



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **2293/2016**
Heard: **05/05/2021**
Delivered: **04/06/2021**

In the matter between:

GEORGE RAKHOJANE

Applicant/Plaintiff

and

**MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, NC PROVINCE**

Respondent/Defendant

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Mamosebo J

- [1] This is an application for leave to appeal to the Full Bench of this Division, against my judgment handed down on 05 February 2021 in which I refused to grant the applicant condonation for the late filing of his Particulars of Claim and struck out specified paragraphs in the application, with costs. The application is opposed.

The Notice of Application for Leave to Appeal

[2] On 19 February 2021 the applicant filed his notice of application for leave to appeal dated 29 September 2020, with the office of the Registrar. The Notice comprises fourteen (14) typed pages of mainly lengthy arguments. He also filed heads of argument consisting of eight (8) typed pages. Despite the many admonishments by the courts that the grounds of appeal, in a Notice of application for leave to appeal, must be clearly and succinctly set out, in unambiguous terms, to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out, and, for the respondent to meet in its opposition, the applicant has not taken heed thereof. The following warrants repetition: (i) The notice should not contain arguments; and (ii) The points to be argued must be fully set out in the heads.¹ In this instance, I have had to repeatedly ask Mr Ponoane, for the applicant, what the grounds of this application really are.

The distilled grounds for leave to appeal

[3] The applicant mainly argued two grounds that this Court erred:

3.1 in relying on prescription to determine that the purported amended particulars of claim had created a new cause of action which cause of action had in any event, prescribed; and

3.2 in refusing to grant the applicant condonation.

[4] The test for applications for leave to appeal is governed by section 17 of the Superior Courts Act², which stipulates:

¹ Songono v Minister of Law and Order 1996 (4) at 385I – 386B; S v McKenzie 2003 (2) SACR 616 (CPD) at 618c – 619b; Xayimpi and Others v Chairman Judge White Commission (formerly known as Browde Commission) and Others [2006] 2 All SA 442 (E) at 445 para 8(c); S v Van Heerden 2010 (1) SACR 539 (ECP) at 541d – 542a

² 10 of 2013

"17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a)
 - (i) The appeal would have a reasonable prospect of success; or
 - (ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on a matter under consideration;
- (b) The decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c)"

[5] The provisions of section 17(1) raise the threshold of the test for leave to appeal.³ The applicant must demonstrate to the Court that there are reasonable prospects that the appeal would succeed. Nugent JA made the following pronouncements in *S v Mabena*⁴:

"[22] *It is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the Judge concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing argument, and decide whether there is a reasonable prospect that a higher court may disagree.*"

[6] Determining whether to grant leave to appeal on the basis that the appeal would have a reasonable prospect of success is higher and more stringent. Our courts have already interpreted the phrase "*would*", found in section 17(1)(a)(i) of the Act, as indicative of some form of certainty or realistic chance of success.

³ The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para 6; MEC for Health, Eastern Cape v Mkhitha and Another [2016] ZASCA 176 (25 November 2016) at paras 16-17 and Notshokovu v S [2016] ZASCA 112 (7 September 2016) at para 2

⁴ 2007 (1) SACR 482 (SCA) at 494 (para 22)

Prescription in respect of the amended particulars of claim

[7] Mr Ponoane argued that prescription is a non-starter in this application because the cause of action was not new but merely a perfection by Dr Wilkinson, the applicant's medical expert, of the cause of action as it appeared in the applicant's particulars of claim. Invoking the case of *Links v Department of Health, Northern Province*⁵ pertaining to when prescription starts to run. Counsel argued that the applicant was not aware of the cause of action until Dr Wilkinson's report reached his attention. In countering this argument Mr Lemboe, for the respondent, pointed out that Dr Wilkinson's report is dated 22 September 2016, a month prior to the issuing of the summons on 21 October 2016.

[8] The Constitutional Court has, two years after the *Links* judgment, in *Loni v Member of the Executive Council, Department of Health, Eastern Cape, Bisho*⁶, had occasion to re-visit the prescription issue and made this pronouncement:

"[23] *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'. The first issue that this Court considered in Links was 'what [were] the facts from which the debt arose'. It explained that these would be the 'facts which are material to the debt'. 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'. The court held that it would be unrealistic to expect a party, with no knowledge of medicine, to have knowledge of the facts of his condition, without seeking professional medical advice.*

⁵ (CCT 29/15) [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) (30 March 2016)

⁶ (CCT 54/17) [2018] ZACC 2; 2018 (3) SA 335 (CC); 2018 (6) BCLR 659 (CC) (22 February 2018)

[24] *In applying those principles to the facts before it, in Links, this Court held that the applicant would have to have had 'knowledge of [the] facts [which] would have led him to think that possibly there had been negligence and that this had caused his disability. This Court placed emphasis on the fact that the applicant was unable to acquire knowledge of the material facts from any medical doctor or nurse independent of the hospital until he was discharged. This Court decided in favour of the applicant, as it found the claim had not prescribed as the applicant 'did not know or have reasonable grounds to suspect' that it was the medical staff's negligent treatment that led to the amputation and loss of the use of his left hand.*

[25] *The main finding of This Court was that:*

'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.'"

[8] The facts in *Links* are clearly distinguishable from the facts in this case. In this case, when summons was issued Dr Johan Wilkinson's report, the applicant's Neurosurgeon, dated 22 September 2016, was in his legal team's possession. It is not a case that the applicant was seeking expert medical advice. The real issue here that has a bearing on the aspect of prescription is that the applicant's amended particulars of claim, filed in terms of Rule 28(1) were only served on the respondent 18 months later. The respondents conceded that the MEC did not object to the amendment of the applicant's particulars of claim, on whom the applicant ought to have served the amended copies within 10 days of the expiration of the period mentioned in subrule 28 (2).

- [9] The applicant ought to have served and delivered the amended particulars of claim as prescribed in Rule 28 of the Uniform Rules of Court, but has failed to do so. Mr Ponoane's contention that the amended particulars of claim are not new but a perfection of what was already filed is without substance. I have decided in the main judgment that the amended particulars of claim constitute a new cause of action, which is out of time, in respect of which prescription applies. It therefore follows that leave to appeal on this ground stands to fail.

Condonation

- [10] The condonation application related to the late filing of the amended particulars of claim. The main judgment has adequately dealt with the issue at paras 11, 12, 13 and 14 in respect of which the aspect of good cause was also considered, and found to be absent. Having referred to *Madinda v Minister of Safety and Security*⁷, I refused to condone the applicant's condonation request.
- [11] In the premises, I am of the view that there are no reasonable prospects of a success appeal in that another court, on appeal, would arrive at a different conclusion based on the facts, than this Court arrived at. The application for leave to appeal to the Full Bench of this Division should therefore fail.
- [12] On the question of costs. There is no reason why costs should not follow the result.
- [13] Resultantly, the following order is made:

The application for leave to appeal is dismissed with costs.

⁷ (153/07) [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) (28 March 2008) at para 10



M.C. MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

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