



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

CASE NO.: 646/2023

Reportable	Yes / No
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In the matter between:

N[...] N[...]

Plaintiff/ Applicant

and

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

Defendant/ Respondent

JUDGMENT

Cengani-Mbakaza AJ

[1] Before me is the application stemming from the provisions of s 3 of the Civil Proceedings Against Certain Organs of the State Act, 40 of 2002 (the Act).

[2] In the notice of motion, the applicant seeks a declaration that she has complied with notice requirement as contemplated in the Act, or alternatively, an order condoning her failure to give timely notice in terms of the Act. The application is opposed by the respondent, citing prescription as a defence.

[3] For the sake of convenience, the parties will be referred to as they appear in the main action. The plaintiff's claim arises from a contract entered into with the defendant on or about 23 January 2007. The express or implied terms of the contract included:

Admission to St Lucy's hospital (the hospital).

Examination and monitoring of labour by qualified medical doctors and/or nurses with obstetric knowledge employed by the defendant.

Monitoring the health of the plaintiff's unborn baby.

Provision of professional services with reasonable skill, care and diligence before, during and after delivery.

[4] Following the agreement, the hospital's medical practitioners and nursing staff purportedly failed to meet the expected standard of care, providing substandard treatment to the plaintiff and her baby 'B' during and after labor, constituting negligence.

[5] The plaintiff alleges that the negligence resulted in 'B' experiencing significant distress characterised by : Absence of crying at birth, respiratory difficulties, tube feeding, low apgar score, abnormal breathing sounds, incubator admission and oxygen therapy. As a direct result, 'B' sustained hypoxic ischemic brain injury, leading to severe and irreversible brain damage.

[6] In support of her application, the plaintiff avers that her rural upbringing and lack of knowledge about the legal principles, particularly regarding claims for damages and s 3 of the Act, contributed to the delay in instituting the proceedings. She had hoped that 'B' would develop normally despite his floppiness and all other disability symptoms he had.

[7] In March 2021, she became aware of a firm of attorneys that specialises in assisting parents of children with disabilities. Subsequently, on 26 March 2021, she consulted with attorneys at the firm. On 31 March 2021, her attorney dispatched a letter to the hospital requesting hospital records. The records were subsequently provided towards the end of 2021.

[8] During consultation, her attorney advised that to assess the potential grounds for a claim against the defendant, 'B' would require examination by medical experts including an MR1 scan. An arrangement was made with City Hospital in Cape Town for an MRI scan. 'B' underwent an MR1 scan on 22 September 2022. Thereafter, a paediatrician assessed him on 22 September 2022.

[9] In opposing the application, the defendant argues that the plaintiff unduly delayed in filing the notice despite meeting with her attorney in March 2021. The defendant points out that there is unexplained gap between late 2021 and September 2022.

[10] The defendant argues further that the plaintiff's failure to provide a complete timeline with the precise date and explanation for the delay means that she had not shown good cause for non-compliance with s 3(4)(b) of the Act, as a result, the claim in her personal capacity has prescribed and should be dismissed. The defendant concedes, however, that as 'B' was a minor at the time the particulars of claim were served, the claim in his favour cannot be deemed prescribed solely due to timing.

[11] The gravamen of the defendant's prescription defence hinges on the fact that the plaintiff's claim arose on or after 24 January 2007, yet the combined summons were served on the defendant on 16 February 2023, more than three years later.

[12] The plaintiff could and should have acquired the necessary knowledge by exercising reasonable care but failed to do so within three years preceding the service of the combined summons and particulars of claim on the defendant on 16 February 2023.

[13] Despite becoming aware of the complications, the plaintiff failed to take reasonable steps to investigate the cause, including potential negligence by the defendant's employees. Had she done so, she would have obtained the necessary facts to establish the debt and the defendant's liability. It is therefore reasonable to deem that the plaintiff had the requisite knowledge shortly after January 2007, so the argument goes.

[14] Both parties acknowledge that to succeed with a special plea of prescription in medical negligence cases, it must be demonstrated that the other party had knowledge of sufficient facts to reasonable suspect fault on the part of the medical staff , thereby prompting the seeking of a legal advice. The Constitutional Court (CC) in *Links v Department of Health, Northern Cape*¹ (Links), a case that I was referred to by Mr Sakhela on behalf of the plaintiff, Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J held:

‘[42] ... To require knowledge of causative negligence for the test in section 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

¹ (CCT 29/15) [2016] ZACC 10; 2016 (5) BCLR 656 (CC); 2016 (4) SA 414 (CC) (30 March 2016).

cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises.

- [45] In a claim for delictual liability based on the Aquilian action, negligence and causation are essential elements of the cause of action. Negligence and, as this Court has held, causation have both factual and legal elements. 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 section 12(3). (footnotes omitted).’

[15] A multitude of cases establishes a clear principle that the defendant bears the onus of proof, to establish, as a matter of fact , the commencement date of the relevant periods (i.e. when the debt becomes due) based on the plaintiff’s actual acquisition of the facts underlying her cause of action and the defendant’s identity, or the date upon which plaintiff, exercising reasonable care, could have obtained such knowledge.

[16] The Supreme Court of Appeal in *Macleod v Kweyiya*², Tshiqi JA (Mthiyane DP, Majiedt JA and Plasket and Saldulker AJJA concurring) held:

‘This court has repeatedly stated that a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt.’

[17] Section 3 of the Act reads:

‘3. Notice of intended legal proceedings to be given to organ of state.-

- (1) No legal proceedings for the recovery of a debt may be instituted against an organ of the state unless-
 - (a) the 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
 - (b) the organ of state in question has consented in writing to the institution of legal proceedings-
 - (i) without such notice; or
 - (ii) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

² (365/12) [2013] ZASCA 28; 2013 (6) SA 1 (SCA) (27 March 2013) at para 10. See also Links (*supra*) at para 24.

- (2) A notice must-
- (a) within six months from the date upon which debt became due, be served on the organ of the state in accordance with section 4(1); and
 - (b) be briefly set out-
 - (i) the fact giving rise to the debt; and
 - (ii) such particulars of such debt as are within the knowledge of the creditor.

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

- (a) a debt may not be regarded as being 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 subsection (2) (a), the creditor may apply to a 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/or
 - (iii) the organ of state was not unreasonably prejudiced by the failure.
- (c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.'

[18] In the Act a debt is defined as follows:

‘debt means any debt arising 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, whether such debt became due before or after the fixed date.’

[19] The relevant provisions of s 12 (3) of the Prescription Act³ are apposite. They are as follows:

‘12. When prescription begins to run. —

- (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 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)

[20] In her heads of argument, the plaintiff alludes to the fact that the claim relates to birth defects which occurred because of causative factors in utero. The nature of the injury, its cause, timing and preventability, as well as whether it resulted from misfortune, bad luck, or an unforeseen circumstance are matters determined by scientific evidence which often lies beyond the knowledge of a layperson.

[21] To determine the issue of prescription, the facts of the case as presented by the plaintiff in the founding affidavit, which cannot be disputed by the defendant on its affidavits are a relevant consideration in establishing when the debt became due.

[22] In the answering affidavit, the defendant offers a bare denial of liability, specifically in relation to the allegations contained in paragraph 23 to 26 of the founding papers. The plaintiff asserts that in support of his claim, Prof Lotz

³ Act 68 of 1969.

expressed the opinion that the MRI scan's features are diagnostic of a posterior watershed-cantered prolonged partial hypoxic-ischemic injury.

[23] Furthermore, Prof Kara opined that concerns about the newborn's condition at birth, coupled with the presence of encephalopathy post-birth, suggest that the insult likely occurred during labor, a period of highest risk for brain injury in terms of infants. The following facts presented by the plaintiff in her founding affidavit are incontrovertible:

- 23.1 The letter requesting hospital record was sent on 31 March 2021, and the records were received by the plaintiff late in 2021.
- 23.2 'B' was scheduled for and underwent MR1 scan at N1 City on 16 September 2022, following arrangements made for the procedure.
- 23.3 Professor Lotz and Dr Kara provided their expert reports in October 2022.
- 23.4 Shortly after obtaining knowledge of the facts relevant to the timing and/cause of B's brain injury, the plaintiff delivered the requisite statutory notice to the defendant on 01 November 2022.

[24] The facts of this case more specifically the common cause facts are not materially distinguishable from those Constitutional Court's previous judgments, specifically *Links*. At paragraph 47, the CC opined that it would be unreasonable to expect a non-medical litigant to identify the cause of action of their condition without first consulting a medical professional. This requires the litigant to have sufficient information to suspect that something went wrong and seek advice.

[25] The facts presented by the plaintiff in her founding affidavit constitute the material and sufficient facts that establish a cause of action. It is undisputed that these facts were obtained in October 2022. Furthermore, it is common cause that she was raised from a rural background with no medical expertise or scientific

analytical skills. Therefore, the argument positing that the claim has prescribed is not supported by the facts and the Constitutional Court's principles in this regard.

[26] In the heads of argument, the defendant contends that even if the court finds in favour of the plaintiff on prescription, she must still demonstrate good cause for failing to provide notice under s 2(a) of the Act and justify whether the defendant was not unreasonably prejudiced thereby.

[27] In her oral submissions, Ms Van Vereen argued that, given the fact that 'B' was born on 23 January 2007, the defendant may suffer prejudice due to the potential fading of factual witnesses' memories of events from 2007. This court is aware of the conventional rationale behind requiring prior notification of intention to sue the organs of state. Given the state's extensive activities and large shifting staff, it needs an opportunity to investigate claims, consider them responsibly and decide whether to accept, reject or settle them before litigation ensues at public expense. Failure to timely issue such a statutory notice may, if proven, prejudice the state's position.

[28] However, it is a matter of public record that the defendant maintains records of births and relevant circumstances, which serve to refresh hospital personnel's memories in disputes and other relevant issues. Furthermore, these records assist the expert to inter alia formulate opinions and compile reports. Therefore, this argument is unsubstantiated.

[29] While it may seem repetitive, the debt was due on 18 October 2022 and following the plaintiff's knowledge of the debt, she sent a statutory notice to the defendant. This statutory notice was sent on 01 November 2022, approximately 13 calendar days. The sending and receipt of the statutory notice complied with s 2(a) of the Act which requires that a notice be served on the organ of the state within six months from the date on which the debt became due.

[30] To give a notice before that time, specifically in January 2010 as suggested by defendant would be futile and would not have complied with s 2 (b) of the Act. This is so, considering the fact that the facts giving rise to the debt, including its particulars, were not within the knowledge of the plaintiff prior 18 October 2022. Therefore, the conspectus of the facts presented justifies the granting of the order in favour of the plaintiff.

Order

[31] In the result, I make the following order:

1. It is declared that the plaintiff has duly complied with the provisions of section 3 of the Legal Proceedings Against Certain Organs of the State Act 40 of 2002 in respect of her personal claim and the minor child.
2. The defendant shall pay costs on Scale B as set out in Rule 67A read with Rule 69 of the Uniform Rule of Court.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Attorney for the Plaintiff : MR SAKHELA

Instructed by : Sakhela Inc.
Mthatha

Counsel for the Defendants: ADV VAN VUUREN

Instructed by : Smith Tabata Attorneys
Mthatha

Date Heard : 21 August 2025

Date Delivered : 30 October 2025