CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 117/22

In the matter between:

PIETER PAUL LE ROUX	First Applicant
JOHANNA CATHARINA LE ROUX	Second Applicant
and	
JOHANNES G COETZEE & SEUNS	First Respondent
DANIEL CORNELIUS COETZEE	Second Respondent

Neutral citation:	*Le Roux and Another v Johannes G Coetzee & Seuns and Another* [2023] ZACC 46
Coram:	Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Potterill AJ, Rogers J, Theron J and Van Zyl AJ
Judgments:	Kollapen J (majority): [1] to [146] Van Zyl AJ (concurring in the result): [147] to [216] Rogers J (concurring): [217] to [235]
Heard on:	16 May 2023
Decided on:	18 December 2023
Summary:	Prescription Act 68 of 1969 — section 12(3) — clients' professional negligence claim against legal practitioner — knowledge of facts may include knowledge of a legal conclusion — exception to the general rule

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Northern Cape Division, Kimberley):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:
   "The appeal is dismissed with costs."
4. The respondents are to pay the applicants' costs, including the costs of two counsel.

JUDGMENT

KOLLAPEN J (Maya DCJ, Madlanga J, Majiedt J, Rogers J and Theron J concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Supreme Court of Appeal which held that the applicants' claim against their erstwhile legal practitioner for damages arising out of a breach of mandate claim had prescribed in terms of the Prescription Act[1] (Prescription Act). This matter turns on the

[1] 68 of 1969.

"primary facts" a client is required to have knowledge of for the purposes of prescription in a claim against their legal practitioner for negligent breach of mandate – in particular whether such "primary facts" may include a legal conclusion. The question arises in the context of section 12(3)[2] of the Prescription Act which provides that prescription will not begin to run until the creditor has knowledge of the facts from which the debt arises.

Parties

[2] The applicants are Mr Pieter Paul le Roux and Ms Johanna Catharina le Roux (applicants). The first respondent is the law firm Johannes G Coetzee & Seuns, and the second respondent is Mr Daniel Cornelius Coetzee (Mr Coetzee), the applicants' erstwhile legal practitioner, practising at the first respondent's offices (collectively referred to as the respondents).

Factual background

[3] This dispute's genesis is in legal services provided by Mr Coetzee to the applicants, in particular, the purported exercise of an option to purchase a farm. The matter was decided on the basis of agreed facts in the Supreme Court of Appeal and only a summation is necessary. I deal with: (a) the option; (b) the first action between the applicants and the deceased estate of the owner of the farm; and (c) the breach of mandate action in this section.

The option

[4] On 13 July 2000, the applicants were granted an option by Mr Jan Harmse Steenkamp, the owner of a farm in the Northern Cape (property), to purchase the property (option). The option could be exercised within two months of Mr Steenkamp's death, which subsequently occurred on 13 September 2003. Thereafter, the applicants met with Mr Coetzee, and mandated him to represent them as

[2] See [35] below.

their legal practitioner, and in that capacity, advise them and exercise the option on their behalf. In doing so, the applicants provided Mr Coetzee with the option. He informed the applicants that the option was valid and that he would write a letter to the executor of Mr Steenkamp's estate exercising the option. Material to this matter is that, prior to leaving his offices, Mrs le Roux asked Mr Coetzee whether it was necessary for them to sign anything, to which Mr Coetzee responded that it was not. On 26 September 2003, Mr Coetzee addressed correspondence to the executor of Mr Steenkamp's estate purporting to exercise the option on behalf of the applicants.

The first action

[5] However, in breach of the option and without the applicants' knowledge, the property had already been sold by Mr Steenkamp to a Mr Paul Steenkamp Nel (Mr Nel) on 8 July 2003 and transferred on 16 September 2003. Consequently, the applicants brought an action against Mr Steenkamp's estate and Mr Nel to enforce the option and claim the transfer of the property (first action). The first action was dismissed by the High Court on the basis that the exercise of the option was ineffectual, as it did not comply with the requirements of section 2(1) of the Alienation of Land Act[3] in that Mr Coetzee had failed to obtain the applicants' written authority.[4]

The breach of mandate action

[6] It was only as a result of the first action that the applicants learnt of the non-compliance with the Alienation of Land Act and the ineffectual exercise of the option by Mr Coetzee. Consequently, the applicants brought an action for breach of mandate seeking damages against the respondents (breach of mandate action). The following events are material to the breach of mandate action:

(a) The option could have been exercised from 13 September 2003 until 12 November 2003.

[3] 68 of 1981.

[4] *Le Roux v Johannes G Coetzee & Seuns*, unreported judgment of the Northern Cape High Court, Kimberley, Case No 1682/09 (13 December 2019) at para 9.6 (High Court judgment).

(b) The applicants mandated Mr Coetzee and the correspondence purportedly exercising the option, was despatched on 26 September 2003.

(c) Initially, Mr Nel's attorneys obtained an opinion from counsel advising that the applicants were entitled to the transfer. After long and fruitless negotiations, Mr Nel's new attorneys challenged the option on the basis of undue influence and that Mr le Roux had allegedly misled the late Mr Steenkamp. This led to the applicants instituting the first action.

(d) In January 2005, Mr Nel's plea in the first action was served. In response to an allegation in the particulars of claim that the applicants had exercised and confirmed the option in writing, on 26 September 2003, ("skriftelik uiteoefen and bekragtig"), Mr Nel pleaded:

> "Eerste Verweerder erken dat Eisers gepoog het om die opsie skriftelik uit te oefen en te bekragtig. Behoudens die voorgaande word die inhoud van hierdie paragraaf ontken."
> [First Defendant admits that the Plaintiffs attempted to exercise and confirm the option in writing. Save for the aforesaid, the content of this paragraph is denied.]

(e) On or about 17 May 2005, the applicants terminated Mr Coetzee's mandate and on 22 June 2005 they appointed Nilssens Attorneys as their new attorneys.

(f) Nilssens Attorneys briefed counsel to deal with the first action. Neither advised the applicants that Mr Coetzee was required to have their written authority in order to validly exercise the option.

(g) In early November 2007, during the trial of the first action, Mr Coetzee's non-compliance with the Alienation of Land Act was put to Mr le Roux during his cross-examination. For the first time, the applicants were alerted to the fact that Mr Coetzee's purported exercise of the option had been ineffectual for want of compliance with section 2(1) of the Alienation of Land Act. The proposition was as follows:

> "Wel laast daar geen misverstand is nie, ek stel dita an u in termed at op wat Coeetzee gedpen het op getuienis en dekumentasia tot nou toe voor heirdie Hof, is dit die Eestre Veweerder se saak dat daar nie voldoen was aan die vereistes van Artikel 2(1) van die Wet op Vervreemding van Grond nie end at alleen om daardie rede u eis nooit kan slaag nie."
>
> [I put it to you that in terms of what Coetzee did in evidence and in documentation until now before this Court, it is the First Defendant's case that there has not been compliance with the requirements of section 2(1) of the Alienation of Land Act and for that reason alone your claim cannot succeed.]

(h) On 11 September 2009, judgment was handed down in the first action dismissing the applicants' claim and confirming the non-compliance with the Alienation of Land Act.

(i) On 29 September 2009, the applicants served the summons in the breach of mandate action on the respondents.

(j) On 10 March 2010, in response to the breach of mandate action, the respondents filed a special plea of prescription in terms of the Prescription Act.

[7] It is the breach of mandate claim which is the subject of the application before this Court.

Litigation history

High Court

[8] The respondents' special plea of prescription in the High Court was that non-compliance with the Alienation of Land Act was a legal conclusion, and not a fact, for purposes of section 12(3) of the Prescription Act. It was therefore not open to the applicants to rely on November 2007 as the date from which prescription began to run as non-compliance with the Alienation of Land Act was a legal conclusion knowledge of which was not necessary for prescription to commence running. They contended that prescription started to run on 13 November 2003, when the option lapsed without having been validly exercised. In the alternative, the respondents submitted that the applicants should have become aware of non-compliance with the Alienation of Land

Act in 2005 upon receipt of Mr Nel's plea in the first action, or thereafter pursuant to the appointment of new attorneys.

[9] The High Court found in the applicants' favour and dismissed the special plea with costs. It held that non-compliance with the Alienation of Land Act was not a legal conclusion, but a fact that the applicants were required to have knowledge of in terms of section 12(3) of the Prescription Act. The Court accepted that the applicants only acquired knowledge of this during the cross-examination of Mr le Roux.

[10] In its reasoning in dismissing the special plea of prescription, the High Court said that a "basic and material" ingredient of the applicants' cause of action was a material breach of the mandate. It then said that setting out the cause of action without pleading the implied term and the breach would render the claim excipiable. This, it said, led to the inescapable conclusion that non-compliance with the provisions of section 2(1) of the Alienation of Land Act was a fact of which the applicants had to have knowledge and not a legal conclusion.[5] The High Court granted the respondents leave to appeal its judgment and order to the Supreme Court of Appeal.

Supreme Court of Appeal

[11] The Supreme Court of Appeal confirmed that in terms of section 12(3) of the Prescription Act, "the facts from which the debt arises" are those minimum essential facts required to prove a claim and that prescription begins to run when the creditor has knowledge of these facts, but that the same position does not apply to legal conclusions arising from the facts.[6] As such, the Supreme Court of Appeal held that a two-step enquiry is required where prescription is raised. The court must, first, determine the primary facts; and second, the knowledge or deemed knowledge thereof.

[5] Id at paras 29-31.

[6] *Johannes G Coetzee & Seuns v Le Roux* [2022] ZASCA 47; 2022 JDR 0773 (SCA) at paras 11-7 (Supreme Court of Appeal judgment).

[12] The Supreme Court of Appeal relied on a series of cases, including *Truter*[7] and *Mtokonya*,[8] and upheld the appeal on the basis that knowledge of legal conclusions drawn from the facts was not required for prescription to run. It also referred to *Yellow Star Properties*[9] where the Supreme Court of Appeal affirmed that the failure to appreciate the legal consequences which flowed from the facts does not delay the date from which prescription starts to run.[10]

[13] The Supreme Court of Appeal found that the applicants had the minimum facts to institute a claim on 26 September 2003. This included the consultation with Mr Coetzee, the advice that the applicants need not sign anything, the mandate provided to Mr Coetzee to exercise the option, and the subsequent letter of 26 September 2003 sent by Mr Coetzee to the executor of Mr Steenkamp's estate. In addition, it also found that the applicants were aware of these primary facts when they suffered damages with the lapsing of the option on 13 November 2003. Alternatively, they should reasonably have had knowledge thereof when they appointed their new attorneys and consulted with them in June 2005. The Supreme Court of Appeal accepted that the applicants only became aware of the non-compliance with the Alienation of Land Act during the cross-examination of Mr le Roux in November 2007. However, it held that this was a legal conclusion, not a fact from which the claim arose and, as such, was unrelated to the commencement of the running of prescription. The Supreme Court of Appeal upheld the appeal in favour of the respondents.

In this Court

[14] Aggrieved by the decision of the Supreme Court of Appeal, the applicants approached this Court seeking leave to appeal against the judgment and order of the Supreme Court of Appeal. The Chief Justice issued set-down directions and called on

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

[8] *Mtokonya v Minister of Police* [2017] ZACC 33; 2018 (5) SA 22 (CC); 2017 (11) BCLR 1443 (CC) at para 36.

[9] *Yellow Star Properties 1020 (Pty) Ltd v Department of Development Planning and Local Government (Gauteng)* [2009] ZASCA 25; 2009 (3) SA 577 (SCA).

[10] Supreme Court of Appeal judgment above n 6 at para 13.

the parties to file written argument on the merits of the appeal. In addition, the parties were directed to file written submissions on the following issues:

(a) In the light of the facts of this matter, where clients claim from their legal practitioner for giving them incorrect advice about the law, is knowledge that the advice was wrong to be treated, for purposes of prescription, as knowledge of a fact?

(b) If, for purposes of prescription, the applicants did not have the requisite knowledge in September-November 2003 (when the option was ineffectually exercised and then lapsed), did the applicants acquire the requisite knowledge, or could they by exercising reasonable care have acquired the requisite knowledge, when they terminated the mandate of their previous attorneys and instructed new attorneys in June/July 2005?

Applicants' submissions

Jurisdiction and leave to appeal

[15] The applicants argue that the jurisdiction of this Court is engaged in a number of respects. They say that, to the extent that the matter involves the interpretation of the Prescription Act, this raises a constitutional issue as this Court found in *Links.*[11] They further submit that the judgment of the Supreme Court of Appeal will result in legal uncertainty as that Court deviated from its own jurisprudence in *McMillan,*[12] *Bath*[13] and *WK Construction,*[14] with regard to when the running of prescription commences in professional negligence claims. Relying on *Beadica*,[15] the applicants say that certainty is accordingly required, and it is for this Court to provide it. Finally, the applicants argue that the judgment of the Supreme Court of Appeal has created an

[11] *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 (CC) at para 22.

[12] *McMillan v Bate Chubb & Dickson Inc* [2021] ZASCA 45; [2021] JOL 50108 (SCA).

[13] *Van Heerden & Brummer Inc v Bath* [2021] ZASCA 80; [2021] JOL 50855 (SCA).

[14] *WK Construction (Pty) Ltd v Moores Rowland* [2022] ZASCA 44; 2022 (6) SA 180 (SCA).

[15] *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).

insurmountable hurdle for litigants seeking to claim from their erstwhile legal practitioners. In order to avoid the adverse consequences of prescription, a client who receives advice from a legal practitioner is required to scrutinise and test the correctness of that advice when it is received. This, they say, is impractical and unfair and in violation of the right of access to court which section 34 of the Constitution guarantees.

Merits

[16] The applicants contend that the breach of mandate is a primary fact, and that prescription could not start running until such time as they had knowledge of the breach. The applicants rely on *Links*, where this Court held that knowledge of the factual element of negligence is a "fact" in the context of section 12(3) of the Prescription Act.[16] They say, in addition, that *Links* held that in cases of professional negligence, a party seeking to rely on prescription must 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, recognising that a claim of this nature is usually premised on a layperson seeking professional services of which they know little.[17]

[17] Further, the applicants submit that the judgment in *McMillan*, which was confirmed by *Bath*, applies the same ratio as those in *Links* and *WK Construction*. These judgments, they say, all hold that prescription only commences when there are reasonable grounds for suspecting that the advice, they had been given was incorrect and the creditor has an opportunity to investigate further.

[18] Accordingly, the applicants say that they only acquired actual knowledge of the breach during Mr le Roux's cross-examination in the first action. As to constructive knowledge, they also say that they could not, with the exercise of reasonable care, have

[16] *Links* above n 11 at paras 42 and 45.

[17] Id at para 47.

acquired knowledge of the breach of mandate at any earlier time than in November 2007, when this emerged during the cross-examination of Mr le Roux.

Respondents' submissions

Jurisdiction and leave to appeal

[19] The respondents dispute that the application engages the jurisdiction of this Court on any basis. They say, without conceding that much, that if the Supreme Court of Appeal erred in the application of the law by failing to follow precedent, it was a case of the misapplication of a settled principle of law. This, they say, does not engage the jurisdiction of this Court. In addition, they contend that leave to appeal should not be granted as the dispute before this Court is factual and not located in any principle of law which requires the attention of this Court.

Merits

[20] The respondents submit that the facts for the purposes of section 12(3) are that the respondents had—

(a) been given a mandate by the applicants to exercise an option on their behalf;
(b) purported to exercise the option on their behalf; and
(c) attempted to do so without the written authorisation of the applicants.

[21] Conversely, the respondents contend that knowledge that the purported exercise of the option was ineffectual for non-compliance with the Alienation of Land Act, is a legal conclusion.

[22] The respondents submit that the applicants require this Court to deviate from the findings of the Supreme Court of Appeal and this Court in the matters of *Fluxmans*[18] and *Mtokonya*, respectively. They argue that these judgments draw a clear distinction

[18] *Fluxmans Inc v Levenson* [2016] ZASCA 183; 2017 (2) SA 520 (SCA).

between the facts from which a debt arises and the legal conclusions to be drawn from such facts. Further, the respondents submit that *Fluxmans* and *Mtokonya* support the proposition that knowledge of the legal consequences of the facts was not required for prescription to run.[19] As knowledge of non-compliance with the Alienation of Land Act was a legal conclusion, knowledge thereof was not required. Instead, they conclude that prescription began to run when the applicants had knowledge of the primary facts either on 26 September 2003, when the respondents purported to exercise the option without any written authority, alternatively on 13 November 2003, when the two-month period for the exercise of the option, expired.

[23] The respondents also contend that, if the applicants did not have actual knowledge of the breach of the mandate before November 2007, they could, by the exercise of reasonable care, have acquired such knowledge. They say that this should have occurred in January 2005 when the plea in the first action was filed, and additionally thereafter when the applicants changed legal practitioners and engaged the services of Nilssens Attorneys in mid-2005.

Issues for determination

[24] The following issues are to be determined:

(a) Does the matter engage the jurisdiction of this Court?

(b) Can the facts as contemplated in section 12(3) of the Prescription Act in a negligence action against a legal professional (including a claim based on the furnishing of incorrect legal advice or the failure to discharge a mandate) include a legal conclusion?

(c) On the agreed facts, when did the applicants acquire knowledge of such facts?

(d) On the agreed facts, when could the applicants, by the exercise of reasonable care, have acquired such knowledge?

[19] Id *Fluxmans*; *Mtokonya* above n 8.

Jurisdiction and leave to appeal

[25] A consequence of extinctive prescription is that it extinguishes a right of action that a party would ordinarily have under section 34 of the Constitution. To that extent, the interpretation of section 12(3) of the Prescription Act raises a constitutional matter engaging this Court's jurisdiction under section 167(3)(b)(i) of the Constitution.[20]

[26] In addition, the discrete legal point as to what constitutes the relevant "facts" contemplated in section 12(3) of the Prescription Act in actions of professional negligence against legal practitioners also engages this Court's jurisdiction under section 167(3)(b)(ii) of the Constitution, as it raises an arguable point of law of general public importance. The interpretative question located in section 12(3) of the Prescription Act is whether a client who sues a legal practitioner for damages in a claim based on professional negligence must have knowledge, that there was, as a matter of law, a breach of mandate as part of the facts on which the claim is based. It is arguable in all of the respects alluded to by this Court in *Paulsen*,[21] in that:

(a) there is no authoritative pronouncement on the issue, with available, cogent academic or expert views on it being divergent;

(b) it raises new and difficult questions of law; and

(c) the answer to the question in issue is not readily discernible.[22]

[27] Further, the point of law extends beyond the interests of the parties to this litigation, having relevance for the legal profession as a whole and the public who seek and engage their professional services. Finally, it is a point of law that ought to be determined and it is therefore important for this Court to pronounce on the issue in the interests of legal certainty.

[20] *Links* above n 11 at para 22; *Mtokonya* above n 8 at para 9.

[21] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC).

[22] Id at para 23.

[28] In addition, it is in the interests of justice that leave to appeal be granted. It is not an issue that has previously enjoyed the attention of this Court. There are good prospects that this Court will reverse or materially alter the decision of the Supreme Court of Appeal. I find in favour of the applicant on jurisdiction and leave to appeal. Leave to appeal is granted.

Analysis

Legal framework

Right of access to courts and legal certainty

[29] The proposition that a claim, otherwise valid in law and even one that is unassailable, may be extinguished if not asserted within the time provided by the law is unsettling. It is unsettling, as its effect is to negate the substance of the right conferred by section 34 of the Constitution "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".

[30] The right of access to courts is central to the functioning of any democratic society and was described by this Court in *Barkhuizen*,[23] as follows:

> "Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court."[24]

[31] In addition, in *Chief Lesapo*[25] this Court said:

[23] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

[24] Id at para 31.

[25] *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."[26]

[32] At the same time, it is unfair for those against whom such claims are brought to have to unduly wait for those claims to emerge and be adjudicated upon. The ability to adequately respond to such claims, to locate documents that may be relevant, to trace relevant witnesses and to generally prepare properly to meet a claim, is all prejudiced by long periods of delay. In much the same way, the right to a fair public hearing that section 34 contemplates may also be undermined by undue delay in asserting a claim.

[33] In *Mdeyide*[27] this Court referred to extinctive prescription as advancing the interests of social certainty when it said:

> "In the interests of social certainty and the quality of adjudication, it is important, though, that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant may be barred from having a dispute decided by a court. This has been recognised in our legal system – and others – for centuries."[28]

[34] It is between these imperatives – the right of access to court and the need for legal certainty – that the law of extinctive prescription must carefully navigate in order to do justice to both. The effect of extinctive prescription is to permanently extinguish the right of access to court which would otherwise be intact. The consequences of delay for the debtor might not be as far-reaching, as the debtor would still retain the

[26] Id at para 22.

[27] *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC).

[28] Id at para 2.

opportunity to contest the claim. In one instance, the effect is permanent and dispositive of the right, while, in the other instance, it is relative and not as far-reaching. It is within this context that section 12 of the Prescription Act is located.

Section 12 of the Prescription Act

[35] Section 12 of the Prescription Act provides, in relevant parts, as follows:

> "(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.)

[36] In *Coboza*,[29] the Supreme Court of Appeal set out the manner in which the issue of prescription, and specifically section 12(3) of the Prescription Act, should be applied. They are:

(a) what are the facts from which the debt arises ("the primary facts"); and

(b) when were the primary facts known, or when should they reasonably have been known, to the creditor?[30]

[37] While section 12 provides the framework within which claims of extinctive prescription are to be adjudicated, its interpretation takes place against the backdrop of the Constitution, as section 39(2) reminds us that "[w]hen 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".[31]

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[29] *The MEC for Health, Western Cape v Coboza* [2020] ZASCA 165; 2020 JDR 2720 (SCA).

[30] Id at para 8.

[31] See also *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 9.

[38] There are a number of features of the section that require consideration and they relate in the main to knowledge – what it means, when it is acquired or deemed to be acquired and what would constitute the facts for purposes of section 12(3).

The content and scope of the knowledge requirement

[39] A dominant theme of section 12(3) of the Prescription Act is that prescription generally runs against a creditor when there is either knowledge or awareness of the debt. While knowledge and awareness may have different meanings depending on the context,[32] they can also be used interchangeably. In the context of the section, they generally refer to the same thing – the facts from which the debt arises as well as the identity of the debtor that the creditor has knowledge of or is deemed to have knowledge of, if the creditor could have acquired it by exercising reasonable care.

[40] The knowledge that section 12(3) contemplates could be either actual or deemed. Actual knowledge relates to the subjective knowledge that a creditor acquires of a fact while deemed knowledge is that which a creditor could have acquired by exercising reasonable care.

[41] In *Brand*[33] the Court said whether conduct would constitute failure to take reasonable care would depend on a number of factors. It said:

> "Whether the failure on the part of the creditor to take such steps amounts to a failure to exercise reasonable care within the meaning of the proviso or not depends, in my view, upon a consideration of all the circumstances relevant to the creditor's conduct, including, in the context of the present case, such factors as the plaintiff's physical and mental condition, the pain he was suffering, his memory function and the environment in which he then found himself."[34]

[32] Awareness is the ability to feel or sense things, while knowledge is about skills and information.

[33] *Brand v Williams* 1988 (3) SA 908 (C).

[34] Id at 916.

[42] In addition, in *Truter* the Court said in the context of when prescription began to run:

> "By contrast, in the present case, it is abundantly clear that Deysel *believed and appreciated* from as early as 1994 that a wrong had been done to him by Drs Truter and Venter."[35] (Emphasis added.)

The general rule that legal conclusions are not primary facts

[43] Our courts have drawn a distinction between primary facts and legal conclusions for the purpose of what constitutes knowledge of the facts under section 12(3). A general rule has emerged that legal conclusions do not constitute facts. Therefore, knowledge of such legal conclusions is not required by a creditor for purposes of section 12(3).

[44] In *Truter*, the Supreme Court of Appeal drew a clear distinction between facts and legal conclusions when it said:

> "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*:
>
> > '*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.'"[36] (Emphasis added.)

[35] *Truter* above n 7 at para 21.

[36] Id at para 17.

[45] This approach was accepted and approved by this Court in *Links*[37] and *Mtokonya*.[38]

[46] In *Links*, this Court clearly distinguished the factual and the legal elements of negligence and causation and emphasised that, until there was knowledge of facts that would have led the creditor "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)".[39] This highlights both the relationship as well as the distinction between the factual and the legal components of a case.

[47] In *Mtokonya*, this Court, in dealing with the distinction between facts and legal conclusions, said:

> "Furthermore, to say that the meaning of the phrase 'the knowledge of . . . the facts from which the debt arises' includes knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law would render our law of prescription so ineffective that it may as well be abolished. I say this because prescription would, for all intents and purposes, not run against people who have no legal training at all. That includes not only people who are not formally educated but also those who are professionals in non-legal professions. However, it would also not run against trained lawyers if the field concerned happens to be a branch of law with which they are not familiar. The percentage of people in the South African population against whom prescription would not run when they have claims to pursue in the courts would be unacceptably high. In this regard it needs to be emphasised that the meaning that we are urged to say is included in section 12(3) is not that a creditor must have a suspicion (even a reasonable suspicion, at that) that the conduct of the debtor giving rise to the debt is wrongful and actionable but we are urged to say that a creditor must have knowledge that such conduct is wrongful and actionable in law. If we were asked to say a creditor needs to have a reasonable suspicion that the conduct is or may be

[37] *Links* above n 11 at paras 31-2.

[38] *Mtokonya* above n 8 at para 36.

[39] *Links* above n 11 at para 45.

> wrongful and actionable in law, that would have required something less than knowledge that it is so and would not exclude too significant a percentage of society."[40]

[48] This Court was clear in its view that a creditor is not required to have knowledge that the conduct of the debtor was wrongful and actionable in law for the purposes of section 12(3). On the other hand, this Court also reasoned that a requirement for a creditor to have a reasonable suspicion that conduct was wrongful and actionable might be different. This Court left open the meaning to be attributed to section 12(3) and said that it would not exclude a suspicion of wrongful and actionable conduct, as opposed to knowledge that such conduct was wrongful and actionable. As I understand it, the suspicion that conduct would be actionable or wrongful would be a fact; it could never constitute a legal conclusion. A suspicion is, by its very nature, incompatible with a conclusion of law. On the other hand, knowledge of wrongfulness, fault or negligence would constitute conclusions of law.

[49] Relatedly, in *Haward*,[41] the House of Lords also referred to the issue when it said:

> "A linguistic point, which can give rise to confusion, should be noted here. Sometimes the essence of a claimant's case may lie in an alleged act or omission by the defendant which cannot easily be described, at least in general terms, without recourse to language suggestive of fault: for instance, that 'something had gone wrong' in the conduct of the claimant's medical operation, or that the accountant's advice was 'flawed'. Use of such language does not mean the facts thus compendiously described have necessarily stepped outside the scope of section 14A(8)(a). In this context there can be no objection to the use of language of this character so long as this does not lead to any blurring of the boundary between the essential and the irrelevant."[42]

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[40] *Mtokonya* above n 8 at para 63.

[41] *Haward v Fawcetts* [2006] UKHL 9.

[42] Id at para 13.

The knowledge requirement in professional negligence claims

[50] In instances involving claims against professionals based on negligence, a creditor may have knowledge of facts but may, due to a lack of expert knowledge, be unable to discern from those facts that something wrong has occurred. Those facts may well objectively constitute the necessary facts to institute an action seen from the perspective of someone knowledgeable in the field (for example, medicine, engineering or auditing). However, to a creditor who lacks such expertise, they may not say the same thing. It would be harsh in those situations to say that the creditor has knowledge of the facts from which the debt arises.

[51] This is precisely the situation that this Court described in *Links* when dealing with a medical negligence claim, it said:

> "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."[43]

[52] This was also the approach followed by the Supreme Court of Appeal in *WK Construction*,[44] a case involving professional negligence by an auditor, where the Court said:

> "The question is, accordingly, whether, by 22 August 2013, it can be said that the known facts would have caused WK Construction, on reasonable grounds, to have suspected that there was fault on the part of Mazars so as to cause it to seek further advice. Stated differently, whether *WK Construction* had 'knowledge of facts that would have led [it] to think that possibly there had been negligence [on the part of Mazars] and that this had caused' its loss from the fraud perpetrated by Mr Maartens."[45]

[43] *Links* above n 11 at para 47.

[44] *WK Construction* above n 14.

[45] Id at para 38.

[53] Two propositions emerge from *Links* and *WK Construction*. First, we are able to say that in professional negligence cases, at least in cases involving professionals other than lawyers, knowledge of the facts for the purpose of section 12(3) will arise when the creditor knows, or should on reasonable grounds know, that something wrong has occurred. This may be preceded by a suspicion to that effect which will require the creditor to make further enquiry or seek expert advice as part of the exercise of reasonable care. The reference to "something wrong" occurring, or a "suspicion of fault", or of "negligence" is not a reference to knowledge of a wrong in the legal sense, but rather a reference to the existence of facts that should instil in the creditor a belief that something had gone wrong.

[54] Second, it also follows from the above that in professional negligence cases, a mere suspicion that some wrong has occurred would not trigger the running of prescription. If the facts are such that they give rise to a suspicion of some wrongdoing on the part of another, it would warrant further enquiry. Prescription would start to run upon the conclusion of that enquiry if the suspicion is confirmed or upon the expiry of a reasonable period for investigating the matter and coming to a conclusion.

[55] However, if the nature of the facts is such that they do not appear to a reasonable person to suggest wrongdoing on the part of another, the creditor would not be at risk and prescription will not start to run. *Links* tells us that in such situations, prescription would only start to run when the creditor knows or on reasonable grounds should know that a wrong has been committed by an identified party and the facts giving rise to it. It is then that the creditor has knowledge of the identity of the debtor and the facts from which the debt arises. That prescription should start to run from that point accords with the language of section 12(3), gives effect to the rights in section 34 of access to court and does not unduly impede the right to a fair hearing that a debtor is also entitled to under section 34.

[56] These principles have not been contentious. In cases such as *Links* and *WK Construction*, the expert, or further, advice that the court made reference to would have constituted facts and not legal advice or a legal conclusion. The advice would fit relatively seamlessly into the scheme of section 12(3) as primary facts. However, the problem is that not all expert advice fits neatly into the characterisation of a fact, as I explain below.

The difficulty with the general rule in legal professional negligence claims

[57] The application before this Court is one based on professional negligence on the part of a legal practitioner and the applicants have argued that there should be no difference in the approach in this case to that taken in professional negligence cases such as *Links* (medicine) and *WK Construction* (auditing). They say that if a medical or auditing conclusion would constitute a fact for the purpose of section 12(3), there is no reason why a legal conclusion should not be treated in the same way in a claim for professional negligence against a legal practitioner for allegedly deviating from the standard of reasonable attorneys. At first sight, this may seem to be a persuasive proposition but there are difficulties that it runs into.

What is the difficulty?

[58] In cases involving a claim for damages based on the professional negligence of a legal practitioner, the facts-versus-legal-conclusion distinction arises much more sharply and raises a conceptual difficulty in maintaining the separation between facts and legal conclusions that cases such as *Mtokonya* and *Truter* speak to.

[59] The attorney-client relationship is understood to be "of a very special character with certain aspects peculiar to itself".[46] An attorney—

> "'must be meticulous, accountable, . . . He or she must serve his client faithfully and diligently and must not be guilty of any unnecessary delay. He or she must once he or

[46] *Goodriche & Son v Auto Protection Insurance Co Ltd (In Liquidation)* 1967 (2) SA 501 (W); [1967] 2 All SA 437 (W)at 503H.

> she has undertaken the client's case, not abandon it without lawful reason or excuse. An attorney who fails to explain his or her precise instructions and lays possum invites an adverse inference against him or herself . . .'
>
> 'An attorney is liable for the consequence of gross negligence if he or she displays a lack of reasonable skill and diligence in the performance of his or her duties in matters within his or her field of practice, expertise or knowledge.'
>
> 'An attorney's liability arises out of contract and his or her exact duty towards his or her client depends on what he or she is employed to do. In the performance of his or her duty or mandate, an attorney holds himself or herself out to his or her clients as possessing the adequate skill, knowledge and learning for the purpose of conducting all business that he or she undertakes. If, therefore, he or she causes loss or damage to his or her client owing to a want of such knowledge as he or she ought to possess, or the want of such care he or she ought to exercise, he or she is guilty of negligence giving rise to an action for damages by his or her client against him or her.'"[47]

[60] People seek the services of a legal practitioner for a variety of reasons – but in the main, they seek legal advice or require the provision of legal professional services. It would be fair to say that those who seek professional legal services are not knowledgeable in the law and its intricacies. In a country such as ours, where the Constitution and the law occupy a central place in the lives of people, many rely on the advice and services of legal practitioners to navigate their way around the choices they must make, the conduct they must conform to and generally how they must live their life as constitutional subjects. When this happens, it would also be fair to say that reliance may reasonably be placed on the legal advice received or an undertaking that the legal practitioner will carry out the given mandate professionally and diligently. An assurance that it has been discharged may be similarly treated. In *Waglines*,[48] Didcott J alluded to the duty to acquaint one with the area of law they were involved in and to seek advice to that effect if necessary:

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[47] *Ramonyai v LP Molope Attorneys* [2014] ZAGPJHC 65; [2014] JOL 32399 (GJ) at para 16 with reference to Charlesworth and Percy *Negligence* 4 ed (Sweet and Maxwell, 1962) at paras 1032-42; *Clark v Kirby Smith* [1964] 2 All ER 835; *Bagot v Stevens Scanlan & Co* [1984] 3 All ER 577; *Honey & Blanckenberg v Law* 1966 (2) SA 43 (R) at 46 (*Honey and Blanckenburg*); *Halsbury's Law of England* 3 ed (LexisNexis, 1964) 36 at para 135.

[48] *S v Waglines (Pty) Ltd* 1986 (4) SA 1135 (N).

> "Sometimes, to be sure, the duty to investigate will be performed satisfactorily when advice on the lawfulness or otherwise of the course envisaged is obtained from a source ostensibly qualified to furnish such, and to think it lawful will be reasonable once the assurance has thus been given that it is."[49]

[61] The large majority of people who consult legal practitioners do not have any independent basis to test the correctness of the advice received or to interrogate an assurance that a mandate has been professionally discharged. They would not, in any event, have any need to do so. That is the nature of the knowledge gap between professionals and laypersons, reinforcing the reliance that people place on professionals in many areas of their lives – the medical, accounting, engineering and legal spheres.[50] It is for these reasons that legal practitioners are subject to professional and regulatory bodies.

[62] While the legal position in other areas of professional negligence is relatively uncomplicated,[51] when a legal practitioner gives incorrect legal advice or fails to discharge a mandate by overlooking a legal requirement, the legal position is different. The reason for this lies primarily in the facts-versus-legal-conclusions distinction. This distinction does not carry the same significance in claims against professionals who are not legal practitioners. In the case of other professions, the furnishing of an expert opinion would require the expert to apply the rules of that discipline to the facts at hand and reach a professional conclusion. That conclusion would not be a legal conclusion but, for example, a radiological, an auditing or an engineering conclusion. That conclusion may well constitute a primary fact from which a debt arises. Our law offers no impediment in recognising that knowledge of such a conclusion may in appropriate cases be required before prescription starts to run.[52]

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[49] Id at 1145.

[50] Id.

[51] *Truter* above n 7; *Mtokonya* above n 8.

[52] *Links* above n 11 at para 47.

[63] Different considerations, however, apply when that professional is a legal practitioner, as the application of legal rules to the facts would result in a legal conclusion. Just as someone who does not understand engineering would seek the view of an engineer to advise on possible defective engineering advice given, in other instances, someone may need to consult a legal practitioner to advise on a legal issue that may relate to advice previously given by another legal practitioner. In the latter instance, the legal advice received may run into the barrier of the exclusion of legal conclusions as primary facts. In the former case, it would not. This distinction may appear to be arbitrary and with prejudicial consequences to some.

[64] At the time the incorrect advice is given, or a mandate is purportedly discharged, the client would generally not know that the advice was incorrect or that the mandate was not properly discharged. Either may have occurred as a matter of fact. Yet the knowledge and appreciation that the advice was incorrect or that the mandate was not properly discharged may only emerge much later. This may emerge as a result of a legal conclusion – an opinion, advice or a ruling by a court and on a timeline which may be unpredictable.

[65] In *Mtokonya* the Court referred to what constitutes a legal conclusion by referring, in part, to an article by Clarence Morris which says:

> "A conclusion of law results when legal effects are assigned to events. A conclusion of law stands for more than the happening of events, it is a step in the legal disposal of events. If a rule of law must be applied before a conclusion is reached, that conclusion is one of law.
>
> . . .
>
> '(T)he distinction between [questions of fact and questions of law] is vitally practical. A question of fact usually calls for proof. A question of law usually calls for argument.'"[53]

[53] *Mtokonya* above n 8 at para 43; see also Morris "Law and Fact" (1942) 5 *Harvard Law Review* 1303 at 1328-9, 1304 and 1331.

Relevant case law

[66] Arising from this, if a legal conclusion is the only way a creditor can obtain knowledge that incorrect legal advice was given or a mandate not professionally discharged, does this constitute knowledge of a fact that section 12(3) contemplates or knowledge of a legal conclusion? At first blush, it might appear to be a legal conclusion, as it would generally arise by applying the law to the facts. But that is precisely the conundrum that arises in matters of this nature. That legal conclusion may be essential to completing the spectrum of the minimum facts from which the debt arises and of which the creditor is required to have knowledge. Put differently, it may be that, but for the legal conclusion, a creditor would not have knowledge of the "facts" from which the debt arises. To illustrate these differences, it is useful to undertake a brief overview of the approach of our courts in relevant cases involving legal practitioners. I deal with: (a) *Fluxmans*; (b) *McMillan*; and (c) *Ditedu*.[54]

[67] In *Fluxmans*,[55] a client and their legal practitioner concluded an oral contingency fee agreement in 2006 that would apply to the prosecution of a claim by the client against the Road Accident Fund (RAF). The RAF claim was settled in 2008. After deducting the contingency fee provided for in the agreement, the legal practitioner paid the client. In 2014, the client wrote to the legal practitioner advising that it had come to his knowledge that the contingency fee agreement did not comply with the provisions of the Contingency Fees Act.[56] This followed a judgment by this Court to that effect.[57] The client brought an action against the legal practitioner for unjust enrichment. The legal practitioner raised a special plea that the claim had prescribed. The High Court dismissed the special plea.

[54] *Ditedu v Tayob* [2005] ZAGPHC 86; 2006 (2) SA 176 (W).

[55] *Fluxmans* above n 18.

[56] 66 of 1997.

[57] *Ronald Bobroff & Partners Inc v De La Guerre; South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* [2014] ZACC 2; 2014 (3) SA 134 (CC); 2014 (4) BCLR 430 (CC).

[68] The Supreme Court of Appeal, in a split decision, overturned the finding of the High Court. The majority deemed non-compliance with the Contingency Fees Act a legal conclusion. For the minority it was a primary fact. The majority found that the client knew, in 2008, all the facts on which his claim for unjust enrichment was based, even though he did not know the legal conclusion arising from those facts, namely that the contingency fee agreement was invalid. It said that—

> "[k]nowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. . . . It may be that before February 2014 the respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run. Knowledge of invalidity of the contingency fee agreement or knowledge of its non-compliance with the provision of the Act is one and the same thing otherwise stated or expressed differently. That the contingency fee agreement such as the present one, which do not comply with the Act, are invalid is a legal position that obtained since the decision of this court in *Price Waterhouse Coopers Inc* and is therefore not a fact which the respondent had to establish in order to complete his cause of action. Section 12(3) of the Prescription Act requires knowledge only of the material facts from which the prescriptive period begins to run – it does not require knowledge of the legal conclusion (that the known facts constitute invalidity)."[58]

[69] The minority would have upheld the appeal on the basis that, until the judgment of this Court, the appellant was not aware of, and could not by the exercise of reasonable care, have become aware of, the facts that indicated non-compliance with the Contingency Fees Act. In coming to the conclusion that the claim had not prescribed, the minority said:

> "In his founding affidavit the respondent averred that he is a lay person and that he relied on the appellant to represent his interests and to advise him properly and fairly. It is clear that he placed his trust in the appellant, who he would have thought were the experts on matters legal and would handle his claim professionally. He referred to

[58] *Fluxmans* above n 18 at para 42.

> Mr Perlman, who handled his claim, as 'a very experienced attorney', and felt confident that he 'would be properly advised and represented in all respects'. There is nothing in the papers to suggest that he should at any stage have realised that there had been non-compliance with the provisions of the [Contingency Fees] Act and which should have led him to believe that he should seek legal advice elsewhere. It is true that he was not happy with the amount of the fees that he paid in terms of the agreement, but that was no reason for him to even suspect that there had not been compliance with the provisions of the [Contingency Fees] Act. He merely felt that, because of the nature and extent of his injuries, the percentage fees he was required to pay should be less than 22.5%. There can be no basis, therefore, for a submission that the respondent could, by the exercise of reasonable care, have acquired knowledge, at an earlier stage, of facts that would indicate non-compliance with the [Contingency Fees] Act. It follows that prescription did not begin to run until the respondent acquired knowledge, during February 2014, that the appellant had not complied with the provisions of the [Contingency Fees] Act."[59]

[70] The minority premised their view on the absence of knowledge of facts, as opposed to legal conclusions, namely that the client had not initially been aware that the document he signed at the attorneys' office had not been a written contingency fee agreement. And while the minority need not have dealt with the proposition that legal conclusions may be facts for the purpose of section 12(3), its reasoning on the progression from the facts of non-compliance to a conclusion that such facts constitute non-compliance with the Prescription Act leaves open that possibility. This matter involved a claim for unjust enrichment and not professional negligence and is distinguishable from the case on hand. Regardless, the views of the majority and the minority are insightful.

[71] *McMillan*[60] is an illustration of a breach of mandate claim. In that case, a firm of legal practitioners were sued in 2017 for breach of mandate arising out of the drafting of an ante-nuptial contract which was subsequently found to be invalid by the High Court in a ruling in 2016. The firm pleaded that prescription began to run in 1998,

[59] Id at para 23.

[60] *McMillan* above n 12 at para 1.

when the firm drafted an invalid ante-nuptial contract. In the alternative, the firm pleaded that prescription began to run in May 2014. At this date, a director of the firm advised the client to consult another legal practitioner on the basis that he had a potential claim against the firm for the contract. This was followed up by a letter from the firm to the client to that effect.

[72] The Supreme Court of Appeal dismissed an appeal to it and confirmed the order of the High Court that the claim had prescribed. It found, in particular, that the client was aware in May 2014 when he consulted with the firm that he "may" have a claim against them. It went to find further that his cause of action was complete as soon as he was informed in May 2014.[61]

[73] *Ditedu* involved a claim for damages by a client against her erstwhile legal practitioner based on negligence in discharging a mandate. In particular, the client alleged that the legal practitioner was negligent in advising her to accept a settlement of the claim in the amount of R5 013 which was offered by the RAF. The legal practitioner raised a special plea of prescription. They argued that the claim was brought three years after the client had knowledge of all the facts on which the claim was based, being when the claim was settled and the client was paid. The High Court dismissed the special plea. In doing so, it made two important observations:

> "In my view, once a layman consults an attorney, or other legal expert, and the latter furnishes him or her with an opinion as to the law, which opinion proves to be erroneous, the furnishing of that erroneous opinion is a fact for the purposes of section 12(3).
>
> . . .
>
> If Mr Kruger's contention were to be accepted, laymen contracting with attorneys for the furnishing of their expertise in the knowledge of the law would be without a remedy in respect of any errors made by such attorneys, and discovered more than three years after the rendering of the service concerned. This would be an absurd result – especially in the case of commercial contracts of long duration – which the legislature

[61] Id at para 37.

> could not have intended. Moreover, section 39(2) of the Constitution enjoins me '(w)hen interpreting any legislation, . . . (to) promote the spirit, purport and objects of the Bill of Rights'. In *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) Heher JA said the following at 98I: 'In addition, the plaintiff is entitled to the benefits of a constitutional dispensation that promotes, rather than inhibits, access to courts of law'. The present plaintiff is, of course, entitled to the same benefits."[62]

[74] All of these cases proceed from the premise that the creditor should have knowledge of the facts from which the debt arises. However, the cases are not unanimous as to whether the creditor must have an appreciation of the facts from a legal point. The majority in *Fluxmans* answered this in the negative, as did *McMillan*. The court in *Ditedu* took a different view. It may be argued that the minority in *Fluxmans* left the door open to such a view.

[75] And so, it does appear that the position on the issue is far from clear. What is clear though, is that in cases of professional negligence legal conclusions on matters such as negligence, wrongfulness and unlawfulness appear to be firmly out of the realm of what may constitute the primary facts. Yet, there is a thread in some of these judgments that prescription will not run until there is knowledge and appreciation of the facts. Arising from this, is the equally strong stance that, unless someone knew from the available facts that something wrong had occurred, prescription will not run.[63] From this, it must be arguable, in professional negligence cases involving legal practitioners, that: if the absence of a legal conclusion prevents a creditor from having knowledge, or deemed knowledge, of the facts from which a debt arises; then that legal conclusion may be essential to completing knowledge of the minimum facts from which the debt arises.

[76] It would be inconsistent with the knowledge requirement in section 12(3) to suggest that prescription must begin to run, even in the absence of knowledge that

[62] *Ditedu* above n 54 at paras 8-9.

[63] Id *Ditedu*; *Fluxmans* above n 18 at para 23.

something wrong may have occurred. In claims involving professional negligence on the part of legal practitioners, knowledge that the advice received was incorrect or knowledge that a mandate was not properly discharged, where it may depend on legal conclusions, must be regarded as facts for the purposes of section 12(3). To hold otherwise would lead to an injustice for many creditors in that position – their claims against their erstwhile legal practitioners would run the risk of becoming prescribed even in the absence of knowledge that there was a breach of the mandate. This runs counter to the language and the objective of section 12(3) of the Prescription Act. I expand on this below.

The exception – a legal conclusion may be essential in completing the facts that section 12(3) contemplates

[77] There may be instances where a conclusion that advice is incorrect, or a mandate not discharged, may be reached without a legal conclusion being arrived at. In those instances, the failure to discharge the mandate would be a fact from which the debt arises, and one not reached by a legal conclusion. However, in other cases, it may be impossible to have knowledge that the advice given was incorrect or that the mandate was not professionally discharged without obtaining professional advice to that effect.

[78] In those situations, it is argued by the applicants that the advice obtained would constitute knowledge that the original advice received was incorrect or that the mandate was not professionally discharged. They go on to say that this would then be a fact from which the debt arises as, absent the further advice or opinion received, they would not know or reasonably be assumed to know that the original advice was incorrect.

[79] In such instances, a limited exception to the rule is necessary and appropriate. The exception being: for the purposes of section 12(3) of the Prescription Act, in professional negligence claims against legal practitioners, the facts from which the debt arises may include a legal conclusion, where that legal conclusion forms part of the cause of action or minimum facts in order to pursue the claim. This view is advanced on three grounds: (a) the application of the general rule may result in an injustice; (b)

an exception for negligence claims against legal practitioners would accord with our jurisprudence relating to other professions; and (c) the exception is limited in scope.

[80] First, to suggest that the general rule must apply in such instances would result in an injustice in a number of respects in negligence claims against legal practitioners where the basis of the claim is the negligent provision of incorrect advice. Such injustices may include the following:

(a) Prescription would start to run when the incorrect advice is given, notwithstanding the lack of knowledge on the part of the client that the advice was incorrect and the entitlement to regard that advice as correct.

(b) Prescription would in such instances have the result of penalising innocent inaction as opposed to negligent inaction.

(c) A legal practitioner who acts negligently, under circumstances where the client is unaware of such negligence, will be entitled to rely on that negligence from the date that it objectively occurred to defeat a claim arising out of such negligence.

[81] This is an unjust and oppressive outcome by any measure. It would be asking the impossible of those who seek the services of a legal practitioner. Instead of being able to rely on the correctness of the advice received, they would be required to independently test the correctness of that advice in order to prevent the prescription of any possible claim that may arise from the giving of that advice. They could only test it by consulting another legal practitioner, and so the cycle of always having to be sceptical of legal advice would be repeated. This cannot be correct.

[82] Accordingly, it is necessary to bring the interpretation of section 12(3) in line with the spirit of the Bill of Rights in not unduly impeding the right of access to courts and as section 39(2) enjoins this Court to do. It would avoid using extinctive prescription as a blunt instrument to achieve legal certainty.

[83] Second, it is also necessary to ensure that our law of prescription does not perpetuate an arbitrary distinction between those who have professional negligence claims against legal practitioners as opposed to those who have similar claims against other professionals.

[84] It must follow that, in appropriate cases of professional negligence involving legal practitioners, a legal conclusion may be essential to complete knowledge of the facts from which the debt arises. It should not, though, apply in all cases of professional negligence involving legal practitioners. Where the facts suggest some wrongdoing, it would activate the need to make further enquiry. In that event, prescription will only commence running after the completion of that enquiry within a reasonable time.

[85] The current state of our law recognises this in cases involving professionals other than legal practitioners. In *Links*, this Court said that it would be unrealistic to expect a layperson with no knowledge of medicine to have knowledge of what caused his condition without first having the opportunity to consult with a medical expert for advice.[64]

[86] It must be similarly arguable that it would be unrealistic for a layperson who has no knowledge of the law to know or reasonably suspect that the advice given by a legal practitioner or the manner in which a mandate was discharged was legally correct. That person should have the same opportunity, after realising that something might have gone wrong, to consult with an expert (another legal practitioner) to establish whether the advice received, or the services rendered were in accordance with the standards of the profession. They are identical situations in all respects except that in one the conclusion will be a medical or accounting conclusion while in the other it would be a legal conclusion. They would say the same thing and achieve the same object in the context of interpreting section 12(3). In both situations, they would provide the creditor with an appreciation of the facts that the creditor needs to have knowledge of. That, in

[64] *Links* above n 11 at para 47.

the instance of legal practitioners, this appreciation would be arrived at through a legal conclusion should not stand as an obstacle to the conclusion that the knowledge in question constitutes knowledge of the facts from which the debt arises.

[87] Thus, an exception would be consistent with the guarantee found in section 9 of the Constitution that all are equal before the law. It would at first sight seem incongruous with the guarantee of equality to have different legal regimes applying to what are essentially similar professional negligence actions based on the same principle.

[88] Third, the exception I propose would constitute a limited exception. The scope of the exception would be defined in the following terms: it would only apply—

(a) in professional negligence cases against legal practitioners; and

(b) where a legal conclusion is necessary as part of the minimum facts required by a creditor to have knowledge of the debt in terms of section 12(3) of the Prescription Act.

[89] That it is a limited exception is important for a number of reasons. It would not apply in all cases of professional negligence involving legal practitioners but only in those where a legal conclusion is necessary to establish that incorrect advice was given, or a mandate was not properly discharged.

[90] Importantly, it would also not apply as an exception to the general principle of the ignorance of the law and the attendant concern alluded to by this Court in *Mtokonya* – that if prescription did not run against those who did not have knowledge of the law it would render the law of prescription ineffective.[65] The proposed exception is not directed at that category or persons but, instead, to those who seek and obtain legal advice or give a mandate only to later discover that the advice was incorrect or the mandate not discharged in the manner required by the law. This limited and narrowly

[65] *Mtokonya* above n 8 at para 63.

tailored exception will not have any adverse effect on the efficacy of the law of prescription.

[91] Finally, such a limited exception would not unsettle the substantive holding that a legal conclusion with regard to unlawfulness or negligence is not a fact for the purpose of section 12(3)[66] – or that, generally, knowledge of legal conclusions is not required before prescription commences to run. While the general rule remains relevant in ensuring the balance between the right of access to courts and the requirements of legal certainty in bringing a claim timeously, it may, if applied without exception, have unintended and prejudicial consequences in claims against legal practitioners. It may, in particular, be inappropriate where the legal conclusion is the very subject on which the claimant sought advice from the legal practitioner and on which the claimant was kept in ignorance by that legal practitioner's negligence. In such a case, the legal rule is not merely part of the law applied to the facts of a case; it is at the heart of the cause of action.

Other jurisdictions

[92] Before I apply the exception to the facts in this matter, I pause to consider how other jurisdictions approach the fact-versus-law distinction, namely: England and Canada's discoverability principle; India's sufficient cause approach; and Kenya's approach to material facts. Though the law on prescription, or limitation as it is termed in these jurisdictions, differs in detail from South Africa, there are beneficial insights to be drawn.

The English and Canadian distinction between facts and legal conclusions

[93] The limitation legal framework in both England and Canada is based on what is termed the rule of discoverability. "Discoverability" serves to protect a creditor who could not reasonably discover that they had a claim. This serves as a qualification on

[66] *Truter* above n 7 at para 19.

the usual rule that the limitation period starts to run as soon as the claim accrues. Samuel Beswick (in relation to Canadian law) captures the principle as the limitation running from when a plaintiff discovered, or could with reasonable diligence have discovered, a right to the action as follows:

> "Rather than construing time to run from the date at which damage or loss occurs, limitation usually runs from when a plaintiff discovered, or could with reasonable diligence have discovered, their right of action."[67]

[94] The strong view that emerges, at least from England and Canada, is that prescription should not begin to run unless a client has knowledge, or may reasonably suspect, that the advice given by their legal practitioner was incorrect. A brief discussion on each jurisdiction is warranted.

England

[95] The position in England is governed by the English Limitation Act of 1980 (English Limitation Act). The ordinary limitation period is six years from when the cause of action accrues. However, section 14A deals with special time limits for negligence actions where facts relevant to the cause of action are not known at the date of accrual. Section 14A(9) provides that "knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.[68] This position, in respect of the running of prescription, is similar

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[67] Samuel Beswick "Error of Law: An Exception to the Discoverability Principle?" *Osgood Hall Law Journal* 57 (2020) 295 at 296.

[68] Section 14A of the English Limitation Act states in relevant parts as follows:

> "(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.
>
> . . .
>
> (5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.
>
> . . .

to South African law where cases hold that knowledge that the particular act or omission constituted negligence or was wrongful and actionable would not be required or be relevant for prescription to commence.[69]

[96] The leading case for the English position, in respect of negligent investment advice is *Haward*.[70] Although it does not deal with solicitor negligence and the applicant was not successful, it is insightful. Lord Nicholls touched on the question of claims against solicitors, observing that—

> "[*in*] *many cases the distinction between facts (relevant) and the legal consequence of facts (irrelevant) can readily be drawn. In principle the two categories are conceptually different and distinct*. But lurking here is a problem. There may be difficulties in cases where a claimant knows of an omission by say, a solicitor, but does not know the damage he has suffered can be attributed to that omission because he does not realise the solicitor owed him a duty. *The claimant may know the solicitor did not advise him on a particular point, but he may be totally unaware this was a matter on which the solicitor should have advised him. This problem prompted Janet O'Sullivan . . . to ask the penetrating question: unless a claimant knows his solicitor owes him a duty to do a particular thing, how can he know his damage was attributable to an omission?*"[71] (Emphasis added.)

[97] Lord Mance, in the same case, said:

> "For present purposes what matters is that it is, in my opinion, wrong to suggest that all a claimant needs to know is that he has received professional advice but for which he would not have acted in a particular way which has given rise to loss, or that he has not received advice when, if he had received it, he would have acted in a way which would avoided such loss.
>
> . . .

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above."

[69] *Truter* above n 7; *Mtokonya* above n 8.

[70] *Haward* above n 41.

[71] Id at para 15.

> *A claimant who has received apparently sound and reliable advice may see no reason to challenge it unless and until he discovers that it has not been preceded by or based on the investigation which he instructed or expected. A claimant who has suffered financial loss in a transaction entered into in reliance on such advice may not attribute such loss to the advice unless and until he either makes the like discovery about the inadequacy of the work done, or at least discovers some respect in which the transaction was from the outset unsound giving him . . . prima facie cause to complain*. Such a scenario may well occur where there are other causes of loss which appear to him capable of explaining the whole loss."[72] (Emphasis added.)

[98] Furthermore, again in *Haward*, Lord Walker makes the point that the dividing line between facts and legal concepts is often a fine one—

> "[A]lthough the claimant need not, at the starting date, know anything about the tort of negligence (not even its name) his or her state of knowledge cannot be assessed, with hindsight, without some reference to legal concepts, including what is causally relevant in the context of a negligence action."[73]

[99] *Haward* continues to be supported in subsequent cases. In dealing with a mistake of law in terms of section 32 of the English Limitation Act, the Supreme Court of the United Kingdom in *Test Claimants in the Franked Investment Income Group Litigation*[74] understood *Haward* (and a dissent in *Deutsche Morgan Grenfell*) to mean that time does not begin to run until the claimant knows, actually or constructively, that he made a mistake (that being an essential ingredient of the cause of action), to the standard that "a worthwhile claim arises".[75] In dealing with a professional negligence case against solicitors, the Manchester High Court in *Taylor*[76] relied on *Haward* and found that "[i]n the context of professional negligence cases subject to section 14A, it may be that, on the particular facts, a claimant may not know the loss or damage is

[72] Id at para 113.

[73] Id at para 59.

[74] *Test Claimants in the Franked Investment Income Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 47.

[75] Id at para 195.

[76] *Taylor v Legal and General Partnership Services Ltd* [2022] EWHC 2475 (Ch).

attributable to the acts or omissions alleged to constitute negligence until the point at which he is advised of a potential claim in negligence".[77] Similarly, in *Witcomb*,[78] the trial court (upheld in the Court of Appeal) relying on *Haward* made the following conclusions:

> "[W]here the essence of the allegation of negligence is the giving of wrong advice, time will not start to run under section 14A [of the English Limitation Act] until a claimant has some reason to consider that the advice may have been wrong. . . . [W]here the essence of the allegation is an omission to give necessary advice, time will not start to run under section 14A [of the English Limitation Act] until the claimant has some reason to consider that the omitted advice should have been given."[79]

[100] England maintains a distinction between facts and legal conclusions. However, the cases referred to indicate that there is a subtle difference between the two and the possibility that a creditor may need to reach a legal conclusion – not a legal conclusion of negligence, but indeed a legal conclusion in order to have knowledge of the facts for their claim. All of this leads to the conclusion made by Janet O'Sullivan, and noted in *Haward*, wherein she asks the following challenging question of this conceptual separation: "unless a claimant knows his solicitor owes him a duty to do a particular thing, how can he know his damage was attributable to an omission?"[80]

[101] In the analysis that I have undertaken, I conclude that there may be cases where the defective nature of the advice is transparent, on its face, but there will also be other cases where something more is needed to require the creditor's own inquiry, something which would reasonably cause a person to ask questions about the correctness of the

[77] Id at para 106.

[78] *Witcomb v J Keith Park Solicitors (A Firm)* [2021] EWHC 2038 (QB) and on appeal *Witcomb v J Keith Park Solicitors (A Firm)* [2023] EWCA Civ 326.

[79] Id at paras 36-7.

[80] O'Sullivan "Limitation, Latent Damage and Solicitors' Negligence" (2004) 20 *Journal of Professional Negligence* 218 at 237.

advice that they were given.[81] This reasoning appears consistent with the English position.

Canada

[102] Canadian courts have also had some difficulty with the distinction between facts and law, which Beswick describes as shallow.[82]

[103] In *Rafuse*,[83] the Supreme Court of Canada was called upon to consider the distinction. In 1969, the plaintiff's solicitors had failed to advise the plaintiff that the mortgage he sought was invalid because it involved the mortgagor-company giving prohibited financial assistance, contrary to legislation. The Court considered whether the discoverability rule was applicable to the provincial limitation statute, and in concluding such said:

> "I am thus of the view that the judgment of the majority in *Kamloops* laid down a general rule that *a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence*, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents."[84] (Emphasis added.)

[104] It held that prescription against the negligent solicitors only began to run in 1997, when non-compliance with the legislation was raised by the mortgagor in foreclosure proceedings brought by the plaintiff. The Supreme Court of Canada regarded the absence of this knowledge, as the absence of knowledge of a material fact.

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[81] See [53] to [54] above.

[82] Beswick above n 67 at 324.

[83] *Central Trust Co v Rafuse* [1986] 2 SCR 147.

[84] Id at 224.

[105] Later, in *Cooper*,[85] dealing with an action against a solicitor, a Saskatchewan court took a similar view to that in *Rafuse* and the English position. Again, the discoverability rule was applied in favour of the claimant who had not been aware, until some years later, of legislative provisions of which the solicitors should have advised him. The Court said:

> "Each cause of action [of Ms Hatch] is founded on the principle that the defendants had a duty to advise her of her legal rights vis-a-vis the Estate and themselves and that they failed to do so, and/or negligently misstated the applicable law. Thus, the discovery by Ms Hatch of her rights under the MPA [Matrimonial Property Act] and the DRA [Dependants' Relief Act] and the alleged misinterpretation of the Will by the defendants constitute a discovery of facts on which to found an action in negligence against the defendants and not the law on which to found an action under the MPA or the DRA. Her initial discovery is akin to [the plaintiff's] discovery [in *Rafuse*] that its mortgage security was void because its lawyer failed to comply with a specific law governing mortgages that were unknown to it."[86]

[106] In conclusion, and while the principle of discoverability distinguishes our legal framework from that of England and Canada, the idea that a legal conclusion will always be irrelevant is not one of general applicability. At the very least, the question has been raised, and answered to some extent, that knowledge of the facts may well, in some instances, include knowledge of a legal conclusion.

India

[107] The running of prescription in India is governed by the Limitation Act[87] and the period within which the action is to be brought will depend on the subject matter of the case. The starting point of the limitation is the date of the accrual of the cause of action. Section 5 of the Indian Limitation Act[88] allows a court to extend the period of limitation

[85] *Hatch v Cooper* 2001 SKQB 491.

[86] Id at paras 19-21.

[87] 36 of 1963.

[88] Section 5 states as follows:

on sufficient cause. A body of jurisprudence has developed considering what would constitute sufficient cause, with the Supreme Court taking a generous view. It said:

> "The legislature has conferred the power to condone delay by enacting section 5 of the Indian Limitation Act 36 of 1963, in order to *enable the Courts to do substantial justice to parties by disposing of the matter on 'merits'. The expression 'sufficient cause' employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court*."[89] (Emphasis added.)

[108] Mistakes on the part of counsel or incorrect legal advice have been accepted, in some instances, as constituting sufficient cause for the purpose of section 5.[90] It would appear that sufficient cause is, therefore, wide enough to encompass a diverse range of reasons, and the facts-versus-legal-conclusion distinction does not appear to feature as a significant matter of interpretation.

Kenya

[109] The Kenyan Limitation of Actions Act[91] includes a provision that the prescription period of three years for an action founded on torts may be extended by one year where "it is proved that material facts relating to that cause of action were or

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> "Extension of prescribed period in certain cases.—Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.
>
> *Explanation.*—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."

[89] *Collector, Land Acquisition, Anantnag v Mst Katiji* AIR 1987 SC 1353.

[90] Basu *Commentary on Law on Limitation Act* 6 ed (Delhi Law House, 2007) at 103-7; Mallick *The Limitation Act 1963* 21 ed (Eastern Law House, Kolkata 2005) at 213-9; Mitra *Law of Prescription & Limitation* 12 ed (Wadhwa and Company Nagpur, New Delhi 2006) at 221-5; Desai and Desai *Commentary on the Limitation Act* (Universal Law Publishing Co Pty Ltd, Delhi 2005) at 173-8.

[91] 21 of 1968 (Chapter 22).

included facts of a decisive character which were at all times outside the knowledge (actual or constructive)".[92]

[110] Material facts appear to be defined widely to include knowledge of negligence, as was said in *Mbithi*[93] in the following terms:

> "Material facts are restricted to three categories of fact, namely, (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting the cause of action; (b) the nature or extent of the personal injury so resulting and; (c) the fact that the personal injuries were attributable to the negligence, nuisance or breach of duty or the extent to which they were so attributable".

[111] In this matter, a father pursued a claim for his son's death after the outcome of an inquest. Kwach JA found that the appellant had pleaded ignorance of the law and that the issue to be determined was "whether ignorance of the law can constitute a material fact of a decisive nature within the meaning of section 27 of the [Kenyan Limitation of Actions Act]". After laying down the three categories of "material facts", Kwach JA said that it is not enough that the facts are known to the plaintiff and that they are material. They must also be of a decisive character, "that is to say, they must be such that a reasonable person, knowing them and having obtained appropriate advice

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[92] Section 30 of the Kenyan Limitation of Actions Act provides as follows:

> "(1) . . .
>
> (2) For the purposes of sections 27, 28 and 29 of this Act any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from section 4(2) of this Act) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.
>
> (3) . . .
>
> (4) In the application of subsection (3) of this section to a person at a time when he was under a disability and was in the custody of a parent, a reference to that person in paragraph (a), paragraph (b) or paragraph (c) of that subsection shall be construed as a reference to that parent.
>
> (5) In this section, "appropriate advice" in relation to any fact or circumstances means the advice of a competent person qualified, in their respective spheres, to advise on the medical, legal or other aspects of that fact or those circumstances, as the case may be."

[93] *Bernard M Mbithi v Mombasa Municipal Council* [1993] eKLR.

with respect to them, would have regarded them as determining that an action would have a reasonable prospect of succeeding". Further, Kwach JA said that "there can be no doubt that the appellant knew right from the start that the death of his son had been caused by the negligence and/or breach of duty attributable to the respondents". The fact that he mistakenly thought he had to wait until the completion of an inquest was not a "material fact".

[112] Mull JA said that he did not regard the appellant's mistaken belief about the inquest as fulfilling the requirements of section 27(2), stating as follows:

> "I also hold that ignorance of the law was not a material fact of a decisive character relating to the cause of the intended action. The appellant knew the tortfeasors well within the prescribed time. As a reasonable man, he could have sought legal advice well within time to protect his right. . . . The appellant's conduct as regards the material facts of the decisive character as well as his failure to seek legal advice cannot be regarded as that of a reasonable and prudent person. The death of his son called for vigilant and reasonable steps to be taken to ensure that the tortfeasors were sued for their negligence."[94]

[113] Both judgments in *Mbithi* appear to leave open the possibility that, in different circumstances, ignorance of the law might be a material fact of a decisive character.

Conclusion on other jurisdictions

[114] Evidently, different jurisdictions have adopted different legal frameworks for regulating prescription or limitation, and the approach varies considerably. Though, what emerges from the overview is that, in cases that involve legal practitioners and the giving of incorrect advice, the strong view is that a client should not be prejudiced by the giving of incorrect advice until the client becomes aware of the incorrectness of that advice. That outcome is reached in different ways. In England and Canada, there appears to be a tentative leaning in that direction located in the interpretation of the

[94] Id at para 7.

discoverability principle. In India, it is the development of the sufficient cause concept in the context of extending prescription. In Kenya, it may be in the width of what constitutes material facts for the running of prescription. These approaches are instructive for the exception carved out in this judgment.

The respondents' plea of prescription in the applicants' breach of mandate claim

[115] In *McMillan*, the Supreme Court of Appeal set out the following requirements that must be met in order to claim breach of mandate against a legal practitioner:

(a) a mandate was given to and accepted by the legal practitioner;
(b) there was a breach of that mandate;
(c) there was negligence, in the sense that the legal practitioner did not exercise the degree of skill, knowledge and diligence expected of an average legal practitioner;
(d) the client suffered damages; and
(e) the damages were within the contemplation of the parties when the mandate was extended.[95]

[116] In these proceedings, and for the purpose of adjudicating the special plea, the respondents do not dispute that they breached the mandate given to them by the applicants and that their conduct was, in the circumstances, negligent. Instead, the dispute centres on when it could be said that the applicants had knowledge of the breach of the mandate.

[117] The Supreme Court of Appeal held that prescription commenced to run either on 26 September 2003, when the applicants consulted with Mr Coetzee, or on 13 November 2003 when the option expired.

[118] On 26 September 2003, the applicants sought legal advice from their legal practitioner and Mr Coetzee breached his mandate in providing erroneous legal advice.

[95] *McMillan* above n 12 at para 35.

[119] It is not disputed that the applicants did not know until November 2007, when Mr Le Roux was cross-examined, that the advice they had sought and which was given to them by Mr Coetzee was wrong. There was also no basis for them to suspect that this was the case, even with the exercise of reasonable care. The conclusion by the Supreme Court of Appeal, that they had the minimum facts they needed to institute their claim, is not however correct as by 26 September 2003, the Le Rouxs had not yet suffered any loss and their cause of action was thus not complete.

[120] 13 November 2003 is the alternate date upon which the Supreme Court of Appeal concluded that the applicants ought to reasonably have acquired the requisite knowledge. This is the date on which the option expired. The Le Rouxs could not, with the exercise of reasonable care have known that the option had expired without it being validly exercised. On the contrary, any reasonable person in their position would have believed that the option had been validly exercised by that date. There is no basis to then conclude that they would have acquired knowledge at that date of either a breach of the mandate or that they had suffered loss. However, if the general rule is applied prescription would have run from this date as was found by the Supreme Court of Appeal. On that view of the matter, the Prescription Act would treat as irrelevant the fact that the applicants were kept in ignorance of the legal position by the negligent advice of their own attorneys in the very respect on which they subsequently sought to sue those attorneys.

[121] Further, in respect of constructive knowledge, in January 2005, Mr Nel served and filed his plea in the first action. That was preceded by attempts to settle the matter based on counsel's opinion that the Le Rouxs had a valid claim to the transfer of the property. The plea disputed the validity of Mr Coetzee's exercise of the option. The relevant portion of the plea admitted that the applicants attempted to exercise the option in writing but then advanced a bare denial in respect of the actual exercise of the option. The applicants would have reasonably concluded from this, as well as the attempts to settle the matter, that their legal practitioner did in fact in writing attempt to exercise

the option but nothing more. They would not have had any reason to question the efficacy of what Mr Coetzee had done.

[122] In any event, Mr Coetzee did not explain the plea to them. Even if he did, it is not clear what he would have told them, as it appears that he too believed that he had exercised the option validly. In fact, Mr Nel's legal representatives themselves may not have been aware of the lack of written authority at that stage. Various specific defences were raised in pre-trial correspondence and in the plea, but non-compliance with the Alienation of Land Act was not one of them. It would be asking the impossible to expect the applicants to reasonably have suspected that something was amiss when both sets of legal practitioners probably did not.

[123] In June 2005, the applicants changed attorneys. From the agreed facts it does not appear that the decision was taken following suspicion or belief that Mr Coetzee had breached his mandate. Even if the new attorneys should, if they had diligently perused the file, have discovered the absence of a written authority, their knowledge could not be attributed to the applicant for the purposes of section 12(3), having regard to *Jacobs v Adonis*.[96]

[124] Therefore, it must follow that the applicants could not by the exercise of reasonable care have acquired deemed knowledge of the breach of mandate by Mr Coetzee either in January 2005 or in June 2005.

[125] Accordingly, if the general rule is applied without exception, the result is not only unsettling but creates different and formidable obstacles for those who litigate against their erstwhile legal practitioners compared with those who do so against their erstwhile doctors, accountants or engineers. It is unsettling because its premise is that when you obtain incorrect legal advice from a legal practitioner and have no reason to doubt or question the correctness of the advice, prescription will commence to run as

[96] *Jacobs v Adonis* 1996 (4) SA 246 (C).

soon as the incorrect advice is given. This is a result that goes against the spirit of the knowledge requirement in extinctive prescription and would have as its consequence the prescription of a claim even when the holder of the claim has no knowledge of any conduct that may have given rise to the debt.

[126] Finally, its effect is to permanently divest a party of a justiciable claim in terms of section 34 of the Bill of Rights, even when that party is unaware that they ever had such a claim. It is for all these reasons that the operation of the general rule without exception is constitutionally unsettling and may fall foul of the injunction in section 39(2) that, when interpreting any legislation, courts must promote the spirit, purport and objects of the Bill of Rights.

[127] If we were to apply this general rule to the present case, the applicants, who left the offices of the respondents assured that their mandate was in good hands, would have had prescription commence to run against them from that very day, alternatively from 13 November 2003, when the option which they reasonably thought had been effectually exercised, in truth had lapsed. This, even though they would not have had any basis to reasonably suspect that the advice they received was incorrect. After all, it was the very reason they consulted a legal practitioner – to obtain advice and give a mandate. They were surely entitled to expect that, on both scores, the advice they received was correct and that the mandate given would be professionally discharged.

[128] And so, it does appear that the rule in *Truter*,[97] that knowledge of legal conclusion is not required for prescription to commence, may result in considerable injustice in cases where, without such knowledge, a party may not reasonably know that it has a claim.

[129] On this score, and while I am in agreement with the ultimate conclusion reached by the High Court, its reasoning in getting there was flawed. It found that

[97] *Truter* above n 7 at para 20.

non-compliance with the Alienation of Land Act was not a legal conclusion but a fact of which the applicants were required to have knowledge of. Based on the test articulated by Morris and accepted by this Court in *Mtokonya*,[98] that a conclusion of law results when legal effects are assigned to events, the conclusion of non-compliance with the Alienation of Land Act is a legal conclusion. That conclusion is arrived at by having regard to the text of the Alienation of Land Act and applying it to the purported exercise of the option with the resultant conclusion being that the attempt to exercise the option was invalid in the absence of written authority granted by the Le Rouxs to Mr Coetzee.

[130] That it may also constitute a fact from which the debt arises, namely the fact of a breach, does not change its character as a legal conclusion but it does lend itself to a measure of conceptual confusion which may be inevitable. It is difficult to consider a legal conclusion as constituting a fact for the purpose of section 12(3), but the consequences of not doing so in appropriate cases are far-reaching and in conflict with the spirit of the Prescription Act as well as the Constitution.

[131] In such circumstances, the general rule must yield to the exception even if it must be at the expense of blurring the distinction, to a limited extent, between the facts and legal conclusions. For all the reasons I have advanced the general rule cannot remain unyielding against the need for a just process in determining the bounds of extinctive prescription in claims of professional negligence by former clients against their erstwhile legal practitioners. For the reasons given, it may be best to approach it on the basis that it constitutes a narrow and limited exception to the rule in *Truter* – that conclusions of law are not facts for the purposes of section 12(3).[99]

[132] In the result, I conclude that as a general proposition knowledge of the facts that section 12(3) requires for prescription to commence running may, in cases involving

[98] *Mtokonya* above n 8.

[99] *Truter* above n 7.

negligence on the part of legal practitioners, include knowledge of a legal conclusion, namely that legal advice given was incorrect or that a mandate given was not discharged in the way required by law. In these proceedings, and on the agreed facts, the applicants did not acquire actual knowledge of the breach of the mandate by Mr Coetzee until this was raised in the cross-examination of Mr le Roux in November 2007. That such knowledge would have arisen as a result of a legal conclusion arrived at during the cross-examination must mean that it should be treated as falling within the exception to the general rule to which reference has been made earlier in this judgment.

[133] I have read the judgment by my Colleague Van Zyl AJ in which he reaches the same conclusion as I do but for different reasons. Further, I have read the third judgment of my Colleague Rogers J in which he concurs with this judgment's reasoning and conclusion and, in addition, advances reasons why the approach in the second judgment is not sustainable. I concur in the third judgment. The second judgment says that the knowledge that the applicants acquired (that the advice was erroneous) was knowledge of a fact and not of a legal conclusion. On this basis, the second judgment argues that there is no exception required as that knowledge falls within section 12(3). There are a number of reasons for underpinning this conclusion which I deal with.

[134] The second judgment takes the stance that a stand-alone exception under the general rule is not desirable as it would create uncertainty. I do not agree. The general rule is that, for purposes of section 12(3), legal conclusions do not constitute facts and therefore knowledge of such legal conclusions is not required by a creditor for section 12(3). The second judgment accepts this proposition. The deviation from the general rule is warranted where the cause of action by a client against their legal practitioner involves a legal conclusion. It is not that legal practitioners are to be singled out from other expert professions, but, rather, as I point out, to ensure that there is parity in the process as the rule on legal conclusions does not affect claims brought against professionals, other than legal practitioners. Central to the attorney-client relationship is the provision of legal services, the correctness of which the client invariably does not have knowledge of and relies on the legal practitioner to furnish with due care. As a

result, a claim based on negligence against a legal practitioner, in some circumstances, will include a legal conclusion, not on negligence, but on a central element of the claim – knowledge of the breach of the contract. The exception carved out is not a general exception, rather, it is one narrowly tailored to such instances. Further, it is warranted as it avoids the undesirable conflation of facts and legal conclusions which has been avoided in our law thus far.

[135] The second judgment says that the postulated legal conclusion (that the purported exercise of the option was invalid for want of compliance with section 2(1) of the Alienation of Land Act) is not a legal conclusion in respect of the constituent elements of the applicants' claim. This is not correct. The second judgment accepts that a material element of the applicants' claim is the breach of the duty to perform.[100]

[136] The applicants' case is that they only became aware of the breach during the cross-examination of Mr le Roux and this as a result of a legal conclusion. Leaving aside for a moment whether this was knowledge of a legal conclusion or knowledge of a conclusion of fact, it was a material and constituent element of the applicants' claim. The applicants' case was that the breach of a duty to perform was based on the failure by Mr Coetzee to exercise the option in accordance with the requirement of the Alienation of Land Act. This failure, it is accepted from the statement of agreed facts, only became evident during the cross-examination of Mr Coetzee and so the postulated legal conclusion was a material and constituent element in support of the claim and without which the applicants would not have acquired knowledge of the breach of the duty owed to them.

[137] The second judgment seeks to distinguish between a legal requirement as constituting a "legal fact" and the effect and consequences of such a requirement. Whatever name one assigns to a legal requirement, knowledge of it constitutes knowledge of the law. If such knowledge is considered to be knowledge of a fact for

[100] Second judgment at [193].

the purpose of section 12(3), as the second judgment suggests, then this would have a radical and unsettling effect on the law of prescription. It would mean that, unless a claimant has knowledge of the facts from which the debt arises and those facts include knowledge of the law as in the legal rules, requirements and rights, then prescription would not commence to run until such knowledge is acquired. This is not only contrary to the state of our current law[101] but would have the effect of postponing indefinitely the running of prescription – something the second judgment accepts would be at odds with the rationale for extinctive prescription.

[138] Further and in relation to the argument that the applicants became aware of the erroneous advice they received though a legal conclusion, the second judgment says that, having acquired knowledge of a fact in relation to the provisions of the Alienation of Land Act, "this in turn meant that they acquired knowledge of the fact that Mr Coetzee gave them erroneous advice". This too cannot be correct.

[139] This Court said in *Mtokonya* that when a conclusion is reached by applying a rule, that conclusion is a legal conclusion.[102] The conclusion that the option was not validly exercised was reached by applying section 2(1) of the Alienation of Land Act – section 2(1) is a rule and its application resulted in a legal conclusion. That legal conclusion was that the purported exercise of the option was invalid. It is the knowledge of that conclusion which is at the heart of this application. That conclusion as I have demonstrated by reference to *Mtokonya*, is a legal one and the knowledge the applicants acquired of it was therefore knowledge of a legal conclusion. The leap in the reasoning of the second judgment that knowledge of a legal fact then results in knowledge of the fact that the advice based on that fact was erroneous is not sustainable. What is missing is the step involving the application of the legal fact to reach a conclusion which we know then results in a legal conclusion.

[101] See *Links* above n 11.

[102] *Mtokonya* above n 8.

[140] The second judgment says that the applicants acquired knowledge of the fact that erroneous advice was given to them. However, the knowledge that the advice was erroneous and which they acquired could only be reached through a conclusion of law which was essential in reaching the conclusion that the advice was erroneous. Simply to illustrate the point, the proposition that was put to Mr le Roux during his cross-examination was that the purported exercise of the option was invalid because there was no compliance with the provisions of the Alienation of Land Act. This was a legal conclusion of the kind described in *Mtokonya* that was put to him and which resulted in him acquiring the knowledge of the invalidity of the purported exercise of the option. Again, it could only constitute knowledge of a legal conclusion and not of a fact.

[141] Finally, the second judgment suggests that a layperson, could draw the conclusion that the advice was incorrect from a cursory reading of the Act and the services of a trained lawyer were not required.[103] This takes the argument outside of the agreed facts. The question of whether the provisions of section 2(1) of the Alienation of Land Act are self-evident to a layperson was never an issue that arose in these proceedings.

[142] It also ignores the narrow and limited scope within which this matter arises. It is confined to instances where a person consults a legal practitioner for advice, receives the wrong advice, relies on the wrong legal advice and only later discovers that the advice was erroneous. The Le Rouxs acquired the knowledge that the option was not properly exercised in law during Mr le Roux's cross-examination. If regard is had to the proposition put to Mr le Roux during cross-examination,[104] it is clear that this proposition was based on a conclusion of law, and not a fact.

[103] Second judgment at [207].

[104] See [6](g) above.

[143] In these circumstances, the reliance on the advice is reasonable[105] and no more can be reasonably expected of the reasonable client in such a position. It must be accepted that the client will not have knowledge of the "legal facts" and it is for this purpose that the services of a legal practitioner are engaged. Ascertaining the state of the law and drawing conclusions from it is precisely why a legal practitioner is consulted and why the Le Rouxs consulted with Mr Coetzee. The exception which I seek to carve out is specifically tailored to prevent prescription from commencing to run until the client has knowledge that there has been a breach of the mandate through erroneous legal advice.

[144] It is for these reasons that I persist with the reasoning in support of the conclusion that I reach.

Conclusion

[145] In the circumstances, the appeal must succeed with costs. There is no reason why the applicants should also not be entitled to their costs in this Court which, given the complexity of the legal issues involved, warrant the costs of two counsel.

[146] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:
   "The appeal is dismissed with costs."
4. The respondents are to pay the applicants' costs, including the costs of two counsel.

[105] *Waglines* above n 48.

VAN ZYL AJ (Makgoka AJ and Potterill AJ concurring):

Introduction

[147] I have had the pleasure of reading the judgment prepared by my Colleague, Kollapen J (first judgment). I agree that the applicants must be granted leave to appeal, and that the appeal must succeed with costs. However, in my view, the appeal must succeed for reasons different from those given in the first judgment.

[148] The first judgment concludes that a claim for damages arising from an attorney's failure to exercise his or her mandate with the necessary skill, diligence and care as required from a reasonable attorney, may include knowledge of a legal conclusion. Therefore, an exception to the general rule in *Truter*[106] is deemed necessary. The general rule as referred to in *Truter*, is the finding that knowledge as envisaged in section 12(3) of the Prescription Act[107] is limited to knowledge of facts and does not require knowledge of a legal conclusion. The general rule as stated by the Court in *Truter* is that—

> "[s]ection 12(3) of the Prescription Act requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running – it does not require knowledge of the relevant legal conclusions (i.e. that the known facts constitute negligence) or of the existence of an expert opinion which supports such conclusions."[108]

[149] The first judgment reasons that a client's knowledge of the fact that his legal representative gave him incorrect advice or failed to discharge his mandate properly may emerge much later as a result of a legal conclusion, such as an opinion, advice or

[106] *Truter* above n 7.

[107] Above n 1.

[108] *Truter* above n 7 at para 19.

a ruling by a court. This premise is based on the respondents' submission that when the first applicant was informed during his cross-examination in the first trial that the respondents' purported exercise of the option was ineffective for a failure to comply with section 2(1) of the Alienation of Land Act,[109] he acquired knowledge, not of a fact, but of a legal conclusion.

[150] I am of the firm view that there is no need for an exception to the general rule in *Truter*. The rationale for the exception is, in essence, that strict adherence to the distinction between a fact and a legal conclusion, may make it difficult for a creditor to acquire knowledge of a fact that requires some knowledge of the law. The first judgment reasons that this difficulty arises due to the distinction drawn in *Truter* between the knowledge of facts on the one hand, and the knowledge that those facts support the formulation of a legal conclusion, on the other. It then grapples with the distinction between a fact and a legal conclusion.

The factual background

[151] I do not intend to deal extensively with the facts, as that has been comprehensively done in the first judgment. I will simply provide some background and highlight certain facts to contextualise the circumstances in which the applicants were said to have had knowledge of a legal conclusion as opposed to a fact.

[152] The applicants obtained a written option from Mr Steenkamp to purchase his farm in Nieuwoudtville in the province of the Northern Cape. The option expressly required the applicants to exercise it within two months of the death of Mr Steenkamp.

[153] Following Mr Steenkamp's passing, the applicants approached an attorney, Mr Coetzee from the firm Johannes Coetzee & Seuns. They instructed Mr Coetzee to represent them as their attorney, to advise them on the steps necessary to exercise the option, and therefore exercise it on their behalf. After reading the option document,

[109] Above n 3.

Mr Coetzee advised the applicants that it was a valid agreement. He made notes and informed them that he would send a letter to the executor of Mr Steenkamp's deceased estate. The second applicant pertinently asked Mr Coetzee whether it was necessary for them to sign any documents, to which Mr Coetzee responded that it was not. It is common cause that the applicants, being laypersons, possessed no knowledge of the law relating to the sale of the land.

[154] Mr Coetzee carried out his instructions to exercise the option by writing a letter to the executor of the estate. Subsequently, it emerged that the deceased had, during his lifetime, sold the farm to a Mr Nel, and pursuant to the sale, the farm had been transferred to him. When the applicants became aware of the sale and the transfer, they instituted an action against Mr Nel and the executor of the estate in the High Court, Northern Cape Division (High Court). In this action (the first action), the applicants essentially sought a court order declaring that they were entitled to the transfer of the farm into their names. Additionally, they also claimed damages for the alleged profits they would have accrued from farming activities had they received the transfer of their farm. Throughout the proceedings, the applicants were represented by Mr Coetzee and his firm.

[155] The first action was founded on a supposed valid exercise of the option, allegedly resulting in a binding sale of the property to the applicants. However, unbeknown to the applicants, the exercise of the option did not comply with the provisions of section 2(1) of the Alienation of Land Act, which requires that a contract for the sale of land, if not signed by the principal, must be signed by his agent duly authorised in writing. Consequently, there was no valid contract of sale that the applicants could enforce against Mr Nel and the executor.

[156] At no stage were the applicants advised by either Mr Coetzee or by the firm of NME Nilssens Attorneys, whom they later appointed in Mr Coetzee's stead before the finalisation of the action against Mr Nel and the executor, that the failure to comply with the provisions of the Alienation of Land Act was fatal to the success of their action.

Only during the first applicant's cross-examination in the first action was he alerted for the first time that Mr Coetzee's exercise of the option was ineffective for want of compliance with section 2(1) of the Alienation of Land Act. Needless to say, the applicants were unsuccessful in their action to obtain transfer of the farm.

[157] Following an unsuccessful appeal against the dismissal of their action against Mr Nel and the executor of Mr Steenkamp's estate, the applicants instituted an action against the respondents for damages in the sum of R859 000 in the High Court. The respondents raised a special plea of prescription, which was determined as a separate issue. The plea was dismissed and the respondents were granted leave to appeal to the Supreme Court of Appeal. As the record of proceedings had gone missing, the appeal was determined based on a statement of agreed facts. The appeal was successful; the plea of prescription was upheld, and the applicants' action was resultantly dismissed with costs. It is against this order of the Supreme Court of Appeal that the applicants are currently seeking leave to appeal.

The distinction between a fact and a conclusion of law (legal conclusion)

[158] There is undoubtedly, a conceptual distinction between a fact and a conclusion of law. A fact, as defined in Black's Law Dictionary, is an "actual or alleged event or circumstance, as distinguished from its legal effect, consequence or interpretation".[110] A legal conclusion is in turn defined as a "statement that expresses a legal duty or result but omits the facts creating or supporting the duty or result".[111]

[159] This distinction usually arises in the context of judicial decision-making, where the court is required, in the exercise of its judicial functions, to make findings of fact and to draw conclusions therefrom, by applying the law to the established facts. In jurisdictions with jury trials, the distinction between matters of law and fact is of particular significance. Matters of law are determinable by the judge and matters of

[110] Garner *Black's Law Dictionary* 8 ed (Thomson West Publishing, Minnesota 2004) at 1775.

[111] Id at 2615.

fact by the jury.[112] Appreciating the manner in which this distinction is dealt with in those jurisdictions may be of valuable assistance in the context of the issue arising in this matter.

[160] The distinction between fact and law does not have the same significance in our own legal system. Its importance is dictated more by procedural matters, the nature of the particular proceedings and the enquiry a court is called upon to conduct. The distinction between law and fact is by way of example relevant to the approach on appeal to the findings of a trial court.[113] In pleadings, conclusions of law must be supported by facts and in motion proceedings, a party may make any legal contention which is open to him on the facts.[114]

[161] In matters of prescription, there is no need to attempt to define with any precision the boundary between a fact and a legal conclusion. This is because the material facts and the legal conclusions that are to be drawn from those facts, are determined by the plaintiff's pleaded claim. The distinction between fact and law, for purposes of deciding a plea of prescription, is as a result determined within the confines of the creditor's pleaded claim. The reason is found in section 12 of the Prescription Act and its interpretation in previous decisions.

[162] Moreover, professionals, including legal practitioners, may be mandated to provide advice on a range of matters. Such advice may be acted upon to the detriment of the person seeking it. It would be unjust to differentiate between legal professionals

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[112] Howard *Phipson on Evidence* 15 ed (Sweet & Maxwell, London 2000) at 19.

[113] *R v Dhlumayo* 1948 (2) SA 677 (A); [1948] 2 All SA 566 (A) at 698. See also *Ndlovu v AA Mutual Insurance Association Ltd* 1991 (3) SA 655 (E) at 659E-F.

[114] Rule 18(4) of the Uniform Rules of Court provides:

> "Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

See also *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A); [1988] 2 All SA 271 (A) at 793D-E; *Van Rensburg v Van Rensburg* 1963 (1) SA 505 (A); [1963] 1 All SA 572 (A) at 509H-510A; and *Cusa v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68.

and other categories of professionals whose advice may similarly require specialised knowledge, by applying a different standard of knowledge in cases involving negligence on the part of legal professionals. All cases should be treated similarly. In my view, creating exceptions and applying different principles to cases involving legal or other professional persons is undesirable. Creating an exception to the rule in *Truter* is not conducive to considerations such as certainty, predictability and uniformity, which are inseparable components of the rule of law.[115]

[163] Conceptually, I am of the view that the first judgment does not adequately justify the proposed exception within the context of the above-mentioned components of the rule of law. As Hahlo and Kahn correctly point out, when exceptional circumstances arise, courts may deviate from a general rule.[116] However, this deviation must be justifiable in order to maintain legal certainty. For the rule of law to function, the role of the Court is to weigh up the need for certainty against the uniqueness of the exceptional circumstances.[117]

[164] The proposed exception will create unnecessary uncertainty with regard to the soundness of the rule in *Truter*, which is based on the plain wording of section 12(3). What section 12(3) requires is knowledge of the "facts". Logically, the section does not require the creditor to know what the legal consequences of those facts are. This makes it unnecessary for the creditor to know that the alleged act or omission on which they rely as the cause for their harm constituted negligence – precisely what was found in *Truter*. Correctly interpreted, the scheme of section 12 of the Prescription Act makes it in my view unnecessary to treat legal practitioners differently from any other debtors, including various categories of professionals. Correctly applied, section 12(3) provides

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[115] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108:

> "The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."

[116] Hahlo and Kahn *The South African Legal System and its Background* (Juta & Co Ltd, Cape Town 1968) at 35-7. See also Malan "The rule of law versus decisionism in the South African constitutional discourse" 45 *De Jure* 272 at 279.

[117] Id.

adequate protection to both a creditor and a debtor, eliminating the need for the formulation of different principles or qualifications. These matters are dealt with more comprehensively in what follows.

Framework of section 12 of the Prescription Act

[165] The general position is that extinctive prescription begins to run "as soon as the debt is due".[118] This provision, however, is subject to exceptions, as referred to by this Court in *Links*[119] and *Mtokonya*.[120] The two qualifications relevant for present purposes are those found in section 12(3). The first is that the debt is deemed not to be due until the creditor has knowledge of the facts from which the debt arises. The second qualification, framed as a proviso to the deeming provision in the first part of the sub-section, stipulates that the creditor shall be deemed to have such knowledge if he could have acquired it by the exercise of reasonable care.

[166] On a reading of section 12(3), four factors emerge that determine the commencement of the running of prescription, namely: the existence of a "debt"; that the debt must be "due"; and the creditor must have "knowledge" of the "facts" from which the debt arises. Although the term "debt" is not defined in the Prescription Act, much has been said about its meaning, but it is generally accepted that the term is used "primarily to describe the correlative of a right or claim to some performance, in other words, as the duty side of an obligation (*verbintenis*) produced by contract, delict, unjustified enrichment, statute or other source".[121]

[167] Prescription begins to run when the debt is due – when it is owing and payable. The commencement of the running of prescription is accordingly determined by when the debt is recoverable; that is, when the creditor acquires a right to claim, and

[118] Above n 1 at sections 12(1) and 12(3).

[119] *Links* above n 11.

[120] *Mtokonya* above n 8.

[121] Loubser *Extinctive Prescription* 2 ed (Juta & Co Ltd, Cape Town 2019) at 32. See also *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A); [1980] 2 All SA 40 (A) (*Evins*) at 842F and *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) 709 at paras 187-193.

conversely, the debtor has the obligation to perform. The creditor acquires the legal right to claim when every fact has happened that is necessary for the creditor to pursue his claim.[122] The creditor will only be able to pursue his right by instituting an action when he has a complete cause of action in respect of it. In *Links*, this Court cited with approval the following passage from *Truter*,[123] where the Supreme Court of Appeal stated that a claim is due for purposes of the Prescription Act—

> "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."[124]

[168] What are the facts of which a creditor must have knowledge of? The plaintiff's cause of action is the factual basis that "begets" the plaintiff's right of action and its correlative, the defendant's debt.[125] It is best described as the procedural manifestation of the right which the plaintiff seeks to enforce, and it does not exist independently from the underlying right itself.[126] Since an enforceable legal right cannot exist without a remedy, the creditor's chosen cause of action is the mechanism provided to them by the law to enforce that right and obtain remedial relief.

[169] In determining what the facts are of which a creditor must have knowledge for purposes of the Prescription Act, the focus is on the combination of facts that constitute

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[122] See Du Bois et al *Wille's Principles of South Africa Law* 8 ed (Juta & Co Ltd, Cape Town 1991) at 38:

> "A legal right is 'an interest conferred by, and protected by the law, entitling one person to claim that another person or persons either give him something or do on an act for him, or refrain from doing an act.'"

[123] *Truter* above n 7 at para 16.

[124] *Links* above n 11 at para 31.

[125] *CGU Insurance v Rumdel Construction (Pty) Ltd* [2003] ZASCA 45; 2004 (2) SA 622 (SCA) at para 6; *Evins* above n 121 at 825F-G; and *Links* above n 11 at para 32.

[126] *First National Bank of SA Ltd v Lynn N.O.* [1995] ZASCA 158; 1996 (2) SA 339 (A) at 352C-D.

the creditor's pleaded cause of action.[127] The caveat is that the creditor need not have knowledge of every such fact, but only those facts which constitute the essence of the creditor's pleaded claim, that is, "the minimum facts that are necessary to institute action",[128] and a "cause of action does not comprise every piece of evidence which is necessary to prove each fact".[129] The requisite knowledge is, therefore, knowledge of those facts which constitute the essence of a creditor's claim.

[170] What those essential or material facts are must be distilled from the essential elements of the creditor's pleaded claim. A fact is considered material if, without proof of its existence, a court would be unable to find that the creditor had succeeded in proving a constituent element of their pleaded claim. For instance, an essential or material fact that a creditor who pursues a delictual remedy must have knowledge of, is the act or omission which is causally relevant for the purposes of an allegation of negligence. In a contractual setting, such as the present matter, it is the act or omission which causally gives rise to a conclusion of a breach of the terms of the contract.

[171] It is not necessary for the creditor to also possess knowledge that a material fact supports a conclusion regarding the constituent elements of his claim, such as negligence or a breach of contract. The term "knowledge" does not imply knowing or becoming aware that, as a matter of law, an act or omission did, or did not, amount to negligence. Instead, the creditor must have knowledge of the facts that may be described as constituting the negligence or breach of the contract of which they complain. In other words, the creditor is only required to have knowledge of the material facts underlying the essential elements of their pleaded cause of action and not the legal consequence of those facts. It is the legal consequence of a material fact to

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[127] *Coboza* above n 29 at para 7. This is consistent with the position in other jurisdictions such as the United Kingdom. See *Haward* above n 41 at paras 49 and 120; and *Ministry of Defence v AB* [2012] UKSC 9 at para 34. See also Hoffman LJ in *Broadley v Guy Clapham & Co* [1994] 4 All ER 439 at para 448J:

> "Section 14(1)(b) requires that one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had in broad terms, knowledge of the facts on which that complaint is based."

[128] *Links* above n 11 at paras 32-5.

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

which *Truter* referred to when it spoke of a "relevant" legal conclusion that must be drawn from the facts, such as the requirements of fault and unlawfulness in the context of a delictual claim for damages.

[172] This finding in *Truter* is correct. Section 12(3) limits knowledge to fact not law, and prescription is not postponed until a creditor becomes aware of the full extent of their rights or until they appreciate the legal consequences which flow from the material facts.[130] To hold otherwise would raise the bar too high and not afford a debtor the protection from "undue delay by litigants who are laggard in enforcing their rights";[131] and would be at odds with the rationale that extinctive prescription promotes certainty and stability to social and legal affairs and maintains the quality of adjudication.[132]

Deemed or constructive knowledge

[173] The final aspect concerns when a creditor can be said to have had "knowledge" or constructive knowledge of the material facts as envisaged in section 12 of the Prescription Act. A creditor may possess actual knowledge of a material fact signifying a "mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them."[133] Knowledge extends to a conviction or belief fostered by or from the surrounding circumstances,[134] encompassing what may conveniently be referred to as non-material facts of which the creditor may have actual knowledge.

[174] Whether or not actual knowledge of a material fact can be inferred requires the existence of a conviction or belief that transcends beyond a "mere suspicion not

[130] *Minister of Finance v Gore N.O*. [2006] ZASCA 98; 2007 (1) SA 111 (SCA); [2007] (*Gore*) at para 17. See also *Yellow Star Properties* above n 9 at para 37.

[131] Id *Gore* at para 16.

[132] *Mdeyide* above n 27 at para 8.

[133] *Gore* above n 130 at para 19.

[134] Id.

amounting to conviction or belief justifiably inferred from attendant circumstances".[135] The conviction or belief only becomes knowledge when the justification for the belief exists – a belief sustained by the relevant surrounding circumstances and the known facts.

[175] For purposes of section 12(3), a creditor's knowledge includes knowledge which he may reasonably be expected to have acquired. In the absence of justification, knowledge of non-material facts may therefore be sufficient to lead the court to conclude that the creditor had constructive knowledge as envisaged in the proviso to sub-section (3). A creditor will be deemed to have had knowledge of the identified facts at the time when a reasonable person in the position of the creditor would have deduced the material facts from which the debt arose, or if it was reasonable for a person in the position of the creditor to have made such enquiries relevant to ascertaining the material facts.[136]

[176] Accordingly, while the test for reasonable care for purposes of section 12(3) is objective, what is reasonable is measured against the standard of a reasonable person with the characteristics of the creditor. It is crucial to emphasise that, by reason of the nature of the enquiry envisaged in section 12(3), the enquiry is fact-specific. In other words, what is reasonable must be determined in the context of the factual circumstances of each case. Consequently, it serves very little purpose to seek guidance in the decisions of other cases.[137]

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[135] Id.

[136] *Leketi v Tladi N.O.* [2010] ZASCA 38; [2010] 3 All SA 519 (SCA) at para 18. See also *Gunase v Anirudh* [2011] ZASCA 231; 2012 (2) SA 398 (SCA) at para 15.

[137] See by way of analogy: *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* [2017] ZACC 32; 2018 (1) SA 94 (CC); 2017 (12) BCLR 1562 (CC) at para 77. See also *Kruger v Coetzee* 1966 (2) SA 428 (A); [1966] 2 All SA 490 (A) at para 430G:

> "[W]hat steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."

[177] The statement in *Links* that a creditor in a medical negligence case lacks knowledge of the necessary facts until he has knowledge "of the facts that would have led him to think that possibly there had been negligence and that this had caused his disability"[138] and in *Loni*[139] that "facts which would cause the plaintiff, on reasonable grounds to suspect that there was fault on the part of the medical staff"[140] requires some commentary. These statements have faced considerable criticism, with the point being made that they are inconsistent with *Truter* and knowledge of facts as opposed to the legal consequences of those facts.[141]

[178] What was said in *Links* and *Loni* was not intended to be a departure from what is envisaged by section 12. The statements must be read in the context of the nature of the enquiry envisaged in section 12(3). The aim of the enquiry is to determine at what point in time the creditor acquired knowledge, or could reasonably have acquired knowledge, of facts that would have caused a reasonable person in the position of the creditor to have formed the belief (and not a suspicion) in broad terms that the medical care he received might be the possible cause of his injury.

[179] From a linguistic point of view, the use of terminology in *Links* and *Loni* indicative of fault that falls outside the scope of "facts" in section 12. However, as stated in *Haward*—

> "[s]ometimes the essence of a claimant's case may lie in an alleged act or omission by the defendant which cannot easily be described, at least in general terms, without recourse to language suggestive of fault: for instances, that 'something had gone wrong' in the conduct of the claimant's medical operation, or that the accountant's advice was 'flawed'. Use of such language does not mean the facts thus compendiously described have necessarily stepped outside the scope of section 14A(8)(a). In this

[138] *Links* above n 11 at para 45.

[139] *Loni v Member of Executive Council for Health, Eastern Cape* [2018] ZACC 2; 2018 (3) SA 335 (CC); 2018 (6) BCLR 659 (CC) (*Loni*).

[140] Id at para 23.

[141] See Loubser *Extinctive Prescription* above n 121 at 182 and Saner *Prescription in South African Law* (Lexis Nexis, Durban 2019) at 157-163.

> context there can be no objection to the use of language of this character so long as this does not lead to any blurring of the boundary between the essential and the irrelevant."[142]

Issues raised by the respondents in their plea

[180] This Court found in *Links* that a defendant who raises a plea of prescription must demonstrate what the facts are that a plaintiff is alleged to have had knowledge of and that the plaintiff had knowledge of those facts on the date prescription is alleged to have commenced.[143] The Court in *Links* made the following statement:

> "In the context of section 12(3) a defendant 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."[144]

This statement is consistent with an acceptance that the defendant bears the burden of proving, as a matter of probability, that prescription commenced to run and expired before the creditor instituted his action.[145]

[181] Prescription is raised by way of a special plea in abatement. A determination of the issues raised by it proceeds on the basis that the plaintiff's allegations in their particulars of claim are correct, except where they have specifically been denied for purposes of the plea in abatement.[146] In the present matter, the respondents accepted for purposes of the special plea the correctness of the allegations made by the applicants in their particulars of claim. Instead, they based their plea of prescription on matters extraneous to the pleadings to show that the applicants could have acquired knowledge

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[142] *Haward* above n 41 at para 13.

[143] *Links* above n 11 at para 24.

[144] Id.

[145] *Van Zijl v Hoogenhout* [2004] ZASCA 84; 2005 (2) SA 93 (SCA) at para 41.

[146] *Dease v Minister of Justice* 1962 (3) SA 215 (T) at para 217F; *Patterton v Minister Van Bantoeadministrasie en Ontwikkeling* 1974 (3) SA 684 (C) at 687C-D. See also Daniels *Beck's Theory and Principles of Pleading in Civil Actions* 6 ed (Lexis Nexis Butterworths, Durban 2002) at 155-56.

of the facts by the exercise of reasonable care and must consequently be deemed to have had the required knowledge as envisaged in the proviso to section 12(3).

[182] They placed reliance on the fact that Mr Nel, in his plea in the first action, placed the validity of the exercise of the option by the applicants in dispute. Furthermore, they pleaded that the fact that the applicants' termination of the respondents' mandate in January 2005 and the appointment of another firm of attorneys to pursue their claim for transfer of the property meant that the applicants would have, alternatively ought to have, become aware of their claim against the respondents more than three years before they served their summons on the respondents on 29 September 2009.

[183] In the statement of agreed facts in the Supreme Court of Appeal, the respondents effectively expanded the grounds on which they relied on for prescription. They contended that the applicants' knowledge that Mr Coetzee did not ask them to sign anything when they instructed him to exercise the option on their behalf constituted knowledge of the facts from which the debt arose. They further contended that the applicants' failure to appreciate that Mr Coetzee's lack of authority amounted to a failure to comply with section 2(1) of the Alienation of Land Act, and that he could not validly exercise the option on their behalf, was not a fact as envisaged by section 12(3) of the Prescription Act, but a legal consequence of the facts which were known to them. Alternatively, the respondents persisted with their plea that the applicants could have acquired the requisite knowledge by exercising reasonable care when they terminated Mr Coetzee's mandate and appointed another firm of attorneys in January 2005 to represent them in the first action.

Findings of the Supreme Court of Appeal

[184] The Supreme Court of Appeal found that the applicants had knowledge of the minimum facts necessary to institute their action when they first consulted with Mr Coetzee, or alternatively, when the option expired. The facts identified by the Court were that: (a) the applicants gave Mr Coetzee the mandate to exercise the option on their behalf; (b) that he told them that he would send a letter to the executor of the

deceased's estate; and (c) that the applicants did not sign anything. The Court concluded that the applicants' lack of awareness regarding the provisions of the Alienation of Land Act was found to be a legal conclusion, and not a fact from which their claim arose.

[185] If one has regard to the agreed statement of facts, and the submissions that were based thereon, what this finding presumably means is that the applicants' unawareness that the exercise of the option had not complied with the Alienation of Land Act was regarded by the Supreme Court of Appeal as unawareness of a legal conclusion. Consequently, the applicants acquired knowledge of a legal conclusion. They acquired knowledge of this legal conclusion during cross-examination when they were informed that the exercise of the option by Mr Coetzee produced no legal consequence due to non-compliance with section 2(1) of the Alienation of Land Act. The Supreme Court of Appeal alternatively found that the applicants must be deemed to have had the requisite knowledge when they terminated Mr Coetzee's mandate and instructed another firm of attorneys. The reasons for this finding are unclear. It is presumably based on the facts identified in the judgment of the Court, referred to in the previous paragraph.

Applicants' pleaded case

[186] The applicants' pleaded case was that they instructed the respondents, who accepted the instructions, to perform the following professional services:

(a) to advise the applicants as to the procedure which had to be adopted in order to exercise their option; and

(b) to do all things that were necessary for and on behalf of the applicants in order to exercise the applicants' option and to enforce their rights under the agreement.

[187] According to the applicants, it was an implied term of the agreement entered into between themselves and the respondents that they would perform their services in a

professional manner and without negligence. They alleged that the respondents were negligent in the exercise of their mandate in one or more of the following respects:

> "14.1 They failed to realise that the option could only be exercised validly if all of the requirements of section 2 of the Alienation of Land Act 68 of 1981 were complied with;
>
> 14.2 They failed to cause the Plaintiffs to sign a written authority duly authorising them (the defendants) to exercise the option on the Plaintiffs' behalf;
>
> 14.3 They failed to advise the Plaintiffs that they (Defendants) required written authority duly authorising them (the Defendants) to exercise the option on their behalf before they (the Defendants) purported to do so."

[188] The applicants alleged in paragraph 15 of their particulars of claim that the respondents, by the exercise of such care that could reasonably be expected of an average attorney, would have ascertained the true facts and they would have:

> "15.1 Realised that it was necessary for them to cause the Plaintiffs to sign a written authority duly authorising them (the Defendants) to exercise the option on their behalf;
>
> 15.2 Caused the Plaintiffs to sign a written authority duly authorising them (the Defendants) to exercise the option on their behalf before they purported to do so."

[189] The applicants further alleged that a reasonable attorney would have advised his clients to sign a written authority before the option was exercised and that, as a result of the defendants' incorrect and negligent advice and/or conduct, the option was not exercised validly.

[190] The applicants' pleaded claim is a contractual one for damages arising from the respondents' alleged breach of a material term of the agreement in terms of which they were obligated to exercise their mandate without negligence and in a professional manner with the necessary skill, care and diligence. The respondents' mandate was twofold—

(a) to advise the applicants with regard to the exercise of the option which they held for the purchase of the property in question; and

(b) acting upon that advice, the instruction to exercise the option on their behalf.

[191] The applicants' evidence was that Mr Coetzee's advice to them was that it was not necessary for them to sign any documentation and that all it would take for the option to be exercised, was for him to write a letter to the executor of the seller's estate.

[192] The acceptance of instructions by a legal practitioner to provide legal services to a client establishes a contract of mandate.[147] An implied term of the agreement is that the legal practitioner will perform the service without negligence and with the necessary skill, care and diligence required from the average attorney.[148] A failure to comply with this obligation, resulting in damage, constitutes a "debt" for purposes of the Prescription Act. This debt is due when the creditor has knowledge, or deemed knowledge, that the legal practitioner breached his obligation arising from the terms of the agreement.[149] A correct formulation of an attorney's legal liability towards their client is as follows—

> "[a]n attorney's liability arises out of contract and his exact duty towards his client depends on what he is employed to do. (See Charlesworth on *Negligence*, 4th ed, paras 1032-42; *Clark and Another v Kirby Smith* (1964) 2 All ER 835, and *Bagot v Stevens Scanlen & Co* (1964) 3 All ER 577). In the performance of his duty or mandate, an

[147] *Blakes Maphanga Inc v Outsurance Insurance Company Ltd* [2010] ZASCA 19; 2010 (4) SA 232 (SCA) at para 16. The Court stated that the relationship between attorney and client is based on the contract of *mandatum*, wherein, an attorney, in the absence of a contrary agreement, is entitled to payment of fees on performance of the mandate or on termination of the relationship.

[148] *Bruce, N.O. v Berman* 1963 (3) SA 21 (T) at 23F-G and *Honey and Blanckenberg* above n 47 at 46F.

[149] *Ramonyai* above n 47 at para 16:

> "An attorney's liability arises out of contract and his or her exact duty towards his or her client depends on what he or she is employed to do. In the performance of his or her duty or mandate, an attorney holds himself or herself out to his or her clients as possessing the adequate skill, knowledge and learning for the purpose of conducting all business that he or she undertakes. If, therefore, he or she causes loss or damage to his or her client owing to a want of such knowledge as he or she ought to possess, or the want of such care he or she ought to exercise, he or she is guilty of negligence giving rise to an action for damages by his or her client against him or her."

> attorney holds himself out to his clients as possessing adequate skill, knowledge and learning for the purpose of conducting all business that he undertakes. If, therefore, he causes loss or damage to his client owing to a want of such knowledge as he ought to possess, or the want of such care he ought to exercise, he is guilty of negligence giving rise to an action for damages by his client."[150]

[193] No different from any other contract, the material elements comprising a right of action based on the breach of a contract of mandate are the following:

(a) the existence of a valid and enforceable contract giving rise to a right to claim performance and the corresponding duty to perform;[151]

(b) a breach of the duty to perform in terms of the contract;[152] and

(c) the harm caused by the breach of the contract.[153]

Analysis

[194] The question is then: What are the facts and the legal conclusions that are to be deduced from those facts in the context of the applicants' pleaded case? It was necessary for the respondents to prove the applicants' knowledge of facts that support a conclusion that Mr Coetzee acted in breach of the agreement of mandate by failing to perform the required services in a professional and non-negligent manner. It was implicit that Mr Coetzee would advise the applicants correctly and exercise the option on the applicants' behalf, in a manner that would result in a valid and binding agreement of sale. Section 2(1) of the Alienation of Land Act requires an agent who acts on behalf of a party to the sale of land to do so on the written authority of that party. By advising the applicants that it was not necessary to sign any documentation and that he could

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[150] *Honey and Blanckenberg* above n 47 at 46F; *Bruce N.O.* above n 148 at 23G; *Tonkwane Sawmill Co Ltd v Filmalter* 1975 (2) SA 453 (W) at 454H-455C; *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) (*Mouton*); *Slomowitz v Kok* 1983 (1) SA 130 (A); 1 All SA 242 (A) at 142; and *Steyn N.O. v Ronald Bobroff & Partners* [2012] ZASCA 184; 2013 (2) SA 311 (SCA) at para 14.

[151] *Mlenzana v Goodrick and Franklin Incorporated* 2012 (2) SA 433 (FB) (*Mlenzana*) at paras 12 and 37.

[152] Id at para 40.

[153] Dendy "Legal Practice: Ethics and Common Law" in *LAWSA* 3 ed (2022) at para 955 ff.

exercise the option on their behalf by simply writing a letter to the executor of the estate, Mr Coetzee gave the applicants wrong advice and was, as a result, never in a position to comply with his mandate to exercise the option.

[195] The damage-causing event, in the sense of the identified causative act that constituted a breach of the contract of mandate and gave rise to a "debt" which became due within the meaning of the Prescription Act, was the erroneous advice provided by Mr Coetzee to the applicants and his failure to take the necessary steps to enable the applicants to exercise their option.[154] It is this conduct which is the very essence of the applicants' claim, demonstrating a lack of the knowledge, skill and care that can be expected of the average attorney.[155] Mr Coetzee's failure to correctly advise the applicants was the factual cause of subsequent events and an indispensable primary fact in relation to the applicants' pleaded cause of action. The debt became due and recoverable when the respondent failed to exercise the option by the date agreed to in the option agreement. It was then that the applicants suffered a loss, completing their cause of action for damages.[156]

[196] The applicants further pleaded the facts from which they sought to draw the conclusion that Mr Coetzee acted negligently. This, together with the aforementioned facts, constituted the combination of the material facts indispensable for the applicants to prove at the trial in order to succeed with their claim.[157] They were the facts that would enable the trial court to arrive at conclusions regarding the constituent elements of their claim, such as that the respondents acted in breach of the express or implied terms of their contract of mandate, and that the applicants suffered damages as a result.

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[154] In *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1992 (1) SA 837 (C) at 849H, the Court held that the term debt means whatever is due under any obligation, an obligation to do something or refrain from doing something. Therefore, in terms of the contract of mandate, Mr Coetzee was obligated to conduct himself in a manner demonstrating a lack of the knowledge, skill and care that can be expected of the average attorney in the provision of his services as an attorney, including him providing advice to his clients.

[155] *Mouton* above n 150 at para 142.

[156] *Deloitte Hoskins & Sells v Bowthorpe Herselman Deutch* 1991 (1) SA 525 (A); 1 All SA 400 (A) at 532H-I; *Drennan Maud & Partners v Pennington Town Board* [1998] ZASCA 29; 1998 (3) SA 200 (SCA) at 211F.

[157] *Links* above n 11 at para 32.

[197] From the evidence presented, it is clear that the applicants did not have actual knowledge of the fact that the advice they were given by Mr Coetzee was wrong or that he failed to assist them to exercise the option validly. On the probabilities, their conduct simply does not support such a conclusion. They acted upon Mr Coetzee's advice by instructing him to exercise the option and enter into an agreement on their behalf for the purchase of the land. They subsequently sought to enforce what they clearly thought was an agreement of sale by instituting an action for ownership of the property to be transferred to them. They persisted with this action until they were informed that there was no enforceable contract of sale due to the lack of a signed written mandate authorising Mr Coetzee to act as their agent.

[198] In my view, knowledge of the material facts underlying Mr Coetzee's failure to perform his mandate with the necessary care and diligence can also not be inferred from any of the non-material facts that were known to the applicants. There can be no suggestion that such knowledge must be inferred from the fact that the applicants knew that they were not asked by Mr Coetzee to sign any documentation. They did so based on the advice given to them by Mr Coetzee in the exercise of his mandate. There was no reason for the applicants not to rely on that advice and there was, in the circumstances, no justification for any belief that may be said to have been engendered by that fact.[158]

[199] The respondents' reliance on the fact that in their plea to the applicants' particulars of claim in the action, they pleaded that the applicants "attempted" to exercise the option, similarly cannot support such a finding. The pleading is vague in the extreme and nowhere in their plea did the respondents place the validity of the alleged sale of the property in dispute by reason of a failure to comply with section 2(1) of the Alienation of Land Act.

[158] *Gore* above n 130 at paras 19-20.

[200] From the common cause facts, it is evident that only during the course of the trial in the first action did the applicants become aware of the erroneous nature of the advice they received from Mr Coetzee and his failure to exercise the option in accordance with their instructions. It was at this juncture that they discovered that the letter by Mr Coetzee to the executor of Mr Steenkamp's estate did not result in a legally binding and enforceable contract of sale due to non-compliance with section 2(1) of the Alienation of Land Act.

[201] On the authority of *Truter*, the Supreme Court of Appeal held that this knowledge constituted a legal conclusion rather than a fact as envisaged in section 12(3). In my opinion, this view is incorrect. Firstly, it was made in isolation and without any reference to the material facts of which the applicants had to have knowledge of before prescription commenced running and the legal conclusions to be drawn therefrom. What the Supreme Court of Appeal found to be the facts of which the applicants had knowledge of, bears no relation to the material facts underlying the applicants' pleaded case. As stated earlier, the issue of prescription is dealt with in a manner similar to an exception, in that it proceeds on the basis that the plaintiff's allegations in their particulars of claim are correct, unless specifically denied for purposes of the plea of prescription. The focus of the enquiry in section 12(3) is on what the material facts are of which the creditor must have knowledge. Without first making that determination, any further enquiry is rendered aimless. What the respondents claim to be a legal conclusion bears no relation to the material facts from which the debt that the applicants sought to enforce in their pleadings arose and the legal conclusions to be drawn from those facts in terms of the pleaded cause of action.

[202] The postulated legal conclusion is not a legal conclusion in respect of the constituent elements of the applicants' claim. The legal conclusion that the applicants seek to draw from the pleaded facts, is that the respondents acted in breach of their contract of mandate. When the Court in *Truter* said that section 12(3) does not require knowledge of a legal conclusion, the "relevant" contemplated legal conclusion in the context of the pleaded case in that matter, was that of negligence – a constituent element

of the applicant's pleaded claim in that matter. A legal conclusion that bears no relation to the elements that make up the creditor's pleaded cause of action, or which is based on facts which are not material to the creditor's pleaded claim, is irrelevant for purposes of deciding when prescription started running. This position is supported by the Court in *Truter* when it said the following:

> "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:
>
> > '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.'"[159]

[203] Secondly, the finding fails to acknowledge that a legal conclusion is an outcome that is premised on facts. The factual basis indicating that that no legally enforceable contract of sale came into being arises from the legal requirement stipulated in the Alienation of Land Act. Section 2(1) provides that an agent who acts on behalf of any one of the parties to the sale of land must do so on the written authority of the party whom he represents. This provision is a legislative requirement that reflects a statement of what the law is. It is a representation of a factual assertion regarding what the law is in relation to the sale of land, as opposed to the legal consequences which flow from a failure to comply therewith. It is a legal fact, that is, "a fact that triggers a particular legal consequence."[160]

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[159] *Truter* above n 7 at para 17. See also *Evins* above n 121 at paras 838H-839A:

> "[T]he basic ingredients of the plaintiff's cause of action are *(a)* 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*, ie loss to plaintiff's patrimony, caused by the bodily injury. The material facts which must be proved in order to enable a plaintiff to sue (or *facta probanda*) would relate to these three basic ingredients and upon the concurrence of these facts the cause of action arises."

[160] *Black's Law Dictionary* above n 110 at 1777.

[204] The fact that it is a legal fact makes it no less a fact which is the existence of a "circumstance" as distinguished from its legal effect, consequence or interpretation.[161] The finding of the Supreme Court of Appeal does not reflect the distinction between, on the one hand, the existence of the requirement in section 2(1) of the Alienation of Land Act as a legal fact, which is objectively determinable with reference to the provisions of the Alienation of Land Act, and, on the other hand, the legal consequences which flow from a failure to comply with the provisions of the said section.

[205] When the applicants were told that the exercise of the option did not produce a valid and enforceable contract of sale due to non-compliance with the provisions of the Alienation of Land Act, the applicants consequently also acquired knowledge of the fact that underlies the conclusion of invalidity, namely, what the Alienation of Land Act determines the law is in relation to the sale of land. This in turn meant that they acquired knowledge of the fact that Mr Coetzee gave them erroneous advice and that he had failed to assist them in enforcing their contractual rights in the option agreement. These facts are material facts that serve to prove a breach of the terms of the contract of mandate. It is conduct that supports a conclusion that the respondents acted negligently and not with the necessary skill, care and diligence expected of the average attorney.[162]

[206] That the applicants acquired knowledge of a material fact in this manner is irrelevant, as is the fact that there is a legal component to the conclusion drawn from the facts with regard to one of the material facts, namely that the advice was wrong in law. As stated in *Eaglesfield v Marquis of Londonderry*:[163]

> "It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10 000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated

[161] Id at 1775.

[162] *Ramonyai* above n 47 at para 18. See also Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities, GN 168 *GG* 42337, 29 March 2019 at para 18.14.

[163] (1875) 4 Ch D 693.

> which does not involve such knowledge of law. To state that a man is entitled to £10 000 Consols involves all sorts of law. Therefore this is a statement of fact, and nothing more; and I hold the argument to be wholly unfounded which maintained that it was a statement of law."[164]

[207] The erroneous nature of the advice is clear from a cursory reading of section 2(1) of the Alienation of Land Act. It does not require a trained lawyer to arrive at that conclusion. It is a conclusion of fact inferred from the nature of the advice received from Mr Coetzee and the mandatory requirements of section 2(1) of the Alienation of Land Act.

[208] In *British Launderers Association v Hendon Rating Authority*[165] Lord Denning explained it as follows:

> "The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If and in so far as those conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact and the only questions of law which can arise on them are whether there was a proper direction in point of law and whether the conclusion is on which could reasonably be drawn from the primary facts: see *Bracegirdle v. Oxley (10*). If and in so far, however, as the correct conclusion to be drawn from primary facts requires, for its correctness, determination by a trained lawyer – as, for instance, because it involves the interpretation of documents, or because the law and the facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained lawyer – the conclusion is a conclusion of law on which an appellate tribunal is as competent to form an opinion as the tribunal of first instance."[166]

[209] At this point, it may be convenient to address some of the aspects raised by my Colleague Rogers J in his judgment insofar as it may be necessary. I strongly disagree with the proposition that this judgment seeks to radically depart from established law

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[164] Id at 703. Quoted with approval in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd; Old & Campbell Ltd Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897 at 921.

[165] [1949] 1 All ER 21.

[166] Id at 25H-26A.

and that it "may open the door to all sorts of claims". The first judgment evidently recognises a problem in the finding of the Supreme Court of Appeal, regarding what a legal conclusion is. Otherwise, there would be no need for the introduction of an exception, or as it has also been referred to, "a limited carve-out". The difference between this judgment and the first lies in the approach to the problem. While the first judgment regards the problem as being the rule in *Truter* itself and seeks to rectify it by introducing an exception thereto, this judgment on the other hand, aims to highlight that the problem lies in the incorrect interpretation and application of the judgment in *Truter* by the Supreme Court of Appeal. This judgment seeks to reaffirm the correct interpretation and application of what section 12(3) entails, and it goes no further than that. How this could result in the outcomes contemplated by my Colleague, Rogers J, in his judgment, is unclear.

[210] The reference above to the statement of Lord Denning simply illustrates that not every statement with some legal component to it must necessarily be a conclusion or a matter of law for purposes of *Truter*. The fact is that a simple statement of what the law is, as found in a statute, which is a public document, is a matter of fact. The existence of the legal rule is proven with reference to the statute itself. On the other hand, the legal consequences which are to flow from the non-compliance of such a legal rule by its application to the facts of a matter, are matters of law. The factual existence of a legal rule and the consequences of its non-compliance are two different matters. In the case before us, the essence of the applicants' pleaded case is based on the provision of incorrect advice, that is, advice that departed from the fixed rule of law as found in the Alienation of Land Act. It allows for no debate of what the correct legal position is, and that by comparison to the actual advice given by Mr Coetzee to the applicants, the applicants were erroneously advised. The fact that section 2(1) of the Alienation of Land Act requires an agent to have written authority to conclude a sale on behalf of a principal is accordingly a fact. Its content is known and is proved by the statute itself.

[211] To reiterate, what the facts are for purposes of section 12(3) and what the legal conclusions are which are to be drawn from those facts, are determined with reference to a plaintiff's chosen pleaded cause of action. A legal conclusion that has no bearing on the pleaded case merely hovers unsubstantiated and is therefore irrelevant. The difficulty that arises when a court is determining the issue of prescription when raised, is the failure to first establish the facts of which a creditor must have knowledge of as envisaged in section 12(3) and the legal conclusions which the creditor seeks to draw from those facts. The result of such a failure is that it leads to an avoidable discussion around the issue of a legal conclusion and consequently, an incorrect finding. In this matter, the applicants are required to prove that Mr Coetzee breached the terms of his mandate. For purposes of section 12(3), this required them inter alia, to have had knowledge of the fact that the advice they were given by Mr Coetzee was erroneous. The fact that they acquired that knowledge in the manner in which they did is, for the reasons stated in this judgment, irrelevant.

[212] The remaining question is whether the applicants must be deemed to have had knowledge of the material facts more than three years before they instituted their action. I agree with the finding in the first judgment that on the facts of this matter, the respondents failed to prove that the applicants failed to meet the standard of care required by section 12(3). It is negligent, and not innocent, inaction that the section seeks to prevent.[167] Further, whether a creditor, by exercising reasonable care, could have acquired the relevant knowledge is determined with reference to a reasonable person in the position and the particular circumstance of the creditor. In the context of the present matter, the nature of the professional relationship created by the contract of mandate should be considered in determining whether the applicants could reasonably have been expected to know that Mr Coetzee failed to exercise his mandate with the necessary skill, care and diligence expected from the average attorney.

[167] *Macleod v Kweyiya* [2013] ZASCA 28; 2013 (6) SA 1 (SCA) at para 13.

The duty to act in good faith

[213] An attorney owes his client a contractual duty to act in good faith. In *Goodriche*[168] the Court dealt with the content of this duty by referring with approval to the following statement by Van Zyl:[169]

> "The law exacts from an attorney uberrima fides – that is, the highest possible degree of good faith. He must manifest in all business matters an inflexible regard for truth; there must be a vigorous accuracy in minutiae, a high sense of honour and incorruptible integrity; he must serve his client faithfully and diligently."[170]

[214] The attorney-client relationship further imposes fiduciary obligations on the attorney,[171] which is consistent with the duties of legal practitioners to "maintain the highest standard of honesty and integrity";[172] "treat the interest of their clients as paramount"[173] and "maintain legal professional privilege and confidentiality regarding the affairs of the present or former clients or employers, according to law."[174] In *Robinson*[175] Innes CJ stated that—

[168] *Goodriche* above n 46.

[169] Van Zyl *The Theory of Judicial Practice in South Africa* (Juta & Co Ltd, Cape Town 1931) at 33.

[170] *Goodriche* above n 46 at 504G-H.

[171] Midgely *Lawyers' Professional Liability* (Juta & Co Ltd, Cape Town 1981) at 77; Wessels *The Legal Profession in South Africa* (Juta & Co Ltd, Cape Town 2021) at 176. See also *Fourie v Van der Spuy and De Jongh Inc* 2020 (1) SA 560 (GP) at paras 18-9; *Nash v Mostert* 2017 (4) SA 80 (GP) at para 63.

[172] Code of Conduct for All Legal Practitioners and Juristic Entities above n 162 at para 3.1.

[173] Id at para 3.3.

[174] Id at para 3.6.

[175] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at paras 177-80. Endorsed in *Phillips v Fieldstone Africa (Pty) Ltd* [2003] ZASCA 137; [2004] 1 All SA 150 (SCA) at para 30.

> "[w]here one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationships. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position."

[215] The applicants are laypersons who entrusted their affairs to a trained lawyer. The fiduciary relationship and the respondents' duty to act in good faith entitled them to reasonably rely on the advice given to them by Mr Coetzee. Before they were told that the exercise of the option did not produce a valid and enforceable contract of sale, there were no facts that were known to the applicants that would have caused an ordinary prudent person in their position to make enquiries and begin to investigate whether or not Mr Coetzee has complied with his mandate.

Conclusion

[216] For these reasons the appeal must succeed. I am in agreement with the terms of the order proposed in the first judgment.

ROGERS J (Maya DCJ, Kollapen J, Madlanga J, Majiedt J and Theron J concurring):

[217] I have had the pleasure of reading the judgments by my Colleagues Kollapen J (first judgment) and Van Zyl AJ (second judgment). I wish to add a few words to explain my concurrence in the first judgment.

[218] Both judgments recognise, I think, that it would be an unacceptable outcome for prescription in this case to have started running on 13 November 2003, the date by which it was no longer possible for the applicants (plaintiffs) to validly exercise their option to purchase the late Mr Steenkamp's farm. By that date, the plaintiffs had a

complete cause of action against the present respondents (defendants). But they did not know that the advice given to them by Mr Coetzee was wrong in law. This was something they only discovered in November 2007 during Mr le Roux's cross-examination in the action against Mr Nel. On what basis, in justice, can an attorney contend that prescription began to run despite the fact that the client's ignorance of the law was the very subject of wrong advice by the attorney and the very subject of the client's subsequent claim against the attorney?

[219] The two judgments reach the same outcome along different paths. The first judgment acknowledges that, ordinarily for the purposes of prescription, the content of section 2(1) of the Alienation of Land Act[176] and the invalidity of the purported exercise of the option would be knowledge of the law rather than knowledge of the facts, and ignorance thereof would thus not delay the commencement of the running of prescription in terms of section 12(3) of the Prescription Act.[177] The first judgment carves out an exception by which such knowledge is treated as knowledge of a fact where the claim against the attorney arises from the very circumstance that the attorney wrongly advised the client as to the content of the law in question.

[220] The second judgment protests that the first judgment's carve-out constitutes an unnecessary and unjustified exception, one which will be at odds with certainty, predictability and uniformity, which are components of the rule of law. Instead, the second judgment posits that there is a difference between "legal facts", which are facts for purposes of section 12(3), and "legal conclusions", which are not facts for purposes of section 12(3). That section 2(1) of the Alienation of Land Act requires an agent to have written authority to conclude a sale on behalf of a principal, including a sale concluded by the exercise of an option, is regarded by the second judgment as a mere fact. Conversely, the legal conclusion from this fact, namely that the option was never validly exercised, is treated by the second judgment as not being a fact.

[176] Above n 3.

[177] Above n 1.

[221] In my view, the second judgment's reasoning is unsound and constitutes a far more radical departure from our existing law than the first judgment's limited carve-out. It would open the door to all sorts of claims that hitherto would have been treated as shut by prescription. I have been unable to find, in our authorities, any support for the distinction, insofar as prescription is concerned, between the objective content of the law (supposedly a fact, available to lawyer and layperson alike) and the legal conclusions to be drawn from the objective content of the law (supposedly a matter of law requiring a lawyer's skill).

[222] Section 2(1) of the Alienation of Land Act expressly states that an alienation of land that does not comply with the formalities laid down in the Act, including the requirement of signed written authority by the principal in favour of an agent, is of no force or effect. The content of the formality and the legal consequences of non-compliance are both express provisions of the Act. Why should the one be regarded as a fact and the other a legal conclusion? Even where legislation does not expressly state that a contract concluded contrary to its terms is of no force and effect, the validity of the resultant contract remains a matter of the proper interpretation of the legislation. It is not as if some hidden field of law visits nullity on the contract.

[223] The objective content of the law determines all the consequences flowing from a particular set of facts. The consequence of non-compliance with a particular legal provision is as much part of the objective content of the law as the legal provision itself, whether it is express (as with section 2(1) of the Alienation of Land Act) or implied or a matter of construction. A distinction between legal matters which laypeople could supposedly find out by a "cursory" reading and those which only lawyers could supposedly know about is wholly impractical. Is the content of a regulation made under an empowering provision a fact, even though it would be a matter of some difficulty to access it? And if that is a fact, is the interpretation of the regulation contained in the law reports also a fact? What about knowledge of the common law, which can be found stated in textbooks and authoritative judgments?

[224] In distinguishing between facts and law for purposes of prescription, the cases, including *Truter*,[178] talk about the "set of facts" a creditor must prove in order to succeed. The content of the law is not part of the "set of facts" a creditor need prove and it is not something that needs to have "happened" to complete a cause of action. It is neither necessary nor permissible to call a witness to establish the content of the Alienation of Land Act. Although a plaintiff or defendant may allege the content of the law in their pleadings, this is not strictly necessary. For example, in the first action against Mr Nel, neither side pleaded or needed to plead the content of the Alienation of Land Act. Whether, on the facts pleaded, the option was or was not validly exercised was a matter of law.

[225] In *Van Staden*,[179] the question was when prescription started to run in respect of a statutory right of recovery in terms of section 18(1) of the Share Blocks Control Act[180] arising from a purported sale of a share block that did not comply with section 17 of that Act. The Supreme Court of Appeal did not regard the content of either of those sections as facts. Prescription was held to have started running as soon as the creditor paid money under the contract in question, despite the creditor's ignorance of sections 17 and 18(1).[181] Although non-compliance with section 17 was a prerequisite for bringing a claim in terms of section 18(1), and was in that sense part of the creditor's cause of action, it was not among the facts of which the creditor needed to be aware before prescription started to run.

[226] In *Claasen*,[182] a client sued his attorney because an agreement for the repurchase of land, although in writing, left the purchase price to be determined at the time of repurchase. The Supreme Court of Appeal held that time started to run as soon as the

[178] *Truter* above n 7.

[179] *Van Staden v Fourie* [1989] ZASCA 36; 1989 (3) SA 200 (A); [1989] 2 All SA 329 (A).

[180] 59 of 1980.

[181] *Van Staden* above n 179 at 216C-E.

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

contract was concluded. That section 2(1) required the contract to contain all the material terms, including the price, and that non-compliance rendered the contract invalid and of no force or effect, were regarded as a legal conclusion.[183] Although non-compliance with section 2(1) was a prerequisite for claiming against the attorney, and was in that sense part of the creditor's cause of action, it was not among the facts of which the creditor needed to be aware of before prescription started to run.

[227] The Supreme Court of Appeal reached a similar conclusion in *Fluxmans*.[184] The creditor was unaware of the requirements of the Contingency Fees Act[185] and of the invalidity at common law of contingency fee agreements. This ignorance was not regarded as ignorance of a fact for purposes of prescription. Once again, non-compliance with the Contingency Fees Act was a prerequisite for the claim to recover money from the attorneys, and was in that sense part of the creditor's cause of action, but it was not among the facts of which the creditor needed to be aware before prescription started to run.

[228] Whether *Claasen* and *Fluxmans*, which were claims against attorneys, would be decided the same way under the carve-out proposed in the first judgment is unnecessary to debate. I am merely making the point that the second judgment's analysis, while professing to apply existing authority, is at odds with decisions of the Supreme Court of Appeal. And the second judgment's analysis finds no support in the decisions of this Court either, in particular *Links*[186] and *Mtokonya*.[187]

[229] In *Mtokonya*, a wrongful arrest and detention case, this Court held that the "facts" of which a creditor needed to be aware in terms of section 12(3) do not, in a delictual claim, include that the defendant's conduct was wrongful and actionable. This Court,

[183] Id at paras 15-6.

[184] *Fluxmans* above n 18.

[185] Above n 56.

[186] *Links* above n 11.

[187] *Mtokonya* above n 8.

referring to *Fluxmans*, observed that the invalidity of an agreement is not a fact but a legal conclusion, adding that by the same token to say that conduct is wrongful and actionable is a legal conclusion and not a fact.[188] To hold otherwise would, the Court said, render the law of prescription so ineffective that it might as well be abolished.[189]

[230] One of the bases on which the plaintiff in that case claimed to lack the relevant knowledge was that he was unaware that, following his arrest, the police had a statutory duty to bring him before a court within 48 hours.[190] On the second judgment's approach, this statutory duty would presumably be a "legal fact" rather than a "legal conclusion". However, this Court in *Mtokonya* plainly regarded knowledge of this statutory duty, as well as knowledge of resultant wrongfulness and actionability, as equally irrelevant when it came to the "facts" from which the debt arose. If the plaintiff in that case had to know about the statutory duty as a "fact", this Court would have been bound to dismiss the Minister of Police's reliance on prescription, because the stated case did not establish that the plaintiff had been aware of the statutory duty. If a debtor always needs to establish that the creditor had knowledge of some primary "legal fact" before being able to rely on the irrelevance of subsequent "legal conclusions", prescription might, as this Court warned, become completely ineffective.

[231] Accordingly, when the cases refer, as they sometimes do, to its being unnecessary for the creditor to know the "legal conclusions" flowing from the facts, they are talking about the full gamut of the law as applied to the facts, not some secondary process of legal reasoning flowing from some primary legal proposition. That the creditor pleads the law in his particulars of claim does not convert the assertion of law into an allegation of fact.

[188] Id at para 51.

[189] Id at para 63.

[190] This statutory obligation of the police is imposed in terms of section 50(1)(c) of the Criminal Procedure Act 51 of 1977.

[232] The second judgment states that the plaintiffs' pleaded case required them to prove that Mr Coetzee had "breached" his contract with them, in particular his duty to advise them and act on their behalf without negligence; and that they thus needed to know that his advice to them had been "wrong" and that he had failed to exercise the option "validly". However, the words I have placed in quotation marks each embody an assertion as to the law. If the plaintiffs had sued the defendants in delict (and leaving aside the permissibility of concurrent causes of action in contract and delict), the counterpart of "breach of contract" by the giving of "wrong" advice and failing to exercise the option "validly" would have been allegations of "wrongful" and "negligent" conduct. The legal grounds on which conduct is wrongful or negligent are not ordinarily among the "facts" referred to in section 12(3).

[233] It is for these reasons that there needs to be special treatment of the case where a client who has been brought under a misapprehension as to the law by his or her attorney later sues the attorney for loss caused by the wrong advice.

[234] In addition to what has been stated in the first judgment, the following may be urged as further justification for a carve-out. In an action to enforce a contract for the sale of land, the plaintiff and defendant do not need to plead the content of the Alienation of Land Act. They need only plead the facts from which the conclusion may be drawn that the contract did or did not comply with the Act.

[235] By contrast, in a case such as the present, where a former client sues an attorney for wrong advice about the requirements of the Alienation of Land Act, the creditor would be expected to allege (a) the advice he or she did receive; and (b) the advice he or she should have received. To make the second of these allegations, the creditor would need to know not only what the law is but whether the attorney fell short of the standards of a reasonable attorney by being ignorant of the legal requirement in

question. Although evidence as to the law is not admissible, evidence as to the standards expected of a reasonable attorney might in some circumstances be.[191]

[191] In England, compare *Patel v Daybells (A Firm)* [2001] EWCA Civ 1229, [2001] 32 EGCS 87, [2002] PNLR 6 at para 44, *Shaw v Leigh Day (A Firm)* [2018] EWHC 2034 (QB) at paras 8-9 and *Mason Hayes and Curran v Queally* [2018] IEHC 614 at para 57; but see *West Wallasey Car Hire Ltd v Berkson & Berkson (A Firm) & Anor* [2009] EWHC B39 (Mercantile); [2010] PNLR 14 at paras 19-20. In Australia, see *A.I.McLean Pty Ltd v Hayson* [2008] NSWSC 927 at paras 225-36 (a case coincidentally about the alleged negligence of solicitors in failing validly to exercise options), *Attard v James Legal Pty Ltd* [2009] NSWSC 811 at para 59 and *Lucantonio v Kleinert* [2009] NSWSC 853 at para 8. In Canada, expert evidence is often allowed, but is not always necessary: see, e.g., *Sports Pool Distributors Inc v Dangerfield* 2008 BCSC 9 at paras 61-2, *King Lofts Toronto I Ltd v Emmons* 2013 ONSC 6113 at paras 74-7 and *Odobas v Yates* 2022 BCSC 186 at paras 101-8.

For the First and Second Applicants:	C Cutler and J Hamers instructed by NME Nilssen and Associates.
For the First and Second Respondents:	S Budlender SC, G Porteous and M Nombewu instructed by Bow man Gilfillian Attorneys.