CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 54/17

In the matter between:

MZWANDILE OWEN LONI Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF HEALTH, EASTERN CAPE, BHISHO** Respondent

Neutral citation:	*Loni v Member of the Executive Council, Department of Health, Eastern Cape, Bhisho* [2018] ZACC 2
Coram:	Mogoeng CJ, Zondo DCJ, Cameron J, Froneman J, Jafta J, Kathree-Setiloane AJ, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ
Judgments:	The Court
Decided on:	22 February 2018
Summary:	Prescription Act 68 of 1969 — section 12(3) — medical negligence claim — knowledge of the facts upon which a claim is based — objective assessment — reasonable person — correctly applied by lower courts

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Full Court of the High Court of South Africa, Eastern Cape Division, Grahamstown):

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

JUDGMENT

THE COURT:

Introduction

[1] This is an application for leave to appeal against an order of the Supreme Court of Appeal. That Court had refused leave to appeal against a decision of the Full Court of the High Court of South Africa, Eastern Cape Division, Grahamstown[1] (Full Court).

[2] The applicant, Mr Mzwandile Loni, had instituted proceedings against the respondent, the Member of the Executive Council of the Department of Health, Eastern Cape, Bhisho (MEC), in the High Court of South Africa, Eastern Cape Local Division, Bhisho[2] (High Court) for damages arising out of the alleged negligence of

[1] *Loni v Member of the Executive Council, Department of Health, Eastern Cape Bhisho*, unreported judgment of the High Court of South Africa, Eastern Cape Division, Grahamstown, Case No CA338/2015 (13 October 2016) (Full Court judgment).

[2] *Loni v Member of the Executive Council, Department of Health, Eastern Cape Bhisho*, unreported judgment of the High Court of South Africa, Eastern Cape Local Division, Bhisho, Case No 242/12 (26 March 2015) (High Court judgment).

doctors and nurses in the MEC's employ. The applicant was unsuccessful in the High Court and his appeal to the Full Court was dismissed.

[3] The Chief Justice directed the parties to file written submissions firstly, on whether this Court's decision in *Links*[3] would find application in this case and secondly, whether leave to appeal should be granted and the remedy this Court should grant. The parties complied with the directions and the matter was decided without oral argument.[4]

Background

[4] The applicant was admitted to Cecelia Makiwane Hospital on 6 August 1999 after sustaining a gunshot wound in his left buttock which shattered his left femur. The bullet was lodged in his body. Upon arrival at the hospital, he was given an injection for pain and x-rays were taken. The next morning, the doctors arrived, perused his file and left without saying anything to him. On 10 August 1999, a Denham pin was inserted to alleviate the pain. On 23 August 1999, an operation was performed in order to insert a plate and screws on his femur. The bullet was not removed.

[5] He was later discharged and given painkillers, crutches and medical supplies to clean the wound. He was also given his medical file so that if the painkillers or the wound cleaning items ran out, he could visit the nearest clinic. When he visited the clinic, he was referred to the hospital. During January or February 2000, he went to the hospital. He was examined by a doctor who took x-rays and told him to use one crutch instead of the two. After some time, the gunshot entry wound healed. However, the operation wound took a long time to heal. Pus oozed out of the wound and an infection set in. He was at home when he noticed yarn in the wound but was

[3] *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656.

[4] This matter was decided in terms of rule 19(6)(b) of the Constitutional Court Rules which reads "[a]pplications for leave to appeal may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself."

unable to remove it. He returned to the hospital and the pin was removed. The wound closed and a month later the pus stopped oozing.

[6] During December 2000, and while the applicant was at initiation school, his leg became swollen and he removed the bullet himself. He returned to the hospital and he was informed his leg was fine. At some stage the applicant developed a limp.

[7] In 2008, the applicant secured employment at the South African Police Services (SAPS) as a clerk. As a result of his employment, he was able to secure medical insurance. He thereafter approached doctors in private practice to establish the reason for his limp and constant pain in his leg. He was informed that he was disabled. He was referred to Dr Olivier, an orthopaedic surgeon. In November 2011, Dr Olivier considered his hospital file and advised him that his condition was attributable to medical negligence.

Litigation history

High Court

[8] The applicant instituted proceedings in the High Court against the MEC for damages arising out of the treatment he had received at Cecelia Makiwane Hospital. The applicant's claim against the MEC was founded in contract and, only in the alternative, in delict.

[9] The MEC, in his plea, denied that the doctors and nurses were negligent. The MEC also raised a special plea of prescription. He pleaded that the applicant's claim had prescribed in terms of the Prescription Act[5] since the summons was only served on 20 June 2012. Furthermore, he pleaded that the applicant had not complied with section 3 of the Legal Proceedings Act[6] as he had failed to give the required notice

[5] 68 of 1969.

[6] Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (Legal Proceedings Act). Section 3 provides that:

before instituting the proceedings. The applicant denied that his claim had prescribed as alleged. He submitted that before he met Dr Olivier, he was unaware that he had a claim for damages against the MEC. He averred that he only acquired that knowledge in November 2011 when Dr Olivier advised him that the medical staff at the hospital had been negligent.

[10] During the trial, Dr Olivier testified on behalf of the applicant. He stated that the applicant's treatment from 1999 was sub-standard in many respects. For instance, he criticised the medical team for failing to prescribe antibiotics, clean the wound and remove the dead, infected tissue. Dr Olivier stated that the development of chronic osteitis (inflammation of the bone) could have been prevented by the application of standard medical care. There was no proper assessment of the wound and the applicant was not observed during the material times notwithstanding the fact that he was a high-risk category patient. The oozing of pus should have been investigated urgently, as it was a sign that the wound was infected. Dr Olivier concluded that all this resulted in the applicant developing osteitis, involving the proximal 50% of the femur, and he also developed advanced degenerative changes of the left hip joint. In the same proceedings the MEC did not adduce any evidence.

[11] The High Court considered the special plea raised by the MEC. Regarding the plea in terms of section 12(3) of the Prescription Act,[7] the High Court held that the

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"(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 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) 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)."

[7] Section 12(3) provides that:

"deemed knowledge" imputed to the "creditor" requires the application of an objective standard rather than a subjective one. In order to determine whether the applicant exercised "reasonable care" his conduct must be tested by reference to the steps which a reasonable person in his position would have taken to acquire knowledge of the facts.

[12] The High Court held that the applicant had acquired the knowledge to enable him to institute proceedings long before he met Dr Olivier. It relied on the fact that the wound was still oozing pus after the applicant was discharged; he had removed the bullet himself; he continued to experience pain; was limping; and that he was given his medical file when he was discharged. It further held that the applicant could have gone back to the hospital or to another hospital in order to get another assessment. The Court held that a reasonable person would not have waited for seven years in order to institute proceedings and that a reasonable person would not have endured pain for seven years before seeking help to find out the cause of the pain.

[13] The High Court therefore upheld the special plea and dismissed the applicant's claim.

Full Court

[14] The applicant was granted leave to appeal to the Full Court. That Court held that it was evident that the applicant's condition and the wound became worse over time. When he was discharged in October 1999, he had a visible infection with pus oozing from the operation site. This situation did not change until the fixtures were removed in 2001. For years, thereafter, he experienced pain. The Court held that it was inconceivable that the applicant could have thought he had received adequate medical treatment after all his experiences. The pain he experienced, coupled with the

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"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."

infection of the wound and oozing of pus, must have been an indication that the medical staff had failed to provide him with proper care and treatment.

[15] The Full Court concluded that the applicant had all the necessary facts, such as his personal knowledge of his maltreatment and a full record of his treatment, or lack thereof, as contained in his hospital file which gave rise to his claim. The Court further held that the applicant's knowledge constituted reasonable grounds for suspecting fault that would justify him seeking further advice. This knowledge was sufficient for him to act and in fact it was this same information that caused him to ultimately seek further advice in 2011. Moreover, the Court relied on *Links* and held that although the applicant did not know the causative link between the known breaches of contract and the harm which he knew that he had suffered, knowledge of causative negligence is not required for purposes of section 12(3) of the Prescription Act. The Full Court thus dismissed the appeal.

Supreme Court of Appeal

[16] An application for leave to appeal to the Supreme Court of Appeal was unsuccessful as the requirements for special leave to appeal were not satisfied.

In this Court

[17] The applicant submits that the High Court and the Full Court failed to take into account the fact that when he was discharged in 2001, a medical professional informed him that his leg was fine and that he just needed to exercise it. He avers that the mere possession of the hospital file did not mean that he had knowledge of its content. Instead, he had been told to present the file at the nearest clinic when he needed new bandages and swabs. Therefore, the file would be used to facilitate the provision of medical supplies and appropriate treatment. The applicant submits that both courts erred in finding that he had failed to act as a reasonable person would have acted in his shoes. He contends that as a layperson he could not have suspected that the doctors at the hospital caused him any harm at all especially when they had told

him he was fine and fit. The applicant further contends that both courts denied him his right to a fair trial by placing the onus on him to show what he had done over a period of more than seven years to enforce his claim against the MEC.

[18] In the alternative and in light of this Court's judgment in *Links*, the applicant seeks leave to appeal to the Supreme Court of Appeal and to place further evidence before that Court. This evidence includes the medico-legal report prepared by an orthopaedic surgeon.

[19] The MEC opposes the application and contends that both courts correctly applied the provisions of section 12(3) of the Prescription Act. Regarding the further evidence sought to be adduced, the MEC contends that the application does not satisfy the requirements for the lodging of further factual material in accordance with the provisions of rule 31[8] of this Court.

Leave to Appeal

[20] Constitutional issues are implicated because the matter involves an interpretation of legislation, namely the Prescription Act, which limits the applicant's fair trial right in terms of section 34 of the Constitution.[9] Whether it is in the interests of justice to grant leave to appeal is linked to the merits of the matter.

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[8] Rule 31 provides that:

> "(1) Any party to any proceedings before the Court and an *amicus curaie* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
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> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification."

[9] *Links* above n 3 at para 22. Section 34 of the Constitution provides that:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

Merits

[21] The correct interpretation of the provisions of section 12(3) of the Prescription Act and the application of the relevant principles, have been dealt with authoritatively by this Court in *Links*.[10]

[22] On 26 June 2006, the applicant in *Links* was treated at the Kimberley Hospital for a dislocated left thumb. His left hand and forearm were placed in a plaster of Paris cast and he was told to return in ten days. The applicant returned to the hospital twice, complaining of pain. He was eventually admitted and on 5 July 2006, he underwent surgery during which his left thumb was amputated. He had to undergo three further operations for the debridement of the left thumb. Upon being discharged at the end of August 2006, he was informed by a doctor employed at the hospital, that he might permanently lose the use of his left arm. It was only during September 2006, when his left hand "clawed", that the full extent of the damage became apparent. The applicant alleged he was never informed why his thumb needed to be amputated, what the cause of his problems was, nor the reason he lost the use of his left hand. The applicant approached the Legal Aid Centre for assistance in December 2006. However, Legal Aid only referred the applicant to consult with his lawyers a week before the expiry of the three year prescription period.

[23] In *Links*, this Court found that in order for a party to successfully rely on a prescription claim in terms of section 12(3) of the Prescription Act, he or she must first prove "what the facts are that the applicant is required to know before prescription could commence running" and secondly, that "the applicant had knowledge of those facts".[11] The first issue that this Court considered in *Links* was "what [were] the facts from which the debt arose". It explained that these would be the "facts which are material to the debt".[12] This Court opined that it would be setting the bar too high to require knowledge of causative negligence. In answer to this issue,

[10] Id at para 23.

[11] Id at para 24.

[12] Id at para 30.

this Court held that in cases involving professional negligence, the facts from which the debt arises are those facts which would cause a plaintiff, on reasonable grounds, to suspect that there was fault on the part of the medical staff and that caused him or her to "seek further advice".[13] The Court held that it would be unrealistic to expect a party, with no knowledge of medicine, to have knowledge of the facts of his condition, without seeking professional medical advice.[14]

[24] In applying those principles to the facts before it, in *Links*, this Court held that the applicant would have to have had "knowledge of [the] facts [which] would have led him to think that possibly there had been negligence and that this had caused his disability".[15] This Court placed emphasis on the fact that the applicant was unable to acquire knowledge of the material facts from any medical doctor or nurse independent of the hospital until he was discharged.[16] This Court decided in favour of the applicant, as it found the claim had not prescribed as the applicant "did not know or have reasonable grounds to suspect" that it was the medical staff's negligent treatment that led to the amputation and the loss of the use of his left hand.[17]

[25] The main finding of this Court was that:

> "However, in cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises."[18]

[13] Id at para 42.

[14] Id at para 47.

[15] Id at para 45.

[16] Id at paras 29 and 49.

[17] Id at para 50.

[18] Id at para 42.

[26] It is appropriate to point out that the facts in *Links* are entirely distinguishable from the facts of this matter. In *Links*, the claimant plainly required expert medical opinion, firstly, in order to establish that the treatment that he had received had been negligent, and secondly, in order to draw the causative link between the harm suffered and the negligent treatment.

[27] It was in this context that this Court in *Links* stated:

> "It seems to me that it would be unrealistic for the law to expect a litigant who has no knowledge of medicine to have knowledge of what caused his condition without having first had an opportunity of consulting a relevant medical professional or specialist for advice. That in turn requires that the litigant is in possession of sufficient facts to cause a reasonable person to suspect that something has gone wrong and to seek advice."[19]

[28] As previously mentioned, the applicant's claim against the MEC was founded in contract and alternatively in delict. The alternative claim fell away by virtue of the MEC having admitted the contract. The matter fell to be adjudicated upon the basis of the main claim founded in contract.

[29] Accordingly, and whilst the allegations relied upon by the applicant refer pertinently to alleged negligent acts, these allegations in essence amount to an allegation that the MEC's employees acted in breach of the contract by failing to afford the applicant appropriate treatment and care, this plainly being a term of the admitted contract.

[30] The debt claimed by the applicant arose from the breach of the contract by the employees of the MEC with regard to his care and treatment and upon him having suffered harm as a result thereof. The focus by the applicant on his lack of knowledge of the development of osteitis was not the correct focus of the investigation in regard to this issue. The applicant, on his own evidence, had received sub-standard care and

[19] Id at para 47.

treatment, had suffered harm as a result thereof and this was, on an appropriate assessment of his evidence, plainly apparent to him long before the issue of osteitis arose and the link to such sub-standard care, treatment and harm being dealt with by expert medical opinion. The authorities are clear. It is not necessary for the extent of the harm to be known, the debt arises once harm has indeed been suffered.[20]

[31] In this regard, the uncontroverted evidence of the applicant was:

(a) He matriculated in 2001, was employed by the Department of Environmental Affairs and Tourism, then with a private company for some time, and subsequently was employed by the SAPS in September 2008.

(b) The applicant was still in the employ of the SAPS as a clerk in Law Management.

(c) In casualty or after admission the applicant was given an injection to stabilise pain but nothing else.

(d) After x-rays were taken, he was taken to a ward and spent the night wearing the same clothes, including the jeans, presumably through which he had been shot.

(e) His wound was not cleaned that night.

(g) The following morning, a doctor did ward rounds and perused a folder but did not communicate with him.

(h) The applicant was admitted to hospital on 6 August 1999 and remained there for a period of two to three months during which time an operation was performed. The wound turned septic and oozed pus.

[20] *Harker v Fussell* 2002 (1) SA 170 (T) at 173E-174B.

(i) Notwithstanding that the wound worsened, the applicant was discharged from hospital on 10 October 1999 in a bad condition with the wound not closed.

(j) Notwithstanding the applicant's condition, he was merely given pain medication and items to clean the wound and was instructed to go to the nearest clinic if they ran out.

(k) The applicant returned to the hospital in the first months of 2000, saw a doctor in the orthopaedic section, was referred for x-rays and was merely advised, it seems, to walk around so that the wound could close and to use only one crutch whilst walking.

(l) The applicant enquired why he was not treated because the wound was still oozing but he did not get a response from the doctor.

(m) The wound expanded and the applicant saw "yarn" in the wound which he tried to pull out. It was only once the pin was removed that the wound closed and the oozing stopped.

(n) The applicant continued experiencing pain in his leg.

[32] The objective assessment, which was appropriately applied by both courts, established that a reasonable person in the position of the applicant would have realised that the treatment and care which he had received was sub-standard and was not in accordance with what he could have expected from medical practitioners and staff acting carefully, reasonably and professionally. On an assessment of the applicant's evidence, it is clear that by December 2000, he had already suffered significant harm (leaving aside the question of osteitis), and it would have been apparent from a reasonable assessment that the pain and suffering which he had endured was a direct result of the sub-standard care which he had received.

[33] The applicant was discharged from hospital for the second time during July 2001. Upon his discharge, he still experienced pain in his leg and was limping. He was given his hospital file. There is no evidence of what transpired, or of the applicant's actions, between 2001 and 2008. In 2008, he consulted a number of medical practitioners and was eventually advised that he was disabled. In 2011, he was advised by Dr Olivier that the medical staff at the hospital had been negligent. The applicant submits that he was only able to consult independent medical professionals in 2008 after he had secured medical insurance.

[34] 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 with 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 had 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 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.

[35] 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.

[36] With regard to the application to introduce the medico-legal report of Mr Berkowitz, it is appropriate to point out that a bundle of the relevant reports was handed to the High Court at the hearing and upon a query by the Court whether such reports went in by agreement as evidence, the applicant's advocate informed the Court that the reports were merely what they purport to be and not evidence. The applicant and his representatives were accordingly, at all times, aware that the relevant reports did not constitute evidence before the Court but made no attempt to address this.

[37] In any event, the medico-legal report of Mr Berkowitz can establish no more than that Mr Berkowitz expressed a view that the treatment received by the applicant was not negligent. The report does not deal with the extensive factual evidence that the applicant adduced during the court proceedings and is irrelevant to an assessment of the objective facts relied upon in support of the finding by the court *a quo* that the claim had prescribed.

[38] This is a sad matter that exhibits the bad treatment the applicant was subjected to by those who had an obligation imposed by the Constitution to provide proper health care for him. Unfortunately for the applicant, and as demonstrated, *Links* does not assist him.

[39] There are no prospects of success on appeal in this matter and it would not be in the interests of justice to grant leave to appeal.

Condonation

[40] There are two condonation applications, by the applicant and the MEC. The applicant applies for condonation for the late filing of his application for leave to appeal. The MEC applies for condonation for the late filing of her notice of opposition and replying affidavit. In both instances, the reasons advanced were reasonable and the delay slight, as such, the applications for condonation should be granted.

Order

[41] The following order is made:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs

For the Applicant:	S S W Louw instructed by Niehaus McMahon Inc
For the Respondent:	E A S Ford SC and S J Swartbooi instructed by the State Attorney