IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MAKHANDA]

APPEAL CASE NO.45/2025

High Court Case No. 3615/2023

In the matter between:

ENOUCH MGIJIMA LOCAL MUNICIPALITY **Appellant**

and

Z[...] F[...] obo Y[...] A[...] F[...] **Respondent**

and

High Court Case No: 3616/2023

In the matter between:

ENOCH MGIJIMA LOCAL MUNICIPALITY **Appellant**

and

MXOLISI QUITON MASAYIMANI **Respondent**

JUDGMENT

JOLWANA J

Introduction.

[1] The respondents instituted separate action proceedings claiming delictual damages resulting from two separate incidents in which there were electrocutions and for which they held the appellant liable. The appellant raised two special pleas, prescription and non-compliance with section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act (the Institution Act)[1]. This appeal, which is with the leave of the Supreme Court of Appeal, concerns the granting of the condonation applications by the court a quo. To accommodate the marginal differences in the factual matrix and to avoid confusion, I shall henceforth refer to the respondents simply as Ms F[...] and Mr Masayimani.

Factual background.

[2] On 17 February 2020 Y[...] F[...] (the minor child) who was three years old at the time made contact with live electric cables resulting in his electrocution. At the time of the incident the minor child was playing with other children at his residential area known as Aloe T Square Camp, an informal settlement in Komani (formerly Queenstown). Ms F[...], the mother and natural guardian of the minor child instituted

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[1] 40 of 2002.

damages claims both, in her personal capacity and in her representative capacity on behalf of the minor child.

[3] The live electric cables were illegally connected to the appellant's substation at Saleni Street, T Section, KwaMlungisi Township in Komani, an area that is provided with electricity and electricity infrastructure by the appellant. The minor child sustained bodily injuries as a result of which he was rushed to Park Valley Clinic, Komani where he was treated and later transferred to Frontier Hospital, Komani. He was admitted and treated for about a week. The injuries sustained included disfigurement in his left hand as a result of which he was operated on at Livingstone Hospital in Gqeberha. He thereafter attended physiotherapy sessions at Frontier Hospital.

[4] The incident was reported to Mr Gaju who was the area's erstwhile ward councillor. It was also reported to the South African Police Service in Komani. In May 2020 detective sergeant Baninzi took a statement from the minor child's grandmother who, at the time of the incident, was looking after the minor child. It is unclear when the incident was reported to the police relative to when it occurred.

[5] It does not appear that beyond what is alluded to above, anything else was done consequent to the incident until June 2023. In her founding affidavit there is some reference to the covid 19 declaration of the national state of disaster in the country by the President which Ms F[...] said was finally lifted with effect from 5 April 2022. It is unclear from the papers what point was being made about the declaration of the national state of disaster as there is no indication of what she would have done but for the declaration of the national state of disaster. On 24 June 2023 the minor child's grandmother learnt from other members of the community that Mr

Masayimani, who had also been electrocuted in the same area a few days after the electrocution of the minor child, was receiving legal assistance from a certain attorney.

[6] On 25 June 2023 Ms F[...] and the minor child's grandmother consulted with and gave instruction to the said attorney. Their attorney advised them that they would first investigate the circumstances which led to the minor child's electrocution. They would also need to obtain hospital records and interview witnesses before deciding whether a claim for delictual damages could be instituted against the appellant. Until their interaction with their attorneys of record in June 2023, they did not consult any other attorney about a possible civil claim. She did not know that she had a claim or that she had a right to institute damages claims consequent upon the minor child's electrocution. She also did not know the identity of the respondent, *qua* debtor.

[7] She is a lay person and was under the impression that police to whom the incident had been reported would investigate the matter and take it to court on her behalf. She did not know the difference between a criminal case and a civil claim. In July 2023 copies of the medical hospital records were sought but were not immediately obtained as the hospital failed to provide them. A decision was then taken on 4 October 2023 to proceed with legal action without those records having been obtained. Consequently, on 6 October 2023 a statutory notice in terms of section 3 of the Institution Act was served on the appellant followed by a summons which was issued and served on 10 October 2023 without the hospital records having been obtained. The hospital records were only provided by the hospital on 9 November 2023. The appellant defended the matter and raised a special plea to the effect that Ms F[...] had not complied with section 3(2) of the Institution Act in that the statutory notice was non-compliant for lack of timeous service.

[8] This is more or less the backdrop against which Ms F[...] instituted this application seeking condonation for her failure to serve the notice within six months from the date of the cause of action as provided for in section 3(2) of the Institution Act. She contended that the debt has not been extinguished by prescription, that good cause existed for her failure to timeously give the statutory notice soon after the date of the cause of action and in any event, within six months. Finally, she contended that the appellant would not be prejudiced by such failure to serve the appellant timeously with the said notice.

[9] With regard to the existence of good cause, Ms F[...] contended that there was a good cause for her failure. It was that she is a lay person with no knowledge of the requirements of civil litigation and in particular, the stipulations contained in the Institution Act regarding the service of the notice. She did not know that she had a potential claim against the appellant, *qua* debtor, or the specific organ of state against which any potential claim might lie. She also did not have the full facts on which to establish the existence of the debt. On those bases, the six months period prescribed in section 3(2)(a) of the Institution Act could only start running from the 4 October 2023, the date on which she obtained legal advice from her attorneys following the investigations they conducted. It was only at this point that she obtained knowledge that the minor child's electrocution was caused by the negligence of the appellant's employees who failed to remove the electric cables that were illegally connected to the appellant's infrastructure.

[10] In those circumstances the statutory notice was served timeously in compliance with the Institution Act without any delay and within the required six months period from the time she became aware that she had a claim against which organ of state. She contended that the merits of her claim are good in that she has witnesses in the

form of the members of the public who had lodged complaints with the appellant about the illegal connections before the minor child was electrocuted. Those witnesses could testify that the appellant's employees, despite knowing about the existence of the illegal connections, failed to remove them thus failing to protect the minor child and other members of the public from electrocution. There were also witnesses who witnessed the electrocution of the minor child and the expert medical personnel who treated him as well as the minor child's medical records.

[11] Ms F[...] further contended that it was clear from the appellant's plea that it has no genuine defence to the merits of the claim. It admits the duty of care to ensure the safety of the members of the public including the minor child but does not explain its failure to remove the illegal connections. In all the circumstances, she has good prospects of success in respect of both, her claim in her personal capacity and her claim in her representative capacity on behalf of the minor child. The illegal connections were still there, and unsuspecting members of the community were therefore still being exposed to the risk of electrocution which was a gross dereliction of duty on the part of the appellant. The appellant would not be prejudiced by the granting of the condonation application. What was required was, in any event, not absence of prejudice but absence of unreasonable prejudice which did not exist.

[12] Finally, Ms F[...] contended that the claim has not prescribed in that a debt is not deemed as being due until the creditor has knowledge of the identity of the debtor and the facts giving rise to the debt. Furthermore, she could not have acquired the knowledge of the facts giving rise to the debt or the identity of the appellant as the debtor even by exercise of reasonable care. The debt only became due on 4 October 2023 when she acquired knowledge of the facts giving rise to the debt and the identity of the debtor from her attorney during consultation. Therefore, before the

4 October 2023 the debt had not yet become due within the contemplation of the section 3(2)(a) of the Institution Act read with section 12(3) of the Prescription Act[2]. The debt arose on 4 October 2023, and the statutory notice was served on the appellant as required in terms of section 3(1) of the Institution Act and without delay. Finally, the claim in respect of the minor child has not prescribed as the child is still a minor and her personal claim was, by its very nature, an ongoing claim.

[13] Mr Masayimani was born on 1 December 1983, is unemployed and resides at Aloe T Squatter Camp in Komani. His highest level of education is grade 11. He instituted action proceedings claiming delictual damages arising from the negligent and/or wrongful conduct of the appellant. This was based on appellant's failure to protect him and other members of the public by not removing illegal electricity connections which constituted a hazard to people walking in the area. He held appellant responsible for the removal of the illegal electricity connections to its infrastructure. In his papers his case is more or less the following.

[14] On 19 February 2020 and at Aloe T Squatter Camp he was electrocuted when he accidentally came into contact with live electric cables while walking to a nearby shop. The said electric cables were illegally connected to appellant's infrastructure. He sustained bodily injuries as a result of which he was rushed to Dr Ndamase's surgery who, after treating him, transferred him to Frontier Hospital where he was admitted and received further medical treatment for three weeks. He thereafter attended numerous physiotherapy sessions at Frontier Hospital. The electrocution incident resulted in his left arm becoming disabled.

[2] 68 of 1969.

[15] In May 2023 he met one Mxolisi Ngomane who also resided at Aloe T Squatter Camp. During their conversation, Mr Ngomane wanted to know about his disabled arm and he told him that it became disabled subsequent to an electrocution incident. Mr Ngomane then suggested that he should contact his cousin, Mr Tyatyeka to assist him in instituting a civil claim. Mr Ngomane told him that Mr Tyatyeka was based in East London and assisted poor people in instituting civil claims for injuries sustained in similar circumstances. Due to lack of financial resources, he initially hesitated approaching this attorney but at the beginning of June 2023 he contacted Mr Tyatyeka and they arranged a consultation to take place on 24 June 2023. That consultation took place during which he was advised that Mr Tyatyeka would obtain copies of his hospital records and interview his witnesses before he would be in a position to give him a clear indication on whether or not he had a claim against appellant.

[16] His attorney received some of the hospital records on 29 September 2023 after some delay since the formal request therefor was made on 25 July 2023. His attorney felt that he still needed to do further investigations and he was required to bring his witnesses to his attorney for further consultations. He and his witnesses held a consultation with his attorney on 4 October 2023 in which, based on information that was at his attorney's disposal, he was advised that he had a claim against appellant. He therefore gave his attorney a mandate to institute a civil claim against appellant.

[17] On 5 October 2023 a notice in terms of section 3 of the Institution Act was served on appellant and on 11 October 2023 appellant was served with a summons. On 17 November 2023 his attorneys received a complete set of his hospital records from Frontier Hospital. The civil action was defended and in its special plea,

appellant raised non-compliance with section 3(2) of the Institution Act alleging a failure to serve a notice provided for in that section timeously and prescription. It was this special plea the gave birth to his application for condonation.

[18] He explained that he is a lay person with no knowledge of the requirements set out in the Institution Act. He had no knowledge that he had a potential claim against any organ of state. He also did not have the information and the facts on which he could have established whether in fact he did have such a claim or knowledge of the specific organ of state against which his potential claim might lie. He contended that the six months period referred to in section 3(2)(a) of the Institution Act could therefore only start running from 4 October 2023, the date on which he obtained legal advice from his attorney. It was at that stage that he acquired knowledge that his electrocution was caused by the negligence of appellant's employees in failing to remove electric cables that were illegally connected to its infrastructure. When he did obtain that knowledge, he thereupon served the notice in compliance with the Institution Act without unnecessary delay and within the six months period. This was the time at which he became aware of the existence of the debt and the identity of the debtor.

[19] He contended that the merits of his claim were good as he intended to call other members of the public who had complained about illegal connections to appellant's employees even before his electrocution. He also intended calling members of the public who would be able to testify that appellant's employees knew about the illegal connections before his electrocution but failed to take the necessary steps to protect members of the public including himself. He also intended calling members of the public who witnessed his electrocution as his witnesses. He also intended calling the

medical practitioners who treated him and he would also use his hospital records to prove his case.

[20] In any event, appellant relied on technical defences and has no genuine defence on the merits. Based on all the evidence that he would be able to present, he contended that he has a good prospect of success in his claim against appellant. With regard to unreasonable prejudice, his contentions were that there were still illegal connections at Aloe T Squatter Camp which were still connected to appellant's infrastructure which is situated at KwaMlungisi Township in Komani. Therefore, innocent members of the public were still being exposed to the risk of electrocution. Appellant would therefore not suffer any prejudice if condonation was granted and any prejudice, if it may exist, would have resulted from appellant's employees' action and would not in any event amount to unreasonable prejudice.

[21] He further contended that his debt was not due until he, as a creditor, had knowledge of the identity of appellant as debtor and the facts giving rise to the debt. He could not have acquired knowledge of the existence of the debt even through the exercise of reasonable care. The debt only became due on 4 October 2023 which was when he acquired the facts giving rise to the debt and the identity of appellant as a debtor. Therefore, prescription only commenced running on 4 October 2023. Before that date his debt against appellant had not yet become due as contemplated in section 3(2)(a) of the Institution Act read with section 12(3) of the Prescription Act.

Appellant's case.

[22] Appellant's case to both Ms F[...]'s and Mr Masayimani's condonation applications was the following. On 17 and 19 February 2020, the dates on which the minor child and Mr Masayimani were electrocuted, Ms F[...] and Mr Masayimani

were aware or ought reasonably to have been aware that the electrocutions were caused by electrical wiring in the area of its jurisdiction. Therefore, they ought reasonably to have known the identity of appellant as their debtor. They were aware or ought reasonably to have been aware that appellant was responsible for electrical supply to certain areas in Komani. On these bases the debt for damages sustained in those electrocution incidents became due on 17 and 19 February 2020 respectively, which were the dates on which the two incidents occurred. Despite knowledge aforesaid, they only served their notices on appellant in October 2023, contrary to the provisions of the Institution Act which required them to serve their notices within six months of the debts becoming due.

[23] In all the circumstances, the debts have prescribed as they both had all the minimum facts that were necessary to institute their claims for damages. They were aware or ought reasonably to have known on the respective dates of incidents that the electrocutions were caused by live electric cables connected to appellant's infrastructure, and that appellant had a duty to ensure the safety of the members of the public which it failed to do and therefore breached its duty to ensure the safety of the people of Aloe T Squatter Camp. Summons was served on 10 and 11 October 2023 respectively, and therefore the claims prescribed in February 2023.

[24] Appellant contended that Ms F[...] and Mr Masayimani failed to give explanations for the entire period of the day. There was no explanation as to why witnesses could not be consulted before October 2023. In any event, they had the minimum facts that were required to sustain a cause of action. Waiting for hospital medical records was unnecessary and in any event they proceeded with their claims without obtaining them. There had been an excessive delay of about three years and

seven months reckoned from the dates of electrocutions. Their failure to fully explain this excessive delay was fatal to their condonation applications.

[25] Appellant further contended that it was not responsible for illegal supply of electricity and electrical cables to Aloe T Squatter Camp and there was no record of it having been made aware of the illegal connections. Mr Masayimani should have been aware of the risk involved in being in contact with illegally connected electric cables in that area and should have guarded against coming into contact with them. Appellant owed no duty of care arising from illegal connections in that area as illegal connections were not a municipal service to that community.

[26] Appellant further contended that prejudice to it was apparent after three years and seven months of delay. Its employees who may have conducted inspections at Aloe T Squatter Camp at that time may not have independent recollection of their investigations and inspections in that area and some may not be still in its employ. Even those who may still be available may have had faded memories of their knowledge about illegal connections. This may affect the quality of adjudication by the courts due to the passage of time. It has not been able to locate records of the electrocutions and who attended to the incidents due to the passage of time all of which prejudiced it. In all the circumstances, Ms F[...] and Mr Masayimani had not met the requirements for them to be granted condonations and for the court to exercise its discretion accordingly. The claims have prescribed and no good cause for the delay has been shown by Ms F[...] and Mr Masayimani in circumstances in which appellant has been palpably prejudiced by the failure to timeously give notices.

The court a quo's judgment.

[27] In granting the condonation applications the court a quo made the following observations and conclusions. Ms F[...] consulted an attorney as soon as could reasonably be expected given her misconception, and her attorney in turn reacted expeditiously. Mr Masayimani did so as well. It then went on to deal with the issue of prejudice which it did rather fleetingly. In the process, it omitted to express itself on it beyond what it said was both counsel accepting that a municipality is required to keep records for a number of years. What that number of years is was not stated or dealt with. After discussing and quoting some case law on prescription, it merely pronounced itself as being satisfied that on their pleaded cases, both Ms F[...] and Mr Masayimani gave adequate explanations for their delays in giving the notice required in terms of section 3 of the Institution Act. It then concluded that the respective periods of delays were not excessive without mentioning the period and further concluded that the prejudice alleged by the municipality was not real. It then repeated its earlier observation that a municipality was required to keep records of electrocution incidents for a considerable period of time. However, it again refrained from expressing itself on what that period of time was, relative to the delay for which condonation was being sought.

[28] The court a quo’s ultimate conclusion was that appellant had failed to plead any facts on the basis of which a conclusion that Ms F[...] and Mr Masayimani were aware of their right to claim on the dates their individual causes of action arose. It concluded that the overall impression applying a fair mind to the facts as set out in the papers was that Ms F[...] and Mr Masayimani were unaware of their right to claim. In this regard, it cited what it called inexperience and what it called naïveté of litigants from a previously disadvantaged background. It further said that both of them fall into the category of disempowered and marginalized people given their

socio-economic status. It then concluded that Ms F[...]'s and Mr Masayimani's right to claim had not prescribed. It does need to be said that the court a quo's generalisation about Ms F[...] and Mr Masayimani as being naïve due to being from a previously disadvantaged background was without any basis and therefore unfortunate. The less said about that the better. This, in a nutshell, is the synopsis of the court a quo's reasoning for granting the condonation applications which, as will become clear below, were to some extent, based on an unfortunate disregard or lack of awareness about the legal position as consistently set out by the Constitutional Court and possibly even to well-intended but misplaced pity for Ms F[...] and Mr Masayimani.

The legal framework.

[29] At the back, centre and front of this application is the Institution Act which makes provision for the Prescription Act to be an integral and indispensable part of the equation in considering whether or not a court may exercise its discretion to not non-suit an applicant for condonation. I quote the relevant parts of both pieces of legislation sequentially hereunder.

[30] Section 3 of the Institution Act reads:

> "(1) No legal proceedings for the recovery of a debt may be instituted against an organ of 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 that legal proceeding[s] –
>
> (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) 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 section 4(1), and

(b) briefly set out –

(i) the facts 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 maty not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts given rise to the delt 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 creditors; and

(iii) the organ of stated 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."

[31] The relevant parts of the Prescription Act for the purposes of this matter are contained in section 12 and read as follows:

> "(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."

Discussion.

[32] Section 3(3)(a) of the Institution Act appears to have been taken directly from section 12(3) of the Prescription Act save that section 12(3) was crafted in peremptory terms whereas section 3(3) appears to have been crafted in directory terms. However, nothing really flows from those differences in the language employed between the two pieces of legislation. An observation may be made that the permissive language employed in section 3(3) is indicative of the legislature's clear indication that a court considering a condonation application does have a discretion to grant or refuse such an application upon consideration of all the jurisdictional requirements set out in section 3(4)(b). For a court to exercise its discretion in favour of an applicant, it is trite that all three jurisdictional factors must be shown to exist. In other words, if an applicant for condonation fails to establish the existence of the three requirements set out in section 3(4)(b) a condonation application may not be granted. This is so because these jurisdictional factors are to be considered conjunctively and not disjunctively.

[33] In essence and denuded of all excesses, appellant's argument on appeal was that the jurisdictional prerequisites for the granting of condonation were not

established. Therefore, the court a quo improperly exercised its discretion to grant condonation as it could and should not have granted the applications, absent any of the requirements set out in section 3(4)(b). This is because Ms F[...] and Mr Masayimani knew from the dates of the respective incidents in February 2020, who their debtor was and had all the facts as would enable them to know that they had been wronged. They would and should have sought legal advice to enable them to take steps in claiming any damages allegedly suffered. They did not do so for more than three years and have not provided any good cause for their excessive delays, and their respective claims have prescribed. Appellant will, in any event, be unreasonably prejudiced by the granting of condonations for the reasons already adumbrated earlier.

[34] Submissions on behalf of Ms F[...] and Mr Masayimani on appeal were essentially that they did not know who their debtor was until they consulted their attorney who investigated the matter. It was only after their attorney conducted the necessary investigations that the identity of appellant as the debtor and the full set of facts regarding the electrocutions were established. This was after consultations with witnesses and some medical reports in the form of hospital records were obtained that they were in a position to take action against appellant. Therefore, and until all these facts were established, so went the submission, their claims did not and could not have become due. The running of prescription therefore only started in October 2023 when all the facts were established subsequent to their attorney having investigated the matter. This was because due to their disadvantaged background, Ms F[...] and Mr Masayimani did not know that they had a right to claim against appellant whom they did not know was the one responsible for the damages suffered. In other words, they did not know the identity of their debtor and the full set

of facts so as to take the necessary steps provided for in the Institution Act timeously to recover the debt as they did not know that they had a cause of action against anyone. Furthermore, they could not have established these facts even by exercise of reasonable care.

[35] The consistent jurisprudence coming out of the Constitutional Court on section 3 of the Institution Act can be summarised with reference to *Links*[3] in which the court expressed itself as follows, and also quoted with approval, what the Supreme Court of Appeal said in *Truter*:[4]

> [16]"Section 3(4)(b) reads:
>
> '(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.'
>
> It is clear from section 3(4)(b) that condonation may not be granted where the creditor's claim has prescribed.
>
> …
>
> [31] In *Truter* the Supreme Court of Appeal dealt with the meaning of the phrase "debt due". It said:
>
> 'For the purpose 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 pursue his or her claim.'

[3] Links v Member of the Executive Council, Department of Health, Northern Cape Province 2016 (4) SA 414 (CC) paras 31 and 51.
[4] Truter and Another v Deysel 2006 (4) SA 168 (SCA) para 15.

In the next paragraph the Court further said:

> ‘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.’”

At paragraph 51 the Constitutional Court then expressed itself as follows:

> “The High Court made it clear that, had it not been for its conclusion that the applicant’s claim had prescribed, it would have condoned the applicant’s failure to comply with section 3 of the Legal Proceedings Act. Counsel for the respondent did not argue that this conclusion by the court of first instance was wrong. Indeed, the conclusion seems justified to me. The applicant approached attorneys and the Legal Aid Board within two months or so after being discharged from hospital. He visited the offices of the Legal Aid Board on numerous occasions in pursuit of his claim. The Legal Aid Centre dismally failed to attend to his matter for about three years.”

[36] In contradistinction, in this matter one hardly finds anything tangible done by Ms F[...] and Mr Masayimani in establishing any of the facts they claimed not to have known until they met their attorney. About two years or so after *Links*, the Constitutional Court succinctly summarised the legal position regarding knowledge of the facts and knowledge of the debtor with reference to what the appellant knew and its sufficiency or otherwise for him to take action in *Loni*[5]. It said:

> “When the principle in *Links* is applied to the present facts, the applicant should have over time suspected fault on the part of the hospital staff. There were sufficient indicators that the medical staff had failed to provide him proper care and treatment, as he still experienced pain and the wound was infected and oozing pus. With that experience, he could not have thought or believed that he had received adequate medical treatment. Furthermore, since he has been given his medical file, he could have sought advice at that stage. There was no basis for him to wait more than seven years to do so. His explanation that he could not take action as he did not have access to independent medical practitioners who could explain to him why he was limping or why he continued to experience pain in his leg, does not help him

[5] Loni v Member of the Executive Council, Department of Health, Eastern Cape Bhisho 2018(3) SA 335 (CC) para 34 – 35.

either. The applicant had all the necessary facts, being his personal knowledge of his maltreatment and a full record of his treatment in his hospital file, which gave rise to his claim. This knowledge was sufficient for him to act. This is the same information that caused him to ultimately seek further advice in 2011.

It is clear, that long before the applicant's discharge from hospital in 2001 and certainly thereafter, the applicant had knowledge of the facts upon which his claim was based. He had knowledge of his treatment and the quality (or lack thereof) from his first day in hospital and had suffered pain on a continuous basis subsequent thereto. The fact that he was not aware that he was disabled or had developed osteitis is not the relevant consideration."

[37] At the risk of being tediously repetitious, I consider it important to recap the basic factual matrix of both respondents. In respect of Ms F[...], it was at about 10:00 in the morning when, on 17 February 2020 her minor child who was in the care of her mother accidentally came into contact with live electric cables as a result of which the minor child was electrocuted thus sustaining bodily injuries. She merely says that the incident was reported to their ward councillor, Mr Gaju and the police. She, however, does not indicate who made those reports and when they were made. Strangely, a statement from Ms F[...]'s mother was taken by a sergeant Baninzi from Komani detectives about three months later in May 2020. It is unclear why this statement was not taken shortly after the incident. Furthermore, beyond saying that she and her mother made numerous follow ups with the police, there is no indication of whether or not any attempt was made to contact or talk to the relevant detective being sergeant Baninzi. In any event nothing is said about what exactly, in reporting the matter to the police, was expected of them in the sense of either an investigation for possible criminal prosecution as is the mandate of the police or whether the intention was to somehow get compensation from the police. In the latter event, how this was expected to result in some award of compensation is not dealt with. In any event, throughout, Ms F[...] knew from the first day, not only that her minor child had

been burnt but also that the burn wounds were caused by electrocution from illegally connected electricity.

[38] Two days later, Mr Masayimani also got electrocuted when he came into contact with live electric cables on 19 February 2020 in the same area of Aloe T Squatter Camp in Komani as he was walking to a nearby shop. He sustained bodily injuries as a result of which he was rushed to Dr Ndamase's surgery who treated him and transferred him to Frontier Hospital where he was admitted and received treatment for about three weeks. He had to attend numerous physiotherapy sessions until 2022 at Frontier Hospital. His left arm became permanently disabled. Just like Ms F[...], he knew from day one that the cause of his electrocution was the cables of the illegally connected electricity.

[39]. His case was, in the main, that before he consulted his attorney, he did not know that he had a right to institute civil proceedings pursuant to his electrocution. He also did not know the identity of his debtor. He is a lay person who all along regarded his electrocution as just an unfortunate incident. The respective section 3 notices were only issued on 5 and 6 October 2023, some three years and seven months later for both Ms F[...] and Mr Masayimani. There is no real reason apparent from the papers why these notices were not issued timeously other than the alleged ignorance about their right to institute civil claims due to their ignorance of the law and their socio-economic circumstances.

[40] There was also a contention by Ms F[...] and Mr Masayimani which went as follows. Mere knowledge of the fact that appellant is responsible for installation of electricity in certain areas of Komani is insufficient to meet the requirement of knowing the debtor. Merely knowing that the electric cables which caused the

electrocutions were connected to appellant's infrastructure was not sufficient to meet the requirement of knowing the debtor. They did not know who connected the electric cables in question to appellant's infrastructure. It was through the advice given to them by their attorney that they got to know that appellant had a legal duty to protect members of the community from being electrocuted due to illegal electricity connections. This is all because they are uneducated, unsophisticated and poor. They also did not know about the existence of section 3 of the Institution Act and its requirements.

[41] Both of them did not unequivocally deny knowing that appellant was responsible for the supply of electricity to certain areas of Komani. They also did not unequivocally deny knowing that the illegal electric cables were connected to appellant's infrastructure. It would have been quite surprising and even disingenuous in the extreme if they had claimed not to know that their own municipality was responsible for the supply of electricity in certain areas of Komani. This would be so because it is generally well known by all and sundry in the country that the major, if not the only suppliers of electricity the country over are municipalities and Eskom. This is so especially in informal settlements, townships and rural areas as it is the government that is responsible for service delivery in these areas. That knowledge does not need anyone to be sophisticated, employed, educated or not to be poor or even know the law.

[42] At the very least, it is knowledge that they could have acquired by taking reasonable steps to acquire the information. This specific issue is not addressed at all in their papers in that nowhere do they allege, with any degree of cogency, why they could not, even by exercise of reasonable care, have acquired this knowledge. For example, they could have gone to the police station in which one of the incidents

was reported to ask about their options. They did not do so. They could also have asked their ward councillor whose name was known to them or even gone to appellant's offices to make enquiries. They did not do so. They did not even take these basic steps which would have given them the basic information that they needed regarding the organ of state that could be responsible for the infrastructure to which the illegal connections were made. The issue of them being misled by appellant or anyone or the truth about the ownership of the substation to which the illegal connections were made does not even arise on the facts of this case. For more than three years they remained supine and did absolutely nothing at all until almost four years later. There is no proper explanation for this huge delay and for only giving notice that should have been given within six months as the legislature required, almost four years later. The period of delay is, in the circumstances, excessive with no adequate explanation. References to the lockdown due to the covid 19 declaration of the national state of disaster did not help either as the total shutdown was for a very limited period and was progressively eased to allow free movement of the people. The whole covid 19 issue is, in any event, nothing more than a red herring used to explain the huge gaps between the two incidents and the time at which action was ultimately taken.

[43] The legal position as regards section 3 of the Institution Act and its interplay with section 12 of the Prescription Act has recently been restated by the Constitutional Court in *Tembani*[6]. In that matter, writing a unanimous judgment of the court, Rogers J succinctly explained what the Constitutional Court has always said

[6] President of the Republic of South Africa and Another v Tembani and Others 2024 (9) BCLR 1152 (CC); 2025(2) SA 371 (CC) paras 84-86.

pertaining to both section 3 of the Institution Act and section 12(3) of the Prescription Act. He said:

> "[84] If, subject to the requisite actual or constructive knowledge by the plaintiff, the delictual debts in this case became "due" by the 18 August 2014 (as contemplated in section 3(2)(a) of the Institution Act), and if the plaintiff had the requisite knowledge by not later than 21 July 2015 (as contemplated in section 3(3)(a) of the Institution Act), they needed condonation in terms of section 3(4)(a) of the Institution Act, because their notices in terms of section 3(2) were only served in December 2018 and January 2019, more than six months after the debts became due. And if, by the time the condonation application was served in April 2019, the debts had prescribed, section 3(4)(b)(i) was an absolute bar to condonation.
>
> [85] Subject to the requisite actual or constructive knowledge by the creditor, a delictual debt becomes "due", within the meaning of section 12(3) of the Prescription Act and section 3(2)(a) of the Institution Act, once the debtor's wrongful and deliberate or negligent conduct has caused the creditor to suffer damage. That is when the creditor is entitled in law to institute action for the recovery of damages.
>
> [86] In terms of section 12(3) of the Prescription Act and section 3(3)(a) of the Institution Act, this is subject to the qualification that time does not start to run (that is the debt is not deemed to be "due") until the creditor has actual or constructive knowledge of the identity of the debtor and the "facts from which the debt arises". <u>The "facts" do not include that the debtor's conduct was wrongful or negligent or that the creditor has a right to sue the debtor, nor does it include legal conclusions that may be drawn from the facts</u>. This court has cited with approval the proposition that time starts to run against a creditor when it has "the minimum facts that are necessary to institute action" and that the running of prescription is not postponed until the creditor "becomes aware of the full extent of its legal rights". (My underlying)

[44] It was argued on behalf of Ms F[...] and Mr Masayimani that this matter is not about prescription and that prescription is a trial issue. That may very well be so. However, where an application for condonation in terms of the Institution Act is made

or has to be made, prescription has to be determined as part of the condonation application where it has been raised. This is so because where a debt has prescribed, a court has no discretion to grant condonation. I have already concluded that the explanations tendered for the delay were woefully inadequate by both Ms F[...] and Mr Masayimani and that unreasonable prejudice was apparent.

[45] In *Tembani*[7] the court further said:

> "If a creditor requires condonation in terms of section 3(4)(a) of the Institution Act and the debtor raises prescription as an objection in terms of section 3(4)(b)(i), the court *must*[8] determine prescription as part of the condonation application. Condonation is a threshold issue and section 3(4)(b)(i) makes prescription part of the determination of that threshold issue.
>
> This causes no prejudice to the creditor. If a debtor raises prescription in its answering affidavit, the creditor can, in its replying affidavit, advance any grounds of replication that may be available to it to neutralise prescription. If there are factual disputes, they can be referred to oral evidence. The fact that prescription can also be raised in a special plea is no reason not to deal with it as part of the creditor's condonation application."

[46] I understand this to mean that where prescription has been raised in a special plea and is raised in an application for condonation as is the case in this matter, it must be determined in the condonation application as it is an integral part of that application. It is not reserved for later determination during trial. This makes logical sense legally because where condonation has not been granted, there will be no trial as the applicant for condonation is, for all intents and purposes, non-suited. It becomes the end of the matter if the court finds, in a condonation application, that a claim has prescribed as prescription is dealt at that stage once and for all. In this matter, the debt has prescribed in that summons was served more than three years

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[7] Note 4 supra at paras 82-83.
[8] My emphasis.

after Ms F[...] and Mr Masayimani had knowledge of the debtor and the minimum facts necessary for their causes of action. As submitted on behalf of appellant, on their respective dates of electrocution, they knew who their debtor was and had the minimum facts required for them to champion their causes of action. In an event, and to the extent that they did not have knowledge of their debtor, they could have acquired such knowledge by the exercise of reasonable care as I said earlier. This, they dismally failed to do at their own peril. Their socio-economic status, their unsophistication, not knowing they had a right to sue the appellant, lack of knowledge about the Institution Act and their lack of education or insufficiency thereof all do not assist them as all these are not relevant considerations for a condonation application in terms of the Institution Act.

[47] They maintained that they have good prospects of success in the action on the merits of their claims. It is necessary to point out that the electrocutions in this case were as a result of illegal connections in circumstances in which the appellant was not the licensed supplier of electricity in that specific area. Therefore, this matter is distinguishable from electrocutions that occur as a result of either faulty connections in an area or some other fault in the infrastructure of an organ of state causing foreseeable and preventable danger to the members of the public in an area supplied with electricity by that organ of state. In this matter the appellant denies liability for injuries caused by electrocutions in an area for which it is not a licensee and has not provided electricity to.

[48] Therefore prospects of success can hardly be said to be good in circumstances in which the sole basis for the damages suffered is an illegal or even criminal conduct of unknown persons. Whether or not a duty of care for illegal connections in an area in which appellant is not even licensed for, is to my knowledge, not settled.

Their contentions about appellant having been notified about illegal connections also appear to be unsubstantiated. However, even if they were substantiated, the question of damages suffered due to vandalism of government infrastructure caused by criminality and general lawlessness is, at best, debatable. I do not know how organs of state could be expected to foresee and even prevent damages suffered in those circumstances.

Conclusion.

[49] To the extent that Ms F[...] and Mr Masayimani claimed that the illegal connections were reported to the employees of appellant before the incidents, there were no details provided. The illegal connections prior to the incidents were alleged to have been reported to unnamed employees of appellant. The members of the public who allegedly made the reports to appellant's employees were similarly not mentioned nor have they filed confirmatory affidavits. This raises questions about the reports having been made at all. This is besides the fact that to the extent that the reports were in writing, something that was not addressed by both Ms F[...] and Mr Masayimani, no copies of such reports were annexed to the papers. This again goes to show that the merits of their cases are not a foregone conclusion. It would in my view, have been strange and counter intuitive for members of Aloe T Squatter Camp community to report the illegal connections knowing full well that reporting it would result in their illegal source of electricity supply being cut off. These issues properly considered, buttress the point raised by the appellant about unreasonable prejudice in it being required to prove that reports it has no record of were in fact not made. In all these circumstances, the appeal must succeed.

Costs.

[50] On the *Biowatch* principle, Ms F[...] and Mr Masayimani instituted the actions to assert their constitutional rights against an organ of state. The law on illegal electricity connections, the damages suffered as a result thereof and liability therefor is not necessary settled. I am not aware of a matter in which damages suffered as result of illegal connections in an area for which an organ of state is not licensed to provide electricity were awarded. Therefore, while Ms F[...] and Mr Masayimani were unsuccessful, it would not be correct to mulct them with costs.

Results.

[51] In the result the following order is issued:

1. The appeal is upheld with no order as to costs.

2. The order of the court a quo is set aside and replaced with the following order:

    2.1 The applications for condonation are dismissed with no order as to costs.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree

D. POTGIETER

JUDGE OF THE HIGH COURT

I agree

A. BEYLEVELD

JUDGE OF THE HIGH COURT (ACTING)

Appearances

Counsel for the appellant	: Y. Malunga with R. Booysen
Instructed by	: Philip & Patners Attorneys
	c/o Yokwana Attorneys
	Makhanda
Counsel for the appellant	: V. Madokwe with L. Ntikinca
Instructed by	: N. Tyatyeka Attorneys
	c/o Msitshana Attorneys
	Makhanda
Date heard	: 10 November 2025
Date delivered	: 03 March 2026