

A revisit of section 12(3) of the Prescription Act by the Constitutional Court

In terms of section 12(3) of the Prescription Act 68 of 1969, a debt becomes due when the creditor has knowledge of the identity of the debtor and the facts from which the debt arises. A debtor will also be deemed to have such knowledge if he could have acquired it by exercising reasonable care. In *Loni v MEC for Health, Eastern Cape (Bhisho)* 2018 (3) SA 335 CC the Constitutional Court revisited the issue regarding when a person is regarded as having knowledge of the facts that gave rise to damages emanating from medical negligence, in terms of section 12(3).

On 6 August 1999, the Applicant, Mr. Loni, was admitted to Cecilia Makiwane Hospital, after sustaining a gunshot wound to his left buttock, which resulted in a shattered left femur. When the Applicant arrived at the hospital, he was given an injection and x-rays were taken. A Denham pin was later inserted for pain alleviation and on 23 August 1999, he underwent surgery during which a plate and screw were inserted in his femur. The bullet, however, was never removed. The Applicant was then discharged from the hospital and given the following items: painkillers, crutches, some medical supplies to clean his wound as well as his medical file.

The gunshot wound healed but the healing process of the operation took longer. The operation wound began to ooze pus and eventually an infection developed. The Applicant continued to experience pain and later developed a limp.

Some eight years after the incident, the Applicant approached a private doctor regarding his limp and constant pain in the leg. After consideration of the Applicant's medical file, Dr. Olivier, an orthopaedic surgeon, informed the Applicant that he was disabled. The doctor confirmed that the Applicant's condition was attributed to the medical negligence of the medical staff that initially treated him.

The Applicant then proceeded with a claim for damages in the High Court against the Member of the Executive Council, Department of Health, Eastern Cape,

Bhisho (hereinafter referred to as the “MEC”). The MEC pleaded that the medical staff were not negligent and raised a special plea of prescription. The MEC argued that the Applicant’s claim had prescribed in terms of section 12(3) of the Prescription Act. The Applicant alleged that his claim could not have prescribed, as he only acquired the knowledge that he indeed had a claim for damages in November 2011, when he consulted Dr. Olivier.

The High Court upheld the MEC’s special plea and held that the Applicant had acquired the knowledge enabling him to institute proceeding long before he met Dr. Olivier. It furthermore held that the Applicant failed to act as a reasonable person under similar circumstances.

The Applicant was granted leave to appeal to the Full Court which dismissed his appeal and held that the Applicant had all the necessary facts which gave rise to his claim. In like manner, the Applicant’s leave to appeal to the Supreme Court of Appeal was unsuccessful.

In consequence, the Applicant proceeded with an application to the Constitutional Court of Appeal. The Court referred to the case of *Links v Member of Executive Council, Department of Health, Northern Cape Province* [2016] (4) SA 414 (CC), for the interpretation and application of the principle of section 12(3). The Court, in that matter, held that in cases involving professional negligence, facts from which a debt arises are those which would cause the Plaintiff, on reasonable grounds, to suspect that there was fault on the part of the medical staff and that caused him to seek further advice.

In the current matter, the Constitutional Court, relying on an objective test, held that a reasonable person in the position of the Applicant would have realised at an earlier stage that the treatment he received was below standard and was not in accordance with what can be expected from medical staff acting in a manner that is careful, reasonable and professional.

On the Applicant’s own evidence, the Court held that, based on a reasonable assessment, by December 2011, the Applicant could have acquired the knowledge that his constant pain and suffering was due to the subpar treatment and care he received.

The Constitutional Court described the Applicant’s matter as sad, considering the inferior treatment he was subjected to at the hands of professionals.

Nevertheless, the Court held that the Applicant's claim had prescribed and therefore, dismissed his application. It also remarked that an appeal would not be in the interests of justice.

The significance of this case, as well as the Links matter, is that creditors, or patients that suspect negligence on the part of the medical practitioners, should institute proceedings against the debtor as soon as they have facts from which a claim for damages arises.

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