



CONSTITUTIONAL COURT OF SOUTH AFRICA

Mzwandile Owen Loni v Member of the Executive Council of the Department of Health, Eastern Cape, Bhisho

CCT 54/17

Date of judgment: 22 February 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 22 February 2018, at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against an order of the Supreme Court of Appeal refusing special leave to appeal against the order of the Full Court of the High Court of South Africa, Eastern Cape Division, Grahamstown (Full Court). The High Court, Eastern Cape Local Division (High Court) had dismissed the applicant's application for leave to appeal against its order dismissing his claim for medical negligence against the Member of the Executive Council of the Department of Health for the Eastern Cape. The High Court held that the applicant's claim had been instituted some 11 years after the facts giving rise to his claim had arisen, and had therefore prescribed by the effluxion of time.

The factual background to this matter is as follows: the applicant, Mr Mzwandile Loni, was admitted to Cecelia Makiwane Hospital on 6 August 1999 after sustaining a gunshot wound in his left buttock, which shattered his left femur. He was given an injection to ease the pain and x-rays were taken. On 10 August 1999, a Denham pin was inserted to alleviate the pain and on 23 August 1999, he underwent a further operation to insert a plate and screws on his femur. The bullet was not removed.

Mr Loni was discharged and given painkillers and medical items to clean the wound. In addition, he was given his medical file so that he could go to the clinic for further care. Mr Loni returned to the hospital from time to time as the wound was oozing puss. He experienced pain and also developed a limp. He was told that he was fine and that he must walk more.

It was only in 2008, when Mr Loni secured employment with the South African Police Service, that he was able to obtain medical insurance and approach doctors in private practice to establish the reason for his limp and constant pain in his leg. In

November 2011, Dr Olivier, an orthopaedic surgeon, considered his hospital file and advised him that his condition was caused by medical negligence of the hospital where he had initially been treated.

On 20 June 2012, Mr Loni instituted proceedings against the respondent, the Member of the Executive Council of the Department of Health, Eastern Cape, Bisho (MEC), in the High Court for damages arising out of the alleged negligence by the doctors and nurses in the MEC's employ. The MEC raised a special plea of prescription in terms of section 12(3) of the Prescription Act 68 of 1969. The High Court upheld the plea of prescription and held that Mr Loni had acquired the necessary knowledge to enable him to institute proceedings long before he met Dr Olivier as the wound was still oozing puss, he experienced pain, was limping and had been in possession of his medical file.

Dissatisfied with the outcome, Mr Loni appealed to the Full Court which dismissed his appeal. His petition to the Supreme Court of Appeal also was unsuccessful, hence the application to the Constitutional Court.

The Constitutional Court held that the correct interpretation of section 12(3) of the Prescription Act and the application of the relevant principles have been authoritatively dealt with by the Constitutional Court in *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10. It further held that the objective test, properly applied, established that a reasonable person in the position of Mr Loni would have realised that the treatment and care that he 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 Mr Loni's own evidence, it is clear that long before his discharge from hospital and certainly thereafter, he had knowledge of the facts upon which his claim was based.

The Constitutional Court remarked that this is a sad matter that exhibits the poor treatment to which Mr Loni was subjected by those who had an obligation, imposed by the Constitution, to provide proper health care to him. Unfortunately, his claim had prescribed. In the result, the Constitutional Court refused leave to appeal on the merits.