IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2020-05850

Reportable: No
Of interest to other Judges: No
Revised: No
Date: 31 July 2026 N Strathern AJ
Signature: _____

In the matter between:

D[…] E[…] M[…], Applicant/Plaintiff

in her personal capacity and

on behalf of K[…] M[…]

and

THE MEMBER OF THE EXECUTIVE Respondent/Defendant

COUNCIL FOR HEALTH, GAUTENG PROVINCE

Heard on: 23 July 2026

Decided on: 31 July 2026

Coram: N Strathern AJ

Summary: Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 — section 3 — medical-negligence claim arising from cerebral palsy allegedly caused by intrapartum hypoxic-ischaemic injury — applicant's knowledge of birth asphyxia and later tentative suggestion of improper care — specialist medical evidence required to identify

causation and alleged breach of obstetric standard — first expert opinion inconclusive on negligence — later MRI and paediatric evidence identifying intrapartum hypoxia — applicant acquiring knowledge of material facts only when expert's report was available and explained in 2019 — defects in statutory notice served before debt became due condoned — defective service upon MEC rather than Head of Department — condonation granted for service defect — personal claim not prescribed.

JUDGMENT

N Strathern AJ

[1] The applicant seeks declaratory relief that she acquired knowledge of the material facts giving rise to her personal claim against the respondent on 25 October 2019 and that the notice of intended legal proceedings served on 23 August 2017 complied with section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act). Alternatively, she seeks condonation under section 3(4) of the Act for any late or defective service of that notice, including condonation for service upon the MEC rather than the Head of Department. The relief is sought in respect of the applicant's personal claim and the claim advanced in her representative capacity on behalf of K (the minor child).

[2] The respondent accepts that K's claim has not prescribed and does not oppose condonation in the applicant's representative capacity. Its opposition is confined to the applicant's personal claim, which it says prescribed before the issue and service of summons on 26 February 2020. The Respondent accepts that the action on behalf of the minor child has not prescribed in that she is under the age of 18 years and permanently mentally incapacitated for which the applicant's allegedly defective section 3 notice may be condoned.

[3] There are two issues that require discussion: when did the applicant require the requisite knowledge in respect of her claim and is condonation required in respect of the section 3 notice.

Background

[4] The application arises from the birth of K at Tembisa Hospital on 18 April 2013. The applicant was informed, approximately one week later, that the child had suffered birth asphyxia and permanent brain damage. The applicant alleges that she did not then know what caused the asphyxia or whether hospital staff had acted negligently.

[5] In September 2014, while attending a neuro-clinic with K, the applicant was informed by a third party also attending at the clinic that the child's condition might have resulted from improper care by hospital staff during delivery. The applicant consulted her attorneys on 10 September 2014. She was advised that expert reports would be necessary to determine whether she had a claim.

[6] The attorneys obtained the hospital records and sought an opinion from Dr Pierre Davis, a gynaecologist. In an email dated 30 May 2016, Dr Davis expressed the view that the clinical picture was suggestive of hypoxia during labour but that he could not conclude, on the evidence available to him, that the hospital staff had been negligent. The applicant says that this opinion did not give her a basis to believe that she had a claim founded on negligence.

[7] A notice of intended legal proceedings was served on 23 August 2017 by the applicant's attroneys. The notice contained allegations of negligent care, inadequate fetal monitoring and causal injury. The applicant says that the notice was served protectively while the investigation was

ongoing, and before later specialist evidence supplied a coherent factual explanation of the injury. The papers also record that the applicant returned to the attorneys in January 2018 after receiving a registered letter. The extent and substance of her engagement with the attorneys before and after service of the notice form part of the factual context.

[8] An MRI was completed in June 2018 and reported upon by Prof Savvas Andronikou in September 2018.

[9] On 11 July 2019, Dr Humphrey Lewis, a paediatrician, examined K and concluded that the adverse outcome was related to an intrapartum hypoxic-ischaemic condition, neonatal encephalopathy and seizures, resulting in cerebral palsy. The applicant's case is that the report, when made available and explained to her on 25 October 2019, first supplied the material factual basis for her claim.

[10] The combined summons was issued on 21 February 2020 and was served on the respondent on 26 February 2020. The respondent thereafter delivered a plea and special plea, contending that the applicant's personal claim had prescribed and that there had been non-compliance with the statutory notice provisions.

[11] The applicant accordingly brought the present application. The respondent accepts that the claim pursued by the applicant on K's behalf has not prescribed and that the defective notice may be condoned in that representative capacity. The dispute before this Court concerns the applicant's personal claim: whether she had acquired, or could by reasonable care have acquired, the knowledge contemplated in section 3(3)(a) of the Act and section 12(3) of the Prescription Act 68 of 1969 (the Prescription Act) before the date on which she relies.

[12] The respondent alleges that the applicant knew the identity of the debtor from her discharge from Tembisa Hospital in April 2013, knew that K had suffered birth asphyxia and a brain injury, was told in September 2014 that the condition might have resulted from improper delivery care, consulted attorneys and caused hospital records to be obtained, and received Dr Davis's May 2016 opinion that the clinical picture suggested hypoxia during labour. The respondent contends that these facts, alternatively the facts reasonably obtainable through further investigation, meant that the applicant's personal claim prescribed before the service of summons.

[13] Although both parties referred the Court to medico-legal reports, no finding is made in this judgment on the merits of the competing expert opinions, including negligence, factual causation, legal causation or quantum. The reports have been considered only for the limited purpose of determining when the applicant acquired, or could by the exercise of reasonable care have acquired, knowledge of the material factual matrix necessary to her delictual claim, particularly the facts bearing on the cause of K's injury and the possible role of the conduct of the hospital staff. The ultimate resolution of the expert disputes remains a matter for the trial court.

Applicable legal principles

[14] The Act's preamble states that its purpose is to regulate and harmonise the prescription periods of debts for which certain organs of state are liable and to make provision for notice requirements before legal proceedings are instituted. The notice requirement gives an organ of state the opportunity to investigate a claim, assess its potential liability and decide responsibly whether to settle or defend it before litigation costs are incurred.

[15] That purpose must be pursued consistently with section 34 of the Constitution, which guarantees the right to have legal disputes resolved in a fair public hearing, and section 39(2), which requires legislation to be interpreted in a manner promoting the spirit, purport and objects of the Bill of Rights. The Act is not a technical trap. It protects a legitimate public interest in early notice while preserving a genuine litigant's access to court.

[16] Section 3(3)(a) provides that, for notice purposes, a debt is not regarded as due until the creditor knows the identity of the organ of state and the facts giving rise to the debt. The creditor is deemed to have knowledge only when those facts could have been acquired by exercising reasonable care. Section 12(3) of the Prescription Act 68 of 1969 is materially similar.

[17] In *Links v Member of the Executive Council, Department of Health, Northern Cape Province* 2016 (4) SA 414 (CC), the Constitutional Court held that a party relying on prescription in a professional-negligence matter must establish both the facts which the claimant was required to know before prescription could commence and the claimant's knowledge of those facts. The relevant facts are the material facts from which the debt arose. In this matter the onus in relation to the claim of prescription lies with the respondent.

[18] It held that a plaintiff must have sufficient facts to cause reasonable grounds for suspecting that medical staff were at fault and for seeking further advice. The Court also recognised that a person without medical knowledge cannot ordinarily know the cause of an adverse medical outcome without relevant professional advice.

[19] In essence the plaintiff must possess enough facts to give reasonable grounds for suspecting that medical staff were at fault and to cause the plaintiff to seek further advice. Until then, the claimant cannot be said to have the statutory knowledge of the facts from which the debt arises.

[20] *Links* correctly identifies the further principle that negligence and causation in a delictual medical-negligence claim have factual as well as legal elements. A plaintiff who lacks medical knowledge cannot ordinarily know the cause of an adverse medical condition without an opportunity to consult an appropriate medical professional or specialist. The statutory enquiry remains one of knowledge of material facts, not knowledge of legal conclusions.

[21] In *Loni v Member of the Executive Council, Department of Health, Eastern Cape, Bhisho* 2018 (3) SA 335 (CC) the court applied the *Links* principle but reached a different result on markedly different facts. The plaintiff personally experienced an infected and oozing wound, persistent pain, inadequate treatment and possessed the hospital file. Those facts made it objectively unreasonable to continue believing that adequate treatment had been received. They supplied reasonable grounds to suspect fault and seek advice before the eventual expert opinion. The case confirms that prescription does not await definitive expert proof where the claimant's personal knowledge already supplies facts indicating fault.

[22] *Links* and *Loni* are therefore complementary. The former applies where expert evidence is required to identify the medical mechanism of injury and possible professional fault. The latter applies where the plaintiff's personal knowledge of the treatment and its consequences already make substandard care objectively apparent. This matter falls within the *Links* category.

[23] The comparable, High Court decision in *Maleshiyo v MEC for the Department of Health, Eastern Cap*e [2021] JDR 0476 (ECB) concerned a mother's claim arising from cerebral palsy. It held that a lay mother who had only a concern about her child's condition did not have the requisite knowledge until medical records and specialist opinion identified the relevant obstetric facts. The decision illustrates the practical operation of *Links* in an obstetric negligence scenario.

Application to the facts

[24] It must be emphasised that medical negligence is not ordinarily established merely because a plaintiff has suffered, or observed, an adverse medical outcome. It requires expert evidence to identify the medical mechanism of injury, distinguish competing causes for the injury, identify the applicable professional standard, and determine whether the conduct of the professionals fell below the required standard. A layperson cannot perform that task. Nor can attorneys, without competent medical assistance, infer from an outcome as serious as cerebral palsy what occurred during labour, whether it was avoidable, and whether any omission by the treating staff caused it.

[25] The complexity of the medical assessment is further demonstrated by the respondent's own reliance on six experts: a paediatrician, medical geneticist, obstetrician and gynaecologist, radiologist, paediatric neurologist, and paediatrician/neonatologist. Their opinions require input from further experts. Dr Sanyane deferred the timing of the brain injury and the management of the pregnancy, labour and delivery to an obstetric expert; Dr Bhengu deferred any assessment of negligence to an obstetrician and neonatologist; Dr Mteshana likewise deferred the timing of the injury and the relevant management issues to obstetric and neonatal experts; and Dr Kamolane indicated that further specialist

assessment was required to determine the probable cause and timing of the brain injury. Even the respondent's obstetric expert deferred aspects of the neonatal outcome to paediatric expertise. This multiplicity of disciplines and interdependent opinions underscores that neither the applicant, as a layperson, nor her attorneys could reasonably have identified the factual basis for negligent medical treatment without obtaining and evaluating appropriate expert evidence.

[26] This matter falls within the *Links* category. The applicant's knowledge in 2013 was knowledge of harm: birth asphyxia and brain injury. It did not reveal whether the asphyxia was unavoidable, genetic, infective, antenatal, neonatal or attributable to intrapartum management. The 2014 neuro-clinic comment was expressly tentative. It gave the applicant a reason to investigate, and she acted on that concern by consulting attorneys.

[27] The record itself was incomplete and, in material respects, unclear. The CTG traces were unavailable. The Apgar scoring chart and resuscitation documents were absent. Parts of the partogram and clinical notes were illegible. Some laboratory information was incomplete. Neither the applicant, as a layperson, nor her attorneys could determine from the adverse outcome and the raw record whether intrapartum management departed from the proper professional standard.

[28] Dr Davis's May 2016 opinion did not convert the initial suspicion into the material knowledge required by the Act. It identified a clinical picture suggestive of intrapartum hypoxia, but did not conclude that staff negligence was responsible. It was reasonable for the applicant to understand that no reliable factual basis for a negligence claim had then been established.

[29] Dr Davis did not say merely that the evidence was incomplete in some peripheral respect. He was asked to address medical negligence and could not, on the available record, do so. It was reasonable for the applicant, a layperson, to understand that she did not then have a reliable factual basis on which to attribute K's disability to negligent hospital care.

[30] The subsequent expert evidence supplied the causal context. Prof Andronikou's MRI report identified a global hypoxic-ischaemic injury in a term-maturity brain and did not reveal congenital infection or malformation. Dr Lewis linked the injury to an intrapartum hypoxic-ischaemic condition, neonatal encephalopathy and seizures, resulting in cerebral palsy. The medical significance of that conclusion is that the injury was placed in the period during which the mother and child were under the care of the health care professionals responsible for the delivery and birth of K, rather than being explained by a congenital abnormality or a pre-existing genetic condition.

[31] Dr Stevens's later obstetric report identified the alleged departures from proper care: failure to recognise and prioritise a high-risk labour, inadequate fetal monitoring, deficient management of prolonged labour, poor documentation and delay in detecting or delivering a distressed fetus. The report was obtained after summons and does not retrospectively determine the commencement of prescription. It nevertheless confirms that the alleged negligence concerns specialist issues of fetal monitoring, labour progress, fetal compromise and timing of delivery.

[32] The respondent's experts raise alternative possibilities, including neonatal hypoglycaemia, congenital pneumonia and the difficult Caesarean

delivery. That disagreement reinforces rather than weakens the conclusion that the medical cause of the injury and the role of hospital conduct could not be ascertained by the applicant or her attorneys without specialist evidence. The ultimate expert dispute remains for trial.

[33] The August 2017 notice contained detailed allegations of negligent care. It is the respondent's most substantial answer to the applicant's 2019 knowledge case. But the notice was drafted by attorneys while the medical investigation remained incomplete and after Dr Davis had been unable to conclude negligence. It is properly characterised as an anticipatory or precautionary notice designed to protect a potential claim. Its service does not inevitably establish that the applicant personally had actual or deemed knowledge of every material fact required by section 3(3)(a).

[34] The respondent's submission that the 2014 comment and attorney consultation started prescription confuses a reason to investigate with knowledge of the material facts. That conflation is inconsistent with *Links*. The applicant did seek assistance. The resulting medical investigation initially produced an inconclusive opinion. Her conduct cannot fairly be characterised as a failure to act reasonably merely because she did not independently resolve technical medical questions that remained unresolved for the professionals.

[35] Nor does the section 3 notice of August 2017 establish that the applicant had actual knowledge of negligence. The notice was a prudent protective step taken by her attorneys while medical investigation continued. It cannot be treated as proof that she personally knew the factual basis of fault and causation.

[36] The respondent bears the onus of proving prescription. It has not shown that the applicant possessed, before the later expert investigation, sufficient facts to form reasonable grounds for believing that staff negligence caused the injury. The respondent's own expert material confirms that causation remains medically complex: some experts recognise hypoxic injury around birth, others raise possible contributions from hypoglycaemia, congenital pneumonia or the difficult Caesarean section.

[37] The Court need not decide whether the anticipatory notice, standing alone, fully complied with section 3(2). The applicant seeks alternative condonation. If the notice was premature, incomplete or served upon the incorrect statutory functionary, section 3(4) permits the Court to cure the non-compliance once the statutory requirements are met.

[38] I find that the applicant acquired the requisite knowledge when Dr Lewis's report was available and explained to her on 25 October 2019. The respondent has not established that, before that date, the applicant had, or through reasonable care must be deemed to have had, sufficient material facts to suspect that negligent medical management caused the child's disability. The personal debt has not prescribed.

Condonation, conditions and leave to proceed

[39] Section 3(4)(b) requires the Court to be satisfied that the debt remains extant, good cause exists and the organ of state has not been unreasonably prejudiced. In *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA), the Supreme Court of Appeal held that good cause is a contextual enquiry in which the explanation, prospects, *bona fides*, responsibility for the delay and the interests of justice must be considered together.

[40] The first requirement has been met for the reasons already given. The personal claim has not prescribed and the representative claim is, in any event, accepted to be extant.

[41] The applicant has established good cause. She sought legal assistance after receiving the 2014 information. Records and expert opinions were obtained. The first specialist opinion was inconclusive. The applicant's position is strengthened by the fact that, when the first medical specialist considered the available material, he could not reach a negligence conclusion. It would be artificial to find that a lay person had knowledge of medical fault at a point when the gynaecologist consulted by her attorneys could not identify it.

[42] The notice served in 2017 was protective and anticipatory. The chronology reflects an attempt to preserve and investigate a complex medical-negligence claim, not wilful or reckless disregard of the Act.

[43] It follows that the applicant's evidence that the relevant knowledge was acquired only when Dr Lewis's report was available and explained to her is consistent with the objective complexity of the medical material. I accept that evidence. For purposes of section 3(3)(a) of the Act and section 12(3) of the Prescription Act, the applicant acquired the requisite knowledge on 25 October 2019.

[44] The applicant's prospects are sufficient. Her expert evidence identifies an arguable case of inadequate fetal monitoring, deficient management of prolonged labour and delayed delivery. The respondent's contrary expert evidence creates a triable issue; it does not extinguish prospects for the purposes of section 3(4).

[45] The respondent has not demonstrated unreasonable prejudice. It received a detailed notice in August 2017, has access to the hospital records, has pleaded over and has commissioned multiple expert reports. It has not identified a witness, document or forensic opportunity lost because of any timing, content or service defect in the notice.

[46] There remains, however, a separate question of '*service'*. The parties' joint practice note records that the applicant seeks condonation for service of the notice on the MEC rather than on the Head of Department.

[47] The personal claim remains extant, the applicant has shown good cause for the defective service, and there is no evidence of unreasonable prejudice. The notice reached the MEC, the executive authority of the department responsible for the hospital staff, and the respondent has in fact investigated, pleaded and obtained expert opinions. In comparable circumstances, *Mafuduka v MEC for Health, Eastern Cape Provincial Government* 2023 JDR 0979 (ECB) confirms that a defect in service upon the proper departmental functionary is addressed by the condonation enquiry, which turns materially on actual prejudice.

[48] I am satisfied that all three requirements in section 3(4)(b) have been met. Condonation should therefore be granted. Under section 3(4)(c), conditions should be imposed to cure any residual notice defect and ensure that the Head of Department receives a clear account of the factual basis on which the claim now proceeds.

[49] Within 20 days of this order, the applicant shall serve on the Head of Department: Gauteng Department of Health:

a. the notice dated 15 August 2017;
b. a copy of this judgment and order;
c. a concise supplementary notice identifying the alleged intrapartum hypoxic-ischaemic injury and the alleged failures in fetal monitoring, labour management and timely delivery; and
d. the available reports of Prof Andronikou, Dr Lewis and Dr Stevens.

[50] The respondent may, within 30 days after such service, deliver any consequential amendment to its plea. The action shall otherwise proceed in the ordinary course.

The following order is made:

[1] In terms of section 3(4)(b) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, the applicant's non-compliance with sections 3(1), 3(2) and 4(1) of the Act is condoned in respect of both her personal claim and the claim pursued on behalf of K[…] M[…].

[2] In terms of section 3(4)(c) of the Act, the applicant is granted leave to proceed with the existing action, subject to the conditions in paragraphs 49 of this judgment.

[3] The costs of this application are costs in the action.

N STRATHERN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the Applicant:
Adv T Mirtle
Instructed by:
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Attorney: Andrew Holt

For the Respondent:
Adv R Ram SC
Instructed by:
The State Attorney, Johannesburg
Attorney: Brunhilda Mokgohloa