CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 200/16

In the matter between:

SINETHEMBA MTOKONYA Applicant

and

MINISTER OF POLICE Respondent

Neutral citation:	*Mtokonya v Minister of Police* [2017] ZACC 33
Coram:	Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Zondo J (majority: [1] to [86] Jafta J (dissenting): [87] to [185]
Heard on:	16 March 2017
Decided on:	19 September 2017
Summary:	[knowledge required by section 12(3) of Prescription Act] — [knowledge of legal conclusion or that creditor has a legal remedy not required by section 12(3)] — [only knowledge of identity of debtor and facts giving rise to debt required] [leave to appeal is granted] — [appeal is dismissed] — [no order as to costs]

ORDER

On appeal from the High Court of South Africa, Eastern Cape Local Division, Mthatha, the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

JUDGMENT

ZONDO J (Cameron J, Froneman J, Khampepe J, Madlanga J, Mhlantla J and Pretorius AJ concurring):

Introduction

[1] This case is about extinctive prescription. In particular, it is about whether section 12(3) of the Prescription Act[1] requires a creditor to have knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable before prescription may start running against the creditor. That is the question that this Court will be called upon to decide if we grant the applicant leave to appeal.

[1] 68 of 1969. Section 12(3) reads:

> "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."

Background

[2] The applicant instituted an action in the Eastern Cape Local Division of the High Court, Mthatha,[2] against the respondent for damages for wrongful arrest and detention by the South African Police Service. He was arrested on 27 September 2010 and detained for four or five days before being released. The respondent delivered a special plea in terms of which he pleaded that the applicant's claim had prescribed. Thereafter, the parties agreed to submit a special case on prescription for adjudication by the Court in terms of rule 33(1) of the Uniform Rules of Court. A special case is submitted to court for adjudication by way of a statement agreed to between the parties setting out the agreed facts, the question of law that the parties ask the court to decide, the parties' contentions and the relief they seek.

[3] The parties submitted an agreed statement in terms of rule 33. After identifying the parties, the agreed statement reflected the following as the "agreed facts giving rise to the claim", "the dispute", "the parties' contentions" and the "relief sought":

> "AGREED FACTS GIVING RISE TO THE CLAIM
>
> 3. The plaintiff:
>
> 3.1 was arrested and thereafter detained by members of the South African Police Service at Engcobo Police Cells on the 27 September 2010;
>
> 3.2 at the beginning of July 2013 met with Mr Nkululeko Babe, an attorney of this Court and Plaintiff's neighbour, who during the course of their interaction enquired about the outcomes of the criminal case in respect of which the plaintiff had been arrested by the Police on the 27 September 2010 and who, on being informed that the plaintiff was never taken to Court following his arrest but

[2] *Mtokonya v Minister of Police* [2015] ZAECMHC 67 (High Court).

was released by the police on the basis that when they need him, they will call on him again to attend and present himself at Court. Mr Babe informed him at the beginning of July 2013 that he, the plaintiff:

3.2.1 was not supposed to be detained in excess of a period of 48 hours without him having been made to appear before a court of law;

3.2.2 was wrongfully and unlawfully:

3.2.2.1 misled by the Police into believing that they will at some point call upon him to attend Court simply to conceal the wrongfulness of their conduct, but never call him; and

3.2.2.2 arrested and detained by the Police in circumstances where they had no reason to believe that he had committed an offence;

3.2.3 has a cause of action against the Minister of Police for unlawful arrest and detention.

3.3 issued a statutory notice pursuant to the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 (Act NO. 40 of 2002) in July 2013; and

3.4 issued and thereafter served summons against the Defendant in April 2014.

THE DISPUTE

4. *The matter has been set down for determination of the question whether the plaintiff's claim has prescribed or not*.

THE PARTIES' CONTENTIONS

5. *The defendant contends that the plaintiff's claim has prescribed and the plaintiff disputes this issue*.

6. *The plaintiff contends that before his meeting with Mr Nkululeko Babe at the beginning of July 2013, he did not know that:*

6.1 *the conduct of the Police in not bringing him before a Court of law within 48 hours following his arrest on the 27 September 2010 was wrongful and actionable*;

6.2 at the time of his arrest the Police did not have information upon which they could have formed a reasonable belief that he had committed the offence for which he was arrested and thereafter detained; and

6.3 *he could sue the police.*

RELIEF SOUGHT

7. The defendant prays for:

7.1 an order upholding the special plea of prescription; and

7.2 dismissing the plaintiff's claim with costs.

8. The plaintiff prays for an order dismissing the special plea with costs."

[4] From the agreed statement it is clear that the broad dispute arising from the special plea was whether the applicant's claim had prescribed. The respondent contended that it had prescribed whereas the applicant contended that it had not. That this was the case was reflected in paragraph 5 of the agreed statement. Paragraph 5 read: "The defendant contends that the plaintiff's claim has prescribed and the plaintiff disputes this issue". To decide that broad question, the parties asked the Court in the agreed statement to answer the question raised by the applicant's contention on why he took the position that his claim had not prescribed.

[5] As to what the question of law was that the parties asked the High Court to decide in order to determine whether the applicant's claim had prescribed or not, one has to look at paragraphs 6.1 and 6.3 of the agreed statement.[3] Paragraph 6.1 read with 6.3 raises the question whether the applicant's lack of knowledge that the conduct of the police in not bringing him before a court of law within 48 hours following his arrest on 27 September 2010 was wrongful and actionable and that he could sue the police had the effect of preventing prescription from running against him. Subparagraphs 6.1 and 6.2 must be read against the respective outcomes each party wanted if the Court upheld its contention on prescription. In paragraph 7 the respondent asked for "an order upholding the special plea on prescription" and

[3] Paragraph 6.2 is irrelevant to prescription and was not relied upon by Counsel for the applicant.

"dismissing the plaintiff's claim with costs" whereas the applicant asked for an order dismissing the special plea with costs.

[6] The question of law that the parties effectively asked the High Court to decide was whether a creditor is required to have knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable before prescription can start running. The applicant's contention was that such knowledge was required whereas the respondent contended that it was not.

High Court

[7] The High Court held that such knowledge was not a requirement before prescription could begin to run. Consistent with what the parties clearly expected the Court to do if it reached that conclusion on the issue, the High Court went on to conclude that, therefore, the applicant's claim had prescribed, upheld the respondent's special plea and dismissed the applicant's claim with costs. The High Court held that the question whether or not the conduct of the debtor giving rise to the debt is wrongful and actionable is a conclusion of law and not a fact whereas section 12(3) of the Prescription Act requires the creditor to have knowledge of "the facts from which the debt arises". In concluding that a creditor did not need to have knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable before prescription may begin to run, the Court relied upon the text of section 12(3) of the Prescription Act as well as *Claasen*[4] and the cases discussed in that case on the issue of whether section 12(3) requires a creditor to have knowledge of a conclusion of law before prescription can begin to run. Those cases include *Van Staden*,[5] *Gore*[6] and *Truter.*[7]

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

[5] *Van Staden v Fourie* [1989] ZASCA 36; 1989 (3) SA 200 (A).

[6] *Minister of Finance v Gore N.O.* [2006] ZASCA 98; 2007 (1) SA 111 (SCA) (*Gore*).

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

[8] The High Court dismissed the applicant's application for leave to appeal as did the Supreme Court of Appeal.

In this Court

Jurisdiction

[9] This Court has jurisdiction in this matter because this matter raises prescription and prescription is a constitutional issue since it implicates the right of access to court entrenched in section 34 of the Constitution.[8]

Leave to appeal

[10] The issue for determination involves the interpretation of section 12(3) of the Prescription Act. It is whether section 12(3) requires that a creditor should have knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law before prescription may start running or before it can be said that the debt is due. That is an important issue. Although the Supreme Court of Appeal has pronounced on this issue in a number of cases, this Court has never had the opportunity of pronouncing upon it. This case gives this Court an opportunity of pronouncing once and for all on this issue so that the law becomes settled. There are reasonable prospects of success for the applicant. It is in the interests of justice that leave to appeal be granted.

The appeal

[11] This is an appeal in a special case as contemplated in rule 33. That is an important fact to bear in mind in deciding this appeal. Since it is an appeal in the context of a special case in terms of rule 33, it is important to discuss rule 33 before actually considering and determining the appeal. This is necessary for purposes of

[8] See *National Union of Metalworkers of SA on behalf of Fohlisa v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)* [2017] ZACC 9; (2017) 38 ILJ 1560 (CC); 2017 (7) BCLR 851 (CC) at para 8; *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus* [2016] ZACC 49; (2017) 38 ILJ 527 (CC); 2017 (4) BCLR 473 (CC) at para 18; *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC) at para 22; *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) (*Mdeyide*) at para 4.

understanding the principles governing the adjudication of a special case submitted to court for adjudication under rule 33.

[12] Rule 33 reads as follows in so far as it is relevant:

> "(1) The parties to any dispute may, after the institution of proceedings *agree upon a written statement of facts in the form of a special case for the adjudication of the court.*
>
> (2) (a) Such statement shall set forth *the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon*. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents *necessary to enable the court to decide upon such questions*. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.
>
> (b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.
>
> (c) . . . .
>
> (3) At the hearing thereof the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference or fact or of law from the facts and documents as if proved at a trial.
>
> (4) . . .
>
> (5) *When giving its decision upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate* and may give any direction with regard to the hearing of any other issues in the proceedings which may be necessary for the final disposal thereof.
>
> (6) *If the question in dispute is one of law* and *the parties are agreed upon the facts, the facts may be admitted and recorded at the trial* and *the court* may give judgment *without hearing any evidence*."

What the agreed facts were, what the question of law in dispute between the parties was and what the parties' contentions were on the question of law in dispute in the

special case appear from the agreed statement. In a rule 33 special case the contentions of the parties contained in the rule 33 statement, as required by rule 33(2)(a), constitute the issues between the parties which the court is asked to consider and decide in order to determine the question of law in dispute between the parties.

[13] Rule 33(1) contemplates that parties to pending proceedings may submit to the Court "a special case for the adjudication of the court". That means that the parties submit to the court the case that they want the court to adjudicate. Rule 33 tells us that the statement agreed to between the parties by way of which the special case is submitted to court "*shall set forth the facts agreed upon, the question of law in dispute between the parties and their contentions thereon*".

[14] From rule 33(1) and (2)(a) it is clear that what is contemplated in a special case is that there must be a question of law that the parties require the court to decide on the agreed facts and in the light of their contentions which must be set forth in the agreed statement. Rule 33(2)(a) provides that the parties may annex to the statement "copies of *documents necessary to enable the court to decide upon such questions*". The reference to "such questions" in rule 33(2)(a) is a reference to "the questions of law in dispute between the parties" which one finds early in the provision. That, in turn, is a reference to the question or questions of law identified by the parties as the questions that they are asking the court to decide.

[15] Rule 33(5) proceeds from this understanding when it says:

> "when giving its decision *upon any question in terms of this rule* the court may give such judgment as may upon such decision be appropriate. . . ."

From rule 33(5) it is clear that the decision of the court is required to be "upon any question in terms of this rule". As I have said, the reference to the "question in terms of this rule" in rule 33(5) is a reference to the question or questions of law that the

parties have submitted to the court for a decision. A court that is called upon to decide a special case under rule 33 is required to decide the question of law presented to it and has no right to travel outside the four corners of the agreed statement and decide a different question that it wishes the parties had submitted to it to decide but did not or that it may wish the parties had included as one of the questions of law they had submitted to it to decide but did not.

[16] There is a good reason for this. In terms of rule 33 parties to pending proceedings agree upon a certain set of facts in the light of what the question is that the court is called upon to decide and in the light of the particular contentions that both parties will pursue. So, if a court were to change the question to be decided from the one that the parties had agreed upon, there would be prejudice to one or both of the parties because, for the different questions, one or both may have wished to add certain facts to the case or withdraw their agreement to certain facts. It would, therefore, be fundamentally unfair to at least one of the parties but, possibly, to both if, in a special case, the court were to change the question to be decided. It would be both a serious misdirection and a gross irregularity for a court to do so. It is, therefore, important that the court should study the agreed statement carefully to identify the question of law that the parties are asking it to decide so that it should not decide a different question from the question the parties asked it to decide.

[17] This approach is the same as the approach that this Court adopted in *Mighty Solutions.*[9] There, the parties had submitted to Court a joint practice note signed by Counsel for both parties which reflected the common cause facts and the issues agreed to between the parties. Then, one of the parties sought in written and oral argument to introduce a new argument on unjustified enrichment. This Court said about this attempt to introduce a new argument that fell outside the practice note:

[9] *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) (*Mighty Solutions*).

"[61] Rule 33(1) of the Uniform Rules of Court provides that parties to a dispute may agree upon a written statement of facts in the form of a special case for the adjudication of points of law. This statement sets out the facts agreed upon and the questions of law in dispute between the parties, as well as their contentions. Rule 33(3) gives the court the discretion to draw any inference of fact or law from the facts and documents as if proved at trial. In *Bane* it was said that rule 33(1) and (2) made it clear that the resolution of a special case proceeds on the basis of a statement of agreed facts. It is, after all, seen as a means of disposing of a case without the necessity of leading evidence.

[62] The Rules of this Court do not speak of a practice note or statement of facts. Rule 29 does not list rule 33 of the Uniform Rules as applicable to this Court. However, until recently it was for some time a practice of this Court to issue directions calling upon parties to submit an agreed statement of facts. The reason for this mirrors that of the Uniform Rules of Court in that it negates the need for evidence and informs this Court as to what the facts of the case are about.

[63] The joint practice note in the High Court was not only an agreement on facts. *It was an agreement on the issues to be decided by the High Court*. The High Court *regarded itself as bound by the note. It confined itself to the two issues in it*. The *judgment dealt with the issues of standing and possessory rights under the Act*. If this *Court were to entertain anything beyond those two issues it would prejudice Engen, as it had no opportunity to rebut the claim, whether on the facts or the law*. Furthermore, it would make this Court a court of first and last instance. *An application for leave to appeal must be adjudicated on whether and how the court below erred. This Court can do so on the two issues only. It would hardly be in the interests of justice for an appeal court to overturn the judgment of a lower court on the basis of an issue that Court was never asked to decide*. As lawyers often say, 'on this basis alone' this Court should not entertain the enrichment argument.

[64] Furthermore, Mighty Solutions did not raise enrichment in its notice of motion. It did so in its written and oral submissions. In *Barkhuizen* Ngcobo J noted that this Court may consider a point of law that is raised for the first time on appeal if the point is covered by the pleadings and its consideration on appeal involves no unfairness to the other parties. *Khumalo* supports this. In *Lagoonbay* this Court stated that it must be in the interests of justice, which takes into account the public interest and whether the matter has been fully and fairly aired, to hear a new argument

> for the first time. In this case the issue was not properly raised on either the facts or the law."[10]

[18] In the present case it is in paragraph 4 of the agreed statement that the parties specified what the dispute was that the Court was called upon to determine. There, the parties wrote:

> "THE DISPUTE
>
> 4. The matter has been set down *for determination of the question whether the plaintiff's claim has prescribed or not*."

In paragraph 5 of the agreed statement the parties set out their contentions. They pointed out that "(t)he defendant contends that the plaintiff's claim has prescribed and the plaintiff disputes this issue". How was the Court to determine whether or not the applicant's claim had prescribed? Rule 33 contemplates that in the agreed statement the parties would articulate the question of law to be decided and would also set out their respective contentions. In this case the broad dispute between the parties was whether the applicant's claim had prescribed. To decide that dispute, the Court had to have regard to the parties' contentions contained in the agreed statement. From the contentions of the parties emerged the question of law that the parties wanted the Court to decide. The answer to that question would automatically decide the dispute about whether the applicant's claim had prescribed.

[19] In this case no elaboration was given on the respondent's contention that the applicant's claim had prescribed. However, elaboration was provided on the applicant's contention that his claim had not prescribed. That elaboration appears in paragraph 6.1 and 6.3 of the agreed statement. This meant that, in order to determine whether or not the applicant's claim had prescribed, the Court would have to consider and decide the contentions advanced by the applicant in support of his stance that his claim had not prescribed. It follows that this meant that, if the Court upheld the

[10] Id at para 61-4.

applicant's contentions in the agreed statement, it would hold that his claim had not prescribed and the applicant would succeed on the issue of prescription. However, if it rejected his contentions, it would have to hold that his claim had prescribed and, thus, uphold the respondent's special plea and dismiss the applicant's claim.

[20] What, therefore, were the parties' contentions on the basis of which the Court was called upon to determine whether the applicant's claim had or had not prescribed? They appear from paragraphs 5 and 6 of the agreed statement. Paragraphs 5 and 6 read:

> "5. The defendant contends that the plaintiff's claim has prescribed and the plaintiff disputes this issue.
>
> 6. The plaintiff contends that before his meeting with Mr. Nkululeko Babe at the beginning of July 2013, he did not know that:
>
> 6.1 the conduct of the Police in not bringing him before a Court of law within 48 hours following his arrest on the 27 September 2010 was wrongful and actionable;
>
> 6.2 at the time of his arrest the Police did not have information upon which they could have formed a reasonable belief that he had committed the offence for which he was arrested and thereafter detained; and
>
> 6.3 he could sue the Police."

[21] As already stated, the contention in paragraph 6.2 is irrelevant to the issue of prescription. Accordingly, no more needs to be said about it. The contention in paragraph 6.3 can be seen as integral to the contention in paragraph 6.2. The applicant also treated it as such in all the courts. The contention in 6.3 that the applicant did not know that he could sue the police means simply that. It does not mean that he did not know of the existence of the debt. After all he was the one who had been arrested, detained and, according to him, also assaulted by the police. Therefore, when one talks about lack of knowledge of the existence of the debt in this case one is not, it

must be remembered, talking of a debt that is based on a contract that the creditor might not be aware of for one reason or another. Paragraph 6.3 means that the applicant did not know that he had recourse or remedy in law. That is consistent with the applicant's contention that he had no knowledge that the conduct of the police was wrongful and actionable.

[22] Paragraphs 5 and 6 need to be read together. When read together, the paragraphs mean that what would determine whether the applicant's claim had prescribed, as contended by the respondent, or, had not prescribed, as contended by the applicant, would be a decision on whether the lack of knowledge claimed by the applicant in paragraph 6 had the effect that prescription did not begin to run. If that lack of knowledge had the effect that prescription did not begin to run, the Court would have to hold that the claim had not prescribed. If, however, that lack of knowledge did not have that effect, the Court would have to hold that the claim had prescribed. Under paragraph 7 of the agreed statement, the parties indicated what relief they sought from the Court. The respondent asked for "an order upholding the special plea of prescription" and "dismissing the plaintiff's claim with costs" whereas the applicant sought "an order dismissing the special plea with costs".

[23] This Court is sitting as a court of appeal in an appeal against a decision of the High Court. Therefore, the question before us is whether the High Court was correct in its decision that section 12(3) of the Prescription Act does not require a creditor to have knowledge that the conduct of the debtor giving rise to the debt was wrongful and actionable before the debt could be said to be due or before prescription could start running.

[24] That the question before the High Court was whether, in terms of section 12(3), a creditor needs to have knowledge that the conduct of the debtor is wrongful and actionable before a debt can be said to be due is to be gathered from the judgment of that Court. Nhlangulela DJP, who heard the matter in the High Court, put the applicant's case before him as follows: "The upshot of the plaintiff's case is that he

was ignorant of the fact that he had a right to sue the defendant for damages as soon as he was released from detention".[11] Later on, he said:

> "In the present case the upshot of *the plaintiff's case is that he did have the knowledge of [the] identity of the debtor and the material facts giving rise to the debt at the time when he was released from detention in September 2010; but he did not know that he had a legal remedy against the defendant. That much was submitted by Mr Bodlani, counsel for the plaintiff,* when he said that the plaintiff was not aware of his rights until he was approached by Mr Babe with a legal advice that the plaintiff had a right to sue the defendant for damages. For present purposes the real question to be asked, and answered, is *whether knowledge of a legal remedy is required for prescription to run.*"[12]

[25] The High Court's identification of the applicant's case as being that the applicant had no knowledge that he had a legal remedy against the defendant is not to be taken as saying that the applicant did not know that the Minister of Police was a co-debtor. In the first lines of the passage it is made clear that the applicant's case was that he did have the knowledge of the identity of the debtor and the material facts giving rise to the debt at the time he was released from detention in September 2010, but he did not know that he had a legal remedy against the defendant. Since the applicant's own Counsel told the High Court, as reflected in this passage, that the applicant knew the identity of the debtor and the facts giving rise to the debt, it cannot now be said that the applicant's case was that he did not know that he had a debt or that the Minister was a co-debtor.

[26] The applicant's bases for the position he took that his claim had not prescribed were the contentions in paragraphs 6.1 and 6.2 of the rule 33 statement. That is that the applicant did not know that the conduct of the police was wrongful and actionable and that he had a remedy in law against the police. That the High Court correctly identified the issue that the parties wanted it to decide is supported by the applicant's

[11] See High Court judgment above n 2 at para 7.

[12] Id at para 9.

formulation of the issue in his application for leave to appeal to this Court against the decision of the High Court. The applicant says in paragraph 11.3 of his founding affidavit before us:

> "The absence of knowledge of a legal remedy should arrest the running of a prescription. A prescription cannot run against a person who is innocent, ignorant and uninformed about the legal conclusions or consequences of facts in possession of".

In paragraph 11.5 of the same affidavit the applicant continues:

> "The decision[s] of the Supreme Court of Appeal in *Claasen*, *Yellow Star Properties*, *Van Staden, Truter* and *Gore* were, with respect, incorrectly decided insofar as they impute knowledge of legal conclusions or consequences on the part of a creditor irrespective of whether such innocent creditor is ignorant or uninformed about such legal conclusions or consequences."

[27] Later in the same affidavit the applicant also said:

> "12.6.2 Knowledge of legal conclusions or consequences are relevant for determining the date from which prescription begins to run. A strict adherence to minimum facts alone could frustrate an innocent creditor who has knowledge about the legal conclusions or consequences of the wrongful conduct of a debtor.
>
> 12.6.3 Therefore, prescription should begin to run from the date on which the creditor acquires knowledge of legal conclusions of the wrongful conduct of a debtor. This interpretation has been rejected by our courts, including the Supreme Court of Appeal, as stated more fully hereunder.
>
> . . .
>
> 12.11 It will be observed that section 12(3) simply refers to '. . . the facts from which the debt arises'. Profoundly, the sub-section does not make provisions for a creditor who has no knowledge about the legal conclusions or consequences flowing from '. . . the facts from which the debt arises'. *It is this lacuna which I respectfully ask the Honourable Court to deal with*

> *because the court of first instance dismissed my action against the Respondent when there was agreed* evidence (in the form of a stated case) *that I have no knowledge that my detention by the police in excess of 48 hours without appearing before a court was wrongful.*
>
> . . .
>
> 14.7 *Whilst it is correct that my cause of action (i.e. wrongful arrest and detention) was complete the moment I was released from detention, I, however, did not know that I had a cause of action against the police.*
>
> . . .
>
> 14.12 In line with the decisions in *Macleod* and *Shange,* in this *case prescription should have begun to run in July 2013 i.e. the date when I was advised by my attorney that my detention in excess of 48 hours without being brought to a court of law was wrongful and actionable in law*."

[28] It is clear from paragraph 12.11 of the applicant's founding affidavit that the applicant accepts that the question before us is, in effect, whether a creditor must have "knowledge about legal conclusions or consequences flowing from . . . the facts from which the debt arises" before it can be said that the debt is due or before prescription can begin to run. It is also clear from the above paragraphs that the issue that the applicant wants this Court to pronounce upon is a legal issue or a legal conclusion. That issue is whether under section 12(3) lack of knowledge that the conduct of the debtor is actionable and wrongful prevents prescription from running.

[29] Counsel for the applicant also confirmed, in response to a question from the Bench, that the issue we are called upon to decide is the same issue that the High Court was called upon to decide. Counsel was asked this question during the hearing:

> "Am I correct in thinking that when one has regard to the stated case and the contentions by the parties before the High Court and indeed again before us, am I correct in thinking that in effect what the lawyers did before the trial Judge was to say 'the issue before us, the issue between us, between the parties, in relation to

> prescription, is whether prescription began to run immediately after the release of the applicant from detention or whether it began to run in July 2013 when the applicant got advice from Mr Babe. The applicant – that is the plaintiff – says prescription began to run in July 2013. The Minister of Police says prescription began to run immediately after the applicant was released from detention. *And the basis on which we have this difference is that the plaintiff's side says knowledge of wrongfulness is a requirement before prescription begins to run and the Minister of Police says that is not a requirement. So, we ask you, Court, to resolve that issue. If you conclude that wrongfulness is a requirement before, then . . . the plaintiff, you must conclude that prescription, his claim had, the plaintiff's claim had not prescribed. But if you conclude that knowledge of the wrongfulness of the conduct is not a requirement then you can conclude that prescription, the claim had not prescribed*. Am I correct to understand that that's how it was run?"[13]

Counsel for the applicant answered this question in the affirmative.

[30] The starting point in considering the question is to point out that the question calls for a construction of section 12(3). Since the question requires a construction of a statutory provision, we must bear in mind the provisions of section 39(2) of the Constitution. Section 39(2) reads as follows in so far as it is relevant:

> "When interpreting any legislation . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

[31] Section 12 of the Prescription Act reads:

> "12 When prescription begins to run
>
> (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.

[13] Own transcription.

> (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."

[32] Section 12(1) makes provision for the general rule. That is that prescription commences to run as soon as the debt is due. However, it says that this is subject to three exceptions which are to be found in subsections (2), (3) and (4). The first exception, in subsection (2), is that prescription does not commence to run against a creditor if the debtor wilfully prevents him or her "from coming to know of the existence of the debt" until he i.e. the creditor "becomes aware of the existence of the debt". So, under subsection (2) it is not every time a creditor does not know of the existence of a debt that prescription does not commence to run. It is only in those cases where the debtor is wilfully preventing or has wilfully prevented the creditor from "coming to know of the existence of the debt". One cannot therefore use the exception in subsection (2) to say that in all cases in which a creditor does not know of the existence of a debt prescription does not commence to run.

[33] There is a reason why the exception in subsection (2) applies only where the reason for the creditor's lack of knowledge of the existence of the debt is a result of the fact that the debtor has been wilfully preventing the creditor from coming to know of the existence of the debt. It is that, if the reason the creditor does not know of the existence of the debt is that the creditor has failed to acquire that knowledge by exercising reasonable care when he otherwise could have acquired it by exercising reasonable care, then the debt will have become due and prescription will have commenced running.

[34] The second exception, in subsection (3), is that a debt is "not deemed to be due until the creditor has knowledge of" two things. The first is knowledge of the identity of the debtor. The second is knowledge "of the facts from which the debt arose". However, this exception is itself subject to another exception provided by way of the proviso in subsection (3). The exception reads: "Provided that a creditor shall be

deemed to have such knowledge if he could have acquired it by exercising reasonable care". So, if a debtor delivers a special plea of prescription and the creditor seeks to meet it by saying prescription did not run because, before a certain date, he did not have knowledge of the identity of the debtor or of the facts from which the debt arose, the debtor can come back and say: but you could have acquired that knowledge before that date if you had exercised reasonable care but you failed to exercise such care and, therefore, prescription did commence to run before that date.

[35] We know that in the agreed statement, nothing is said to the effect that the applicant did not have knowledge of the identity of the debtor. In fact, the judgment of the High Court makes it clear that counsel appearing for the applicant in that Court said that the applicant knew the identity of the debtor and the facts from which the debt arose but what he did not know was whether the conduct of the police was wrongful and actionable. Therefore, any lack of knowledge of the identity of the debtor is not one of the issues that the High Court was called upon to decide. The other thing that the creditor must have knowledge of in terms of section 12(3) is referred to in the section as "the facts from which the debt arises".

[36] Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor nor does it require him or her to have knowledge of legal conclusions that may be drawn from "the facts from which the debt arises". Case law is to the effect that the facts from which the debt arises are the facts which a creditor would need to prove in order to establish the liability of the debtor.[14] In his founding affidavit in support of his application for leave to appeal to this Court, the applicant in effect criticises the fact that section 12(3) refers only to knowledge of "the facts from which the debt arises" and does not also refer to knowledge of legal conclusions that must be drawn from those facts. He says in the affidavit that this creates a lacuna in section 12(3) and that that is the question he is asking this Court to decide, namely, whether section 12(3) requires a creditor to also know that the conduct of the debtor is wrongful and actionable before a debt may be deemed to be due or before prescription

[14] *Links* above n 8 at para 39 and *Truter* above n 7 at paras 16-9.

may begin to run. It is not necessary to deal with the third exception which is provided for in subsection (4) because it does not arise in the present case.

[37] The question that arises is whether knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a fact. This is important because the knowledge that section 12(3) requires a creditor to have is "knowledge of facts from which the debt arises". It refers to the "facts from which the debt arises". It does not require knowledge of legal opinions or legal conclusions or the availability in law of a remedy.

[38] The reference to "knowledge . . . of facts" in section 12(3) raises the question of what a question of fact is as distinct from, for example, a question of law or a value judgment. The distinction between a question of fact and a question of law is not always easy to make. How difficult it is will vary from case to case. In *Perskor*[15] the Appellate Division had to consider this question. In that case the Court said:

> "In principle, therefore, there need not be a rigid classification of all matters to be decided by a Court of law as being either questions of fact or questions of law."[16]

[39] The Appellate Division referred to *Salmond on Jurisprudence*[17] and pointed out that the author uses the term "question of law" in three distinct though related senses. The Appellate Division then said:

> "In the first place it means a question which a Court is bound to answer in accordance with a rule of law- a question which the law itself has authoritatively answered to the exclusion of the right of the Court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. In a second and different signification, a question of law is a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and

[15] *Media Workers Association of South Africa v Press Corporation of South Africa Ltd. (Perskor)* [1992] ZASCA 149; 1992 (4) SA 791 (A) (*Perskor*).

[16] Id at 797G-H.

[17] Fitzgerald *Salmond on Jurisprudence* 12 ed (Sweet & Maxwell, London 1966) at 65-75.

> determination is what the true rule of law is on a certain matter. A third sense in which the expression 'question of law' is used arises from the division of judicial functions between a Judge and jury in England and, formerly, in South Africa. The general rule is that questions of law in both the foregoing senses are for the Judge, but that questions of fact (that is to say, all other questions) are for the jury."[18]

[40] Another part of a passage that the Court quoted from *Salmond* reads:

> "A question of judicial discretion pertains to the sphere of right, as opposed to that of fact in its stricter sense. It is a question as to what ought to be, as opposed to a question of what is. Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose. Matters of right and judicial discretion are not the subject of evidence and demonstration, but of argument, and are submitted to the reason and conscience of the court. In determining questions of fact the court is seeking to ascertain the truth of the matter; in determining questions of judicial discretion it seeks to discover the right or justice of the matter. Whether the accused has committed the criminal act with which he is charged, is a question of fact; but whether, if guilty, he should be punished by way of imprisonment or only by way of fine, is a question of judicial discretion or of right."[19]

[41] Within the context of the present case, the question is whether, when a person says A's conduct is wrongful and actionable, that is a statement of fact. If it is a statement of fact and it is one of the facts from which the debt arose in this case, then the applicant's case would fall within section 12(3). That would mean that the debt did not become due before July 2013 and, therefore, prescription only started running in July 2013. However, if such statement is not a statement of fact but is, for example, a legal conclusion, then what the applicant did not know falls outside section 12(3) and, therefore, the debt did become due upon the applicant's release and prescription began to run then. This would mean that the applicant's claim did prescribe.

[18] *Perskor* above n 15 at 795.

[19] Id at 795-6.

[42] In *Perskor* the Appellate Division said one of the senses in which the term "question of law" is used is where the Court is bound to answer in accordance with a rule of law.[20] If one applies this sense to the question whether knowledge of whether the conduct of the police was wrongful and actionable is a question of law, the answer would be in the affirmative.

[43] In "Law and Fact"[21] Clarence Morris 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."[22]

In the same article it is also said:

> "the 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."[23]

Elsewhere the author says:

> "By definition, propositions of fact are descriptive of what happened, and are bare of dispositive effect in themselves. Conclusions of law are more than that; they stand for description plus decision that at least starts the process of disposing of described cases."[24]

[44] Whether the police's conduct against the applicant was wrongful and actionable is not a matter capable of proof. In my view, therefore, what the applicant said he did not know about the conduct of the police, namely, whether their conduct

[20] Id.

[21] Morris "Law and Fact" (1942) 5 *Harvard Law Review* 1303.

[22] Id at 1328-9.

[23] Id at 1304.

[24] Id at 1331.

against him was wrongful and actionable was not a fact and, therefore, falls outside of section 12(3). It is rather a conclusion of law. As I point out elsewhere in this judgment, the second judgment accepts that what the applicant says he did not know is a legal conclusion and not a fact. Once the second judgment had reached that conclusion, that should have been the end of the matter because that is the only question that the Court is called upon to decide in determining the appeal before us.

[45] Knowledge that the conduct of the debtor is wrongful and actionable is knowledge of a legal conclusion and is not knowledge of a fact. The second judgment accepts that this is so. Therefore, such knowledge falls outside the phrase "knowledge of facts from which the debt arises" in section 12(3). The facts from which a debt arises are the facts of the incident or transaction in question which, if proved, would mean that in law the debtor is liable to the creditor.

[46] In an unreported judgment in the then Transvaal Provincial Division of the High Court in *Eskom v Bojanala Platinum District Municipality*[25], Moseneke J said:

> "In my view, there is no merit in the contention advanced on behalf of the plaintiff that prescription began to run only on the date the judgment of the SCA was delivered. The essence of this submission is that a claim or debt does not become due when the facts from which it arose are known to the claimant, but only when such claimant has acquired certainty in regard to the law and attendant rights and obligations that might be applicable to such a debt. If such a construction were to be placed on the provisions of section 12(3) grave absurdity would arise. These provisions regulating prescription of claims would be rendered nugatory and ineffectual. Prescription periods would be rendered elastic, open ended and contingent upon the claimant's subjective sense of legal certainty. On this contention, every claimant would be entitled to have legal certainty before the debt it seeks to enforce becomes or is deemed to be due. In my view, legal certainty does not constitute a fact from which a debt arises under section 12(3). A claimant cannot blissfully await authoritative, final and binding judicial pronouncements before its

[25] *Eskom v Bojanala Platinum District Municipality* 2003 JDR 0498 (T) at para 16. This excerpt is quoted by Saner in his book: "Prescription in SA Law" (Issue 23 3–98).

> debt becomes due, or before it is deemed to have knowledge of the facts from which the debt arises."

[47] In *Truter*[26] the Supreme Court of Appeal reiterated this principle of section 12(3). It said:

> "Section 12(3) of the 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."[27]

[48] In *Gore*[28] the Supreme Court of Appeal said:

> "This Court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights. . . ."[29]

[49] In *Yellow Star Properties*[30] it was argued that, by reason of section 12(3), prescription had begun to run only once Smit J had delivered his judgment to the effect that the sale was invalid because, until then, the applicant in that case could not have known that the sale was invalid. The Supreme Court of Appeal rejected this contention and, *inter alia,* said: "It may be that the applicant had not appreciated the legal consequences which flowed from the facts, but its failure to do so does not delay the date prescription commenced to run".[31]

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[26] *Truter* above n 7.

[27] Id at para 20.

[28] *Gore* above n 6.

[29] Id at para 17.

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

[31] Id at para 37.

[50] In *Claasen*[32] the Supreme Court of Appeal had to consider the same issue. It referred to its previous decisions in *Truter* and *Gore* and said that these cases—

> "[made] it abundantly clear that knowledge of legal conclusions is not required before prescription begins to run. . . . The principles laid down have been applied in several cases in this court, including most recently *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) ([2009] 3 All SA 475) para 37 where Leach AJA said that if the applicant 'had not appreciated the legal consequences which flowed from the facts' its failure to do so did not delay the running of prescription."[33]

In *Claasen,* Lewis JA also referred to *ATB.*[34]

[51] The most recent judgment of the Supreme Court of Appeal which has also confirmed that section 12(3) does not require knowledge of legal conclusions on the part of a creditor before a debt can be said to be due is *Fluxmans*.[35] Both the majority and the minority judgments were agreed on this. That an agreement is invalid is not a fact but a legal conclusion.[36] That seems to be the same as to say that that conduct is wrongful and actionable is a legal conclusion and not a fact.

[52] Counsel for the applicant relied heavily on the decisions of the Supreme Court of Appeal in S*hange*[37] and *Macleod*[38] in support of his contention. In *Shange,* a learner – Mr Shange – suffered a blunt-force injury to his right eye when one of his teachers administered corporal punishment on another learner with a belt and the tip of the belt struck Mr Shange on the side of his eye. The incident occurred in

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[32] *Claasen* above n 4.

[33] Id at para 15.

[34] *ATB Chartered Accountants (SA) v Bonfiglio* [2010] ZASCA 124; [2011] 2 All SA 132 (SCA) (*ATB*) at paras 14 and 18.

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

[36] Id at paras 10 and 32, 40-4.

[37] *MEC for Education, KwaZulu-Natal v Shange* [2012] ZASCA 98; 2012 (5) SA 313 (SCA) (*Shange*).

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

June 2003 when Mr Shange was 15 years 10 months old. After the incident, the teacher said that the incident was a "mistake" and Mr Shange accepted it as such.

[53] In January 2006 Mr Shange was 18 years 5 months old when, after he had referred the matter to the office of the Public Protector on the advice of his mother's friend, an advocate in that office informed him that he had a claim against the Member of the Executive Council for Education, KwaZulu-Natal (MEC). On 2 February 2006 Mr Shange's attorney dispatched to the National Minister of Education (instead of to the MEC for Education, KwaZulu-Natal) a notice in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act[39] (Act). That was a notice prescribed by section 3(1)(a) of the Act informing the addressee of Mr Shange's intention to institute legal proceedings. Mr Shange instituted action against the MEC and served summons on the MEC on 3 December 2008. He later gave the MEC the notice required by section 3(1)(a) of the Act and, because this was done late, applied for condonation in terms of section 3(4)(a) of the Act. Section 3(4)(b) of the Act provided that the Court could grant condonation for that failure if it was satisfied, among other things, that the "debt has not been extinguished by prescription".

[54] The MEC delivered a special plea in terms of which she sought the dismissal of Mr Shange's claim for non-compliance with sections 3(1)(a) and 3(2)(a) of the Act. In considering whether to grant Mr Shange condonation, the Court had to consider whether his claim had not prescribed. The Supreme Court of Appeal took the view that there were two joint debtors in that case, namely, the teacher and the MEC. The latter was said to be a joint debtor on the basis that she was vicariously liable for the delict committed by the teacher as it was committed within the course and scope of his employment. The Supreme Court of Appeal concluded that, on the facts of the case, Mr Shange did not know the MEC's identity as his joint debtor until he was so informed by the advocate in the Public Protector's office. The Court then held that, for this reason, Mr Shange did not have the knowledge contemplated in section 12(3)

[39] 40 of 2002.

of the Prescription Act in relation to the identity of the MEC as a joint debtor and, therefore, his claim against the MEC had not prescribed. It said that this was so because the prescription period had to be calculated from January 2006 when an advocate in the office of the Public Protector informed Mr Shange that he had a claim against the MEC.

[55] *Shange's* case does not assist the applicant. In that case the Court decided the issue of prescription on the basis that Mr Shange had no knowledge of the MEC's identity as a joint debtor. The provision in section 12(3) that a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor is not the provision in issue in the present case. The part of section 12(3) in issue in the present case is the part that says a debt is not deemed to be due until the creditor has knowledge of the facts from which the debt arises.

[56] The Court said in *Shange*:

> "The respondent's affidavit comes closer to addressing the real question. He states that an advocate in the office of the Public Protector advised him, in January 2006, to institute a civil claim against the appellant. Unfortunately the respondent's legal representatives did not appreciate the significance of this fact. Its disclosure, evidently for the first time, informed the respondent of the identity of the appellant as the joint debtor with the teacher who injured him. He was a rural learner of whom it could not be expected to reasonably have had the knowledge that not only the teacher was his debtor, but more importantly, that the appellant was a joint debtor. *Only when he was informed of this fact did he know the identity of the appellant as his debtor for the purposes of the provisions of section 12(3) of the Prescription Act.*"[40]

[57] *Shange* dealt with the first requirement of section 12(3) whereas here we are dealing with the second part of section 12(3). In the present case the applicant is asking this Court to hold that in terms of section 12(3) of the Prescription Act a creditor must know that the conduct of the debtor giving rise to the debt is wrongful

[40] *Shange* above n 38 at para 11.

and actionable – which is a legal conclusion and not a fact – before a debt can be said to be due or before prescription can start running. In *Shange* the Supreme Court of Appeal rejected that approach, albeit in passing. It said that in that case Mr Shange's attorney's affidavit—

> "focuse[d] on allegations of wrongfulness that, in a long line of cases in this court, has been held to be an irrelevant consideration when the provisions of section 12(3) of the Prescription Act are considered."[41]

[58] *Macleod* also does not support the applicant's contention that section 12(3) of the Prescription Act requires a creditor to have knowledge that the conduct of his debtor is wrongful and actionable in law before prescription may start running. In *Macleod* the Court first formulated two issues as the issues it had to decide. The first, and the only one with which we need to concern ourselves, was "whether the respondent knew or could have reasonably known the identity of the debtor and the facts on which her debt against the appellant arose before April 2006".[42] Later on, the Court effectively qualified the formulation of that issue by saying:

> "The appellant places no reliance on actual knowledge [in the context of section 12(3)] but on constructive knowledge. Constructive knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care."[43]

[59] In *Macleod* the Court said:

> "The question is not whether [the respondent] could or could not have obtained the documents from her mother or the appellant but rather whether she was negligent or innocent in failing to do so. There is no basis to arrive at the conclusion that she was negligent."[44]

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[41] Id at para 10.

[42] *Macleod* above n 39 at para 7.

[43] Id at para 9.

[44] Id at para 15.

[60] Counsel for the applicant also referred to a passage in *Links*[45] where this Court said:

> "The provisions of section 12 seek to strike a fair balance between, on the one hand, the need for a cut-off point beyond which a person who has a claim to pursue against another may not do so after the lapse of a certain period of time if he or she has failed to act diligently, and on the other, the need to ensure fairness in those cases in which a rigid application of prescription legislation would result in injustice. As already stated, in interpreting section 12(3) the injunction in section 39(2) of the Constitution must be borne in mind. In this matter the focus is on the right entrenched in section 34 of the Constitution."[46]

[61] The applicant's reliance on these cases is misplaced. In *Macleod* the Court was dealing with the question whether, by the exercise of reasonable care, the creditor in that case could have acquired knowledge of the identity of the debtor and the facts from which the debt arose earlier than April 2006. In other words, that case dealt with the proviso in section 12(3). In the present case we are not dealing with the proviso. In any event, the question we are called upon to decide in this case is not the same as the question that the Supreme Court of Appeal had to decide in *Macleod*. Here, the question is whether a creditor must have knowledge that the debtor's conduct from which the debt arises is wrongful and actionable in law before the debt may be said to be due or before prescription can start running.

[62] We decline the invitation by Counsel for the applicant to hold that the meaning of the provision in section 12(3) that a debt shall not be deemed to be due until the creditor has "knowledge . . . of the facts from which the debt arises" includes that the creditor must have knowledge of legal conclusions, i.e. that the conduct of the debtor was wrongful and actionable. We decline it for a variety of reasons. I mention a few. The text of section 12(3) does not support the contention, especially as section 12(3)

[45] *Links* above n 8 at para 26.

[46] Id at para 26.

makes it clear that it refers to knowledge "of the facts from which the debt arises". That is apart from knowledge of the identity of the debtor.

[63] 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 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.

[64] I have read the judgment by my Colleague, Jafta J (second judgment). It concludes that the High Court erred in holding that the applicant's claim had prescribed.[47] However, the second judgment does not base its conclusion on the answer it gives to the question that the parties had asked the High Court and this Court to answer which would then result in the resolution of the question of law in dispute between them.

[47] Second judgment at [88].

[65] The question of law in dispute between the parties was whether the applicant's claim had prescribed. The parties had included in their rule 33 statement a contention that they asked the Court to uphold or reject in order to resolve the question of whether or not the applicant's claim had prescribed. The question the High Court was asked to answer was whether or not the applicant needed to have had knowledge that the conduct of the Police against him was wrongful and actionable before prescription could begin to run. The applicant's contention was that such knowledge was required by section 12(3) of the Prescription Act. The respondent's contention was that it was not. The High Court held in favour of the respondent.

[66] The High Court's basis for its conclusion was that knowledge whether the police's conduct was wrongful and actionable was knowledge of a legal question or a legal conclusion and not of a fact as is required by section 12(3). Counsel for the applicant did not contest the proposition that this is a legal conclusion or a legal question. Indeed, in his written submissions he made it clear that he was urging this Court to hold that lack of knowledge of a legal conclusion, just like lack of knowledge of facts from which a debt arises, prevents prescription from running.

[67] The second judgment accepts that knowledge whether the conduct of the police against the applicant was wrongful and actionable is not knowledge of a fact but of a legal conclusion. This means that the applicant's lack of knowledge related to something that fell outside the exception provided for in the second part of section 12(3). The first part requires lack of knowledge of the identity of the debtor. The second part requires lack of knowledge of "the facts from which the debt arises".

[68] There are two grounds upon which the second judgment concludes that the applicant's claim had not prescribed by the time the summons was served. The first is that the applicant did not have knowledge of the identity of the Minister of Police as a debtor. The second is that the applicant did not have knowledge of the existence of the debt. This means that the second judgment, in deciding the appeal, asked two questions. The first was whether the applicant had been shown to have had

knowledge of the identity of the Minister of Police as a debtor or co-debtor. The second was whether the applicant had been shown to have had knowledge of the existence of the debt.

[69] Both these questions do not arise from the contentions of the parties contained in the rule 33 statement of the parties. Both questions were never raised before the High Court. Both questions were never raised by any of the parties before this Court either in their written submissions or in oral argument. As indicated elsewhere in this judgment, there was only one question that the parties wanted the High Court and this Court to decide. That was whether lack of knowledge on the part of a creditor that the conduct of the debtor is wrongful and actionable prevents prescription from running.

[70] The question that arises, therefore, is whether this Court would be entitled to raise these two questions and to decide the appeal on the basis of the answer it gives to them. The second judgment says the Court may do so because these are questions of law and a Court is entitled to raise a question of law at any time. In support of this view, the second judgment relies upon *Paddock/Igesund*[48] and cites a passage from Jansen JA's judgment in that case.[49]

[71] In my view, this Court may not raise these questions on appeal and may not decide this matter on the basis of answers to those questions. The first ground for this view is that both these questions are not points of law but points of fact. Being points of fact, a court of appeal may not raise them if they have not been raised by the parties in the rule 33 statement and may not answer them to decide whether the applicant's claim had prescribed. Whether or not A knows the identity of B is a question of fact. Whether or not A knows of the existence of a debt is also a question of fact.

[72] The second ground is that, even if these two points were points of law, neither the Court nor the applicant would be entitled to raise them. Indeed, the Court would

[48] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) (*Paddock/Igesund*).

[49] Second judgment at [177].

not be entitled to decide the appeal on the basis of these points. This is because there are requirements which must be satisfied before a court may raise a point of law that is not raised in the papers or that is not raised by any one of the parties in the papers and those requirements have not been satisfied in the present case. If the contention contained in the rule 33 statement was not included in the agreed statement as the contention which would determine whether the claim had prescribed or not, the court would have been entitled to then ask the question whether the respondent had shown that the applicant had knowledge that the respondent was a co-debtor. However, given that the parties chose to put that contention before the court as the contention that the court would have to uphold or reject to decide whether the claim had prescribed, the court is not entitled to decide the appeal on the basis of any other question. That includes the question whether or not the respondents had shown that the applicant had knowledge of the identity of the Minister of Police as a debtor or co-debtor and the question whether the applicant had knowledge of the debt. Those were not issues between the parties in terms of the rule 33 statement.

[73] As was said by this Court in *Mighty Solutions*, the issue upon which the second judgment decides this matter "was not properly raised on either the facts or the law."[50] In that matter this Court held that "(a)n application for leave to appeal must be adjudicated on whether and how the Court below erred. This Court can do so on the two issues only. It would hardly be in the interests of justice for an appeal court to overturn the judgment of a lower court on the basis of an issue that [that] Court was never asked to decide."[51] In *Genesis* this Court said that "(e)xcept in certain limited situations none of which is present in this case, a court is required to decide matters on the basis of the issues between the parties."[52] The exceptions given in the relevant footnote are jurisdiction of a court or tribunal, *locus standi* (standing), competence of an order of a court or question of law that can be decided on the facts before the court

[50] *Mighty Solutions* above n 9 at para 63.

[51] Id at para 6.

[52] *Genesis Medical Scheme v Registrar of Medical Schemes* [2017] ZACC 16; 2017 (9) BCLR 1164 (CC) at para 169.

without any party needing to lead new evidence. None of those exceptions applies in the present case. Therefore, reliance upon the point that the applicant had no knowledge that the Minister was a co-debtor to decide this appeal runs contrary to this Court's decision in *Genesis* because that was not an issue between the parties.

[74] The second judgment approaches this matter as if the special case as contained in the agreed statement submitted to the High Court simply said that the issue to be decided by the Court was whether the applicant's claim had prescribed and stopped there. In other words it approaches the matter as if the agreed statement does not include paragraphs 5 and 6 thereof which reflect the contentions which the Court was asked to uphold or reject in order to decide whether the applicant's claim had prescribed.

[75] In *Mighty Solutions* Van der Westhuizen J, writing for a unanimous Court, said:

> "In *Barkhuizen* Ngcobo J noted that this Court may consider a point of law that is raised for the first time if the point is covered on appeal by the pleadings and its consideration on appeal involves no unfairness to the other parties. *Khumalo* supports this. In *Lagoonbay* this Court stated that it must be in the interests of justice, which takes into account the public interest and whether the matter has been fully and fairly aired, to hear a new argument for the first time. In this case the issue was not properly raised on either the facts or the law."[53]

He went on to say:

> "*The joint practice note* in the High Court was not only an agreement on facts. It was an agreement *on the issues* to *be decided* by the High Court. The High Court regarded itself as bound by the note. It confined itself *to the two issues in it*. The judgment dealt *with the issues of standing and possessory rights under the Act*. If this Court were *to entertain anything beyond those two issues it would prejudice Engen,*

[53] *Mighty Solutions* above n 9 at para 63.

> as it had no opportunity to rebut the claim, whether on the facts or the law. *Furthermore, it would make this Court a court of first and last instance*."[54]

Van der Westhuizen J, also said:

> "It would hardly be in the interests of justice for an appeal court to overturn the judgment of a lower court on the basis of an issue that that Court was never asked to decide."[55]

In the present case the Court was never asked to decide whether the applicant had knowledge that the Minister was a co-debtor and whether that lack of knowledge, if that be the case, had prevented prescription from running.

[76] In *CUSA*[56] this Court said:

> "[67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the Labour Relations Act specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the Labour Relations Act to have labour disputes resolved as speedily as possible.
>
> [68] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court

[54] Id at para 62.

[55] Id.

[56] *CUSA v Tao Ying Metal Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) (*CUSA*).

> of Appeal was entitled *mero motu* to raise the issue of the Commissioner's jurisdiction and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings in fact did not reach the stage where the question of jurisdiction came into play."[57]

[77] From these two paragraphs in *CUSA*, it will be seen that this Court said in paragraph 67 that, subject to what it said in paragraph 68, the general rule is that a court may not decide a case on the basis of its own issues that have not been raised by the parties in the papers. It said in effect that a court should not tell a litigant what it should complain about. In paragraph 67 this Court said that this was subject to one qualification. That qualification was stated as being that a court may decide a matter on a point of law that has not been raised by the parties in the papers where the common approach of the parties proceeds on a wrong perception of what the law is and the point of law is apparent on the papers. In the present case the two points upon which the second judgment decides the appeal are neither apparent from the rule 33 statement nor is this a case where the common approach of the parties proceeds from a wrong perception of what the law is.

[78] The second judgment relies upon *Paddock/Igesund*[58] to say it is permissible to decide the present appeal on points that were not in issue between the parties. It quotes in paragraph 176 a passage from the judgment of Jansen JA in that matter which at first glance may appear to support that proposition. However, a reading of the paragraph as a whole reveals that the paragraph does not actually support that proposition. The passage from *Paddock/Igesund* quoted by the second judgment in paragraph 176 reads:

> "The argument, however, overlooks the fact that the agreement contemplated by Rule 33(1) and (2)(a) primarily relates to the facts – not 'the questions of law in dispute between the parties and their contentions thereon'. If e.g. the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental

[57] Id at paras 67-8.

[58] *Paddock/Igesund* above n 48.

> to the issues they have discerned and stated, the Court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision."[59]

[79] This passage is qualified by the next few sentences that come after it. They read:

> "This does not mean that the Court will always be free to enlarge the issues, whether *mero motu* or at the request of a party. The question of prejudice may arise, i.e. where a party would not have agreed on material facts, or on only those stated in the special case, had he realised that other legal issues, not stated in the special case, were involved."[60]

[80] In *Paddock/Igesund* the Appellate Division went on to say in the next sentence that in that case "such considerations do not arise as the question the appellant now seeks to raise was actually part of the special case when the facts were agreed upon (which immediately serves to distinguish the present case from cases such as *Commissioner for Inland Revenue v Estate Crewe and Another*, 1943 AD 656 at p. 682, and *Commissioner for Inland Revenue v Lazarus' Estate and Another*, 1958 (1) SA 311 (AD). Moreover, the contention as to the fulfilment of the 'condition precedent' turn on the proper construction of the contract, which is also basic to the adjudication upon the other two points of law."[61]

[81] So, *Paddock/Igesund* is, in any event, distinguishable from the present case because in that case there could be no prejudice to the other party if the matter was decided upon the point of law that had been conceded in the lower court since that point had been included in the rule 33 statement. In the present case the point relied upon in the second judgment to decide the matter was never included in the Rule 33 statement.

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[59] Id at 24A-B.

[60] Id at 24C-D.

[61] Id at 24D-E.

[82] Deciding this appeal on the basis of the two points raised in the second judgment will seriously prejudice the respondent. If the applicant had raised these points before the signing of the rule 33 statement, the respondent would have been entitled to insist that other facts be included in the list of agreed facts. Those additional facts would be facts on the basis of which, if they were agreed to, the respondent would contend, for example, that the applicant had failed to exercise reasonable care and, had he exercised reasonable care, he would have acquired knowledge of the identity of the Minister of Police as a debtor or co-debtor within, for example, a month from the date of his release from detention. That is a defence that is provided by the proviso to section 12(3) which would have been available to the respondent. It is no longer available now because no factual foundation for it has been included in the rule 33 statement. Therefore, deciding the appeal on the basis of the two points relied upon by the second judgment will be prejudicial to the respondent.

[83] In my view, therefore, it would go against quite a few judgments of this Court, namely, *CUSA*[62], *Barkhuizen*[63], *Mighty Solutions*[64] and *Genesis*[65], to decide this appeal on the points that the applicant had no knowledge of the identity of the Minister of Police as a debtor or on the point that the applicant had no knowledge of the existence of the debt.

[84] In conclusion I can do no better than repeat what this Court said in *Mdeyide*[66] about the vital importance of prescription. In that case, this Court said:

> "This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to

[62] Above n 56.

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

[64] Above n 9.

[65] Above n 52.

[66] *Mdeyide* above n 8.

> be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes, and must follow from sound reasoning, based on the best available evidence."[67]

Already, creditors have enough time to institute proceedings under the Prescription Act. The minimum period is three years. There is no need to stretch the extinctive period to more than three years as a norm.

[85] The appeal falls to be dismissed. As to costs, *Biowatch*[68] applies. Therefore, although the applicant has been unsuccessful, he is not to pay the respondent's costs.

Order

[86] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

[67] Id at para 8.

[68] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

JAFTA J (Nkabinde ADCJ and Mojapelo AJ concurring):

[87] I have had the benefit of reading the judgment prepared by my colleague Zondo J (first judgment). I agree that leave to appeal should be granted but disagree that the appeal must fail. I think it should succeed and the order of the trial Court upholding the special plea must be set aside.

Background

[88] This case requires us, by means of statutory interpretation, to strike a balance between holding the state to account for an infringement of the guaranteed right to physical freedom[69] and the objectives of statutory time limits such as "bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication".[70]

[89] A good place to start this exercise is the Constitution. Section 205 establishes a national police service charged with the responsibility "to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."[71] It is apparent from

[69] Section 12(1) of the Constitution provides:

> "Everyone has the right to freedom and security of the person, which includes the right-
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> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

[70] *Mdeyide* above n 8 at para 8.

[71] Section 205 of the Constitution provides:

> "(1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.
>
> (2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

this provision that one of the primary obligations imposed on the police by the Constitution is "to protect and secure the inhabitants of the Republic." This constitutional protection extends even to those who are arrested for committing crimes. For even the vilest criminals retain the rights guaranteed by the Bill of Rights.

[90] In addition, section 7 of the Constitution does not only declare that the Bill of Rights is a cornerstone of our constitutional order but also imposes a specific duty on the state to "respect, protect, and fulfil the rights in the Bill of Rights." In simple terms this means that the Minister of Police and members of the South African Police Service (Service), are duty-bound to respect, protect, promote and fulfil the rights safeguarded by the Bill of Rights.

[91] A constitutional dichotomy arises when members of the Service, contrary to their obligations, unlawfully arrest and detain people, and assault them while in their custody. And when a civil action is pursued by the victims, the Minister of Police (Minister) invokes an apartheid-era statute in an attempt to avoid responsibility and liability for the breach of not only the guaranteed rights but also the obligations imposed by the Constitution. This was done in circumstances where the Minister was not compelled to raise prescription. The Prescription Act on which he relied leaves it to the discretion of a debtor to raise prescription.[72] If a debtor does not raise prescription, a court cannot on its own accord take notice of prescription even where the facts show that the debt has prescribed. Such debtor may even waive the right to raise prescription.[73] Seen in this context, it is remarkable that a Minister of a democratic government would invoke an apartheid-era legislation to undermine the

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(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[72] Section 17 of the Prescription Act 68 of 1969 provides:

"(1) A court shall not of its own motion take notice of prescription.

(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings."

[73] *De Jager v Absa Bank Bpk* 2001 (3) SA 537 (SCA).

Constitution. And to do so in circumstances where he agreed in writing in the statement of agreed facts that the claimant had no knowledge of the existence of the claim.

Facts

[92] Here the claim as gleaned from the pleadings arose in these circumstances. The applicant, an illiterate resident of a rural location called Mxesibe in All Saints Administrative Area in the district of Engcobo, Eastern Cape, was arrested and detained by members of the Service. At the time of arrest, he was assaulted in full view of members of the general public. He was not taken to court within 48 hours as demanded by section 35(1)(d) of the Constitution.[74] He was released from detention on the fifth day.

[93] At the time of the alleged arrest, assault and detention, the members of the Service concerned were acting within the course and scope of their employment with the Minister. Consequently as their employer, the Minister was vicariously liable for their wrongful acts. As a result the applicant instituted in the High Court an action in which he claimed payment of R350 000. This action was initiated in April 2014, just over three years from the date of his arrest. The arrest occurred on 27 September 2010.

[94] In resisting the claim, the Minister filed a special plea of prescription and also pleaded on the merits. The special plea reads:

> "1.1 The plaintiff is a major person.

[74] Section 35(1)(d) of the Constitution provides:

> "Everyone who is arrested for allegedly committing an offence has the right-
>
> (d) to be brought before a court as soon as reasonably possible, but not later than-
>
> (i) 48 hours after the arrest; or
>
> (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day."

1.2 The plaintiff was arrested on the 27th September 2010.

1.3 Summons was issued on the 25th March 2014.

1.4 The aforesaid summons were served to the offices of the Defendant on the 27th March 2014.

1.5 The plaintiff knew that he was arrested on the 27th September 2010 and he further knew who the debtor was.

1.6 On the basis stated above a period of three (3) years from the 27th March 2014 has lapsed.

1.7 On the basis set out above this claim should be dismissed with costs."

[95] It is apparent from the special plea that the Minister contended that prescription commenced running on the day of the arrest. He asserted that as on that day the applicant knew that he was arrested and "he further knew who the debtor was." It appears that the Minister relied on the provisions of section 12(3) in determining the date from which prescription began to run. That section stipulates that a debt shall be deemed to be due on the date the creditor has knowledge of the identity of the debtor and the facts from which the debt arises.

[96] After the pleadings were closed, the parties did not proceed straight to trial. Instead, they invoked rule 33 of the Uniform Rules of the High Court which sanctions a special procedure of deciding a case without hearing oral evidence. Under the rule, parties are required to agree upon a written statement of facts in the form of a special case for adjudication of the matter by the court.[75] This statement must set out

[75] Rule 33 provides:

"(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.

(2)

(a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.

(b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.

the facts agreed upon, the questions of law in dispute between the parties and their contentions on those issues.

[97] Crucially, the purpose served by the agreed statement of facts is to dispense with the leading of evidence to establish facts necessary for success of parties on either side. Therefore, the Court is not required to evaluate evidence so as to make factual findings. But the Court is still required to make factual findings based on the agreed facts. In this regard rule 33(3) provides:

> "At the hearing thereof the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference of fact or of law from the facts and documents as if proved at a trial."

[98] Here having set out the facts they had agreed on, the parties' statement outlined the question of law the trial Court was asked to determine. That was simply whether the applicant's claim had prescribed. This was followed by the parties' contentions which were brief and concluded by describing the relief sought by the Minister. He asked the Court to uphold the special plea of prescription and dismiss the applicant's claim.

[99] Having noted that the Minister relied on section 12(3) of the Prescription Act,[76] the High Court defined the applicant's case thus:

> "The upshot of the plaintiff's case is that he was ignorant of the fact that he had a right to sue the defendant for damages as soon as he was released from prison."[77]

> (c) If a minor or person of unsound mind is a party to such proceedings the court may, before determining the questions of law in dispute, require proof that the statements in such special case so far as concerns the minor or person of unsound mind are true."

[76] 68 of 1969.

[77] High Court judgment at para 7.

[100] From this characterisation of the applicant's claim, the High Court proceeds to identify the issue it was required to determine. The Court said for the remissness of the plaintiff to be excused it must be subjected to the test stated by Tshiqi JA in *Macleod*. In that case the Supreme Court of Appeal had pronounced:

> "It is the negligent, and not an innocent inaction that section 12(3) of the Prescription Act seeks to prevent and courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found himself or herself."[78]

[101] Having referred to *Macleod* and *Shange*[79] the High Court held:

> "In the present case the upshot of the plaintiff's case is that he did have the knowledge of identity of the debtor and the material facts giving rise to the debt at the time when he was released from detention in September 2010; but he did not know that he had a legal remedy against the defendant. That much was submitted by Mr Bodlani, counsel for the plaintiff, when he said that the plaintiff was not aware of his rights until he was approached by Mr Babe with a legal advice that the plaintiff has a right to sue the defendant for damages. For present purposes the real question to be asked, and answered, is whether knowledge of a legal remedy is required for prescription to run."[80]

[102] Two observations emerge from this statement which constitutes the ratio of the High Court's judgment. First, the Court interpreted the applicant's case as that "he did have the knowledge of the identity of the debtor and the material facts giving rise to the debt at the time when he was released from detention in September 2010, but he did not know that he had a legal remedy against the defendant". It will be recalled that the special procedure in rule 33 obliged the Court to make findings based only on the agreed facts, in the written statement. A perusal of that statement supports the finding that at the time of the release, the applicant did not know that he had a legal remedy against the Minister.

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[78] *Macleod* above n 38 at para 13.

[79] *Shange* above n 37.

[80] High Court judgment at para 9.

[103] There are no facts in that statement which support the finding that the applicant had knowledge of the identity of the debtor and the material facts giving rise to the debt. On what then is the Court's finding based?

[104] This leads us to the second observation. The finding was based on an inference the Court drew from the submission made by the applicant's counsel. In its own words the Court said:

> "That much was submitted by Mr Bodlani, counsel for the plaintiff, when he said that the plaintiff was not aware of his right to sue the defendant for damages."

[105] The opening words "that much" comes immediately after the factual findings made by the High Court and link the submission made by counsel to those findings. In my view, the High Court erred in doing so. A submission by counsel cannot be a basis for a factual finding. Moreover, that submission was to the effect that the applicant was unaware that he could sue the Minister for damages. And this submission was based on one of the agreed facts appearing on the statement that formed the special case on the basis which the Court was requested to adjudicate the case.

[106] It is difficult for me to appreciate how the statement on lack of knowledge can establish a positive knowledge on the identity of the debtor and the material facts giving rise to the debt. It is impossible for a person who did not know that he had a claim to, at the same time, know the identity of his debtor and the material facts giving rise to the claim he had no knowledge of. Knowledge of the latter facts may be present if one is aware of the existence of a debt.

[107] Proceeding from this error, the High Court concluded:

> "For present purposes the real question to be asked, and answered, is whether knowledge of a legal remedy is required for prescription to run."

[108] This conclusion differed from the holding made earlier to the effect that in issue was to determine whether the applicant's remissness met the test laid down in *Macleod*. Not only was there an inconsistency in the Court's approach but the Court also departed from the special case procedure prescribed by rule 33. It will be recalled that the rule requires that any inference of fact or law be drawn from the agreed statement of facts and its annexures only and those facts are treated as if proved at trial. Drawing an inference from counsel's submission is at odds with this procedure and such a finding cannot be taken as if it was based on facts that were proved at trial.

[109] The procedural error has unquestionably led the Court astray. The question it was called upon to decide was whether the applicant's claim, as shown by the agreed facts, had prescribed. The Minister, on whom the onus of establishing the special plea rested, could succeed only if the facts set out in the statement of agreed facts indicated that the applicant had knowledge that the Minister was vicariously liable for the arrest, assault and detention by the police and the material facts giving rise to the claim. The statement must have exhibited this knowledge as in September 2010. Without such facts there was no foundation for the finding made by the High Court. Crucially that Court approached the matter on the footing that it was required to determine the nature of the applicant's claim, instead of the Minister's special plea in accordance with rule 33. This was a fundamental error.

The appeal

[110] Since this is an appeal, we must return an order which the Court of first instance should have made.[81] This requires us to determine the question of law posed in the special case and make whatever factual findings necessary from the agreed facts set out in the parties' written statement. More importantly, that enquiry

[81] *Mills Litho (Pty) Ltd v Storm Quinan t/a 'Out of the Blue'* [1987] 1 All SA 299 (C) at page 303; see also Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5 ed (Juta & Co Ltd, Cape Town 2009) vol 2. The ordinary course followed when the Court of Appeal holds that a wrong has been made is for the Court to make a proper order itself.

requires us to interpret the provisions of the Prescription Act so as to determine whether the applicant's claim had prescribed at the time the action was initiated.

Constitutional approach

[111] The Constitution obliges every court when interpreting a statute to promote the spirit, purport and objects of the Bill of Rights.[82] This constitutional approach has been affirmed by this Court in a number of cases.[83] Moreover, this Court has already held that the Prescription Act limits the right of access to courts, and together with other rights in section 34 of the Constitution.[84] The duty imposed by the Constitution during the process of interpreting statutes was described in detail in *Makate*. It entails giving a statutory provision a meaning that does not only avoid limiting rights guaranteed by the Bill of Rights but also prefer a meaning that promotes those rights.

[112] Here we are obliged to prefer a meaning of the relevant provisions that promotes, among others, the applicant's right of access to courts and his right to have the dispute between the parties determined in a fair manner by a court, applying the relevant law.

[113] In addition, we must also bear in mind that the Prescription Act we are concerned with precedes the Constitution. It was enacted under the principle of the supremacy of Parliament which allowed Parliament to pass any legislation, even legislation that violated fundamental rights. This was in stark contrast with the principle of the supremacy of the Constitution which is now in operation. The latter principle obliges Parliament to pass legislation that is consistent with the Constitution.

[82] Section 39(2) of the Constitution provides:

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

[83] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at paras 87-93; *Links above n 8* at para 26 and *Mdeyide* above n 8 at para 10.

[84] *Mdeyide* above n 8.

The presumption that a statute is constitutionally compliant, if there is no invalidity challenge, is associated with the latter principle.

[114] That presumption does not apply to statutes that were passed during the apartheid era. When it comes to legislation of that era, courts must be more vigilant because the risk of assigning a meaning to a statute that limits guaranteed rights is higher. This, in turn, requires a careful discharge of the duty imposed by section 39(2).

[115] Therefore, it is not surprising that, at face value, some of the provisions of the Prescription Act appear to be inconsistent with the values contained in our Constitution. For example, without any discernible reasons, section 11 of that Act arbitrarily determines varying periods of prescription. These range from 30 years for a debt secured by a mortgage bond, a judgment debt, a debt arising from taxation and a debt owed to the state in respect of share profits and royalties. Fifteen years in respect of other debts owed to the state. Six years in respect of a debt arising from a cheque or a bill of exchange and three years for all other debts.

[116] The shortest period of three years applies even to debts which, like in the present matter, arise from a violation of the rights safeguarded by the Bill of Rights. It will be recalled that the applicant's claim is based on the rights to physical freedom and to be free from all forms of violence, guaranteed by section 12 of the Constitution. Furthermore, the violation of those rights occurred in breach of the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. But not only that, the duty imposed on the Service by section 205 of the Constitution was also breached. It will be remembered that this section requires the Service to protect and secure the inhabitants of the Republic.

[117] The application of the stipulated period of three years to this case would mean that the applicant's constitutional rights are not vindicated and that the state gets away with the flagrant violation of the Constitution. This will be occasioned by the

applicant's ignorance of his legal rights until about seven months before he instituted the action. Consequently and owing to his special circumstances, he had a window of about seven months to exercise his constitutional right of access to court so as to vindicate his other rights.

[118] To construe the relevant provisions as having permitted him that short period would amount to punishing the applicant for the vulnerable position he found himself in and which was a direct consequence of the inequalities of the apartheid era. These were aptly described in *Mohlomi* by Didcott J in these terms:

> "That disparity must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons. The severity of section 113(1) which then becomes conspicuous has the effect, in my opinion, that many of the claimants whom it hits are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. They are left with too short a time within which to give the requisite notices in the first place and to sue in the second. Their rights in terms of section 22 are thus, I believe, infringed."[85]

[119] The absurdity of imposing three years for claims based on the violation of the Constitution and allowing 30 years for a debt secured by a mortgage bond is indeed stark. There can be no justification for creditors whose debts are based on cheques to have double the time permitted for the claims that seek to vindicate the Constitution. Of course, the validity of the Prescription Act is not challenged before us.

[85] *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) at para 14.

[120] While one accepts the important purpose served by legislation like the Prescription Act, one is left wondering how that purpose is achieved in the case of long periods of prescription such as 30 years or 15 years. That purpose was defined in these words in *Mdeyide*:

> "This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes, and must follow from sound reasoning, based on the best available evidence."[86]

[121] The objective of "certainty and stability to social and legal affairs, and maintaining the quality of adjudication" may not be achieved in cases where the prescription period is 15 or 30 years. This is because evidence relevant to the issues may have been lost, witnesses may no longer be available or their memory may have faded. This would lead to a poor quality of adjudication which in turn would seriously undermine the rule of law. Such long periods frustrate the realisation of certainty and stability in social and legal affairs. As a result there is no rational link between the means chosen and the objective of prescription.

[122] In *Murray & Roberts* the Court articulated the purpose of the Prescription Act in these terms:

> "Although many philosophical explanations have been suggested for the principles of extinctive prescription . . . its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubts may exist as to whether a valid debt ever arose, or, if it did,

[86] *Mdeyide* above n 8 at para 8.

> whether it has been discharged. . . . The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost, etc. These sources of uncertainty are reduced by imposing a time limit on the existence of a debt, and the relevant time limits reflect, to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject (section 11 of the Act)."[87]

[123] As mentioned, there are no discernible reasons for the Prescription Act to afford some creditors 30 years within which to exercise their right of access to court and others be allowed three years only. Nor are there convincing reasons for giving more protection to commercial creditors and the State. The varied periods of prescription treat creditors unequally and are also inconsistent with the right to equal protection and benefit of the law.[88]

[124] The fact that as a concept prescription is not inconsistent with the Constitution does not mean that every provision in a prescription statute is consonant with the Constitution. While the rights guaranteed by the Bill of Rights like the right of access to courts may be limited, the limitation must meet the requirements of section 36 of the Constitution. If not, a clause in a prescription statute would be invalid. As a subject matter prescription does not insulate a statute in which it is contained from constitutional scrutiny, including the manner of interpretation stipulated in section 39(2) of the Constitution.

[125] Consequently our duty in construing section 12(3) of the Prescription Act is not only to search for an interpretation that avoids these constitutional anomalies but to adopt a meaning that promotes the objects of the Bill of Rights. Of course, this exercise may be undertaken only if the language of the provision is reasonably capable of such an interpretation.

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[87] *Murray & Roberts (Cape) v Upington Municipality* 1984 (1) SA 571 (A) (*Murray & Roberts*) at 578.

[88] Section 9(1) of the Constitution provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

The relevant scheme

[126] Chapter III of the Prescription Act governs the prescription of debts. It consists of sections 10 to 16. Section 10 stipulates that a debt shall be extinguished by prescription after the lapse of the period stated in section 11. Section 11 lists varying periods for different debts. Section 12 determines the date from which prescription starts to run. This section is crucial to the determination of this matter and as a result I return to it later. Section 13 acknowledges the unjust consequences flowing from the running of prescription in circumstances where the creditor was not in a position to enforce the debt. While it allows prescription to run, the section affords a creditor two years within which to enforce the debt if there was an impediment.

[127] The section lists about eight instances which interrupt the running of prescription. These include minority, insanity, curatorship and an impediment occasioned by a superior force.

[128] Sections 14 and 15 regulate other forms in terms of which prescription is interrupted. In terms of section 14, the running of prescription is interrupted if the debtor acknowledges liability of the debt. If this happens, prescription commences to run afresh from the date of the acknowledgement. Under section 15, prescription is interrupted by conduct of the creditor only. It is interrupted if the creditor serves upon the debtor any legal process in terms of which payment of the debt is claimed. Section 16 determines the scope of the applicability of chapter III.

Meaning of section 12(3)

[129] Section 12 has been the subject of interpretation in a number of cases. Some of these were decided before the coming into effect of the Constitution. Consequently in those cases courts did not apply section 39(2) of the Constitution to their interpretation exercise. But even those that were decided after 27 April 1994, most of them do not apply this constitutional provision. This is occasioned by the irresistible temptation to assign to section 12, a meaning that was given to it under the previous apartheid order.

[130] While judicial precedent as component of the rule of law, forms part of the new legal order, care must be exercised when seeking guidance from the pre-Constitution decisions. Those decisions must be followed only if they are not at odds with section 39(2). For that provision is part of our supreme law which expressly declares that conduct or law that is inconsistent with it is invalid.[89] But more importantly, the duty imposed by the section is ever present whenever a court interprets a statute that implicates the Bill of Rights. If a court is minded to adopt a pre-Constitution construction, it must first satisfy itself that the meaning in question promotes the spirit, purport and objects of the Bill of Rights. To do otherwise would amount to paying no attention to the injunction in section 39(2). With this in mind, it is now convenient to interpret section 12 of the Prescription Act.

[131] Section 12 provides:

> "(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.
>
> (4) Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 3, 4, 17, 18(2), 20(1), 23, 24(2) and 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, and an alleged offence as provided for in sections 4, 5, and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act,

[89] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

> 2013, during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition."

[132] For a proper understanding of section 12(3) with which we are concerned, the entire section 12 must be read in the context of the whole chapter outlined earlier. Section 12(1) tells us that prescription commences to run as soon as the debt is due. The words "as soon as the debt is due" have been construed to mean as soon as the debt is recoverable or enforceable by legal proceedings. Thus in *Apalamah*, Miller J said:

> "Although it is true that in many cases the date upon which a debt 'becomes due' might also be the date upon which it 'arose', that is obviously not true of all cases. There is a vital difference in concept between the coming into existence of a debt and the recoverability thereof. There can be little doubt, if any, that the purpose of the Legislature in enacting section 12(1) of the new Prescription Act was to crystallize that difference; thenceforth prescription in terms of that Act began to run not necessarily when the debt arose but only when it became due."[90]

[133] This construction was later affirmed by Diemont JA in *Jungers* in these words:

> "The difference relates to the coming into existence of the debt on the one hand and the recoverability thereof on the other hand. . . . It is a distinction which is recognised by the Legislature in the 1969 Prescription Act; section 12 provides that prescription begins to run 'as soon as the debt is due', whereas section 16, which relates not to the running of prescription but to the application of the Act, significantly refers to 'a debt which arose."[91]

[134] The notion that a debt is recoverable or enforceable presupposes that the creditor is not only aware of the existence of the debt but also that he or she can also demand its payment, failing which to institute legal proceedings to enforce payment. That this is so is made clearer by the provisions of section 12(2) which states that prescription shall not commence to run where the debtor has wilfully prevented the

[90] *Apalamah v Santam Insurance Co Ltd* 1975 (2) SA 229 (D) at 232E-F.

[91] *List v Jungers* 1979 (3) SA 106 (A) at 121C-D.

creditor from coming to know of the existence of the debt. Indeed one can only institute legal proceedings for a debt he or she knows about and which is recoverable. This manifestly illustrates that in the context of section 12(1), "recoverable or enforceable" must carry the meaning of being able to claim the debt and that, in turn, requires knowledge of the existence of the debt and its ripeness, for payment to be demanded.

[135] To hold that a debt is recoverable even where the creditor has no knowledge of it would clearly subvert the objects of section 12 in particular. The main object is that prescription shall not begin to run unless the debt is due and the creditor actually knows about it or he or she is deemed to know. Such an interpretation would not accord with section 39(2) of the Constitution. It would frustrate the enjoyment of the rights guaranteed by section 34 in circumstances where it was impossible for the creditor to institute legal proceedings.

[136] Even during the previous order in which fundamental rights were not guaranteed, courts did not construe legislation to mean that those on whom it applied were required to do the impossible. Our courts have always held the view that–

> "no one should be compelled to perform or comply with that which is impossible, in the sense of physical, objective impossibility. This must needs emanate from the underlying principles of justice, equity and reasonableness which are suffused throughout our legal system."[92]

[137] According to the maxim *lex non cogit ad impossibilia,* the law does not require a person to do the impossible. If performance in terms of a particular law has been rendered impossible by circumstances over which the person with interest had no control, those circumstances are taken as a valid excuse for not complying with what such law prescribes. The logic of this is apparent from the terms of both

[92] *Gassner N.O. v Minister of Law and Order* 1995 (1) SA 322 (C) (*Gassner*) at 326B; see also *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A).

subsections (2) and (3) of section 12. Notably this principle was applied to statutes that imposed time bars to the institution of legal proceedings.[93]

[138] In *Murray & Roberts* it was declared that the Prescription Act has a duality of purpose which involves the promotion of certainty, on the one hand and the protection of a creditor who is unable to institute legal proceedings, on the other. In that case Grosskopf AJA stated:

> "The Act, however, also embodies a principle which is inconsistent with the promotion of certainty. *It is accepted in the Act that there are circumstances in which it would be unfair to require of the creditor that he institute proceedings within the time normally allowed. This unfairness arises in the main where it is impossible or difficult for a creditor to enforce his rights within the time limit*. . . . It will thus be seen that there are two general principles which protect the creditor against the effects of extinctive prescription. The first is the basic requirement of certainty which underlies extinctive prescription, where the debtor removes all uncertainty by acknowledging liability, or the creditor does so by instituting and prosecuting legal proceedings, the running of prescription is suitably adapted. The second principle is that it may sometimes be impossible or difficult for the creditor to recover his debt. Here too the Act comes to his aid."[94]

[139] The agreed facts establish that before July 2013, the applicant did not know that he had a claim arising from his arrest and detention. In other words he did not know of the existence of the debt. I can think of no reason why prescription should commence in his case if it could not begin to run where the debtor wilfully prevented the creditor from coming to know of the existence of the debt. In both instances knowledge of the existence of the debt would be lacking. The difference would be that in one instance, that lack of knowledge would have been caused by the debtor's wilful conduct.

[93] *Gassner* and *Montsisi* id and *Hartman v Minister of Police* 1983 (2) SA 489 (A).

[94] *Murray & Roberts* above n 87 at 579.

[140] In the case where section 12(2) applies, prescription does not commence even if the debt becomes due. What prevents the running of prescription is the creditor's lack of knowledge of the existence of the debt brought about by the debtor. As I see it, the crucial reason is the creditor's ignorance which prevents him or her from interrupting prescription by instituting legal proceedings. It would be surprising if despite undisputed ignorance, prescription would commence only because the ignorance was not caused by the debtor's wilful conduct. A construction that gives credence to this distinction would be out of touch with the lamentable conditions described so aptly in *Mohlomi*.

[141] In circumstances like the present where prescription is not triggered by the debt becoming due, its commencement may be activated only by the creditor's actual knowledge of the identity of the debtor and facts from which the debt arises, if the deeming proviso in section 12(3) does not apply. Here that proviso is not applicable. What needs to be determined, therefore, is whether the applicant had actual knowledge of the identity of the Minister as his debtor and the facts from which the debt arose. This is a factual enquiry which may be determined with reference to the agreed facts only. This is so because here we are concerned with a special case that must be adjudicated in terms of rule 33 of the Uniform Rules. I return to this point later when considering the special case.

[142] For now it suffices to mention that the onus to establish those facts rests on the party that raised prescription as a defence.[95] Here the Minister bore that duty.

[143] Under section 12(3) if the proviso that deems the creditor to have acquired the relevant facts does not apply, a debt is deemed to be due from the time when the creditor acquires actual knowledge of those facts. That date must be objectively determinable so as to enable a court to calculate and determine whether the relevant period of prescription has expired.

[95] See [161] below and *Links* above n 8.

[144] By deeming that the debt is due, the section addresses the issue of a negligent inaction by a creditor who knows the identity of the debtor against whom a legal action may be instituted and the facts supporting the action but fails to initiate the action without a satisfactory excuse. It seems to me that if the presence of the facts mentioned in section 12(3) is established, it would constitute proof of knowledge of the existence of the debt on the part of the creditor. For he or she cannot know of a debtor if he or she is not aware of the existence of the debt. Equally, if it is proved that the creditor had no knowledge of the existence of a debt, it cannot in the same vein be said that he or she had knowledge of the identity of the debtor and the facts from which the debt arises. It defies logic that a creditor who does not know that a debt exists may at the same time know of the identity of a debtor and facts from which a debt arose.

[145] The purpose served by section 12(3) is to prevent the commencement of prescription being delayed by the negligent inaction of the creditor who faces no impediments to instituting legal proceedings. The legitimate purpose served by provisions of a limitation such as section 12(3) is founded on public policy and are underpinned by two principles. The first is the interest of the state which requires that there should be a limit to litigation. The second is that the law helps the vigilant and not those who slumber.[96] As mentioned, the Prescription Act protects individuals from having to defend themselves where the facts have become obscure with the passage of time and preserves the quality of adjudication by requiring that actions be instituted without undue delay.

[146] These interests of the administration of justice must, however, be weighed against the claimant's interests and the rights entrenched by section 34 of the Constitution. Consistent with this approach, in *Links* Zondo J pronounced:

> "The provisions of section 12 seek to strike a fair balance between, on the one hand, the need for a cut-off point beyond which a person who has a claim to pursue against

[96] *Stambolie v Commissioner of Police* 1990 (2) SA 369 (ZS) at 375.

> another may not do so after the lapse of a certain period of time if he or she has failed to act diligently, and, on the other, the need to ensure fairness in those cases in which a rigid application of prescription legislation would result in injustice. As already stated, in interpreting section 12(3) the injunction in section 39(2) of the Constitution must be borne in mind. In this matter the focus is on the right entrenched in section 34 of the Constitution."[97]

[147] If section 12(3) were to be interpreted to mean that prescription begins to run even if the creditor is not aware of the existence of the debt, in circumstances where the deeming proviso doesn't apply, then the correct balance would not be struck between these competing interests. It would mean that a person with a good claim, but through no dilatoriness or fault on his or her part, will be prohibited from exercising his or her constitutional rights under section 34 of the Constitution. That would be inimical to the principle of supremacy of the Constitution.

[148] Therefore, in my view section 12(3) should not be read as authorising prescription to commence running where the claimant through to no fault of his or hers, has successfully established that he or she was not aware of the existence of the debt. The effect of holding otherwise would be denying the uneducated and poor people in society the protection arising from constitutional rights. Our Constitution safeguards equal rights for all individuals, regardless of whether they are rich or poor, educated or uneducated, and whether they live in an urban or rural area. The aspirations and dreams the Constitution promises must be made realisable for everyone and the fruits of a constitutional dispensation must reach everybody. This was the goal of the struggle for liberation and democracy in this country. Equal rights and social justice for all.

[149] Indeed section 34 of the Constitution movingly declares that everyone has a right to have any disputes that can be resolved by the application of law decided in a fair public hearing before a court. These rights are not reserved for the elite and

[97] *Links* above n 8 at para 26.

sophisticated in society, they are enjoyed in equal measure by everyone of us including Mr Mtokonya who was handicapped by circumstances that disadvantaged black people under the previous order. The holders of these rights include the most vulnerable groups in society, the poor and uneducated.

[150] Properly construed section 12 of the Prescription Act tells us that prescription commences to run when the debt becomes due. But if the debtor prevents the creditor from knowing of the existence of a debt, the clock does not start to tick even if the debt has become due. In circumstances where the date of becoming due is not ascertainable, section 12(3) deems it to be the date upon which the creditor acquires actual knowledge of the identity of the debtor and material facts from which the debt arose. However, if the creditor fails to exercise reasonable care to acquire the requisite knowledge, he or she is deemed to have acquired that knowledge from the date he or she could have had knowledge of those facts.

[151] Here we are concerned only with section 12(3) which deems the due date to be the one on which the creditor became aware of the identity of the debtor and material facts from which the claim arose. We must determine that date from the facts contained in the statement of agreed facts. As appears below, that statement does not even mention that the applicant acquired knowledge of the identity of the debtor and material facts from which the debt arose, let alone the date of acquiring the relevant knowledge.

[152] Accordingly, I hold that here prescription commenced to run in July 2013 when the applicant became aware of the claim he had against the Minister. It was only then, on the basis of the agreed facts, that he acquired knowledge of the identity of the Minister as the debtor. This construction is consistent with the meaning assigned to it by the Supreme Court of Appeal in *Van Zijl*.[98] Having quoted section 12(3), the Court stated that the knowledge which is required is the minimum necessary to enable a

[98] *Van Zijl v Hoogenout* [2004] ZASCA 84; 2005 (2) SA 93 (SCA) at para 18.

creditor to institute action. If the creditor is not aware of the existence of the debt in the first place, he or she cannot be able to institute an action.

[153] In *Van Zijl*, the assaults that gave rise to the plaintiff's claim had occurred in 1958 and 1969 while she was a minor. She attained majority in 1973. But instituted her action in August 1999. The defendant raised a plea of prescription. As the assaults were committed before 1969, the Supreme Court of Appeal held that the 1943 Prescription Act applied but pointed out that nothing turns on this because both the 1943 and 1969 Acts have identical provisions. The trial Court had applied the 1969 Act.

[154] The Supreme Court of Appeal pointed out though that the circumstances of the plaintiff placed her outside the factors that delayed the completion of prescription in section 7 of the 1943 Act which is the equivalent of section 13 of the 1969 Act. Like here, the plaintiff in that case had established by evidence that she only became aware that the assaults in question constituted actionable conduct in 1997.

[155] In holding that prescription could commence running only in 1997, Heher JA said:[99]

> "Prescription penalises unreasonable inaction, not inability to act. Where, therefore, the statute speaks of prescription beginning to run when a wrong is 'first brought to the knowledge of the creditor', it presupposes a creditor who is capable of appreciating that a wrong has been done to him or her by another: Compare *Wulfes v Commercial Union Assurance Co of SA Ltd* 1969 (2) SA 31 (N) at 37A and *SA Mutual Fire and General Insurance Co Ltd v Mapipa* 1973 (3) SA 603 (E) at 608F - 609D. The existence of section 7 (which suspends prescription in five specific instances) does not detract from this conclusion. In the first place, suspension can only take place if the running of prescription has commenced. Perhaps more important is the fact that there exists a category of creditor (the person abused as a child who has reached adulthood before commencing the action) who does not

[99] With whom Mpati DP, Cameron JA, Nugent JA and Van Heerden AJA concurred.

> necessarily fall into any of the categories of suspension and who should be accommodated within the legislative framework if that can be achieved without doing violence to the language. Such a person is not *non compos mentis*. Nor is he or she incapable of rational thought. What the evidence shows is that the process of reasoning and the development of insight have been distorted in the child's psyche when it comes to an appreciation of where responsibility lies."[100]

[156] On the correct interpretation of section 12(3), the trial Court should have concluded that, with reference to the facts set out in the agreed statement of facts, the Minister on whom the onus rested, had failed to show that before July 2013, the applicants had actual knowledge of the identity of the Minister as the debtor. Accordingly, the running of prescription could not begin before the applicant had acquired actual knowledge not only of the identity of the debtor but also of the facts giving rise to the debt.

Special case

[157] As mentioned earlier, the trial Court's approach to the adjudication of the special case was irregular. Contrary to the express terms of rule 33(3) that required the Court to base its factual findings on the agreed facts, the Court drew inferences from legal submissions made by counsel. And those inferences were vital to the conclusion that the applicant's claim had prescribed.

[158] The stated case, within the four corners of which this matter had to be adjudicated, contains no facts that support the finding that before July 2013, the applicant knew that the Minister was the debtor. In fact as it appears below, the agreed facts refute the presence of such knowledge.

[159] A perusal of the agreed facts in the parties' statement does not indicate that the applicant had actual or deemed knowledge of the identity of the debtor. The following are the agreed facts:

[100] *Van Zijl* above n 98 at para 19.

"The plaintiff:

3.1 was arrested and thereafter detained by members of the South African Police Services at Engcobo Police Cells on 27 September 2010;

3.2 at the beginning of July 2013 met Mr. Nkululeko Babe, an attorney of this Court and Plaintiff's neighbour, who during the course of their interaction enquired about the outcomes of the criminal case in respect of which the Plaintiff had been arrested by the Police on the 27 September 2010 and who, on being informed that the Plaintiff was never taken to Court following his arrest but was released by the police on the basis that when they need him, they will call on him again to attend and present himself at Court. Mr Babe informed him at the beginning of July 2015 that he, the Plaintiff:

3.2.1 was not supposed to be detained in excess of a period of 48 hours without him having been made to appear before a Court of law:

3.2.2 was wrongfully and unlawfully:

3.2.2.1 misled by the Police into believing that they will at some point call upon him to attend Court simply to conceal the wrongfulness of their conduct, but never call him; and

3..2.2.2 arrested and detained by the Police in circumstances where they had not reason to believe that he had committed an offence;

3.2.3 has a cause of action against the Minister of Police for unlawful arrest and detention;

3.3 issued a statutory notice pursuant to the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 (Act No.40 of 2002) in July 2013: and

3.4 issued and thereafter served summons against the Defendant in April 2014."

[160] Apart from recording facts that show that the applicant did not know of the claim he had against the Minister until July 2013, the statement merely records that he was arrested and detained by members of the Service at Engcobo Police cells on 27 September 2010. There are no facts on that statement which establish that the applicant acquired knowledge to the effect that the Minister was liable for the wrongful acts of the police. At best, it can be said that he knew about the arrest and detention by members of the Service. Therefore, he had knowledge of the identity of

the Minister's co-debtors and not the identity of the Minister. For the Minister's special plea to succeed, it was incumbent upon him to prove that the applicant knew that the Minister was the debtor.[101] In *Van Zijl* the Court stated:

> "Where prescription is raised as a defence, it is the defendant who bears the *onus* of establishing, as a matter of probability, that prescription commenced to run and had expired before the action was instituted, and he or she is not relieved of that burden only because the material facts might be within the exclusive knowledge of the plaintiff."[102]

[161] There are similarities between this matter and *Shange.* There a 15-year-old rural learner lost his eye as a result of corporal punishment administered by a teacher. The teacher told him at the time that the injury was caused "by mistake". The incident occurred in June 2003. In January 2006, six months before a period of three years expired from the date of the injury, he was advised by a friend to report the incident to the Public Protector. An advocate from that office advised him to see an attorney as he had a claim against the MEC for Education. Until then, he did not know that he had a claim. Following that advice, he instructed attorneys who instituted an action against the MEC. Since six months from the date of the injury had long passed, he had to apply for condonation.

[162] Under the Institution of Legal Proceedings Against Certain Organs of State Act,[103] legal proceedings to recover a debt against the state must be instituted "within six months from the date on which the debt became due" unless condonation is granted by a court. With regard to a debt becoming due, section 3(3) provides:

> "For purposes of subsection (2)(A)-
>
> (a) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he

[101] *Links* above n 8 at para 44.

[102] *Van Zijl* above n 98 at para 41.

[103] 40 of 2002.

> or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge."

[163] The Court of first instance granted condonation and the MEC appealed to the Supreme Court of Appeal against that order. The latter Court noted that the facts, like here, indicated that there were two joint debtors, the teacher who assaulted the learner whilst acting within the course and scope of his employment and the teacher's employer, the MEC. In assessing whether the time bar in section 3 applied, Snyders JA said:

> "The respondent's affidavit comes closer to addressing the real question. He states that an advocate in the office of the Public Protector advised him, in January 2006, to institute a civil claim against the appellant. Unfortunately the respondent's legal representatives did not appreciate the significance of this fact. Its disclosure, evidently for the first time, informed the respondent of the identity of the appellant as the joint debtor of the teacher who injured him. He was a rural learner of whom it could not be expected to reasonably have had the knowledge that not only the teacher was his debtor, but more importantly, that the appellant was a joint debtor. Only when he was informed of this fact did he know the identity of the appellant as his debtor for the purposes of the provisions of section 12(3) of the Prescription Act."[104]

[164] With regard to the running of prescription based on these facts, the learned Judge declared:

> "On the facts, the respondent, *in consulting an advocate in the office of the Public Protector and his attorney during January 2006, should reasonably have become aware, for the first time, that he had a claim against the appellant.* If prescription commenced running at that time it would, by 1 July 2007, when the respondent, ex lege, achieved majority, have already run for some eighteen months. By reason of section 13(1) of the Prescription Act, the respondent was entitled to the

[104] *Shange* above n 37 at para 11.

> benefit of the full relevant period of prescription, i.e. three years, before his claim would be extinguished."[105]

[165] What emerges from this statement is that the Supreme Court of Appeal was of the opinion that prescription did not begin to run because the learner had no knowledge of the identity of the MEC as the debtor, before he consulted the advocate in January 2006. It is apparent from *Shange* that this conclusion was based on the Court's interpretation of section 12(3) of the Prescription Act, with which we are concerned in this matter. Otherwise prescription begins to run even against minors but its completion is delayed by two years which commences to run upon attainment of majority.

[166] It also appears from *Shange* that where the delict is committed by public officials and the political head of a department raises prescription as a defence, he or she must prove that the claimant had knowledge of him or her as the debtor, apart from the actual wrongdoers. If a defendant fails to prove this, the plea of prescription cannot succeed. In a case of a special case like the present, that proof must be contained in the statement of agreed facts because in those matters no evidence is led.

[167] It must be emphasised that for the special plea to succeed, the onus was upon the Minister to prove both elements of section 12(3) namely, knowledge of the identity of the debtor and the material facts from which the debt arose. And because the parties opted for the rule 33 procedure, these facts must have been contained in the statement of agreed facts. It follows that the omission of these essential facts from that statement is fatal to the special plea. The inclusion of the fact that until July 2013 the applicant did not know that he had a claim does not and cannot in law relieve the Minister from the duty to prove that the applicant acquired knowledge of the identity of the debtor and material facts on a date more than three years before the action was instituted. Nor does the assertion by the applicant alter the scope of what the Minister should have established.

[105] Id at para 12.

[168] It was the Minister who invoked section 12(3) in the special plea and the burden to prove that the requirements of that section were met fell squarely upon him. He freely agreed that his special plea be decided in terms of rule 33. His failure to show that section 12(3) was complied with cannot be blamed on the applicant nor can any blame be laid at the door of a court that decides the special plea with reference to the agreed facts contained in the statement submitted in terms of rule 33.

[169] There can also be no question of unfairness to the Minister if the special plea is decided on the basis of what is contained in the statement of agreed facts. He should have seen to it that facts showing that requirements of section 12(3) were met were included in that statement. But he failed to do so. He cannot be rewarded for this failure by holding that his case in the special plea was narrowed down by the applicant's disclaimer. The special plea with which we are concerned is the Minister's and not the applicant's. If the Minister has failed to establish facts supporting the special plea, it must fail.

[170] While the first judgment accepts that the agreed statement does not say that the applicant had knowledge of the identity of the debtor, it holds that the omission was as a result of the fact that the applicant's counsel in the High Court said the applicant knew the identity of the debtor and material facts from which the debt arose. It is recorded that this appears from the High Court's judgment.[106] I do not agree. Nowhere in its judgment does the High Court say that the applicant's counsel stated that the applicant knew the identity of the debtor and the material facts.

[171] Instead, the judgment of the High Court shows that that court inferred from a submission by counsel that the applicant had knowledge of the identity of the debtor and facts from which the debt arose. The relevant paragraph of the High Court's judgment is quoted in paragraph 9. With regard to the submission made, the High Court said:

[106] First judgment at para 35.

> "That much was submitted by Mr Bodlani, *counsel for the plaintiff when he said that the plaintiff was not aware of his rights until he was approached by Mr Babe with a legal advice that the plaintiff has a right to sue the defendant for damages*."

[172] As mentioned earlier, this submission cannot be construed, as the High Court did and the first judgment here does, to mean that the applicant knew that the Minister was the debtor and also knew the facts from which the debt owed by the Minister arose. All that was submitted was that he was not aware of his rights and that he could sue the Minister. What this submission meant was that the applicant lacked knowledge of what his rights were and that he could institute a claim against the Minister. Its text is not by law reasonably capable of meaning that he knew that the Minister specifically was the debtor. The Minister could only be exempted from establishing the facts required by section 12(3) if in the statement of agreed facts, the applicant had admitted those facts. He did not and none of the contents of that statement could be construed as an admission that he knew identity of the Minister as the debtor and the facts from which the debt arose. And this submission is the sole factual basis on which the High Court and the first judgment relied for holding that the applicant admitted that he knew the identity of the debtor and facts from which the debt in question arose. That much is clear from the statement of agreed facts which does not contain an admission of that kind. If the applicant had made the admission at the time of signing the statement, it would have been included in that statement. It was not and it could not because it would have contradicted a fact to which the parties agreed, namely that the applicant did not know that he could sue the Minister for unlawful arrest and detention. Therefore, the premise from which both the High Court and the first judgment proceeded is not correct.

[173] If the trial Court had followed the right approach to determining a special case submitted in terms of rule 33, it could have realised that the Minister had not discharged the onus that rested on him. That Court could have reached this conclusion even if it had construed section 12(3) literally.

Applicant's concession

[174] What remains for consideration is the applicant's statement in this Court to the effect that the issue to be determined is whether properly interpreted section 12(3) requires knowledge of wrongfulness before prescription may begin to run. It cannot be gainsaid that this is a legal conclusion. Therefore, the parties' views on it do not bind this Court. If the parties' opinions were to be binding, courts would run the risk of giving wrong judgments based on incorrect contentions advanced by the parties.

[175] That approach was rejected in *Igesund*.[107] The appellant in that case had raised a legal point which was later abandoned in the court of first instance. The same point was omitted in its written submissions on appeal and was not raised during oral argument. However, counsel for the respondent was asked and had exchanges with the Court on the issue that was covered by the abandoned point. Encouraged by the exchange, counsel for the appellant sought to revive the point in reply. In opposing the revival, counsel for the respondent argued that the appeal Court had no jurisdiction to entertain the point that was abandoned, because it no longer formed part of the special case.

[176] In rejecting the respondent's argument in that case, Jansen JA said:

> "The argument, however, overlooks the fact that the agreement contemplated by Rule 33(1) and (2) *(a)* primarily relates to the facts – not 'the questions of law in dispute between the parties and their contentions thereon'. If e.g. the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discerned and stated, the Court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision."[108]

[107] *Paddock/Igesund* above n 48.

[108] Id at 24A-B.

[177] It will be remembered that here the question of law mentioned in the special case was whether the applicant's claim had prescribed. That is the same question arising from the special case on appeal. The fact that the trial Court incorrectly reformulated the question it was asked to decide does not change the question raised by the special case.

[178] The first judgment holds that:

> "The question the High Court was asked to answer was whether or not the applicant needed to have had knowledge that the conduct of the police against him was wrongful and actionable before prescription could begin to run. The applicant's contention was that such knowledge was required by section 12(3) of the Prescription Act. The respondent's contention was that it was not. The High Court held in favour of the respondent."[109]

[179] I disagree. This is not the question that was formulated for decision in the stated case quoted in full in paragraph 3 of the first judgment. Nor did the parties advance any of the submissions recorded in the first judgment in their written statement. With regard to the parties' contentions, their joint statement states:

> "THE PARTIES CONTENTIONS
>
> 5. The defendant contends that the plaintiff's claim has prescribed and the plaintiff disputes this issue.
>
> 6. The plaintiff contends that before his meeting with Mr Nkululeko Babe at the beginning of July 2013, he did not know that:
>
> 6.1 the conduct of the police in not bringing him before a court of law within 48 hours following his arrest on 27 September 2010 was wrongful and actionable;
>
> 6.2 at the time of his arrest the police did not have information upon which they could have formed a reasonable belief that he had committed the offence for which he was arrested and thereafter detained; and

[109] First judgment at para [65].

6.3 he could sue the police."

[180] It is immediately apparent from these contentions that none of the parties has submitted that the applicant needed to have had knowledge that the conduct of the police was actionable before prescription could begin to run. Properly read the submissions advanced by the plaintiff in that statement were not directed at showing that prescription could not have begun to run. This is plain from the submission at 6.2 which states that at the time of his arrest the police had no information upon which they could have formed a reasonable belief that he had committed an offence. More significantly, the defendant upon whom the onus fell for establishing that the claim had prescribed in terms of section 12(3) merely contended that the claim had prescribed. He did not formulate the question to be determined by the High Court in the manner formulated in the first judgment.

[181] Moreover, the rejection of the submissions advanced by the plaintiff in that statement cannot lead to upholding the special plea as requested by the defendant. For the Minister to succeed he had to prove the date on which the claim was deemed to have been due in terms of section 12(3). He could only achieve this if by means of facts recorded in the statement, he established that the plaintiff had knowledge of him as the debtor and material facts from which the debt arose, more than three years before the summons was issued. He has failed to do this. In *Gericke* Diemont JA held:

> "The onus was clearly on the respondent to establish this defence. He could not succeed if he could not prove both the date of the inception and the date of the completion of the period of prescription. He accordingly alleged in his special plea that the debt was prescribed because the debt had become due on 13 February 1971 and summons was issued only on 14 February 1974. However, the Act specifically provides that prescription begins to run only when the debt becomes due and that it is not deemed to become due until the creditor has knowledge both of the identity of the debtor and of the facts from which the debt arises. It follows that if the debtor is to

> succeed in proving the date on which prescription begins to run he must allege and prove that the creditor had the requisite knowledge on that date."[110]

[182] The first judgment proceeds to hold that the two bases on which I hold that the special plea should fail, "do not arise from the contentions of the parties contained in the rule 33 statement of the parties".[111] I cannot agree. First, in paragraph 3.2.3 of that statement the plaintiff states that he did not know that he had a cause of action against the Minister of Police for unlawful arrest and detention. It is apparent from the same statement that the Minister admitted this fact. It will also be recalled that some authorities construe "debt" as meaning a claim or a cause of action. Again in paragraph 6 of the statement, the plaintiff repeats that he did not know that the conduct of the police was actionable and that he could sue. The debt we are concerned with here is the delictual claim or cause of action. If the applicant in this Court did not know that it exists, there can be no factual basis on which it could be held that he had knowledge of who the debtor was and the material facts from which it arose.

[183] It would indeed be an intolerable result if a court were to be precluded from giving the right decision on agreed facts merely because a party advanced an incorrect submission, as a consequence of an error of law on the party's part. Here the agreed facts set out in the special case do not sustain the finding that before July 2013, the applicant possessed knowledge that the Minister was the co-debtor. Accordingly, it cannot be said that on a proper evaluation of the special case, the Minister has proved that the applicant had knowledge of the identity of him as the debtor more than three years before the action was instituted.

[184] To hold that this Court may not decide the question mentioned in the special case would also be at variance with its decision in *Kwazulu-Natal Joint*

[110] *Gericke v Sack* 1978 (1) SA 821(A) at 827-8.

[111] First judgment at para [69].

Liason Committe.[112] In that case the applicant had grounded its claim in contract. The Court of first instance had held that the applicant had failed to prove an enforceable contract. At the hearing of the appeal in this Court, the applicant persisted through its senior counsel with a claim based on contract. In deciding the matter on a claim that was not pleaded, the majority in this Court said:

> "It is true that this was not the clasp on which the applicant originally pegged its hopes. The applicant relied in its founding and subsequent papers on what it simply and persistently described as an enforceable undertaking to pay the entire year's subsidy without any reduction. This cast the claim in contractual, or ostensibly contractual, terms. In my view the undertaking is indeed enforceable, but on broader public law and regulatory grounds rather than bilateral agreement."[113]

[185] I conclude that there is no legal impediment that stands in the way of determining the legal question on which the parties agreed before the trial Court. For all these reasons I would uphold the appeal, set aside the High Court's order and replace it with an order dismissing the Minister's special plea.

[112] *Kwazulu-Natal Joint Liason Committee v MEC for Education, Kwazulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC).

[113] Id at para 58.

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