



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 29/15

In the matter between:

DIRK LINKS

Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT
OF HEALTH, NORTHERN CAPE PROVINCE**

Respondent

Neutral citation: *Links v MEC for Health, Northern Cape* [2016] ZACC 10

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J

Judgment Zondo J (unanimous)

Heard on: 25 August 2015

Decided on: 30 March 2016

JUDGMENT

ZONDO J (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J and Wallis AJ concurring):

Introduction

[1] The applicant has applied for leave to appeal against a judgment and order of a Full Court of the Northern Cape Provincial Division of the High Court¹ (Full Court) in terms of which that Court dismissed his appeal with costs. The appeal was against an order of a Judge of that Division, Mamosebo AJ² (High Court), which related to the applicant's claim for damages against the respondent. The applicant's claim was held by the High Court to have prescribed. For that reason, the High Court dismissed the applicant's application for the condonation of his failure to comply with the requirements of section 3 of the Institution of Legal Proceedings Against certain Organs of State Act³ (Legal Proceedings Act). In terms of that provision the applicant was required to give the respondent notice in writing within six months from the date on which the "debt became due". This was required before he could institute the legal proceedings against the respondent. The applicant had failed to give that notice within the prescribed period.

Background

[2] The undisputed facts are the following. In 2006 the applicant worked as a cleaner. His highest level of education is Grade 7. On 26 June 2006 he dislocated his thumb on his left hand and went to Kimberley Hospital for medical treatment. There were no open wounds on his left hand or thumb. A plaster of Paris cast was put on his left hand and forearm. He was then sent home and asked to return after 10 days to have the cast removed.

[3] After four or five days the applicant returned to the hospital because he was experiencing severe pain and discomfort in his left arm and hand. This would have been on 30 June 2006. The hospital staff conducted a clinical examination of the applicant's left hand and gave him pain medication. He was told to return after

¹ *Links v MEC, Department of Health, Northern Cape Province* [2014] ZANCHC 17.

² *Links v MEC, Department of Health, Northern Cape Province* [2013] ZANCHC 26.

³ 40 of 2002.

five days. About three or four days later he returned to the hospital. This was on 4 July 2006. He returned before the expiry of five days because the pain on his left arm and hand had increased and had become unbearable. On this occasion he was admitted.

[4] On 5 July 2006 the applicant was taken to theatre for a fasciotomy⁴ and was operated on under general anaesthetic. During this operation his left thumb was amputated. He remained in hospital. He claims that he was never told of the decision to amputate his thumb nor was he told the reason for it. The applicant was again operated upon on 12, 15 and 21 July 2006 for the debridement⁵ of the left thumb. The applicant remained in hospital until the end of August 2006 when he was discharged.

[5] There is no evidence that the hospital doctors or nurses ever explained to the applicant why he was feeling pain after 26 June 2006. Nor is there any admissible evidence to show that anybody ever spoke to the applicant about why it was necessary to amputate his thumb. The applicant says that, although his thumb was amputated on 5 July 2006, he was unaware of this before his discharge from hospital.

[6] This part of the applicant's version can simply not be true and falls to be rejected. It is highly improbable that, for about 2 months after the amputation, he would not have felt that he no longer had his thumb. It is equally improbable that over that period the medical and nursing staff would not have talked to him about how he was coping without the thumb.

[7] Furthermore, after the amputation of his thumb, the applicant's wound would have needed to be dressed regularly. This would have happened while he was in hospital. The applicant's version is that, after his discharge from hospital, he regularly attended the out-patient department so that the wound could be cleaned. Logically, it must also have been regularly dressed while he was in hospital. How could he not

⁴ A surgical procedure in which tissue is removed in cases of compartment syndrome.

⁵ That is the removal of dead, damaged or infected tissue.

have noticed when the wound was cleaned that he had lost his thumb? However, this is not the end of the matter. As will be shown later in this judgment, he needed to know other facts as well.

[8] The applicant says that on the day that he was discharged from hospital a doctor employed in the hospital told him that he would probably never again be able to use his left arm. At that stage the applicant was aware of the risk but not certain that he had permanently lost the use of his left arm in addition to losing his left thumb. For some time after his discharge from hospital, the applicant attended the hospital as an out-patient for the cleaning of the wound on a daily basis. It was during this time about September 2006 that the applicant realised that he had permanently lost the use of his arm. By this stage the full extent of the damage to his arm was apparent as his hand had “clawed” and had become unusable.

[9] In November 2006 the applicant approached Booysen Macloed Attorneys to establish the reason why he had lost the use of his left arm and why his thumb had been amputated. He contemplated that if it could be established that employees of the Kimberley Hospital had been negligent he intended to sue. He was told that the firm did not do medical negligence cases but that, even if they did, he would need to pay a deposit. As the applicant was indigent, they referred him to the Legal Aid Board. In December 2006 he approached the Legal Aid Centre in Kimberley for legal assistance and asked them to investigate a possible claim. For about three years they failed to institute an action against the respondent. About a week or two before the expiry of 3 years, the Legal Aid Centre referred him to his present attorneys. Within a matter of days these attorneys sent out to the respondent a notice required by section 3 of the Legal Proceedings Act.

[10] Dr Willem Reyneke, a general surgeon, expressed the following views in regard to what happened with the applicant’s medical treatment and his condition:

“After clinically evaluating Mr Link’s current condition on 19/01/2011, as well as having had insight in the hospital records, as well as the history as disclosed by Mr Links regarding the time and visits to Kimberley Hospital between 27 June 2006; when he received plaster of paris on his arm; and on 03 July 2006 when he had the first surgery, I hereby want to add the following to my previous statement.

1. Mr Links presently has a Volkmann’s contracture of his left hand, as well as amputation of the distal phalanx of the left thumb. Clinically there is total loss of function of the Ulnar, Median and Radial nerves in the forearm and hand. This includes motor as well as sensory function.
2. The causes of Volkmann’s contraction may be the following:
 - 2.1 Ischemia due to vascular injury (this can be thrombosis or bleeding) with increased pressure in the muscles compartment of the forearm.
 - 2.2 Plaster of paris for a tourniquet causing ischemia because it is too tight.
3. Regarding the history of Mr Links: the injury was on 26 June 2006, and the treatment was given on the 26th June 2006. Treatment included plaster of paris of the left forearm.
4. During 5 days (from 26/06/2006 until 03/07/2006) Mr Links went back to the hospital on two occasions with complaints of pain. Pain medication was given.
5. According to the hospital notes the treatment Mr Links received from the 3rd of July 2006 was medically correct. The damage occurred before then.
6. The cause of the Volkmann’s contraction is most probably due to plaster of paris that was too tight, and not removed soon enough. Ischemia developed and the patient had severe pain for which he went back to hospital on the 28th or 29th of June 2006. He was given pain medication.

IN SUMMARY

The Volkmann’s contracture is of a severe degree with total loss of function of the left hand. This is most probably due to the plaster of paris which was applied too tight on the 26th of June 2006, and not removed when ischemia occurred.”

High Court

[11] In due course the applicant’s present attorneys issued summons in which the applicant claimed damages arising out of his treatment at the Hospital. The summons

was served on the respondent on 6 August 2009. In response the respondent raised two special pleas. The first one was that the notice in terms of section 3 failed to comply with the requirements of that Act. The second was that the applicant's claim had prescribed because the summons was served after the lapse of three years from 5 July 2006 when his thumb was amputated.

[12] After the respondent had filed his plea, the applicant delivered and served in effect a reply in the form of an application for condonation for his failure to comply with section 3. In his founding affidavit in support of that application, the applicant dealt with both special pleas. He needed to deal with prescription because, if his claim had prescribed, condonation would be refused.⁶ The respondent opposed the application.

[13] In his founding affidavit the applicant averred that he had no knowledge before he was discharged from hospital what the reason for the amputation of his left thumb was nor did he know the reason for, or, cause of, the loss of the function of his left hand. In response to this affidavit, the respondent delivered two affidavits. One was by Dr L Koning, who became the medical head of the Kimberley Hospital after the time of the applicant's treatment, and the other by Mr Ndlovu, the legal advisor in the respondent's office.

[14] In her affidavit Dr Koning did not respond at all to any of these averments. In his affidavit Mr Ndlovu was supposed to respond to this averment. Mr Ndlovu had much to say but none of it was a response to the applicant's averment that, before his discharge from hospital, he had no knowledge of the reason for, or, cause of, his problem. This, therefore, meant that this important averment by the applicant – which goes to the issue of causation – was not denied. These were the affidavits on the basis of which the court of first instance and the Full Court were required to decide whether the respondent had shown that the applicant's claim had prescribed.

⁶ The relevant provisions are set out in para [16] below.

[15] The parties agreed that the Court should deal with the application for condonation and the special plea of prescription. They argued the application for condonation on the papers. In dealing with the application for condonation the Court had to decide whether the applicant's claim had prescribed. This was so because of the provisions of section 3(4)(b) of the Legal Proceedings Act. Section 3(4)(b) refers to an application referred to in paragraph (a). That is a reference to an application for condonation such as the one that the applicant had delivered.

[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.

[17] The court of first instance quoted the following passage from *Truter and Another v Deysel*:

“... ‘debt due’ means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.”⁷ (Footnotes omitted.)

⁷ *Truter and Another v Deysel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) at para 16.

Mamosebo AJ also referred to *Van Staden v Fourie*⁸ and *Macleod v Kweyiya*.⁹ She referred to a passage in *McKenzie v Farmers' Co-operative Meat Industries Ltd*¹⁰ which was quoted with approval by Van Heerden JA in *Truter and Another*.¹¹

[18] In seeking to apply the law as reflected in these cases, the High Court stated:

“[T]he [applicant’s] cause of action was complete and the debt of the [respondent] became due and payable as soon as the first known harm was sustained by the [applicant]. The cause of action arose on 26 June 2006 when the [applicant] first presented himself in hospital for medical treatment.”¹²

The Court referred to the following passage in the applicant’s founding affidavit:

“(E)k het egter nog steeds nie geweet, en kon nog steeds nie vasstel, sonder die hospitaalrekords en-notas op die lêr, wat die oorsaak van die probleem was en wie / of wat daarvoor verantwoordelik was nie. Ek doen met respek aan die hand dat ek deur die uitoefening van redelike sorg op die vroegste teen die einde van Januarie 2007 van die feite bewus kon geword het, indien die Regshulpraad die hospitaalrekords aangevra het.”¹³

[19] The first sentence of the passage is the important one. In it the applicant said that he did not know and could not know, without the hospital records and notes in the file, what the cause of the problem was and who or what was responsible for it. The court of first instance stated that what the applicant said in this passage was unpersuasive. However, the Court did not give any reasons why it was not persuaded.

⁸ *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216D-E.

⁹ *Macleod v Kweyiya* [2013] ZASCA 28; 2013 (6) SA 1 (SCA).

¹⁰ *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

¹¹ *Truter and Another* above n7 at para 19.

¹² High Court judgment at para 22.

¹³ “I, however, still did not know and could still not determine, without the hospital records and notes on the file what the cause of the problem was and who or what was responsible for it. I submit with respect that with the exercise of reasonable care I could only have become aware of the facts towards the end of January 2007 if the Legal Aid Council had requested the hospital records.” (My translation.)

[20] The Court concluded that the applicant's claim had prescribed. It stated that, were it not for that conclusion, it would have granted the applicant condonation for his failure to comply with section 3. The High Court dismissed the applicant's condonation application, upheld the respondent's special plea of prescription and dismissed the applicant's claim with costs including the costs of two counsel. The applicant applied for leave to appeal but the High Court refused it.

Full Court

[21] The applicant approached the Supreme Court of Appeal for leave to appeal against the judgment and order of the court of first instance. The Supreme Court of Appeal granted the applicant leave to appeal to a Full Court of the Northern Cape Provincial Division of the High Court. In a judgment by Kgomo JP (with Lacock and Pakati JJ concurring) the Full Court dismissed the appeal with costs. The reasons given by the Full Court for its conclusion were substantially the same as those of the High Court.

In this Court

Jurisdiction

[22] This Court has jurisdiction because the matter involves an interpretation of legislation that limits the applicant's right in terms of section 34 of the Constitution.¹⁴ That is the Prescription Act.¹⁵ The meaning that the court a quo attached to section 12(3) of the Prescription Act had the effect of preventing the dispute between the applicant and the respondent from being resolved by a court of law. The applicant

¹⁴ Section 34 reads:

“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.”

The essence of this right, in the context of legislation that limits it, was highlighted by this Court in *Road Accident Fund and Another v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) at paras 1-2.

¹⁵ 68 of 1969.

challenges the correctness of that meaning. The provisions of section 39(2) of the Constitution should be borne in mind. Section 39(2) reads:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

The case also implicates the right to security of the person entrenched in section 12 of the Constitution.¹⁶

Leave to appeal

[23] It is in the interests of justice that leave to appeal be granted. This matter is about the correct interpretation of section 12(3) of the Prescription Act. In particular, the question is what the “facts” are from which the debt arises which the creditor is required to know before the debt can be said to be due and, therefore, before prescription can start running. This Court has not dealt with the meaning of section 12(3). In *Mdeyide*¹⁷ Van der Westhuizen J referred to section 12(3) and contrasted it with section 23(1) of the Road Accident Fund Act.¹⁸ However, this Court was not called upon to interpret section 12(3) in that case. Section 12(3) raises important questions about prescription and the pronouncement of this Court will go

¹⁶ Section 12 reads:

- “(1) Everyone has the right to freedom and security of the person, which includes the right—
- (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right—
- (a) to make decisions concerning reproduction;
 - (b) to security in and control over their body; and
 - (c) not to be subjected to medical or scientific experiments without their informed consent.”

¹⁷ *Mdeyide* above n 14 at para 43 and 47.

¹⁸ 56 of 1996.

beyond the litigants in this case. Furthermore, there are reasonable prospects of success for the applicant's appeal.

The appeal

[24] The question for determination is whether the applicant's claim had prescribed by 6 August 2009 when he served summons. That in turn depends upon the interpretation of the provision of section 12(3) of the Prescription Act and the application of that provision to the facts of this case. The respondent bears the onus to prove that the applicant's claim had prescribed by the given date. In order for the respondent to prove that, he must show that prescription began to run against the applicant's claim not later than 5 August 2006. This is so because the period of prescription applicable is three years. In the context of section 12(3) the respondent must show what the facts are that the applicant was required to know before prescription could commence running. The respondent must also show that the applicant had knowledge of those facts on or before 5 August 2006.

[25] Section 12(1), (2) and (3) of the Prescription Act read:

- “(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) A debt shall not be deemed to be due *until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises*: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.” (Emphasis added.)

[26] The provisions of section 12 seek to strike a fair balance between, on the one hand, the need for a cut-off point beyond which a person who has a claim to pursue against another may not do so after the lapse of a certain period of time if he or she has failed to act diligently and on the other the need to ensure fairness in those cases

in which a rigid application of prescription legislation would result in injustice. As already stated, in interpreting section 12(3) the injunction in section 39(2) of the Constitution must be borne in mind. In this matter the focus is on the right entrenched in section 34 of the Constitution.

[27] The parties argued this appeal on the basis that section 12 of the Prescription Act was applicable to the applicant's claim. I, too, shall deal with the matter on that basis. Section 12(1) sets out the general rule of prescription under the Act. It provides that, subject to two exceptions provided for in subsections (2) and (3), prescription "shall commence to run as soon as the debt is due". Section 12 then sets out the two exceptions to this rule.

[28] The applicant's case is that prescription did not commence to run against his claim on or before 5 August 2006 because he did not by that date have knowledge of the facts from which the debt arose. He says that he did not know that his left thumb had been amputated and only got to know this later. I have already rejected this. He also says that he did not know what gave rise to the need for his thumb to be amputated. He further states that he did not know the cause for his problem. Nor did he know that he had permanently lost the use of his left arm.

[29] The question, therefore, is whether on or before 5 August 2006 the applicant had, in the words of section 12(3), "knowledge of the facts from which the debt [arose]". To make a determination on this question, it will be important to bear in mind that from about 3 July 2006 to the end of August 2006 the applicant was in hospital. This means that during that period his movement was restricted to the hospital. That hampered his ability to acquire knowledge from anyone beyond the medical and nursing staff of the hospital.

[30] The first issue is what the facts are from which a debt arises. Obviously, these are facts that are material to the debt. Counsel for the respondent submitted that the ordinary meaning of the phrase "debt is due" is that a debt is "owing and already

payable.” In support of this submission he referred to *Lagerwey*.¹⁹ He also referred to *Drennan* where Harms JA said:

“In short, the word ‘debt’ does not refer to ‘cause of action’, but more generally to the ‘claim’. . . .In deciding whether a ‘debt’ has become prescribed, one has to identify the ‘debt’, or, put differently, what the ‘claim’ was in the broad sense of the meaning of the word.”²⁰

Counsel for the respondent also referred to *Sentrachem* where it was held that the word “debt” refers to the right of action and not to the cause of action.²¹ In support of this, counsel also referred to *Geldenhuis*,²² *Claasen*²³ and *Nedcor*.²⁴

[31] In *Truter* the Supreme Court of Appeal dealt with the meaning of the phrase “debt due”. It said:

“For the purposes of the Act, the term ‘debt due’ means a debt, including a delictual debt, which is owing and payable. *A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.*”²⁵
(Emphasis added and footnotes omitted.)

In the next paragraph the Court further said:

¹⁹ *Lagerwey v Rich and Others* 1973 (4) SA 340 (T) at 345.

²⁰ *Drennan Maud & Partners v Town Board of the Township of Pennington* [1998] ZASCA 29; 1998 (3) SA 200 (SCA) at 212G and I.

²¹ *Sentrachem Ltd. v Prinsloo* [1996] ZASCA 133; 1997 (2) SA 1 (SCA) at 15B-16D.

²² *Geldenhuis NO v Diedericks* 2002 (3) SA 674 (O) at 680-1.

²³ *Claasen v Bester* [2011] ZASCA 197; 2012 (2) SA 404 (SCA).

²⁴ *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* [2000] ZASCA 65; 2001 (1) SA 987 (SCA).

²⁵ *Truter* above n 7 at para 16.

“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.”²⁶

[32] The Court also quoted²⁷ with approval the following statement in Loubser:

“A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely *a causative act, harm, unlawfulness and culpability or fault.*”²⁸
(Emphasis added.)

Quoting from *McKenzie*²⁹, which was also cited with approval by Corbett JA in *Evins*³⁰, the Court in *Truter and Another* pointed out:

“‘Cause of action’ for the purposes of prescription thus means:

‘. . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.’”³¹

The respondent also referred to this passage in making his submissions on when a debt can be said to be due, owing and payable.

[33] In *Evins* the Court stated:

²⁶ Id at para 17.

²⁷ Id.

²⁸ Loubser, *Extinctive Prescription* (Juta & Co, Ltd, Kenwyn1996) at 80-1, para 4.6.2.

²⁹ *McKenzie* above n10 at 23.

³⁰ *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-H.

³¹ *Truter* above n 7 at para 19.

“[T]he basic ingredients of the Plaintiff’s cause of action in the case of an Aquilian action for damages for bodily injury are: (a) wrongful act by the Defendant causing bodily injury; (b) accompanied by fault, in the sense of *culpa* or *dolus* on the part of the Defendant, and, (c) *damnum* i.e loss to Plaintiff’s patrimony caused by the bodily injury.” (Underlining supplied.)³²

[34] In *Deloitte*³³ the Court said the following about the phrase “debt due” in section 12(1) of the Prescription Act:

“This means that there has to be a debt immediately claimable by the [creditor] or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. . . . It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, i.e. before he is able to pursue his claim. . . .”³⁴

[35] In *Gore*³⁵ the Supreme Court of Appeal said through Cameron and Brand JJA:

“This court has in a series of decisions emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action.”³⁶

Later on in the same case the Court said:

“The defendants’ argument seems to us to mistake the nature of ‘knowledge’ that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified, true belief. Belief on its own is insufficient. Belief that happens to be true (as Rabie had) is also insufficient. For there to be knowledge, the belief must be justified.”³⁷

³² *Evins* above n 30 at 838H–839A.

³³ *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (AD).

³⁴ *Id* at 532 H-I.

³⁵ *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA).

³⁶ *Id* at para 17.

³⁷ *Id* at para 18.

The Court also said:

“It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less is vehemently controverted allegation or subjective conviction.”³⁸

[36] Counsel for the applicant submitted that even if the applicant knew by 5 August 2006 that he had lost his thumb, he did not and could not know who or what caused it. Counsel went on to submit that the reason why the applicant lost his thumb and what caused it is a factual question and not a legal conclusion but are part of the facts that the applicant had to establish before it can be said that he had knowledge of the facts. On causation she invoked *Lee*³⁹ where this Court held:

“This element of liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then that is the end of the matter. If it did, the second enquiry, a juridical problem, arises.”⁴⁰

[37] Counsel for the applicant submitted that the applicant simply did not have knowledge to establish, before or on 5 August 2006, what caused the problem with his thumb. Despite the fact that the applicant delivered and served his written submissions before the respondent delivered and served his, the respondent did not provide an answer to the above submissions of the applicant. The respondent focused on the applicant’s first contention that he was not aware of the fact that his left thumb had been amputated until after he had been discharged from hospital. With regard to whether on or before 5 August 2006 the applicant was aware of what had caused his problem, the respondent did not make any submission disputing the applicant’s contention. Instead, there are indications in the respondent’s written submissions that

³⁸ Id at para 19.

³⁹ *Lee v Minister for Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 (CC).

⁴⁰ Id at para 38.

tend to support the applicant's evidence that at the hospital nobody ever told him what had caused his problem.

[38] The respondent submitted:

“Before each surgical procedure during July 2006, the applicant was informed of the *nature, extent and possible consequences of the proposed medical procedure* and consented to the procedure and anaesthesia in writing.” (Emphasis added.)

This tends to support what the applicant says because, although it says the applicant was given an explanation with regard to “the nature, extent and possible consequences of the proposed medical procedure”, it does not say that the applicant was told what had caused his problem.

[39] The respondent's counsel stated that the applicant was operated on again subsequent to the fasciotomy on 12 July 2006 and 21 July 2007 for the re-debridement of the left thumb. He then continued:

“On these two further occasions the applicant was informed of the *nature and possible consequences* of the proposed surgical procedure and consented to the procedures and anaesthesia in writing.” (Emphasis added.)

Once again the respondent does not assert that on any of these or other occasions any doctor or nurse told the applicant what had caused his problem.

[40] Instead of dealing with the applicant's evidence that on or before 5 August 2006 the applicant was not aware of the reason or cause for his problem, the respondent deals with what happened at the end of August 2006 when the applicant was discharged from hospital. The respondent's attitude is that the applicant did not give any reason why he did not enquire from the doctor who spoke to him at the end of August 2006 what the reason was for the amputation and loss of function of his arm. The respondent added that it was highly unlikely that the applicant would not

have been informed by any doctor or other hospital personnel the reason for the amputation and loss of the function of his left hand during the period from 4 July 2006 to the end of August 2006.

[41] In part the problem with this submission is that it relates to what happened after 5 August 2006. Whatever the applicant may have known after 5 August 2006 is irrelevant to the respondent's special plea on prescription. This is because the special plea can only be upheld on the basis of what the applicant knew on or before 5 August 2006. In any event the applicant did provide an explanation for this. He said that he had been "brought up to believe that medical doctors and personnel know what they are doing".

[42] There is a further problem with the submission in that it presupposes that any explanation given to the applicant by the medical staff would have identified medical error as the actual or even a potential cause of his injuries. It is not necessary for a party relying on prescription to accept liability. To require knowledge of causative negligence for the test in section 12(3) to be satisfied would set the bar too high. However, in cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault so as to cause the plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises.⁴¹

[43] It is now appropriate to return to section 12(3) of the Prescription Act. That provision says that a debt shall not be deemed to be due and, therefore, prescription shall not commence to run "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

⁴¹ The courts in Canada have grappled with similar issues and it may be profitable in a future case to refer to their approach. It may also be helpful in dealing with a case where the plea alleges that the plaintiff could by the exercise of reasonable care have discovered the facts from which the debt arises.

deemed to have such knowledge if he could have acquired it by exercising reasonable care".⁴² (Emphasis added).

[44] In his opposing affidavit in the High Court the respondent did not rely upon the proviso at the end of section 12(3). Both Dr Koning and Mr Ndlovu said nothing that would bring the respondent's defence within the proviso. Nor could they have. Both lacked personal knowledge of the applicant's treatment. Therefore, to the extent that counsel for the respondent may have sought to rely upon that proviso in his written submissions, the reliance was misplaced. This is so because that was not the case the respondent had advanced in the affidavit. The respondent's case as set out in those affidavits was simply that the applicant's cause of action arose on 26 June 2006 and the applicant had knowledge of all the relevant facts on that day. The question is, therefore, whether the respondent discharged the onus to show that on 26 June 2006 or at any date on or before 5 August 2006 the applicant had knowledge of all the material facts from which the debt arose or which he needed to know in order to institute action.

[45] In a claim for delictual liability based on the Aquilian action, negligence and causation are essential elements of the cause of action. Negligence and, as this Court has held, causation have both factual and legal elements.⁴³ Until the applicant had knowledge of facts that would have led him to think that possibly there had been negligence and that this had caused his disability, he lacked knowledge of the necessary facts contemplated in section 12(3).

[46] The respondent did not aver that the applicant had knowledge of the facts that caused his problem. The applicant did aver in the High Court that he did not know before the end of August 2006 the reason for his condition or the cause of his condition. This averment related to both the issue of negligence and the factual element of causation. In Dr Koning's and Mr Ndlovu's affidavits the respondent did

⁴² Section 12(3) of the Prescription Act.

⁴³ *Lee* above n 39 at para 39.

not deny this averment. A firm finding that the applicant did not know what caused his condition as at 5 August 2006 can, therefore, be justifiably made. That was a material fact that a litigant wishing to sue in a case such as this would need to know. This would be the case whether one sued on the basis of a delict or a breach of contract. On this basis, it cannot be said that the debt was due before 5 August 2006.

[47] The opinion given by Dr Reyneke was that the amputation of the applicant's thumb and loss of function of the left hand "was most probably due to the plaster of paris that was too tight, and not removed soon enough . . .when ischemia occurred". That opinion was given years after the events in issue. Without advice at the time from a professional or expert in the medical profession, the applicant could not have known what had caused his condition. 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.

[48] Earlier on I rejected the applicant's version that, prior to his discharge from hospital, he had no knowledge that his thumb had been amputated. However, even if he had known, as we find that he had known that he had lost his thumb, he still didn't know what had caused the need for the amputation.

[49] The applicant was in hospital between 4 July 2006 and the end of August 2006. Therefore, realistically, before the end of August 2006, he could not have had access to independent medical professionals. Accordingly, he could not have had knowledge of all the material facts he needed to have before he could institute legal proceedings. Prescription could, therefore, not have begun running before 5 August 2006. Therefore, on this basis too, the respondent failed to show that the applicant had knowledge of all the material facts on or before 5 August 2006. Accordingly, the applicant's claim did not prescribe.

[50] The High Court and the Full Court appear to have overlooked the question whether the applicant had the full facts necessary for him to institute his claim on or before 5 August 2006. He did not know or have reasonable grounds to suspect that his negligent treatment at the hands of the respondent's personnel had led to the compartment syndrome. Nor did he know that this in turn caused the amputation of his thumb and the loss of function of his left hand. In my view, the High Court and the Full Court erred in not approaching the matter in this way.

[51] 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 to me justified. The applicant approached attorneys and the Legal Aid Board within two or so months 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.

[52] Both the High Court and the Full Court criticised the manner in which the Legal Aid Centre handled the applicant's matter. We, too, add our voice. The conduct of the people who handled the applicant's matter at the Legal Aid Centre was reprehensible. Those who have authority over the people concerned or over the Centre itself would do well to study the affidavits filed in this matter and to take appropriate action against the personnel concerned. The Centre is supposed to render a service to indigent people who are part of a vulnerable section of our society to enable them to pursue claims that they otherwise would not be able to pursue for lack of funds. It should not be the Centre that destroys their claims by failing to attend to them with diligence and allowing them to prescribe. If we had reached a contrary conclusion, the Centre may well have been liable for the applicant's damages. Nevertheless, the Centre is responsible for a major part of the delay in the finalisation of this matter and some steps must be taken against those responsible.

Condonation

[53] The applicant's application for leave to appeal was lodged with the Registrar of this Court out of time. It was on 17 November 2014 that the applicant received the order of the Supreme Court of Appeal dismissing his application for special leave to appeal against the order of the Full Court. That order had been made two days or so before then. The applicant was required to lodge the application on or about 8 December 2014.

[54] On 2 December 2014 the applicant's attorneys wrote to the State Attorney and advised that the applicant had been advised to have a Senior Counsel with experience in constitutional matters briefed to prepare an application for leave to appeal to this Court and that this could delay the lodging of the application. The State Attorney responded and said in effect that there was no explanation as to why this had not been done earlier. The applicant says that difficulties were experienced in obtaining Senior Counsel with constitutional litigation experience who was prepared to come into the matter at that stage and to do so on a contingency fee basis. This was because the applicant could not afford legal fees. The Christmas holiday period intervened. The applicant says the Senior Counsel who was obtained was only available to attend to the matter towards the end of January 2015. The application for leave to appeal was lodged on 19 February 2015.

[55] The explanation for the delay given by the applicant is not full. We are not told when he was given advice to involve Senior Counsel with constitutional litigation experience. We are not told when the efforts to find him or her started and when exactly she was found. We are not told which other Senior Counsel were approached, when they were approached and what they said.

[56] The delay is not a short delay. However, the respondent had been informed in advance that there could be a delay in the lodgement of the application for leave to appeal. No prejudice has been shown to have been suffered by the respondent as a

result of the delay. The issue raised by the matter – namely the interpretation of section 12 of the Prescription Act – is an important issue. It has been shown that the applicant’s prospects of success were reasonable. In the circumstances it is in the interests of justice that the applicant be granted condonation.

[57] In the result the appeal must be upheld with costs.

Order

[58] The following order is made:

- (1) Condonation for non-compliance by the applicant with Rule 19 is granted.
- (2) Leave to appeal is granted.
- (3) The appeal is upheld with costs including the costs of two Counsel.
- (4) The order of the Full Court is set aside and replaced with the following:

“(a) The appeal is upheld with costs

(b) The order of the Court of first instance is set aside and replaced with the following order:

- (i) The two special pleas of the Member of the Executive Council are dismissed.
- (ii) Mr Links’ failure to comply with section 3 of the Legal Proceedings Act 40 of 2002 is condoned.
- (iii) The Member of the Executive Council is to pay Mr Links’ costs.”

For the Applicant:

A De Vos SC
C H Botha instructed by Elliott Maris
Wilmans & Hay

For the Respondent:

A J R Van Rhyn SC
T L Manye instructed by the State
Attorney