicant’s lack of knowledge related to something that fell outside the exception provided for in the second part of section 12(3). The first part requires lack of knowledge of the identity of the debtor. The second part requires lack of knowledge of “the facts from which the debt arises”.’

[16] In light of the above findings, the appellant contends that the respondent had knowledge of the identity of the debtor (being St Barnabas Hospital, and by implication the Department of Health, Eastern Cape) as well as the ‘facts’ from which the debt arose at the time when she and her baby were discharged from the hospital. There is nothing in the pleadings to indicate that the nurses or doctors at the hospital informed the respondent of any complications at birth or any abnormalities which they had found during the post delivery period, and more particularly, the significance thereof to the health of her child. These could hardly constitute what this Court in *MEC for Health, Western Cape v M C*⁵ described as the ‘minimum essential facts that the plaintiff must prove in order to succeed with the claim’, alternatively referred to as the ‘primary facts’.⁶

[17] In circumstances similar to the present matter, in *Links v Department of Health, Northern Province*⁷ (*Links*) the plaintiff injured his thumb and went to hospital where he was treated with a plaster cast. The cast was applied too tight, resulting in the amputation of his thumb, eventually leading to the permanent loss of the use of his left hand. The plaintiff decided to sue the hospital. When his claim was eventually lodged, it was met with a plea that the claim had prescribed as he should have instituted his claim within three years from when his thumb was amputated. The plaintiff contended that prescription could not have commenced at the time when his thumb was

⁵ *MEC for Health, Western Cape v MC* [2020] ZASCA 165.

⁶ *Ibid* para 8.

⁷ *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (5) BCLR 656 (CC).

amputated, as he was unaware of the facts from which his claim ultimately arose, or that the earlier negligence led to the loss of the use of his hand. He had no access to his hospital records and the hospital personnel did not explain to him the cause of his condition.

[18] The Court considered the facts from which the debt arose, which the plaintiff was required to know before the debt could be said to be due, and for prescription to start running. The plaintiff in *Links* had no idea what caused the loss of the use of his left hand at the time of his discharge from hospital. His explanation was simply that he had 'been brought up to believe that medical doctors and personnel know what they are doing'.⁸ Similarly, the respondent in the present matter says she had no reason to believe that the hospital staff had anything to do with the 'outcome of her baby', which she considered 'an unavoidable' consequence of a complicated labour.⁹ In *Links* the Court said:

' . . . To require knowledge of causative negligence for the test in s 12(3) to be satisfied would set the bar too high. However, in cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises.'¹⁰

[19] The appellant bears the onus to prove that the respondent's claim had prescribed¹¹ by 9 April 2018, the date when the summons was served. On that score, the appellant must show that the respondent had knowledge of the relevant facts on or before 8 April 2015, because the applicable period of prescription in respect of the respondent's personal claim is three years.

[20] A material fact which the appellant is required to prove in order to succeed is that the respondent had knowledge of what caused the condition of her baby, as at

⁸ *Ibid* para 41.

⁹ See in this regard *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA) para 18: 'Mere opinion or supposition is not enough: there must be a justified, true belief. Belief on its own, is insufficient.'

¹⁰ *Links*, para 42.

¹¹ *Ibid* para 24.

the time of her delivery or discharge from hospital, being 18 May 2012. There is nothing on the record to indicate that this is so. Only after consulting with her attorney did she become aware of the basis for a potential claim. It is only at that stage that she acquired the knowledge that the hospital staff were the cause of her child's condition, and that the appellant was therefore the debtor.

[21] 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,¹² 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 St Barnabas Hospital were negligent, and that her child had cerebral palsy as a result.¹³

[22] I am not persuaded by the argument of the appellant's counsel that the Constitutional Court has set a different standard of proof in *Mtokonya* compared to that in *Links* or *Loni v Member of the Executive Council, Department of Health, Eastern Cape (Bhisho)*.¹⁴ In *Loni* the applicant suffered a gunshot wound requiring medical treatment at a provincial hospital. At the time of his discharge he was able to ascertain that the wound was not fully healed and thereafter visited a clinic where he obtained further treatment. After enduring pain in his leg for several years, he developed a limp, eventually leading to his disability. On obtaining an independent medical opinion, he was informed that his disability was attributable to the manner in which his injury was handled by the staff at the hospital. His claim against the hospital was met with a plea that the claim had prescribed. The full court found that he had all the necessary facts at his disposal, sufficient for him to act.

¹² *Loni v Member of the Executive Council, Department of Health, Eastern Cape (Bhisho)* [2018] ZACC 2; 2018 (3) 335 (CC) (*Loni*) para 32.

¹³ *Truter and Another v Deysel* 2006 (4) SA 168 (SCA) para 16:

'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".'

¹⁴ Footnote 13.

[23] The Constitutional Court in *Loni* distinguished the position from *Links* where the plaintiff had no knowledge of the causative link between the breaches by the hospital and the harm suffered. At para 23 the Court stated:

‘In *Links* this court found that in order for a party to successfully rely on a prescription claim in terms of s 12(3) of the Prescription Act, he or she must first prove “what the facts are that the applicant is required to know before prescription could commence running” and secondly, that “the applicant had knowledge of those facts” . . . This Court opined that it would be setting the bar too high to require knowledge of causative negligence. In answer to this issue, this Court held that in cases involving professional negligence, the facts from which the debt arises are those 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”.’

[24] The interpretation contended for by the appellant would require us to hold that a party with no knowledge of medicine, no access to her hospital records, limited schooling and resident in a rural area of the country, would be expected to have knowledge of sufficient facts to institute an action for damages within the prescribed periods. A proper reading of *Mtokonya* does not support such a conclusion as indicated by the Court at para 45:

‘Knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a legal conclusion and is not knowledge of a fact. The second judgment accepts that this is so. Therefore, such knowledge falls outside the phrase “knowledge of facts from which the debt arises” in section 12(3). The facts from which a debt arises are the facts of the incident or transaction in question *which, if proved*, would mean that in law the debtor is liable to the creditor.’ (own emphasis)

Knowledge of a complicated labour that preceded the birth of a child who did not cry, does not meet this test.

[25] The high court properly applied the criteria in *Links* to the facts before it and correctly concluded that the respondent’s personal claim for damages had not prescribed at the time when summons was served. This Court in *WK Construction (Pty) Ltd v Moores Rowland and Others*¹⁵ confirmed the position set out in *Links* as the ‘clear position in our law’.¹⁶

¹⁵ *WK Construction (Pty) Ltd v Moores Rowland and Others* [2022] ZASCA 44; [2022] 2 All SA 751 (SCA).

¹⁶ *Ibid* para 37.

[26] In the result, the following order is made:

- 1 The appeal is dismissed.
- 2 There is no order as to costs.

M R CHETTY
ACTING JUDGE OF APPEAL

APPEARANCES

For appellant:	V Notshe SC and H Cassim
Instructed by:	Zilwa Attorneys State Attorney, Bloemfontein

For respondent:

No appearance