CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 336/17

In the matter between:

ARRIE WILLEM KRUGER Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

Neutral citation:	*Kruger v National Director of Public Prosecutions* [2018] ZACC 13
Coram:	Mogoeng CJ, Zondo DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J
Judgments:	Zondo DCJ (minority): [1] to [77] Froneman J (majority): [78] to [88] Jafta J (concurring in the minority): [89] to [111] Theron J (concurring in the majority): [112] to [127]
Decided on:	9 April 2019
Summary:	Jurisdiction — Purely factual issue does not raise jurisdiction — No constitutional or legal issue Prescription — Prescription Act 68 of 1969 — Section 12(3) of the Prescription Act — Malicious Prosecution

ORDER

The following order is made:

1. Condonation is granted.
2. Leave to appeal is dismissed with costs.

The order is at [88].

JUDGMENT

ZONDO DCJ (Mogoeng CJ, Jafta J and Khampepe J concurring):

Introduction

[1] The applicant is Mr Arrie Willem Kruger. The respondent is the National Director of Public Prosecutions. The National Director of Public Prosecutions was cited on the basis that he was vicariously liable for the conduct of the public prosecutor who represented the State in the criminal proceedings that were brought against the applicant in the Randburg Magistrate's Court on 6 October 2009.

[2] The applicant has brought an application for leave to appeal against an order of Strydom AJ sitting in the Gauteng Division of the High Court, Pretoria.[1] In terms of that order the court dismissed the applicant's action against the respondent for malicious prosecution. The basis for the dismissal of the applicant's action was that his claim had prescribed. Both the High Court and the Supreme Court of Appeal dismissed the applicant's applications to those respective courts for leave to appeal.

[1] *Kruger v National Director of Public Prosecutions*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 37681/2011 (29 April 2016) (High Court judgment).

Background

[3] The applicant was arrested in Randburg on 6 October 2009 and appeared at the Randburg Magistrate's Court on the same day. He was not told why he was arrested. However, he knew that the police were investigating a complaint by one Mr Johnston against him arising out of his conduct in collecting his motorcycles and spare parts of motorcycles from Mr Johnston. According to the applicant, he collected his motorcycles and spare parts because, although Mr Johnston had agreed to repair or fix the applicant's motorcycles and the applicant had even paid him to do so, Mr Johnston had failed over a certain period of time to fix or repair the motorcycles.

[4] The applicant says that, when he appeared in court on 6 October 2009, he could not hear what was being said in court because, in his words, "the audibility was bad". However, the applicant states that the public prosecutor was opposed to the applicant being released on bail. The applicant says that the next thing he remembers is that he was escorted out of the court and sent to Diepkloof Prison. He spent the next seven days at Diepkloof Prison.

[5] The applicant's second appearance in court was on 13 October 2009. The applicant says that, without any explanation, all charges against him were withdrawn on that date and he was released. On that day the applicant was represented by an attorney and counsel in court.

[6] The applicant subsequently instituted an action against the Police. It is not clear from the papers before us what the basis of the action against the Police was. The applicant says that his attorney asked the Police to make the police docket available to them but, for a long time, the Police failed to do so. The applicant states that in August 2012 the Police were ordered by a court to make the police docket available to the applicant or his attorneys. The applicant's attorney received the police docket in August 2012.

[7] The applicant's attorney discovered that inside the police docket there was a statement by the Investigating Officer. The statement was to the effect that the complaint related to a civil matter, the applicant would not interfere with investigations, there was not going to be any further investigations and the applicant should be released on bail or the public prosecutor should not oppose the granting of bail. The applicant implies that this was part of the information that was at the disposal of the public prosecutor when the applicant appeared before the court on 6 October 2009. It is also implied in the applicant's case that the Investigating Officer's statement should have informed the public prosecutor's decision or conduct on that day. The applicant alleges that the public prosecutor was required to convey this information to the court on 6 October 2009 in which event the court would probably have released him.

[8] It is not clear what the outcome of the applicant's action against the Police was. However, the applicant instituted an action in the High Court, Pretoria, against the respondent for damages for "wrongful and malicious prosecution". This must have been late in 2012 or January 2013. The summons for this action was served on the respondent on 31 January 2013. In response, the respondent took a special plea of prescription. The respondent alleged that the applicant's claim had arisen on 13 October 2009 when all the charges against him were withdrawn and he was released from police custody or prison. The respondent contended that that is the date from which the prescription period should be calculated. The respondent argued that, if that was correct, it followed that, by 31 January 2013 when the summons was served, a period of three years had lapsed. The respondent contended that, for that reason, the applicant's claim had prescribed.

[9] The applicant disputed the special plea and its basis. He alleged that his claim against the respondent for malicious prosecution had only arisen in August 2012 when his attorney received the police docket and discovered the Investigating Officer's statement which the Investigating Officer had placed before the public prosecutor on 6 October 2009. He contended that, prior to August 2012, he did not have knowledge of all facts from which the debt arose as contemplated in section 12(3) of the

Prescription Act.[2] Therefore, so went the argument, the claim had not prescribed by 31 January 2013 when the applicant served summons on the respondent.

High Court

[10] The matter came before Strydom AJ who upheld the special plea and dismissed the applicant's claim with costs. His reasoning was that as at 13 October 2009 the applicant had knowledge of all the facts he needed to have in order to institute the action for malicious prosecution against the respondent but had failed to do so within three years and that, therefore, the claim had prescribed. The court rejected the applicant's contention that, as at 13 October 2009, he did not have knowledge of all the facts he needed to have in order to institute the action. Strydom AJ took the view in effect that the only fact that the applicant needed to know in order to institute an action for malicious prosecution against the respondent was that the charges against him had been withdrawn. He said that the applicant knew all the facts on 13 October 2009 and, therefore, that was the date from which prescription began to run.

In this Court

Jurisdiction

[11] With regard to jurisdiction, this Court has put it beyond any doubt that matters in which it must decide whether a claim has prescribed raise a constitutional issue. Loudly and clearly, in *Mtokonya*[3] this Court said:

> "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."[4]

[2] 68 of 1969. See [18] below for the full text of section 12(3) of the Prescription Act.

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

[4] Id at para 9.

On that single sentence and that single sentence alone, this Court held in that case that there was a constitutional issue and it had jurisdiction. That statement applies with equal force to the present case because this case raises prescription. Therefore, there can be no doubt that we have jurisdiction in this case, too. Although the above statement from *Mtokonya* is taken from the majority judgment, it must be regarded as having been unanimously agreed to by all the members of this Court who sat in that matter because the minority judgment did not dispute that this Court had jurisdiction for the reason given in that statement.

[12] I have read the judgment prepared by my Colleague, Froneman J, (second judgment) in which he holds that this matter does not raise a constitutional issue and that this Court has no jurisdiction. As can be seen from what is said above and what follows below, I disagree with that conclusion. The second judgment states that in order to determine whether the applicant's claim had prescribed by the time the summons was served on the respondent one has to ask whether the facts known to the applicant on the day the charges were withdrawn were sufficient to ground the likely inference that there was no reasonable and probable cause for his prosecution and that his prosecution was proceeded with the intention on the part of the prosecutor to injure. The second judgment goes on to say that asking this question is a factual issue and, therefore, this Court has no jurisdiction. I note that Theron J's judgment is also to the effect that this matter raises only a factual issue and therefore this Court has no jurisdiction. I deal with this issue in the context of dealing with the second judgment.

[13] I disagree with the proposition in the second judgment that, in order to decide the applicant's claim, one has to ask the question posed in the second judgment as stated in the preceding paragraph. Formulating the question like that presupposes that the only facts that the applicant needed to know were those relating to whether there was a reasonable and probable cause for his prosecution and that the prosecutor pursued his prosecution with the intention to injure. This is not correct. The applicant needed to know all the facts from which, as section 12(3) says, the debt arose. However, for now

I need to deal with the proposition in the second judgment that this matter raises a factual issue and that, therefore, this Court has no jurisdiction.

[14] The case before this Court in *Links*[5] was about whether the High Court had been correct in concluding that the applicant's claim in that case had prescribed. The present case is also about whether the High Court was correct in concluding that the applicant's claim had prescribed by the time that the applicant served summons on the respondent. To determine that issue, this Court is required to interpret section 12(3) of the Prescription Act which limits the applicant's right in terms of section 34 of the Constitution. Dealing with the question whether it had jurisdiction in *Links*, this Court had this to say:

> "This Court has jurisdiction because the matter involves an interpretation of legislation that limits the applicant's right in terms of section 34 of the Constitution. That is the Prescription Act. The meaning that the court a quo attached to section 12(3) of the Prescription Act had the effect of preventing the dispute between the applicant and the respondent from being resolved by a court of law. The applicant challenges the correctness of that meaning. The provisions of section 39(2) of the Constitution should be borne in mind. Section 39(2) reads:
>
> > 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'
>
> The case also implicates the right to security of the person entrenched in section 12 of the Constitution."[6] (Footnotes omitted).

[5] *Links v Department of Health, Northern Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC) (*Links*).

[6] Id at para 22.

What is the legislation to which reference was made in *Links* as legislation that limited the applicant's section 34 right in that case? That legislation was the Prescription Act. The present case also deals with the same legislation.

[15] Does this matter involve an interpretation of legislation that limits the applicant's right in terms of section 34 of the Constitution as was the case in *Links*? If the answer is that, indeed, this matter does involve an interpretation of legislation that limits the applicant's right in terms of section 34 of the Constitution, this will mean that this Court has jurisdiction in this matter just as it held in *Links* that it had jurisdiction. This will be because that answer will mean that the reason given in *Links* for the conclusion that this Court had jurisdiction in that matter is also present in this case. However, if the answer is that this matter does not involve an interpretation of such legislation, that will not necessarily mean that this Court has no jurisdiction because, as pointed out earlier, on the basis of this Court's decision in *Mtokonya*, this Court would still have jurisdiction. Not only that, but also this Court would still have jurisdiction because of another basis.

[16] In *Links* the case implicated not only the right entrenched in section 34 of the Constitution. This Court held that the case also implicated the right to freedom of security of person entrenched in section 12 of the Constitution. That was an additional basis upon which this Court held in *Links* that it had jurisdiction. This matter implicates the right to freedom of movement as entrenched in section 21(1) of the Constitution since the applicant was kept in prison for seven days.[7] A conclusion that this matter involves an interpretation of legislation limiting the section 34 right should also show that the proposition that this matter is simply about a question of fact or concerns a factual issue and not a legal issue has no proper basis. This raises the question of what a question of law is as opposed to a question of fact. What is a question of law as opposed to a question of fact? In *Mtokonya* this Court considered the distinction

[7] Section 21(1) of the Constitution reads:

> "Everyone has the right to freedom of movement".

between a question of law and a question of fact. It cited with apparent approval a passage from *Salmond on Jurisprudence* which included, among others, the following definition of what a question of law is: "In a second and different signification, a question of law is a question as to what the law is".[8]

[17] What this Court said in regard to what a question of law is as quoted in the preceding paragraph means that, if the present case involves asking what the law is, it raises a question of law. In line with what this Court also said in *Links*, if the matter involves an interpretation of legislation limiting a section 34 right, that matter raises a constitutional issue. Does this matter involve asking the question as to what the law is? The answer is: definitely yes. Does this matter involve the interpretation of legislation limiting a section 34 right? The answer is: definitely yes. Here is how.

[18] Section 12(3) of the Prescription Act provides that a debt is not deemed due "until the creditor has knowledge . . . of the facts from which the debt arises". What this means is that, as long as the creditor does not "have knowledge . . . of the facts from which the debt arises", the debt is not deemed to be due and, therefore, prescription does not start running.[9]

[19] The facts from which a debt arises will differ from claim to claim or from debt to debt. The facts from which a debt arises in the case of, for example, a claim for defamation and the facts from which a debt arises in the case of a claim for wrongful or unlawful dismissal will differ. Indeed, the facts from which a claim or "debt" for malicious prosecution arises will be different from the facts from which another type of claim or debt arises. The facts from which a debt arises will depend on what the elements or requirements of that debt or claim are.

[8] *Mtokonya* above n 3 at para 39.

[9] That is if the situation is not one where, by the exercise of reasonable care, the creditor could have acquired knowledge of those facts which is not the case in the present case.

[20] In the present case there are two questions for determination in the appeal. The first question is: what facts does section 12(3) of the Prescription Act require a creditor or a person to know before prescription may commence running against his or her claim for malicious prosecution? Put differently, the question is: what is the law on what a person must know before prescription may start running against his or her claim for malicious prosecution? The second question is whether the applicant had had knowledge of all those facts for over three years by the time he served summons on the respondent? The first question is certainly a legal question and has to be determined first before the second one can be determined.

[21] One may also put the question we are called upon to determine in this case in these terms: does section 12(3) of the Prescription Act require the creditor to know the facts on the basis of which he or she will have to allege bad faith on the part of the defendant in an action for malicious prosecution before prescription may start running against such a claim? This formulation is informed by the fact that bad faith on the defendant's part or consciousness by the defendant that there were no reasonable prospects of successfully prosecuting the plaintiff is an element of the delict of malicious prosecution as will be seen in *Moleko*[10] below. A question that asks what a statutory provision requires is a legal question. It is a question that seeks to establish what the law is according to that statutory provision. In *Mtokonya* this Court said such a question is a question of law. As can be seen from this judgment, I hold that section 12(3) does require knowledge of such facts on the part of a creditor before prescription may start running against a claim for malicious prosecution. The second judgment holds in effect that section 12(3) does not require knowledge of such facts. That is a question of law, not a question of fact.

[22] To answer the question as to what facts section 12(3) requires a creditor to know in the context of a claim for malicious prosecution before the debt may be deemed to be due or before prescription may start running against such claim, one requires us to

[10] See [48] below.

interpret the phrase "knowledge . . . of the facts from which the debt arises" which appears in section 12(3). In other words, to answer that question, one needs to determine the meaning of that phrase in the context of a claim for malicious prosecution. In the passage quoted above from *Links*, it is said that in *Links* the meaning that the court a quo had attached to section 12(3) of the Prescription Act "had the effect of preventing the dispute between the applicant and the respondent from being resolved by a court of law".[11] As was the case in *Links*, the meaning that the High Court attached to section 12(3) in the present case, namely that all that the applicant had to know was that the charges against him had been withdrawn, "had the effect of preventing the dispute between the applicant and the respondent from being resolved by a court of law".

[23] In *Links*, as shown above, this Court held that the fact that the applicant was challenging the meaning attached by the High Court to section 21(3) rendered the matter one involving an interpretation of section 12(3) and, thus, legislation limiting the applicant's section 34 right. In the present case, too, the applicant challenges the correctness of the meaning given to section 12(3) by the High Court. In the present case the High Court held in effect that the only fact that section 12(3) requires a creditor to know before a claim or debt relating to malicious prosecution could be deemed to be due is that that charges had been withdrawn. The applicant contends that that meaning of section 12(3) is incorrect as section 12(3) requires the creditor to know more facts than that.

[24] If in *Links* the fact that the applicant was challenging the correctness of the meaning that the High Court had attached to section 12(3) of the Prescription Act meant that that case involved an interpretation of legislation limiting a section 34 right and constituted a constitutional issue, it follows that this matter, too, involves an interpretation of such legislation. This is because there is no reason why, in the present case, a different conclusion could be reached. Therefore, holding that this matter

[11] *Links* above n 5 at para 22.

involves an interpretation of legislation limiting a section 34 right gives effect to this Court's decision in *Links* and means that the matter raises a constitutional issue. Therefore, not only does this Court have jurisdiction in this matter on the basis of its approach in *Mtokonya* but it also has jurisdiction on the basis of its decision in *Links*.

[25] The second judgment says that it is not in conflict with *Mtokonya* because neither *Mtokonya* nor the cases upon which *Mtokonya* relied involved the mere settling of a factual dispute. *Mtokonya* made it clear that a matter that raises prescription is a constitutional matter. That was stated in unqualified terms as the paragraph I have quoted above from this Court's judgment in *Mtokonya* shows. Quite clearly, this matter raises prescription. The second judgment acknowledges that this Court has jurisdiction in a matter involving an interpretation of legislation that limits the applicant's right in terms of section 34 of the Constitution but says that the present case does not involve an interpretation of section 12(3) of the Prescription Act. In my view, I have shown above that this matter raises prescription and that it involves an interpretation of section 12(3) and, therefore, does not raise simply a factual issue.

[26] In the light of the above, if a question as to what a statutory provision requires is not a question involving an interpretation of a statutory provision, then it would be very difficult to find a question that involves an interpretation of legislation.

[27] Irrespective of what I have said above in regard to this matter being one that raises prescription and being a matter that involves an interpretation of legislation that limits a section 34 right, there are two other bases which give this Court jurisdiction in this matter. I deal with these separately below.

The matter implicates the applicant's right in section 21(1) of the Constitution

[28] In the present case it could be said that the case implicates the applicant's right to freedom of movement entrenched in section 21(1) of the Constitution. Section 21(1) reads: "Everyone has the right to freedom of movement". In *Mtokonya*, apart from

relying on the proposition that that matter involved an interpretation of legislation limiting the applicant's section 34 right to conclude that it had jurisdiction, this Court also relied on the proposition that that matter implicated the right to security of the person in section 12 of the Constitution. As can be seen in the last sentence of the passage I quoted above from *Links* on jurisdiction, this Court put it in these terms: "The case also implicates the right to security of the person entrenched in section 12 of the Constitution".

[29] This Court reached the above conclusion in *Links* because in that case the applicant's case was based on the fact that the applicant alleged that the hospital authorities were delictually liable for amputating his left thumb and causing him a permanent loss of the use of his left hand or arm. If that was a sufficient basis in *Links* for this Court to conclude that the case implicated the right to security of the person entrenched in section 12 and that, for that reason, this Court had jurisdiction, this Court also has jurisdiction in this case on the basis that this matter implicates the applicant's right to freedom of movement as entrenched in section 21. This is because the basis for this claim is that for seven days the applicant was imprisoned as a result of malicious prosecution and the claim with which we are concerned in the present case is a claim for damages for that incarceration. When this Court holds that a matter implicates a certain right in the Bill of Rights, it concludes that it has jurisdiction.[12] Therefore, on this basis, too, this Court has jurisdiction.

[30] Furthermore, in making its decision the High Court also ordered the applicant to pay the respondent's costs. This is contrary to the approach that this Court held in *Biowatch*[13] should be applied in constitutional litigation. Whether or not the *Biowatch* approach to costs applies in any particular case is a constitutional issue. Indeed, there are a number of cases in which this Court has entertained appeals on the basis that the

[12] See *Hotz v University of Cape Town* [2017] ZACC 10; 2018 (1) SA 369 (CC); BCLR 815 (CC) and *Ferguson v Rhodes University* [2017] ZACC 39; 2017 JDR 1768 (CC); 2018 (1) BCLR 1 (CC).

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

lower court did not apply the *Biowatch* approach in regard to costs.[14] Therefore, for this reason, too, this Court has jurisdiction.

Condonation for the late delivery of the application

[31] The applicant was 34 court days late in lodging his application for leave to appeal with the Registrar of this Court. He has applied for condonation. His explanation includes that he was hospitalised in a psychiatric ward for part of the time when he would have been expected to prepare and lodge his application. The applicant also pointed out that he was going through a divorce. He also pointed out that at some stage his counsel was not available and to get another counsel would have been too expensive. He accordingly applied for condonation.

[32] The respondent opposed the applicant's condonation and disputed that the applicant had been hospitalised and suggested that, if that was true, the applicant should have attached documentary proof of his hospitalisation. The delay was not excessive as it was a few court days over a month. The applicant's explanation is not adequate but the matter is very important to the applicant and to many people who may wish to have certainty as to what they need to know in terms of the facts contemplated in section 12(3) before prescription may begin to run against their claims for malicious prosecution. For the reasons that will become apparent below, the applicant has reasonable prospects of success. There would be no prejudice to the respondent if condonation were to be granted and yet, if condonation were refused, the applicant would suffer serious prejudice as he would be prevented from having his dispute adjudicated by a court of law. In my view, it is in the interests of justice that condonation be granted. In these circumstances, I would condone the applicant's failure to lodge his application timeously.

[14] *Limpopo Legal Solutions v Eskom Holding SOC Limited* [2017] ZACC 34; 2017 (12) BCLR 1497 (CC); *Limpopo Legal Solutions v Vhembe District Municipality* [2017] ZACC 30; 2017 JDR 1363 (CC); 2018 (4) BCLR 430 (CC); *Limpopo Legal Solutions v Vhembe District Municipality* [2017] ZACC 14; 2017 (9) BCLR 1216 (CC).

Leave to appeal

[33] This matter involves the interpretation of section 12(3) of the Prescription Act in relation to a claim for malicious prosecution. It raises the question of what the facts are that a person must have knowledge of in regard to a claim for malicious prosecution before it can be said that the debt is deemed to be due within the meaning of section 12(3) of the Prescription Act or before prescription can start to run against such a debt or claim. The issue raised by this matter is of great importance. As already stated in relation to condonation, there are reasonable prospects of success for the applicant. Accordingly, it is in the interests of justice to grant leave to appeal. Leave is, accordingly, granted.

The appeal

[34] The issue in this appeal is whether the High Court was correct in its decision that the applicant's claim for malicious prosecution against the respondent had prescribed by 31 January 2013 when he served summons on the respondent. In the High Court the respondent contended, in support of the special plea, that the only fact that the applicant had to know that fell under section 12(3) of the Prescription Act was that the criminal charges against him had been withdrawn. In other words, the respondent's special plea was based on the contention that, when all the charges against the applicant were withdrawn on 13 October 2009, he knew all the facts that he needed to know in order to institute an action for malicious prosecution against the respondent. The applicant disputed this and contended that it was not only the fact that the charges against him had been withdrawn that he needed to know in order to be able to institute an action for malicious prosecution against the respondent. The applicant contended that he needed to know more than that. He pointed out that it was only after his attorney had received the police docket in August 2012 that he acquired knowledge of all the facts from which his debt arose.

[35] Whether the High Court was right in concluding that the applicant's claim against the respondent for malicious prosecution had prescribed depends upon whether

as at 13 October 2009 – that is before the applicant gained knowledge of the contents of the police docket – he had knowledge of all the facts that he needed to have knowledge of in order to institute an action for malicious prosecution against the respondent. The person raising prescription bears the onus to show that the claimant had knowledge of all the facts from which the claim arose before prescription can begin to run.

[36] What facts a person must know before prescription may start running against his or her claim for malicious prosecution is governed by section 12(3) of the Prescription Act. Section 12(1) provides a general rule as to when prescription begins to run. It provides that, subject to the provisions of subsections (2), (3) and (4), prescription commences to run as soon as the debt is due. Section 12(2) and (3) reads then:

> "(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 debt.
>
> (3) A debt shall not be deemed to be due *until the creditor has knowledge of the identity and of the facts from which the debt arises*: provided that a creditor shall be deemed to have knowledge if he could have acquired it by exercising reasonable care."

The proviso in section 12(3) is not applicable in the present case because the respondent conceded in the High Court that the applicant had taken reasonable steps to acquire the necessary knowledge. Subsection (4) is also not relevant to the present case.

[37] The facts of which a creditor is required to have knowledge in terms of section 12(3) in order for a debt to be deemed to be due are, as section 12(3) states, "*the facts from which the debt arises*". In *McKenzie*[15] the Appellate Division had to consider the meaning of the phrase "if the cause of action arose wholly within the district". Although that phrase is not the same as the phrase "the facts from which the debt arises"

[15] *McKenzie v Farmers' Co-operation Meat Industry Ltd* 1922 AD 16.

with which we are dealing in the present case, both phrases, the one in *McKenzie* and the other in section 12(3), use the same verb, albeit in different tenses. The verb is to "arise". In *McKenzie* the tense used is the past tense, namely, "arose" whereas in section 12(3) the tense used is the present tense, namely, "arises".

[38] In considering the phrase involved in *McKenzie*, the Appellate Division defined "cause of action arising" as:

> *". . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved*."[16]

[39] The debt in the context of the present case is the applicant's claim for malicious prosecution against the respondent. This Court had occasion in *Links* to refer to some of the decisions of the Supreme Court of Appeal which have interpreted section 12(3) of the Prescription Act in so far as they relate to the phrase "debt due". I refer to some of those cases below. In *Links* this Court said:

> "The first issue is what the facts are from which a debt arises. Obviously, these are facts that are material to the debt."[17]

[40] In *Truter*[18] the Supreme Court of Appeal dealt with the meaning of the phrase "debt due". It said:

> "For the purposes of the Act, the term 'debt due' means a debt, including a delictual debt, which is owing and payable. *A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt*, that is, *when the entire set of facts which the creditor must prove in order to succeed with his or her claim against*

[16] Id at 23.

[17] *Links* above n 5 at para 30.

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

> *the debtor is in place or, in other words, when everything has happened which* would entitle the creditor to institute action and to pursue his or her claim."[19]

[41] In *Links* this Court quoted this passage from Loubser:[20]

> "A cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed with his action. Such facts must enable a court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely *a causative act, harm, unlawfulness and culpability or fault.*"[21]

[42] In *Deloitte*[22] the Supreme Court of Appeal had the following to say about the phrase "debt due" in section 12(1) of the Prescription Act:

> "This means that there has to be a debt immediately claimable by the [creditor] or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately. . . . It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued, i.e. before he is able to pursue his claim. . . "[23]

In *Gore*[24] 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."[25]

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[19] Id at para 16.

[20] Loubser, *Extinctive Prescription* (Juta, Kenwyn 1996) at 80.

[21] *Links* above n 5 at para 32.

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

[23] Id at 532 H-I.

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

[25] Id at para 17.

What facts does section 12(3) require a plaintiff to know in the case of a claim for malicious prosecution?

[43] In *Links* this Court was faced with the same question with which we are faced in the present case except that the present case relates to a claim for malicious prosecution whereas in *Links* the claim did not relate to a claim for malicious prosecution. Both cases relate to prescription. In both cases the same statutory provision had to be considered and interpreted, namely, section 12(3) of the Prescription Act. In *Links* the question was whether Mr Links had acquired knowledge of all the facts from which the debt had arisen as contemplated in section 12(3) when he served summons on the respondent. Of course, the question that follows is what are those facts in the case of a claim for malicious prosecution? In the present case we are required to determine precisely the same question except that the applicant is Mr Kruger and not Mr Links and the claim is one for malicious prosecution.

[44] In *Links* this Court asked the question as to what the facts are from which a debt arises. That is another way of asking the question what the facts are of which a plaintiff or claimant must have knowledge under section 12(3) before it can be said that the debt is due. Put differently, what are the facts from which a debt arises? As can be seen in paragraph 39 above, in *Links* this Court answered that question in these terms:

> "The first issue is what the facts are from which a debt arises. Obviously, these are the facts that are material to the debt."

Therefore, in *Links* this Court made it clear that the phrase "the facts from which the debt arises" which appears in section 12(3) means "the facts that are material to the debt". Accordingly, when the question arises as to what the facts are that a plaintiff or claimant must have known before a debt may be said to be due in terms of section 12(3) in regard to a claim for malicious prosecution or before prescription may start running against a claim for malicious prosecution, the answer provided by this Court's decision in *Links* is: those facts that are material to a claim for malicious prosecution.

[45] In my view, when this Court held in *Links* that the facts from which a debt arises as contemplated in section 12(3) are the facts material to the debt, it meant material facts giving rise to the debt. In other words, those are the facts without which it cannot be said that a debt has arisen. Those are the facts of which section 12(3) says the creditor must have knowledge of before the debt can be said to be due or before prescription may start running. Those are the facts material to a debt as contemplated in *Links*.

[46] In *Mtokonya* this Court also dealt with the question of what facts fall within the phrase "the facts from which the debt arises" which appears in section 12(3). In one place this Court said:

> "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."[26]

Later, in the same judgment, this Court held:

> "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."[27]

[47] What are the facts that are material to a claim for malicious prosecution? To establish those facts, we must have regard to what must be alleged and proved in an action for malicious prosecution in order for a plaintiff or claimant to succeed.

[48] In *Moleko*[28] the Supreme Court of Appeal set out the elements or requirements for an action for malicious prosecution in these terms—

> "In order to succeed (on the merits) with a claim for malicious prosecution, a claimant must allege and prove—

[26] *Mtokonya* above n 3 at para 36.

[27] Id at para 45.

[28] *Minister for Justice and Constitutional Development v Moleko* [2008] ZASCA 43; 2009 (2) SACR 585 (SCA) (*Moleko*).

(a) that the defendants set the law in motion (instigated or instituted the proceedings);
(b) that the defendants acted without reasonable and probable cause;
(c) that the defendants acted with 'malice' (or *animo injuriandi*); and
(d) that the prosecution has failed."[29]

In the balance of this judgment I shall refer to each of these elements or requirements as the element or requirement in (a) or (b) or (c) or (d), as the case may be.

The requirements in (a) and (d)

[49] The requirements in (a) and (d) need not detain us because they are not in issue.

The requirement in (b)

[50] This is the requirement that the defendant must have acted with "reasonable and probable cause". In *Moleko* the Supreme Court of Appeal explained this requirement or element in these terms:

> "Reasonable and probable cause, in the context of a claim for malicious prosecution, means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept therefore involves both a subjective and an objective element—
>
> > 'Not only must the defendant have subjectively had an honest belief in the guilt of the plaintiff, but his belief and conduct must have been objectively reasonable, as would have been exercised by a person using ordinary care and prudence.'"[30]

It is, therefore, clear, from *Moleko* that, in an action for malicious prosecution, the plaintiff must, among others, allege and prove that the defendant did not only

[29] Id at para 8.

[30] Id at para 20.

subjectively have an honest belief in the guilt of the plaintiff but that also his or her belief and conduct must have been objectively reasonable.

[51] The judgment of the court below does not reflect that the respondent showed what facts the applicant had knowledge of that would have shown that the respondent did not subjectively believe in the guilt of the applicant. Instead, the Investigating Officer's statement in the police docket reflects that the complaint related to a civil matter, that there was to be no further investigation and that the public prosecutor should not oppose bail. These facts tend to show that, in the absence of other facts, the respondent might not have acted with any honest belief in the guilt of the applicant. The respondent's failure to show that the applicant knew facts which would demonstrate that the respondent had acted without such honest belief in the guilt of the applicant means that the respondent did not show that the applicant had knowledge of all the facts from which the debt arose as contemplated by section 12(3) of the Prescription Act. This means that the debt was not shown to have been due by 31 January 2013. For this reason alone, the Court below should not have upheld the special plea.

The requirement in (c)

[52] There is also the requirement that the defendant must have acted with "malice" (or *animo injuriandi*). In *Moleko* the Supreme Court of Appeal said:

> "[61] In the *Relyant* case, this court stated the following in regard to the third requirement:
>
> > 'Although the expression malice is used, it means, in the context of the *actio iniuriarum, animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd* Wessels JA said:
> >
> > > 'Where relief is claimed by this *actio* the plaintiff must allege and prove that the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the *quantum* of damages, the

> motive of the defendant is not of any legal relevance.''

[62] In so doing, the court decided the issue which it had left open in *Lederman v Moharal Investments (Pty) Ltd* and again in *Prinsloo v Newman*, namely that *animus injuriandi*, and not malice, must be proved before the defendant can be held liable for malicious prosecution as *injuria*.

[63] *Animus injuriandi* includes not only the intention to injure, but also consciousness of wrongfulness:

> 'In this regard *animus injuriandi* (intention) means that the defendant directed his will to prosecuting the plaintiff (and thus infringing his personality), in the awareness that reasonable grounds for the prosecution were (possibly) absent, in other words, that his conduct was (possibly) wrongful (consciousness of wrongfulness). *It follows from this that the defendant will go free where reasonable grounds for the prosecution were lacking, but the defendant honestly believed that the plaintiff was guilty.* In such a case the second element of *dolus*, namely of consciousness of wrongfulness, and therefore *animus injuriandi*, will be lacking. His mistake therefore excludes the existence of *animus injuriandi*.'"[31] (Footnotes omitted.)

[53] It is clear from the passage quoted in paragraph 63 in *Moleko* that the "*animus injuriandi*" requirement entails that in an action for malicious prosecution the plaintiff must allege and prove that the defendant acted "in the awareness that reasonable grounds for prosecution were absent". In terms of that passage the plaintiff must allege and prove this because, as is stated in the passage, "the defendant will go free where reasonable grounds for the prosecution were lacking but the defendant honestly believed that the plaintiff was guilty".

[54] The judgment of the High Court reflects that the respondent's case on prescription was simply that in order for the applicant to institute legal action all he needed to know in terms of the facts from which the debt arose was that the criminal

[31] Id at paras 61-3.

charges against him had been withdrawn. It said that the applicant knew this on 13 October 2009 and that, therefore, the prescription period should be calculated from that date. The High Court put it thus:

> "The following issue to consider is whether the Plaintiff (Mr Kruger) had actual or deemed knowledge of '*the facts from which the debt arises*' as required by section 12(3) of the [Prescription] Act, on 13 October 2009.
>
> The only fact necessary to have been within the knowledge of the Plaintiff in order for him to have been able to institute this action against the Defendant, as pleaded by the Plaintiff was the fact that the charges against him [were] withdrawn by the Defendant."[32]

[55] The High Court went on to state that the mere withdrawal of criminal charges against the applicant meant that the applicant could have gone ahead and instituted action for malicious prosecution against the respondent. It said that the withdrawal of charges "signifies that there is no reasonable prospect of a successful prosecution of the accused by the State".[33] Later on, Strydom AJ said:

> "I am of the view, with reference to the aforesaid considerations, that on *13 October 2009* Plaintiff *knew or ought to have known* that, since the Defendant withdrew all charges against him, the Defendant did not have any reasonable *prospects to prosecute him successfully*. *This is sufficient facts to sustain a cause* of action for '*wrongful and malicious proceedings, instigated against the Plaintiff by* [*prosecutors*]*, prosecuting the matter whilst acting in the course and scope of their employment with Defendant*'."[34]

[56] In adopting the approach captured in this passage, the High Court dealt with the matter as if the requirement in (c) above did not entail that the person must have been aware that there were no reasonable grounds for a successful prosecution of the accused or plaintiff. In other words, the approach adopted by the High Court in holding that all

[32] High Court judgment above n **Error! Bookmark not defined.** at paras 34-34.1.

[33] Id at para 34.2.

[34] Id at para 35.

the applicant needed to know in order to be able to institute an action for malicious prosecution against the respondent was simply that all the charges had been withdrawn only took into account the objective element referred to in *Moleko* as quoted in paragraph 50 above and completely disregards the subjective element referred to in *Moleko* as quoted in paragraph 50 above.

[57] The same criticism against the approach of the High Court can be advanced on the basis of what the Supreme Court of Appeal said in paragraph 63 of its judgment in *Moleko* regarding *animus iniuriandi* as quoted in paragraph 52 above. It is quite clear from paragraph 63 in *Moleko* that the Supreme Court of Appeal said that one of the features of the element of *animus iniuriandi* in this context is a subjective feature. That feature is to the effect that, in order for the plaintiff to succeed in an action for malicious prosecution, he or she must allege and prove that the case is not one in which "the defendant honestly believed that the plaintiff was guilty". This means that the Supreme Court of Appeal held that the plaintiff must allege and prove that the defendant did not act in good faith or that he or she acted in bad faith (*mala fide*).

[58] Although the Supreme Court of Appeal did not in *Moleko* refer to section 42 of the National Prosecuting Authority Act[35] when it held that the plaintiff must allege and prove that the defendant did not honestly believe that the accused or plaintiff was guilty, it in effect held what section 42 of that Act lays down. Section 42 provides:

> "No person shall be liable in respect of anything done in good faith under this Act."

[59] The reference to "no person" includes a public prosecutor and the National Director of Public Prosecutions. Therefore, a plaintiff must allege in his or her summons that the defendant did not act in good faith or, put differently, that the defendant acted in bad faith. If that allegation is not made in the summons or particulars

[35] 32 of 1998.

of claim, the plaintiff's action will be excipiable on the basis that it does not disclose a cause of action.

[60] Before a plaintiff may allege in a summons that the defendant did not act in good faith or that the defendant acted in bad faith in instituting or pursuing prosecution, he or she must have knowledge of facts on which that allegation is based. He or she may not simply make an allegation in a summons or in particulars of claim which, to his or her knowledge, is not based on any facts in the hope that, by the time of the trial, he or she will have acquired knowledge of such facts. One should not accuse someone of acting in bad faith unless one knows what facts or information was known to that person or was at that person's disposal at the time of acting and, whether, given that knowledge or information, he or she can be said or alleged to have acted in bad faith or not to have acted in good faith.

[61] In the present case there is no suggestion that the prosecutor got any information from the applicant when the latter appeared in Court on 6 October 2009 nor is there any allegation that the applicant and the prosecutor spoke to each other. There is also no suggestion that any correspondence was ever exchanged between the applicant or his lawyers and the respondent or the public prosecutor concerned from which the applicant could have acquired knowledge of the facts that were known to the public prosecutor as at 6 October 2009. The public prosecutor may have said something which, on the applicant's version, the applicant could not hear because of the noise in court. In these circumstances, seeking the information that was known or must have been known to the public prosecutor as at 6 October 2009 in the police docket was one of the ways the applicant could use to ascertain what the public prosecutor knew or what information was at the public prosecutor's disposal on 6 October 2009.

[62] This judgment does not mean that a person may not institute an action for malicious prosecution unless he or she first asks for and obtains the police docket. What it says is this: since, in an action for malicious prosecution, the plaintiff must allege that the defendant acted in bad faith in instituting or pursuing criminal proceedings against

him or her, the plaintiff must know facts which were known to the defendant at the time of instituting or pursuing such criminal proceedings which would form the basis for that allegation. If the applicant in the present case had taken the attitude that, because his version revealed that there were no reasonable prospects for his successful prosecution, that was enough and had gone ahead and instituted an action for malicious prosecution, he would either not have been able to allege bad faith on the respondent's part or he would have alleged bad faith on the respondent's part without any knowledge of facts supporting that allegation.

[63] If the applicant had instituted an action for malicious prosecution against the respondent without alleging bad faith, his summons would have been excipiable. If he alleged bad faith on the part of the public prosecutor without knowledge of any facts supporting that allegation, his action would have failed. The public prosecutor could also have put up a defence to the effect that he or she had acted in good faith. In support thereof, the public prosecutor could have shown that the police docket before him or her as at 6 October 2009 contained a statement by the complainant that the spare parts that the applicant had taken from him belonged to him (i.e. the complainant). That would have meant that the applicant may well have been guilty of theft. This would have meant that the public prosecutor had acted in good faith. The above would have been the consequences of the applicant either instituting an action for malicious prosecution without alleging that the public prosecutor had acted in bad faith or of instituting an action for malicious prosecution and alleging bad faith on the part of the public prosecutor without facts to support that allegation.

[64] The High Court rejected the applicant's contention that he acquired knowledge of all the facts from which the debt arose only in August 2012 after his attorney had received the police docket and he got to know the contents thereof. The High Court did so without considering the contents of the police docket. However, the reason why the High Court did this is that it had already taken the view that the only fact that the applicant needed to know in order to institute action for malicious prosecution against the respondent was that the charges against him had been withdrawn.

[65] Was the High Court correct in deciding that the only fact falling under section 12(3) (other than the identity of the debtor) of the Prescription Act that the applicant needed to know in order to be able to institute an action for malicious prosecution against the respondent was that the criminal charges against him had been withdrawn? If the High Court was correct, the effect of its decision would be that every accused person against whom a criminal charge is withdrawn is entitled to institute an action for malicious prosecution against the public prosecutor or the National Director of Public Prosecutions. That cannot be correct. One needs more than the fact that a criminal charge has been withdrawn before one may institute an action for malicious prosecution. In *Moleko* four elements were identified as the elements that need to be alleged and proved in an action for malicious prosecution. Those elements include facts and a person seeking to institute such action against a public prosecutor must have knowledge of all the facts involved in those elements before it can be said that he or she has knowledge of all the facts from which the debt arises or arose as contemplated in section 12(3).

[66] In the light of *Moleko* it seems to me that, for a plaintiff to be deemed to have had knowledge of facts from which his or her debt arises, as contemplated in section 12(3) of the Prescription Act when that debt is a claim for malicious prosecution, the plaintiff must have had knowledge of more facts than simply that the criminal charges have been withdrawn or that the prosecution failed. Those facts include the facts on the basis of which the plaintiff will allege bad faith on the part of the defendant. This means that the contention by the respondent and the decision by the High Court that the only fact that needed to be known by the plaintiff was that the charges had been withdrawn is wrong and falls to be rejected. The court a quo should have had regard to the elements or requirements of the delict of malicious prosecution in order to determine what facts a creditor in a malicious prosecution action must have knowledge of before it can be said that the debt is deemed to be due in terms of section 12(3) of the Prescription Act but it did not do so. This led it to a wrong conclusion.

[67] Before the High Court the respondent was required to show, among other things, that on or about 13 October 2009 the applicant had knowledge of all the facts on the basis of which he could allege that the public prosecutor had not acted in good faith or had acted in bad faith in instituting the criminal proceedings on 6 October 2009 and in not thereafter withdrawing them before 13 October 2009. The respondent failed to show this in the High Court. For that reason, it was not open to the High Court to conclude that, as at 13 October 2009, the applicant knew all the facts he needed to know in order to be able to institute an action for malicious prosecution against the respondent. Instead, it was the applicant who showed that, when he had access to the police docket in August 2012, he realised that a statement made by the Investigating Officer and placed before the public prosecutor included facts on the basis of which he could allege that the public prosecutor could not have acted in good faith in prosecuting him. Those facts were that the Investigating Officer had said that this was a civil matter, there was to be no further investigation and the public prosecutor should not oppose a bail application. Those were some of the facts of which the applicant did not have knowledge of before August 2012. Those facts were material for the applicant's claim or action and fell within section 12(3) of the Prescription Act.

[68] It is appropriate at this stage to refer to the judgment of this Court in *Links*. In that case this Court was concerned with when prescription had begun to run against Mr Links' claim. The present case is also about the same issue in respect of the applicant's claim. In *Links* that question turned on when it could be said that Mr Links had acquired knowledge of all the facts from which his claim had arisen as contemplated in section 12(3) of the Prescription Act. In the present case, too, the question as to when prescription began to run against the applicant's claim turns on when it can be said that the applicant acquired knowledge of all the facts from which the claim arose as contemplated in section 12(3).

[69] In *Links* the respondent contended that prescription had begun to run on or before 5 August 2006 whereas Mr Links contended that it had begun to run much later than that after a certain doctor had had access to his hospital records and discovered what

had led to the amputation of his thumb and the permanent loss of the use of his left arm and hand. This Court accepted this contention by Mr Links and held that Mr Links only acquired knowledge of all the facts from which his claim had arisen after his medical advisor had had access to his hospital records. In the present case the respondent contends that the applicant acquired all the facts from which his claim had arisen on or before 13 October 2009 – which was way before the applicant or his attorney had access to the police docket – whereas the applicant contends that he only acquired knowledge of all the facts from which his debt or claim had arisen after he or his attorney had gained access to the police docket. That was in August 2012.

[70] In the circumstances, just as this Court held in *Links* that Mr Links had acquired knowledge of all the facts from which his claim or debt had arisen after his medical advisor had had access to his hospital records, in this case, too, it should hold that the applicant acquired knowledge of all the facts from which his claim or debt arose after he or his attorney had had access to the police docket in August 2012. I hold accordingly. This judgment is, therefore, in line with this Court's judgment in *Links* and both judgments deal with when knowledge of facts from which the claim arose was acquired.

[71] The second judgment takes the view that the facts from which a debt arises, as contemplated in section 12(3) of the Prescription Act, requires a distinction to be drawn between *facta probantia* and *facta probanda*. It says that the facts contemplated in section 12(3) are the *facta probanda* and not *facta probantia.*

[72] This case is about whether the applicant's claim had prescribed by the time that the applicant served summons on the respondent. The answer to that question depends upon the answers to the questions: what facts does section 12(3) require a creditor to know in respect of a claim for malicious prosecution before prescription can start running against that claim? Did the applicant know those facts for over three years before he served summons on the respondent? If the answer to the second question is in the affirmative, then the applicant's claim had prescribed. If the answer to that

question is in the negative, then the applicant's claim had not prescribed. In terms of section 12(3) a debt is deemed not to be due and, therefore, prescription does not start running, until, among others, the creditor has "knowledge . . . of the facts from which the debt arises". This Court has not described the facts contemplated in the phrase "the facts from which the debt arises" as provided for in section 12(3) as *facta probanda*. What this Court has done in Links is to hold that the facts referred to in the phrase "the facts from which the debt arises" as provided for in section 12(3) are "the facts that are material to the debt". I have dealt with this above.

[73] In the light of the fact that this Court has already held that the facts from which a debt arises are the facts that are material to the debt, it is preferable to use that concept (i.e. the concept of the facts that are material to the debt) to decide this matter rather than to invoke other concepts. Using other concepts other than the one that has already been decided upon by this Court may serve only to confuse rather than clarify the issue. Section 12(3) of the Prescription Act requires that such facts must have been known to the creditor or plaintiff before the debt may be deemed to be due or before prescription may begin to run. Section 12(3) contemplates a fact without which a plaintiff cannot be said to have a cause of action. Therefore, a fact that falls within section 12(3) is one without which there is no complete cause of action. For prescription to run against a debt or claim, the plaintiff must have knowledge of all the facts without which he or she does not have a complete cause of action.

[74] In the present case, can it be said that as at 13 October 2009 the applicant knew all the facts on the basis of which he could allege bad faith on the public prosecutor's part? The answer is no. He did not know any such fact or facts because (a) he had not had any discussion with the public prosecutor, (b) he had not exchanged any correspondence with the public prosecutor and, (c) he did not know what facts or information was known to the public prosecutor or what facts or information the public prosecutor had at his or her disposal.

[75] In the circumstances I conclude that the respondent failed to show that the applicant had knowledge of the facts contemplated in requirements (b) and (c) or in section 12(3) as at 13 October 2009. That means he failed to discharge the onus which rested on him. That being the case it can, therefore, not be said that the applicant's debt in this case was due or was deemed to be due as at 13 October 2009. Instead it seems to me that the facts that relate to the requirements in (b) and (c) only came to the applicant's knowledge in August 2012. This means that the applicant was not shown to have had knowledge of all the facts from which the debt arose prior to August 2012. That being the case, the applicant's claim had not prescribed as at 31 January 2013. Consequently, the appeal must succeed and the order of the High Court should be set aside and replaced with one dismissing the special plea with costs. In the circumstances the respondent's special plea should have been dismissed. With regards to costs, even if the special plea had been correctly upheld, it would not have been appropriate for the High Court to award costs against the applicant because the *Biowatch* approach would have been applicable.

[76] I agree with Jafta J's judgment which I have had the opportunity of reading.

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

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld with costs.
4. The order of the court a quo is set aside and replaced with the following:
   "(a) The special plea is dismissed with costs."

FRONEMAN J (Cameron J, Ledwaba AJ, Madlanga J, Mhlantla J and Nicholls AJ concurring):

Introduction

[78] I have had the benefit of reading the judgment of Zondo DCJ (first judgment), but I cannot agree with its reasoning and outcome.[36] The reason is that the first judgment conflates what must be proved to establish a claim for malicious prosecution with the evidence that proves those facts.[37] To prove malicious prosecution, the plaintiff here needed to establish only (a) lack of reasonable and probable cause and (b) intent to injure (*animus injuriandi*).[38] Only these two facts are relevant to this case as they are "*the facts from which the debt arises*". Of these only, a creditor needs to have knowledge for prescription to start running in terms of section 12(3). A plaintiff does not need to know the further facts that establish the absence of reasonable probable cause and intent to injure.

[79] Lack of reasonable and probable cause and intent to injure will almost invariably have to be proved by inference from other, secondary, facts. This will be done by assessing whether the facts presented in evidence lead to the probable conclusion[39] that the prosecution took place without reasonable and probable cause and with intent to injure. The factual evidence that, taken together, proves the absence of reasonable and probable cause plus *animus injuriandi* will vary from case to case. It is impossible to state a general legal rule by which factual evidence is necessary as proof of these ultimate legal requirements.

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[36] I have also read the judgments of Jafta J and Theron J. From my perspective they merely strengthen my view that this matter concerns the application of settled law to the facts, which militates against a finding that this Court has jurisdiction to entertain this application.

[37] The distinction between the facts that must ultimately be proved in a case, the *facta probanda* ("the facts that must be proved") and the factual evidence to prove those facts in issue, the *facta probantia* ("the proving facts"), is well known in our law.

[38] See the first judgment at **Error! Reference source not found.** to [52]**Error! Reference source not found.**.

[39] In a civil case like this one, the inference drawn must be the most probable one on the facts. In a criminal case the "two cardinal rules of logic" enunciated in *R v Blom* 1939 AD 188 at 202-3 will apply. Namely, that the inference must (1) be consistent with all the proven facts, and (2) exclude every other reasonable one. In a civil case the first rule applies equally, but the second becomes the *most probable*, not the *only* reasonable inference. See, for example, *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159A-D; *Macleod v Rens* 1997 (3) SA 1039 (E) at 1048I-1049C; and *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-E. For a general discussion of the development of these "two cardinal rules of logic" in South African law, see Zeffert and Paizes *The South African Law of Evidence* 3 ed (LexisNexis, Durban 2017) at 102-116.

[80] It is not clear to me whether the first judgment purports to lay down a legal rule that in all debts arising from delictual claims based on malicious prosecution, prescription starts to run only when a claimant has knowledge of the contents of the police docket. That would be a disquieting departure from the clear conceptual logic of the precedents in this area. For the reason stated above – that the evidence to prove lack of reasonable and probable cause and intent to injure will vary from case to case – a legal rule to that effect cannot and should not be posited.[40]

[81] Did Mr Kruger's claim prescribe? The only question to ask is whether the facts known to him on the day the charge was withdrawn were sufficient to ground the likely inference that there was no reasonable and probable cause for his prosecution and that his prosecution proceeded with intent to injure on the part of the public prosecutor.

[82] Asking this question does not entail propounding a legal precept. It simply involves employing "a rule of logic, an instrument for the avoidance of fallacious inference".[41] Asking whether Mr Kruger knew enough on the day the charge against him was withdrawn to infer that, probably, he could sue for malicious prosecution is a question of fact. It is akin to enquiring whether the factual conclusion reached by the High Court is correct. It is the kind of issue this Court generally eschews enquiring into.

[83] This means there is no constitutional or legal issue to ground this Court's jurisdiction. The first judgment asserts that this statement is in conflict with *Mtokonya*. It is not. Neither *Mtokonya*, nor any of the cases it relied upon, involved the mere settling of a factual dispute as to whether the matter had prescribed or not.[42] I agree that

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[40] Compare *Links* above n 5 at paras 43-9 and *Loni v MEC for Health, Eastern Cape (Bhisho)* [2018] ZACC 2; 2018 (3) SA 335 (CC); 2018 (6) BCLR 659 (CC) at paras 26 and 34-5.

[41] Nicholas "The Two Cardinal Rules of Logic in *Rex v Blom*" in Kahn (ed) *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* (Juta & Co Ltd, Cape Town 1983) 312 at 320.

[42] Each of these cases dealt with the interpretation of legislation in relation to time periods. See *Mtokonya* above n **Error! Bookmark not defined.** at paras 9-10, citing *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; 2018 (1) SA 38 (CC); 2017 (4) BCLR 473 (CC) at para 18; *Links* above n 5 at para

this Court has jurisdiction where the matter involves an interpretation of legislation that limits the applicant's right in terms of section 34 of the Constitution, but this case does not involve the interpretation of section 12(3) of the Prescription Act.

[84] What did Mr Kruger and his lawyers know at that stage? From his personal knowledge he presumably knew that the charge was trumped up by his neighbour. At his first appearance in court, no trouble was taken to explain why he would not be granted bail. Also, he was apparently given no proper opportunity at that stage to explain his position. A week later the charge was withdrawn – once more, without any explanation. There is no evidence to explain this cavalier conduct. Does that warrant a probable inference that there was no reasonable and probable cause and that the prosecutor acted with intent to injure? Of course it does. Some fancy footwork would have to be performed to explain why, if these facts were sufficient for reasonable and proper cause, the charge was withdrawn. Even more dancing on the coals would be necessary to convince a court that all this was done in good faith.

[85] The "facts from which the debt arose" in this case are the "facts that must be proved" (*facta probanda*) for malicious prosecution, which the applicant had knowledge of before learning of the additional "proving facts" (*facta probantia*) gleaned from the police docket. While this additional evidence of the "proving facts" obviously strengthened his case for establishing the facts that must be proved, the applicant already had knowledge of the essential facts from which the debt arose.

[86] That should be the end of the matter. Whether the actual contents of the docket would help Mr Kruger to prove his claim does not matter. It is irrelevant to the question whether the available facts supported the conclusions of lack of reasonable and probable cause and intent to injure on the day of the withdrawal of the charge. Even without the policeman's opinion about the case, the only relevant opinion, that of the public prosecutor, shows lack of reasonable and probable cause, as well as intent to injure.

22; and *Road Accident Fund v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC); 2011 (1) BCLR 1 (CC) at para 4.

[87] I also disagree that *Biowatch* was applicable in the High Court. There was no constitutional principle put forward in the High Court. It was a run-of-the-mill delictual claim for damages arising from malicious prosecution.

[88] I agree that condonation for the late application should be granted, for the reasons set out in the first judgment. In the result I dismiss the application for leave to appeal.

JAFTA J (Mogoeng CJ and Zondo DCJ concurring):

Introduction

[89] I have had the benefit of reading the judgment of Zondo DCJ (first judgment), the judgment of Froneman J (second judgment) and the judgment of Theron J (fourth judgment). The first two judgments differ in relation to the outcome of this matter. The disagreement stems from the question whether upon withdrawal of the criminal charges, the applicant had knowledge of all material facts from which his claim for malicious prosecution arose. And they also diverge on the question of jurisdiction.

[90] The first judgment holds that the applicant acquired knowledge of all material facts when he had access to the police docket in August 2012. Whereas the second judgment holds that the knowledge of those facts was acquired on 13 October 2009, when criminal charges were withdrawn against the applicant. These dates are meant to determine the time at which the claim of malicious prosecution against the respondent is deemed to have been due and prescription commenced to run against that claim in terms of section 12(3) of the Prescription Act. Calculating the running of prescription from October 2009, the second judgment upholds the conclusion of the High Court to the effect that when the summons was issued the claim had prescribed. As a result, the second judgment dismisses the application for leave to appeal.

[91] I agree with the first judgment that prescription commenced to run in August 2012 after the applicant received the police docket. This means that when the

summons was served in January 2013 the claim had not prescribed. I also agree with the first judgment that the jurisdiction of this Court has been established in this matter. The second judgment disputes that the matter falls within the Court's jurisdiction.

[92] I write to show that there are further reasons for concluding that the High Court was mistaken when it held that the applicant's claim had prescribed. Prescription was introduced as a defence by the respondent in the form of a special plea. As the respondent relied on section 12(3) of the Act in contending that the claim had prescribed, the onus was on it to prove that the requirements of that section were met on 13 October 2009 and that prescription commenced to run on that day. In *Van Zijl*, the Supreme Court of Appeal 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 has expired before the action was instituted".[43]

[93] Therefore with reference to section 12(3), for the respondent's special plea to succeed, it had to prove on a balance of probabilities that on 13 October 2009, the applicant had knowledge not only of the material facts from which the claim arose but also of the fact that the respondent was one of the debtors. The respondent would have discharged this onus by leading evidence at the High Court which proved that the applicant had the necessary knowledge of the relevant facts on the date from which the respondent claimed prescription started to run. The judgment of the High Court shows that the respondent did not call even a single witness at the trial.[44]

[94] The question that arises is on what basis can it be said that it had discharged the onus that rested squarely on it. The respondent did not only fail to call witnesses but he placed no evidence whatsoever before the High Court. Instead, he relied on the evidence of the applicant's attorney to claim that the applicant knew of the identity of

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

[44] High Court judgment above n **Error! Bookmark not defined.** at para 27.

the debtor and the relevant material facts on 13 October 2009. On this aspect of the case, the High Court said:

> "The plaintiff hereafter closed its case in respect of the defendant's first special plea. Ostensibly due to the concession by the plaintiff's attorney of record, counsel for the defendant decided not to call any witnesses and also closed the defendant's case."[45]

[95] The concession to which the High Court referred appears in the following statement:

> "I inquired from the witness whether he will accept, that *shortly* after the Defendant's attorney of record (Mr Olwage) received a copy of the Plaintiff's relevant SAPS Docket, made a copy thereof available to him. His answer was:
>
> 'Ek het geen rede om dit te betwis nie.' [I have no reason to dispute it]
>
> Adv Uys vehemently objected to my question. I rejected his objection, firstly because the answer was already given; and, secondly because there was no legal basis for the objection. I merely asked the later question in order to ascertain if this fact would be an issue of dispute between the parties. The answer of Mr Erasmus disposed thereof. It was clear to me that Adv Uys held a different view from that of the witness. Mr Erasmus was a good witness. He was cool, calm and collected and his demeanour was of utmost courtesy. There was no duress placed on Mr Erasmus to make the concession. In my view the answer was given truthfully by Mr Erasmus. I accordingly for the record, noted the aforesaid concession made by Mr Erasmus."[46]

[96] The so-called concession does not support the fact that on 13 October 2009, the applicant knew that the respondent was the debtor and that he also had knowledge of material facts from which the claim against the respondent arose. Instead, it suggests that the applicant acquired that knowledge after he had had access to the police docket in August 2012. In fact, in the preceding paragraph, the attorney is recorded to have

[45] Id at paras 26-7.

[46] Id at paras 24-5.

said that he had "no information that indicated that the Prosecuting Authority went on a frolic of their own".[47]

[97] This is consistent with the attorney's uncontroverted evidence. This witness, as it appears above, was described in glowing terms by the High Court which accepted his evidence. On the issue of knowledge, the High Court said:

> "The witness was however adamant that he was not able to issue summons against the defendant because he did not have knowledge of the identity of the defendant (as debtor) and the facts from which the plaintiff's cause of action arose. Only after he was placed in possession of the SAPS docket pertaining to the arrest and detention of the plaintiff did these facts become known to him and was he able to issue summons on behalf of the plaintiff against the defendant. Mr Erasmus only obtained a copy of the SAPS docket at the end of August 2012, subsequent to which summons was issued against the defendant and served on it on 31 January 2013."[48]

[98] For his part, the applicant had testified that on 13 October 2009 the attorney who represented him then, advised him that he could institute a claim against the complainant or the Minister of Police.[49] Having changed attorneys, he was advised by the attorney who testified at his trial, Mr Erasmus, that there were no prospects of recovering damages from the complainant, rather they should institute action against the Minister of Police. But the attorney advised that the applicant should obtain a copy of the police docket. The applicant's attempts in this regard were unsuccessful. Fearing that the claim against the Minister would prescribe before they obtained the police docket, the applicant's attorney initiated action against the Minister.

[99] Although the High Court had described Mr Erasmus as a good witness whose evidence it had accepted on the concession, it rejected the evidence in relation to the identity of the debtor. The High Court reasoned:

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[47] Id at para 23.

[48] Id at para 20.

[49] Id at para 15.

"32. The next question to consider is the plaintiff's 'knowledge of the identity of the debtor', as envisaged by section 12(3) of the Act.

32.1. Although Mr Erasmus testified, and the plaintiff in his evidence alluded thereto, that the identity of the defendant (as debtor), was unknown to them, before they were placed in possession of the SAPS docket, this is simply untrue due to the following considerations:

32.1.1. Mr Erasmus testified that he was also unable to issue summons against the Minster of Police on the basis that he did not have sufficient information to institute civil action for damages against the Minister of Police without the contents of the SAPS docket. This would obviously also have included the identity of the said debtor. Nonetheless, Mr Erasmus was able to identify this debtor and indeed issue summons against the said Minister, without a copy of the SAPS docket.

32.1.2. Furthermore, only two possible institutions could have been able to arrest and prosecute (and be liable for unlawful arrest and / or wrongful and malicious proceedings) in respect of the plaintiff after Johnson made a false criminal complaint against the plaintiff: The SAPS (under the Minister of Police) and the defendant. Summons was issued against the Minister of Police but not against the defendant.

32.1.3. The defendant (normally acting through its prosecutors) is the only institution in the Republic of South Africa that has the authority to institute and withdraw criminal proceedings on behalf of the State against a person and to carry out any necessary functions incidental thereto.

32.1.4. It was the actions of defendant's prosecutor(s), acting within the scope of their employment, which lead to the incarceration of the plaintiff for 7 days on 6 October 2009. It was the defendant's same

> prosecutor(s) who withdrew all criminal charges against the defendant on 13 October 2009.
>
> 33. I accordingly find that the plaintiff and his legal team, at all relevant times since the plaintiff's cause of action arose on 13 October 2009, had knowledge of the identity of the defendant (as debtor)."[50]

[100] The conclusion that the evidence of the applicant and his attorney was not true was based on what the High Court called considerations. No adverse credibility findings were made against these witnesses. Nor was their version controverted.

[101] The so-called considerations taken, either individually or collectively, do not sustain the finding that the evidence was untrue. It is difficult to appreciate how the statement by the attorney to the effect that he was unable to issue summons against the Minister of Police for he did not have sufficient information without the docket, makes the attorney's evidence untrue. Nor does the fact that he eventually issued summons against the Minister of Police render his testimony false. Worse still is to declare the applicant's own evidence false on the same basis.

[102] The other considerations mentioned by the High Court have no bearing on the finding that the applicant and his legal team had knowledge that the respondent was the debtor as from 13 October 2009. There is simply no factual basis for this finding. As mentioned, the onus was on the respondent to prove that on that date, which was before his current attorney was engaged, the applicant knew that the respondent was the debtor.

[103] In *Shange*[51], the Supreme Court of Appeal had to determine the date on which prescription started to run against the employer of the wrongdoer. The Court held:

> "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

[50] Id at paras 32-3.

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

> 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."[52]

[104] Here the evidence on record is that on 13 October 2009, the applicant knew that the complainant and the Minister of Police were debtors. This was what he was told by his former attorney. And this advice was based on the facts then known to the attorney, namely, the false charge by the neighbour and the arrest by the Police. On the facts, there is nothing suggesting culpability of the public prosecutor at that stage.

[105] Although all of this constitutes an analysis of facts, what implicates the applicant's constitutional rights is the findings reached. Those rights are affected by the application of section 12(3) of the Act to those facts and the legal conclusion that the applicant's claim had prescribed. The effect of that legal conclusion is that the applicant is denied access to courts to have the dispute between him and the respondent resolved by application of law. As was observed in *Links*, the application of section 12(3) also implicates the rights guaranteed by section 12 of the Constitution.[53] Here the affected right is the right to personal freedom which may not be deprived arbitrarily or without just cause. A direct consequence of the prosecutor's conduct was the loss of the applicant's freedom. Consequently, the matter engages the jurisdiction of this Court.

[106] It may well be that had the claim we are concerned with here been against the neighbour who laid a false charge, the conclusion that the requirements of section 12(3) were met would be justified. This is because as on 13 October 2009, the identity of that

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[52] Id at para 11.

[53] *Links* above n 5 at para 22.

debtor and the material facts were known to the applicant. But the knowledge of those facts does not reveal the identity of the public prosecutor as a co-debtor, let alone his culpability. Nor do those facts show that the public prosecutor himself knew that the charge was false at the time he opposed bail. This explains why the applicant's legal team advised him, on the facts as then known, that he had claims against the complainant and the Minister of Police.

[107] The fact that the public prosecutor withdrew the charges on 13 October 2009 does not even remotely suggest that, as on 6 October 2009 when the applicant appeared in court, it can be objectively seen that he knew that the charges were bogus. Therefore, there can be no basis for imputing knowledge of this fact to the applicant. Without having had access to the docket and not having been informed of this fact by anybody, the only plausible inference, if one were to be drawn, is that the applicant had no knowledge of some facts and that the respondent was a co-debtor until he had access to the police docket.

[108] The unsatisfactory manner in which the High Court adjudicated the special plea, prompted the Chief Justice to issue Directions that called upon the parties to address specific issues in written submissions.[54] These issues included the question whether the

[54] In relevant part the Directions dated 23 May 2018 reads:

> "1. The parties are directed to deliver to the Registrar and serve on all other parties written submissions on:
>
> a) Whether the High Court was justified in upholding the respondent's special plea of prescription on the basis that the facts that the applicant and his lawyers knew on 13 August 2009 when the charges against the applicant were withdrawn were enough for him to institute an action against the respondent.
>
> b) Whether, in the context of a claim for malicious prosecution, prescription began to run when the charges against the applicant were withdrawn, or when the applicant and his lawyers got access to the SAPS police docket and discovered that the respondent had no basis for not allowing the applicant to be released on bail and/or for not withdrawing charges.
>
> c) Whether, in view of the facts giving rise to the claim as contemplated in section 12(3) of the Prescription Act, the applicant had, in the absence of the information in the SAPS police docket, the factual knowledge he required to lodge a claim based on malicious prosecution against the respondent.
>
> d) What implications this Court's decision in *Links v MEC of Health* 2016 (4) SA 414 (CC) has on the questions raised in this application."

High Court was right in holding that at the time charges were withdrawn, the applicant had knowledge of the facts described in section 12(3) of the Act, pertaining to a claim against the respondent. In his written submissions, the applicant contended that the facts that supported a claim against the respondent only came to light upon perusal of the police docket.

[109] The respondent countered by submitting that—

> "the fact that the charges against the applicant were withdrawn and that the applicant was represented by an attorney and counsel when that happened, constitute sufficient facts contemplated in section 12(3) of the Prescription Act for the applicant to have instituted action against the respondent."

There is no substance in this argument. The facts envisaged in section 12(3) are the identity of the debtor and material facts from which the debt arose. All these facts must be known to the creditor before prescription can start running. The representation of the applicant by the legal team and the withdrawal of charges could not, contrary to the respondent's submission, sustain the inference that the applicant had knowledge of the necessary facts.

[110] It is for these reasons and those set out in the first judgment that I support the order proposed in that judgment.

THERON J:

[111] I have had the pleasure of reading the judgments of my colleagues Zondo DCJ (first judgment), Froneman J (second judgment) and Jafta J (third judgment). I agree that condonation should be granted. Regarding the application for leave to appeal, I

cannot agree with the reasoning any of them proposes. The reason for this is simple: this matter should have been set down for a hearing.

[112] This application for leave to appeal requires us to consider the circumstances in which this Court should dispose of matters without a hearing. It is the duty of this Court to determine the constitutionally appropriate manner of managing cases before it. This it must do by having regard to the interests of justice.[55] It must also do so bearing in mind that parties before it have a right to have their matter resolved by this Court fairly and publicly.[56]

[113] This Court occasionally writes judgments in applications for leave to appeal without affording parties an oral hearing.[57] This is envisaged in rule 19(6)(b) of the Rules of this Court.[58] This course is adopted when matters are "open and shut", in that their outcome is clear, and when an oral hearing is considered unnecessary.[59] At the

[55] Section 173 of the Constitution provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[56] Section 34 of the Constitution.

[57] The first time this Court delivered a judgment without an oral hearing was in *Besserglik v Minister of Trade Industry and Tourism (Minister of Justice Intervening)* [1996] ZACC 8; 1996 (4) SA 331 (CC); 1996 (6) BCLR 745 (CC). The matter concerned an application for direct access that was summarily dismissed in a short judgment.

[58] The rule reads:

> "Applications for leave to appeal may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself."

[59] *AfriForum v University of the Free State* [2017] ZACC 48; 2018 (2) SA 185 (CC); 2018 (4) BCLR 387 (CC) at para 118; *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38; 2017 JDR 1716 (CC); 2018 (1) BCLR 12 (CC) at paras 9, 15 and 16; *Mogaila v Coca Cola Fortune (Pty) Ltd* [2017] ZACC 6; 2018 (1) SA 82 (CC); 2017 (7) BCLR 839 (CC) at paras 27-9; *S v Schoombee* [2016] ZACC 50; 2017 (2) SACR 1 (CC); 2017 (5) BCLR 572 (CC) at para 36; *Pieterse N.O. v Lephalale Local Municipality* [2016] ZACC 40; 2016 JDR 2069 (CC); 2017 (2) BCLR 233 (CC) at para 11; *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing* [2015] ZACC 4; 2015 (4) BCLR 396 (CC) at paras 9-10; *President of the Republic of South Africa v South African Dental Association* [2015] ZACC 2; 2015 JDR 0103 (CC); 2015 (4) BCLR 388 (CC) at para 15; *MC Denneboom Service Station CC v Phayane* [2014] ZACC 29; 2015 (1) SA 54 (CC); 2014 (12) BCLR 1421 (CC) at para 17; *Daniel v President of the Republic of South Africa* [2013] ZACC 24; 2013 JDR 1439 (CC); 2013 (11) BCLR 1241 (CC) at paras 13-4; *Minister for Correctional Services v Van Vuren; In re Van Vuren v Minister for Correctional Services* [2011] ZACC 9; 2011 (10) BCLR 1051 (CC) at para 9; *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZACC 34; 2010 (5) BCLR 445 (CC) at para 10; *Strategic Liquor Services v Mvumbi N.O.* [2009] ZACC 17; 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC) at para 2; *Helicopter & Marine Services (Pty) Ltd v V & A Waterfront Properties (Pty) Ltd* [2005] ZACC 21; 2005 JDR 1400 (CC); 2006 (3) BCLR 351 (CC) at paras 7-8; *S v van Vuuren* [2005] ZACC 11; 2005 (2) SACR 1 (CC);

same time, though the matter is straightforward and can be dealt with summarily, the circumstances of the case may require a short judgment to explain the Court's order.[60]

[114] The rationale is obvious: scarce judicial resources should not be wasted on hearing matters that can be resolved expeditiously, fairly and effectively without the elongated process of setting them down for a hearing. In *Mphahlele*, this Court explained (in the context of there being no absolute requirement that a Court of last instance gives reasons when dismissing an application for leave to appeal):

> "Courts of last instance in this and most democratic countries do furnish reasons. However, in applications for leave to appeal to a court of last instance, other compelling practical considerations apply. In particular, it is not in the public interest to clog the rolls of such courts by allowing 'unmeritorious and vexatious issues of procedure, law or fact' to be placed before them. The purpose of the procedure requiring leave to appeal is to avoid the waste of judicial time."[61] (Footnotes omitted.)

[115] The European Court of Human Rights, including its Grand Chamber, has explained that, even in the context of criminal matters—

2005 (7) BCLR 639 (CC) at para 4; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 21; *Xinwa v Volkswagen of South Africa (Pty) Ltd* [2003] ZACC 7; 2003 (4) SA 390 (CC); 2003 (6) BCLR 575 (CC) at para 11; *Minister of Home Affairs v Liebenberg* [2001] ZACC 3; 2002 (1) SA 33 (CC); 2001 (11) BCLR 1168 (CC) at para 15; *S v Price* [2001] ZACC 1; 2001 JDR 0761 (CC); 2001 (11) BCLR 1193 (CC) at para 2; *Wallach v Selvan* [2001] ZACC 24; 2001 (11) BCLR 1195 (CC) at para 3; *Levy v Glynos* [2000] ZACC 20; [2001] JOL 7689 (CC) at para 1; *Fraser v Naude* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at paras 10-1; *S v Mello* [1998] ZACC 7; 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC) at para 10; *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole v Premier, Province of the Free State* [1998] ZACC 4; 1998 (3) SA 692 (CC); 1998 (6) BCLR 653 (CC) at para 4; *S v Ntsele* [1997] ZACC 14; 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC) at para 3; *S v Julies* [1996] ZACC 14; 1996 (2) SACR 108 (CC); 1996 (7) BCLR 899 (CC) at para 3; *Besserglik* above n 57 at para 5.

The Supreme Court of Appeal adopts the same approach. See *S v Zulu* [2016] ZASCA 207. The Supreme Court of Appeal does so in terms of section 19(a) of the Superior Courts Act 10 of 2013, which reads:

> "The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law—
>
> (a) dispose of an appeal without the hearing of oral argument."

[60] *Wallach v High Court of South Africa, Witwatersrand Local Division* [2003] ZACC 6; 2003 (5) SA 273 (CC); [2003] JOL 10847 (CC) at para 3; *Beyers v Elf Regters van die Grondwetlike Hof* [2002] ZACC 19; 2002 (6) SA 630 (CC); 2002 (10) BCLR 1001 (CC) at para 2; *Fraser* id at para 11.

[61] *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 13. The Court was quoting from *S v Rens* [1995] ZACC 15; 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC) at paras 24-5. See further *Beyers* id at para 8.

> "provided that there has been a public hearing at first instance, the absence of public hearings at second or third instance may be justified by the special features of the proceedings at issue. Thus, proceedings for leave to appeal or proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 [of the European Convention on Human Rights] even where the appellant was not given an opportunity of being heard in person by the appeal or cassation court."[62]

[116] The European Court of Human Rights has repeatedly emphasised that fairness is the lodestar in determining whether an oral hearing is warranted when an appeal is considered by an appellate court. Fairness is determined on the facts of each case by considering whether the grounds of appeal are factual or legal, the matter is criminal or civil, the parties were represented on appeal, the nature of the issues to be decided by the court of appeal, and whether the appellate court had all the information before it to decide the matter without a hearing.[63] The approach advocated under Article 6 of the European Convention on Human Rights, for determining a fair appeal procedure (without an oral hearing), would equally satisfy the access to justice and fair trial rights requirements of sections 34 and 35 of the Constitution respectively.[64] Fairness and its associated considerations, should also dictate the circumstances when a short judgment, without a hearing, is in the interests of justice as envisaged in section 173 of the Constitution.

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[62] *Meftah v France* [GC], nos 32911/96, 35237/97 and 34595/97, § 41, ECHR 2002. Article 6(1) of the European Convention on Human Rights provides in relevant part that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

[63] See for examples *Moreira Ferreira v Portugal (No. 2)* [GC], no 19867/12, § 22 (Joint Dissenting Opinion of Judges Raimondi, Nußberger, De Gaetano, Keller, Mahoney, Kjølbro and O'Leary), ECHR 2017; *Zahirović v Croatia*, no 58590/11, § 54-7, ECHR 2013; *Sibgatullin v Russia*, no 32165/02, § 34-7, ECHR 2009; *Hermi v Italy* [GC], no 18114/02, § 60-1, ECHR 2006; *Levages Prestations Services v France*, no 21920/93, § 49, ECHR 1996; *Helmers v Sweden*, no 11826/85, § 4-6 (Dissenting Opinion of Judge Morenilla), ECHR 1991; *Ekbatani v Sweden*, no 10563/83, § 27-33, ECHR 1988; *Monnell and Morris v United Kingdom*, nos 9562/81 and 9818/82, § 65, ECHR 1987.

[64] It is trite that international law must be considered when interpreting the Bill of Rights, including (albeit with less weight) non-binding international law. See section 39(1)(b) of the Constitution; *S v Mlungwana* [2018] ZACC 45; 2019 (1) BCLR 88 (CC) at para 48 fn 70; *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 178 fn 28; *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 26; and *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 34-5.

[117] Similarly, the United Nations Human Rights Committee explains, in relation to article 14 thereof,[65] that the International Covenant on Civil and Political Rights (ICCPR)—

> "does not require a full retrial or a 'hearing' [in criminal appeals or reviews], as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus, for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the [ICCPR] is not violated."[66]

[118] In *Van Wyk*,[67] this Court expanded on the factors to be considered when a matter is decided without a hearing (albeit in a different context):[68]

> "It is apparent from the provisions of rule 11(4) that the Court has a discretion on how to dispose of an application before the Court. It is equally clear from these provisions that the fact that the Court has called for written argument does not necessarily mean that the Court will set the matter down for the hearing of oral argument. It may, in an appropriate case, dispose of the matter on the basis of written argument only. How an application shall be dealt with *depends on the complexity of the issues involved and what the Court considers necessary to enable it to deal with a matter*. When the allegations made in the affidavit require amplification by written argument, the Court

[65] Article 14 in relevant part provides that "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

[66] United Nations Human Rights Committee *General Comment 32: Article 14: Right to Equality before Courts and Tribunals and to Fair Trial*, 23 August 2007, UN Doc CCPR/C/GC/32 at para 48. The Committee cites Communication No 1110/2002, *Rolando v Philippines* at para 4.5; Communication No 984/2001, *Juma v Australia* at para 7.5; Communication No. 536/1993, *Perera v Australia* at para 6.4.

[67] *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC).

[68] The Court made these comments in the context of an application referred to the Chief Justice under rule 11(3)(c) as envisaged in rule 11(4) of this Court's Rules. These two rules provide collectively that if an application for directions from this Court is not opposed, then it must be referred to the Chief Justice. The Chief Justice shall then "give directions as to how the application shall be dealt with and, in particular, as to whether it shall be set down for hearing or whether it shall be dealt with on the basis of written argument or summarily on the basis of the information contained in the affidavits". This rule, as the Court held in *Van Wyk* id at para 15, is substantially similar to rule 19(6)(b). The comments the Court made in the rule 11 context thus apply with equal force to rule 19(6)(b).

> will call for written argument. And if written argument raises *debatable issues* the Court will set down the matter for hearing of oral argument."[69] (Emphasis added.)

[119] Further guidance on whether a matter is "debatable" can be gleaned from this Court's jurisprudence on what makes a point of law "arguable" as envisaged in section 167(3)(b)(ii) of the Constitution. In *Paulsen*, Madlanga J emphasised that a factor in deciding whether a matter is "arguable" is disagreement among Judges in the lower court.[70] If disagreement among Judges in the High Court or the Supreme Court of Appeal speaks to a point of law being "arguable", then, in my view, disagreement among Judges of this Court renders the point "debatable", warranting a hearing.

[120] This is not an "open and shut" matter. As envisaged in *Van Wyk*, the written arguments this Court received raise debatable issues on complex matters. The first judgment essentially makes two findings:

(a) If a creditor had no reason to believe or did not know that a prosecution was malicious or without reasonable basis, then prescription in respect of that claim should not begin to run until he does; and

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[69] Id at para 16.

[70] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 23, which reads:

> "Without derogating from the breadth of what I have just said, some factors may be of assistance on this question. Needless to say, these factors are no more than indicators and are by no means decisive. In any given case this Court has to make a value judgment on whether the point of law is indeed "arguable". The examples I itemise here do not purport to be exhaustive. They are just that – examples:
>
> (a) The Supreme Court of Appeal may have expressed itself on the matter by a narrow majority;
>
> (b) A minority view in the Supreme Court of Appeal may be quite forceful;
>
> (c) Different divisions of the High Court may have expressed divergent views on the point, with no pronouncement on it by the Supreme Court of Appeal;
>
> (d) There may be no authoritative pronouncement on an issue; with available, cogent academic or expert views on it being divergent;
>
> (e) The matter may raise a new and difficult question of law; or
>
> (f) The answer to the question in issue may not be readily discernible." (Footnotes omitted.)

(b) Mr Kruger had no reason to believe or did not know that his prosecution was malicious or without reasonable basis so prescription should not begin to run until he did (that is, when he got the docket).

The first finding is common cause between the various judgments in this matter.

[121] In my view, the second finding raises two issues that should be ventilated at a hearing: namely, jurisdiction and the facts within Mr Kruger's knowledge. The fact that three Judges of this Court have written and disagree on these issues underscores the point I am making: the matter is at the least, debatable and on the reasoning in *Van Wyk* should be set down for a hearing. The practice of this Court reflects this approach: it has written about 150 judgments in matters where there was no hearing and of these, only four have not been unanimous.[71] These four, moreover, were handed down in the last three years.

[122] Regarding jurisdiction, is the question whether Mr Kruger had reason to believe that he had a cause of action a factual or a legal enquiry? Does this distinguish this matter from the various authorities concerning jurisdiction relied on by the first judgment?

[123] Just because this Court had jurisdiction in *Links*, it does not follow, without more, that it has jurisdiction in this case too.[72] I agree that if this matter concerned the interpretation of the Prescription Act, then that would be a constitutional matter vesting us with jurisdiction. However, unlike *Links*, we are not called upon to interpret the Prescription Act. We agree that if a creditor had no reason to believe or did not know that a prosecution was malicious or without reasonable basis, then prescription in respect of that claim should not begin to run until she does. What we disagree on is

[71] *AfriForum* above n 59; *S v Phakane* [2017] ZACC 44; 2018 (1) SACR 300 (CC); 2018 (4) BCLR 438 (CC); *Swart v Starbuck* [2017] ZACC 23; 2017 (5) SA 370 (CC); 2017 (10) BCLR 1325 (CC); *Snyders v De Jager (Interim Relief)* [2016] ZACC 52; 2017 (5) BCLR 585 (CC) (this judgment related to an interim order).

[72] *Links* above n 5.

whether, on the facts, this rule is satisfied. This appears to be a factual enquiry or, at best, an application of settled law.

[124] Determining the parameters of this Court's jurisdiction is complicated, contentious and an evolving area of law. This is evident from this Court's recent judgments in *Shane Jacobs*.[73] The finding of jurisdiction made by the first and third judgments have the potential of expanding this Court's jurisdiction in respect of prescription. Indeed, my Brother Jafta J suggests that because prescription implicates access to courts, the "application" of settled rules of prescription raises a constitutional matter.[74] The papers and submissions we received in this matter do not address the issue of jurisdiction in any depth. I therefore would have preferred to have heard argument on this.

[125] Even if we do have jurisdiction in this matter, I do not believe that we can properly decide whether Mr Kruger had sufficient knowledge to found a claim of malicious prosecution without the full record. The first and third judgments lean heavily on the police docket to argue that without it Mr Kruger could not have known that he may have had a claim for malicious prosecution. The third judgment gives a detailed factual analysis of what was known to Mr Kruger at all relevant stages based on the evidence before the High Court. The second judgment invokes how Mr Kruger knew that: (a) the dispute between him and his neighbour was civil in nature; (b) the charges had been withdrawn for no apparent reason; and (c) he was not granted bail, also for no apparent reason. These factual claims may be imprudent when regard is had to the fact that this evidence, like the police docket, the charge sheet and the transcript from Mr Kruger's hearings, are not before us.

[126] Mr Kruger applied for leave to appeal to this Court on 18 December 2017, some 15 months ago. The delay in finalising this application, though regrettable, should not

[73] *S v Jacobs* [2019] ZACC 4.

[74] Third judgment at [104].

deter us from ensuring that justice is done and seen to be done to Mr Kruger and the respondent. To summarily deal with this matter only so that it can be more speedily disposed of than if it were set down for a hearing at this stage, could result in far greater prejudice to Mr Kruger or the respondent than if the matter was further delayed to afford him an oral hearing. Moreover, the purpose of writing a short judgment in this matter – to dispose of it expeditiously – can in any event not be achieved.

[127] For these reasons, and on the papers as they stand, I am forced to dismiss the application. This is because an applicant bears the onus of proving their case. Where there is doubt about the order pursued, this Court cannot grant the relief sought.

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