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 HIGH COURT, KIMBERLEY

Case No: 1870/2012
Heard on: 22/04/2013
Delivered on:24/05/2013

In the matter between:

DIRK LINKS **APPLICANT/ PLAINTIFF**

AND

THE MEC, DEPARTMENT OF HEALTH, NORTHERN CAPE PROVINCE **RESPONDENT/DEFENDANT**

JUDGMENT

MAMOSEBO AJ:

[1] The applicant,Dirk Links, is an adult male residing at Promise Land P10, Galeshewe, Kimberley, Northern Cape Province. The respondent is the MEC of the Department of Health, Northern Cape Province. For convenience the parties are referred to as cited in the summons.

[2] The plaintiff seeks an order that his non-compliance with sec 3(1) of Act 40 of 2002 be condoned, that he be granted leave to continue with his claim against the defendant (the MEC)under Case 1360/2009 and for the MEC to pay the costs of this application.

[3] The issue for determinationis when the prescription started to run in respect of the plaintiff's claim for damages against the MEC. In terms of s 11(d) of the Prescription Act, 68 of 1969, the claim is subject to a three-year extinctive prescription period.

[4] A summons was issued by the plaintiff againstthedefendant on 06 August 2009.The MECdelivered two special pleas in terms of Rule 33(4) of the Uniform Rules of Court. The first is that the claim has prescribed in terms of the Prescription Act,68 of 1969, in that the cause of action arose on 26 June 2006 and that the summons wasonly issued on 6 August 2009, three years and two months later. The second special plea is that the applicant has not timeously given notice of his intention to institute civil proceedings against the MEC as required by s 3 of the Institution of Legal Proceedings against Certain Organs of State Act, 40 of 2002. By serving the notice on the defendant only on 12 May 2009, a period outside the prescribed six months period, the notice has been rendered invalid or at best for the plaintiff putative or inchoate.The plaintiff now applies for condonation for his non-compliance with the provisions of Act 40 of 2002.

[5] Pertaining to the factsin brief. The plaintiff alleges medical negligence against the employees of Kimberley Hospitalwho he claims to have deformed his arm. On 26 June 2006, he injured his thumbthrough

dislocation.He received treatment at Kimberley Hospital. A plaster of paris was cast for his left hand and forearm. He was onlytreated for a dislocated thumb and discharged. He was advised to return after ten days to remove the plaster cast. On 30 June 2006 he returned to the hospital complainingof pain in the arm. On04 July 2006 the plaintiffonce more returned to Kimberley Hospital because he still experienced pain in the left arm. On or about 05 July 2006 this left thumb was amputated.His treatment included wound inspection and redebriment of the left forearm. The redebriment was caused by maltreatment of the dislocated thumb from 26 June 2006 until amputation on 04 July 2006. In the circumstances the plaintiff became aware of the amputation on 05 July 2006. He was discharged from hospital around the end of August in 2006.A notice in terms of Act, 40 of 2002, was served on the defendant on 12 May 2009 afterwhich theplaintiffissued summons on 06 August 2009.

[6] In November 2006 the plaintiff approached a firm of attorneys Booysen Macleod to investigate the possibilities of a claim for medical negligence. No instructions or proper instructions were taken by these attorneys due to the plaintiff's lack of funds.

[7] The plaintiff approached the Legal Aid Justice Centre in Kimberley during December 2006 seeing that he wasindigent.Although he does not remember the name of the legal aid practitioner who assisted him that day he was asked by this official verbally to return on 06 March 2007 when they will commence with the investigation of his case. He also advised the plaintiff to obtain copies of the hospital records in the meantime. The plaintiff requested his cousin around December 2006 to obtain his

medical records from Kimberley Hospital on his behalf. The request was denied by hospital personnel as the records are confidential.

[8] His subsequent numerous visits to the Legal Aid Centre, Kimberley as reflected in his founding affidavit are 10 May 2007, 27 June 2007, 12 October 2007, 21 November 2007, 02 January 2008, 17 April 2008, 23 June 2008, 10 September 2008, 09 October 2008, 11 December 2008, and 24 March 2009. The plaintiff states that he was seen by a different practitioner on each occasion. It must be said that these visits demonstrate that he pursued his action diligently.

[9] On 27 June 2007 heconsulted with Mr Jansen van Vuuren of the Legal Aid Centre, Kimberley, who is apparently the supervisor. Every time when he was called in by Mr Van Vuuren to visit the Legal Aid Centre, he obliged. Although he was assured during all of his visits that his matter is receiving attention it was only when his file was handed over to a private attorney, Mr Van Niekerk, that some progress was made.

[10] The plaintiff only consulted Mr Van Niekerk on 15 July 2009. Two days thereafter, on 17 July 2009, theplaintiff consulted with an advocate. Summons was issued on 06 August 2009; thus more than three years had lapsed from the date of his first treatment. Mr Van Niekerk made attempts to obtain the hospital file on 14 September 2009 but still in vain. The hospital only provided part of the records on 01 November 2010.

[11] According to the plaintiff the plaster cast on his thumb and forearm was removed by the ambulance personnel. It is not in dispute that he was in hospital from the date of his operation on 5 July 2006 until the end of August 2006.

[12] The issues to be decided in this matter centres on two pieces of legislation, namely, the Prescription Act, 68 of 1969, and The Institution of Legal Proceedings against Certain Organs of State Act, 40/2002.

[13] Sec 11 of the Prescription Act provides that:

"The periods of prescription of debts shall be the following:

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[14] In terms of s11 (d) of the Prescription Act read with section 12(1) thereof civil debts prescribe three years after the debt is due. According to section 12(1), the debt must be immediately payable.

[15] Sec 12(3) of the Prescription Act, 68 of 1969,provides:

"(1) Subject to the provisions of subsections (2), (3) and (4), *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 thedebt arises:*Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

[16] From the arguments as well as the papers filed of record there is no evidence that the plaintiff was prevented by the hospital personnel "from coming to know about the debt" (sec 12(2). The plaintiff certainly knew the identity of the debtor(s) from the outset. What remains to be

answered is whether the plaintiff had actual or deemed knowledge of "the facts from which the debt arises", as required by s12 (3), before 06 August 2009 when the summons was issued.

[17] Mr Botha, for the plaintiff, suggested that if the plaintiff had not obtained knowledge by the end of August 2006, then he would concede that the cause of action cannot be said to have prescribed. He contends that unless the Court finds that the plaintiff had knowledge by 5 July 2006 of relevant facts or could have obtained knowledge of the relevant facts, it cannot be assumed that knowledge of facts is knowing about the amputation and the loss of a thumb. According to him the occurrences of 05 July 2006 are not facts as the plaintiff did not have knowledge at the time of his discharge from the hospital that the doctors were negligent. Plaintiff says the following at para 40 of his founding affidavit to the notice of motion:

"(*M*)*et my ontslaguit die Hospitaal is ekdeureen van die geneeshere by die Hospitaalmeegedeeldateknieweer die gebruik van my linkerhandsalherwinnie."*

[18] Tshiqi JA *in* ***Macleod v Kweyiya (365/12) [2013] ZASCA 28 (27 March 2013)*** *at para 9 states:*

> *"(9) In order to successfully invoke s12 (3) of the Prescription Act, either actual or constructive knowledge must be proved. Actual knowledge is established if it can be shown that the creditor actually knew the facts and the identity of the debtor….. Constructive knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care."*

Tshiqi JAgoes on at para 13 to say:

> *"(13) It is the negligent, and not the innocent inaction that s12 (3) of the Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself."*

[19] In ***Deysel v Truter and Another 2005 (5) SA 598 (C)***MloziAJ had found that the prescription did not start to run in respect of plaintiff's claim until a doctor's opinion was obtained. VanHeerden JA (having reversed this decision) said the following in ***Truter and Another v Deysel 2006 (4) SA 168 (SCA)*** at p174 C-D

> *"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."*

[20] Grosskopf JA in ***Van Staden v Fourie 1989 (3) SA 200 (A) at 216 D-E*** said:

> '*Artikel 12(3) van die Verjaringswetstelegternie die aanvang van verjaringuittotdat die skuldeiser die volleonvang van syregteuitgevind het nie. Die toegewingwat die Verjaringswet in hierdieverbandmaak, is beperk tot kennis van "die feitewaaruit die skuldontstaan".'*

[21] Van Heerden JA goes on to say in Truter's decision at 174 G -175 A (para 19) citing from Maasdorp JA in***Mckenzie v Farmer's Cooperative Meat Industries Ltd 1922AD 16 at 23*** :

> '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.'*

[22] Applying the law to the facts of this case, the plaintiff's cause of action was complete and the debt of the defendant (MEC) became due and payable as soon as the first known harm was sustained by the plaintiff.The cause of action arose on 26 June 2006 when plaintiff first presented himself in hospital for medical treatment.This was however denied by the plaintiff who alleged that he only became aware of the facts by end of January 2007, from what he was informed upon his discharge from the hospital that he will not regain the use of his left arm.

[23] I find the plaintiff's argument in paragraphs 103 and 104 of his founding affidavit as quoted hereunder not persuasive considering the Supreme Court of Appeal decisions already discussed above in relation to when acause of action arose:

> '(E)*k het egternog steeds niegeweet, en konnog steeds nievasstel, sonder die hospitaalrekords en –notas op die lėer, wat die oorsaak van die probleem was en wie / of watdaarvoorverantwoordelik was nie. Ekdoen met respekaan die handdatekdeur die uitoefening van redelikesorg op die vroegste teen die einde van Januarie 2007 van*

die feitebewuskongeword het, indien die Regshulpraad die hospitaalrekordsaangevra het."

[24] The plaintiff's own medical expert, Dr Reynecke, has confirmed in his report, a point which was not disputed in argument bydefendants, that the plaintiff's treatment from 03 July 2006 onwards was medically correct. According to the doctor, the damage was then already done. Mr Botha contends that the running of prescription was delayed by the delay in the provision of the hospital records as well as the plaintiff's admission into hospital. This approach is not borne out by the following dictum by Van Heereden JA in Truter's case p175 B:

"*As indicated above, the presence or absence of negligence is not a fact; it is a conclusion of law to be drawn by court in all circumstances of the specific case. 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."*See also ***Mkhatshwa v Minister of Defence 2000 (1) SA 1104 (SCA) para 23 at 1112H.***

[25] In ***Minister of Finance and Others v Gore NO 2007 1 SA 111 (SCA) at 119 para 17***Cameron et Brand JJA said:

"*This Court has, in a series of decisions, emphasized that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'."*

[26] The plaintiff in this case became aware of the amputation on 05 July 2006. He had suspected prior to this date while still in hospital that something was not right.In my view, plaintiff ought reasonably to have realised on or about 15July 2006 that the operation was not successful; alternatively that the subsequent treatment was not properly done or that there was no proper remedial medical follow up action. The plaintiff's knowledge can be imputed to him from the time the plaster cast was removed. From the papers I have not discerned any event that interrupted or could be construed to have interrupted the running of the prescription.

[27] The following passage appears in, **Prescription in South African Law, J Saner at 3-69 issue 19**:

> *"Where the plaintiffs could have issued summons against the Government of the Republic of South Africa within the prescriptive period, but failed to do so because his legal advisors failed to appreciate the fact that this would have been competent in the circumstances, the court upheld a plea of prescription. This it did on the basis that the plaintiff became aware that the state farm in question (on which the fire affecting the plaintiffs had started) belonged, ultimately, to the Government of the Republic of South Africa, on a date more than three years prior to issue of summons. However, despite receiving information to this effect, the plaintiff's attorneys continued to try to ascertain the identity of actual department of state which owned the farm. Only when they had done this did they issue summons accordingly. Unfortunately, as noted, this was too late."*

[28] Mr Van Rhyn, for the defendant, argued persuasively that this claim does not fall under s 13 (1)(a) of the 1969 Prescription Act. The provision deals with an impossibility which prevents a plaintiff instituting the proceedings within the three year period. See ***Lombo v African National Congress 2002 (5) SA 668 SCA at 678H – 679 A.***

[29] Consequently, it becomes apparent that the plaintiff's claim has prescribed. It has taken the plaintiff more than three years before issuing summons against the MEC. It is my view that the plaintiff was in possession of sufficient information to lodge a valid claim against the defendant.

I consequently come to the conclusion that the plaintiff's cause of action has prescribed.

THE RELATIONSHIP BETWEEN SECTION 11(d) OF THE PRESCRIPTION ACT 68 OF 1969 AND SECTIONS 2 AND 3 OF ACT 40 OF 2002

[30] The second special plea is that of failing to give notice within the prescribed period. I must therefore determine if the argument has merit to warrant condonation as prayed for. I have already stated earlier that I have not discerned any event that interrupted or could be construed to have interrupted the running of the prescription. If the plaintiff's claim had not prescribed, I would have condoned his default in giving timeous notice to the defendant for the reasons set out below. This aspect is also relevant in the event that it could be found that I was wrong in finding that the plaintiff's cause of action had prescribed.

[31] Sec 3 of The Institution of Legal Proceedings against Certain Organs of State Act, 40/2002, provides:

'3(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless –

(a) A creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(2) A notice must-

(a) within six months from the date on which the debt became due, ***be served on the organ of state*** *in accordance with s 4(1);*

(3) For purposes of subsection 2(a)-

(a) A debt may not be regarded as due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) A debt referred to in section 2(2)(a), must be regarded as having become due ***on the fixed date****.*

(4) (a) If an organ of state relies on a creditor's failure to serve a notice in terms of s(2)(a) the creditor may apply to court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that –

(i) ***the debt has not been extinguished by prescription****;*

(ii) *good cause exists for the failure by the creditor; and*

(iii) *the organ of state was not unreasonably prejudiced by the failure.'*(my emphasis).

[32] It is also necessary to mention the provisions of section 2(2) referred to in s3 (3) (b) when dealing with this matter.

"*2(2) Subject to sec 3 and subsections (3) and (4), a debt which became due –*

(a) Before the fixed date, which has not been extinguished by prescription and in respect of which legal proceedings were not instituted before that date; or

(b) After the fixed date,

will be extinguished by prescription as contemplated in Chapter III of the Prescription Act, 1969 (Act 68 of 1969), read with the provisions of the Act relating thereto.

(3)subject to subsection (4), any period of prescription which was applicable to any debt referred to in subsection (2)(a), before the fixed date, will no longer be applicable to such debt after the fixed date.

(4)(a) The expired portion of any period of prescription applicable to a debt referred to in subsection 2(a), must be deducted from the said period of prescription contemplated in Chapter III of the Prescription Act, 1969, read with the provisions of that Act relating thereto, and the balance of the period of prescription so arrived at will constitute the new unexpired portion of prescription for such debt, applicable as from the fixed date.

(b) If the unexpired portion of the period of prescription of a debt referred to in paragraph (a) will be completed in 12 months after the fixed date, that period of prescription must only be regarded as having been completed 12 months after the fixed date."

[33] The Act defines both the terms 'creditor' and 'debtor'. A creditor is defined as '*a person who intends to institute legal proceedings against an organ of state for the recovery of a debt or who has instituted such proceedings, and includes such person's tutor or curator if such person is a minor or mentally ill or under curatorship, as the case may be.*' On the other hand, 'Debt' is defined as *'any debtarising from any cause of action-*

(a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any-

(i) act performed under or in terms of any law; or

(ii) omission to do anything which should have been done under or in terms of any law; and

(b) for which an organ of state is liable for payment of damages.'

Organ of State' includes – any provincial department'.

[34] It is not in dispute that the applicant's written notice of intention to institute legal proceedings for recovery of the 'debt' marked 'H1" dated 23 April 2009 from the Legal Aid Board addressed to the MEC for Health, falls outside the 6 months period prescribed by Act 40 of 2002.

[35] Notice is defined in s 1 (vi) of Act 40 of 2002 as 'a notice contemplated in section 3(1) (a). In terms of this section, the creditor must give an

organ of state written notice of the intention to institute legal proceedings. Cloete JA in **Premier, Western Cape v Lakay 2012 (2) SA 1 (SCA) at page 9 para9C-D** states:

> *"The primary purpose of the 2002 Act is to require that a notice of intention to institute legal proceedings be given at an early stage to an organ of State, obviously to enable it to investigate the basis of the proposed claim*: **Mohlomi v Minister of Defence 1997 (1)SA 124 (CC) (1996 (12) BCLR 1559)**para 9 and cases quoted thereinin fn5."

[36] The plaintiff applies for condonation for the failure to comply with the requirement to file his written notice within the 6 months period. It is so that the court can exercise its discretion in deciding whether to grant condonation. Gubbay JA in ***Stambolie* v Commissioner of Police 1990 (2) SA 369 (ZS) at 374 H** made the following remarks:

> *"Although one may envisage situations in which the person would be absolutely unable to give notice and commence action within the times permitted, for instance he may have been incapacitated in an accident, the adequacy of the period must be tested against the normal and not the extraordinary situation. For statutes of limitation do not distinguish between just and unjust delay. This means that in every rare case a person with a good claim, through no dilatoriness or fault on his part but due to circumstances beyond his control, will be barred from asserting a constitutional right."*

[37] In considering whether condonationmay be granted or not for the plaintiff's failure, regard should be had to sec 3(4) which provides that:

"a*court may grant an application for condonation for such failure if it is satisfied on three matters:*

(i) That the debt has not been extinguished by prescription;

(ii) That good cause exists for the failure by the creditor; and

(iii) That the organ of State was not unreasonably prejudiced by the failure." (My emphasis)

[38] The Supreme Court of Appeal in ***Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) at 316 para 8 C-D*** said:

"The *phrase 'if [the court] is satisfied' in s 3(4) (b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. See eg Die AfrikaansePersBeperk v Neser 1948 (2) SA 295 (C) at 297. I see no reason to place a stricter construction on it in the present context."*

[39] I have already dealt with this first requirement on whether or not the debt has been extinguished by prescription. The second requirement, whether or not good cause exists, as stated by Heher JA in *Madinda*at page316 para E-F, continues:

"'Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by

other persons or parties to the delay and the applicant's responsibility therefor."

[40] Further on at 317C- Ethe Learned Judge states:

> '*Good cause for the delay' is not simply a mechanical matter of cause and effect. The court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render mitigation pointless. There are two main elements at play in s4(b), viz the subject's right to have the merits of his case tried by a court of law and the right of an organ of state not to be unduly prejudiced by delay beyond the statutorily prescribed limit for the giving of the notice. Sub paragraph (iii) is directed, at least in part, to whether the subject should be denied a trial on the merits. If it were not so, consideration of prospects of success could be entirely excluded from the equation on the ground that failure to satisfy the court of the existence of good cause precluded the court from exercising its discretion to condone. That would require an unbalanced approach to the two elements and could hardly favour the interests of justice."*

[41] I do not see any point why the Legal Aid Board attorneys invited the plaintiffto their offices on numerous occasions. Clearly a lot of nonchalance was displayed. In one of the letters informing him of progress in the matter dated 17 April 2008 and marked Annexure 'I', The Legal Aid Board stated that the subject matter was "Re: your matter : divorce". The plaintiff's matter before them was about medical

negligence and not divorce. This was utterly ridiculous even for a candidate attorney. On the facts before me my sense is that they did not cover themselves in glory. It is undesirable at this stage to say more on this aspect because the Legal Aid Board is not a party to these proceedings. See ***Mazibuko v Singer 1979 (3) SA 258 (W)***in which Colman Jsaid at 261 C:

> *"In the carrying out of his contractual obligations the defendant was obliged (either personally or through others) to exercise knowledge, skill and diligence to be expected of an average practicing attorney.* See***Mouton v Die Mynwerkersunie 1977 (1) SA 119 (A)*** *at 142-3 and authorities there cited. It is the plaintiff's case that the defendant fell short of that standard."*

It follows that the defendant's special pleas must unfortunately succeed.

ON THE QUESTION OF COSTS:

[42] The costs must follow the result. The defendant is indigent and was carried by the Legal Aid Funding for a considerable period. The cost order may be an empty shell. I will grant it on principle nevertheless.

[43] Due to the relative complexity of the case I will exercise my discretion to allow a fee for two counsel.

[44] **The following order is made**:

1. The defendant's special plea of prescription in terms of section 11(d) of the Prescription Act 68 of 1969 is upheld. The plaintiff's claim is dismissed with costs, which includes the costs of twocounsel.

2. Condonation for the plaintiff’s failure to serve the notice contemplated in s 3(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 within the period laid down in s 3(2)(a) of the Act must fail in view of the order in para 1.

MAMOSEBO, AJ
ACTING JUDGE
NORTHERN CAPE DIVISION

For the Applicant/Plaintiff	:	Adv C Botha
Instructed by	:	Elliot Maris Wilmans and Hay Attorneys
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Instructed by:		The State Attorneys Kimberley