REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION BHISHO

CASE NO: CA 10/2021
DATE HEARD: 02/08/2021
DATE HANDED DOWN: 12/10/2021

In the matter between:

MINISTER OF POLICE **APPELLANT**

and

ABONGILE ZAMANI **RESPONDENT**

FULL COURT APPEAL JUDGMENT

D VAN ZYL DJP:

[1] This appeal deals with extinctive prescription of a delictual claim. The plaintiff (the respondent in the appeal) instituted an action against the defendant (the appellant in the appeal) for damages for unlawful arrest and detention. The defendant raised a special plea of prescription, which was placed before the trial court for separate adjudication. The trial court dismissed the special plea with costs. The appeal against this order is with the leave of that court.

[2] In terms of section 11(d) of the Prescription Act 68 of 1969 (the Act), the plaintiff's claim for damages was subject to a three-year extinctive prescription period. It was common cause that a period of more than three years had elapsed between the

arrest of the plaintiff and his release from custody, and the time when he instituted his claim. The plaintiff was arrested on 2 March 2014. He was detained until he was released on bail on 14 August 2014. He instituted the action on 16 January 2019. However, the plaintiff in reply to the defendant's special plea pleaded that prescription only commenced running after he had consulted an attorney in November 2018, and he had acquired knowledge of the identity of the defendant and of the facts giving rise to the debt.[1]

[3] Although the plaintiff alleged in his particulars of claim that his arrest was wrongful, unlawful and **"malicious"**, his case was one of wrongful arrest and detention. It was presented as such in the trial court, and in this Court.[2] The evidence placed before the trial court consisted of the evidence of the investigating officer, Sergeant Ngcuza (Ngcuza), and of the plaintiff. According to Ngcuza, the plaintiff was arrested on 3 March 2014. It is common cause that the arrest was on a charge of rape, and that it was effected without a warrant of arrest. The following day Ngcuza proceeded to obtain further witness statements, whereafter he took steps to ensure that DNA samples were obtained from the plaintiff for analysis. He informed the plaintiff of the nature of the charge and of his rights. When the plaintiff appeared in court, Ngcuza opposed the plaintiff's bail application. The reasons for such opposition was because the plaintiff had previous criminal convictions and because he lived in close proximity to the victim of the alleged rape. The prosecutor subsequently withdrew the charge against the plaintiff in court following receipt of the results of the DNA analysis from Ngcuza.

[4] The plaintiff's evidence in turn was essentially to the effect that he did not know that he may have a claim for compensation against the defendant, or that his arrest was unlawful. He testified that he was arrested on 2 March 2014. Nothing turns on the

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[1] The plaintiff pleaded that **"for purposes of subsection 3(2)(a), a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt"** and therefore **"the plaintiff pleads that he only became aware of the creditor and the facts giving rise to the debt after consulting with his attorneys of record in November 2018."**

[2] Malicious arrest is a cause of action separate and distinct from wrongful arrest and must be pleaded as such. The distinction between the two causes of action was explained in *Newman v Prinsloo and another* 1973 (1) SA 125 (W) at 127H. See also *Relyant Trading (Pty) Ltd v Shongwe and another* [2007] 1 All SA 375 (SCA) at paras [4] and [6], and Neethling, Potgieter and Visser, Law of Delict 7ed at 350 to 351.

discrepancy regarding the date on which the plaintiff was arrested. Ngcuza, whose evidence on this aspect was based on an entry made in the police docket by another official, did not arrest the plaintiff. The plaintiff knew the police officer who arrested him and where he was stationed. The import of this is dealt with in more detail hereunder. The plaintiff's first appearance in court was two days later on 4 March 2014. He applied for bail, and was released pursuant to such application on 12 March 2014. Following the plaintiff's release, he appeared in court on several occasions. The charges were formally withdrawn against him by the prosecutor on 14 August 2014. The plaintiff was legally represented at his bail hearing and at his subsequent appearances in court. He did not have sight of the police docket, and it was only after he had become aware of his rights when he listened to a radio program **"sometime in 2018",** that he first consulted an attorney. His evidence on this aspect was as follows: **"I listened to a radio in a certain program on True FM where an officer was called to the radio station and explained what happens during your arrest and even the procedures in court. It is then that I collected information."**

[5] The plaintiff elaborated on this aspect further during cross-examination, and in response to questions put to him by the trial court. His responses in summary were that the radio program dealt with the rights of persons on legal issues and that he obtained advice on what to do. At that point he realised that he could sue the police officer who had arrested him. He accordingly sought legal assistance. The plaintiff acknowledged that he had always maintained his innocence. He confirmed that he was dissatisfied with the fact that he had been arrested, and that the charge was later withdrawn. When asked why he did not take any action after the charge was withdrawn against him, the plaintiff answered that all he was **"interested in was to go home, on hearing that the case was withdrawn."**

[6] What the trial court was required to determine was the time when prescription started to run. The commencement of extinctive prescription is dealt with in section 12 of the Act. It reads as follows:

"When prescription begins to run

(1) Subject to the provisions of ss (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

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

[7] Section 12(1) provides for a general rule that prescription commences to run as soon as the debt is due. The rule is however subject to a number of, what the Constitutional Court in *Mtokonya v Minister of Police*[3] referred to as exceptions, two of which are found in sub-section (3). Using this terminology, it is the first of these two exceptions in subsection (3) that was pertinently raised as an issue on the pleadings in this matter, that is, that the debt is not deemed to be due until the creditor has knowledge of the identity of the debtor, and of the facts from which the debt arises. The second exception, which is framed as a proviso to the deeming provision in the first part of subsection (3), comes into effect when the creditor did not have knowledge of the facts envisaged in the first part, namely the identity of the debtor, or of the facts from which the debt arose.[4] The question raised thereby is whether the creditor could have acquired knowledge of those facts by having exercised reasonable care. It focuses on the conduct, or the lack thereof, of the creditor.

[8] The defendant's plea of prescription, as further circumscribed by the plaintiff's reply, requires a determination of two issues: Firstly, what the facts were which the

[3] 2018 (5) SA 22 (CC) at paras [31] to [34]. See also *Links v Department of Health* 2016 (4) SA 414 (CC) at para [27].
[4] Ibid at para [34].

plaintiff was required to have knowledge of before prescription could commence running; and secondly, when the plaintiff acquired knowledge of such facts and of the identity of the defendant. It is well established that the defendant bore the burden of proving when the plaintiff acquired the knowledge in question.[5]

[9] Prescription begins to run when the **"debt is due".** The term **"debt"** in section 12 is not defined in the Act. The meaning given to it in the case law is **"...primarily to describe the correlative of a right or claim to some performance, in other words, as the duty side of an obligation (verbintenis) produced by contract, delict, unjust enrichment, statute or other source."**[6] In *Duet and Magnum Financial Services CC v Koster*[7] Nugent J expressed the view that **"the converse of a "right" is better described as a liability,** (as opposed to an **"obligation"**) **which admits of both an active and a passive meaning." (**my emphasis)[8]

[10] The commencement of the running of prescription is accordingly determined with reference to the time when the debt is recoverable, that is, when the creditor acquires a right to claim, and conversely, the debtor has the obligation to perform.[9] A debt, including a delictual debt, is due in that sense for purposes of the Act, says the Supreme Court of Appeal in *Truter and Another v Deysel*,[10] when:

> **"… the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim."**[11]

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[5] *Gericke v Sack* 1978 (1) SA 821 (A) at 826H to 827D.
[6] Loubser, Extinctive Prescription at page 100 onwards. See also *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 842 F.
[7] 2010 (4) SA 499 (SCA).
[8] Ibid at para [24].
[9] *The Master v I L Back and Co Ltd and others* 1983 (1) SA 986 (A) at 1004G.
[10] 2006 (4) SA 168 (SCA).
[11] Ibid at para [16]. See also *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutch (Pty) Ltd* 1991 (1) SA 525 (A) at 532H; *Santam Ltd v Ethwar* 1999 (2) SA 244 (SCA) at 252 B - D

[11] It follows that prescription does not begin to run against a creditor before his cause of action is fully accrued, that is, before he is able to pursue his claim. The aforementioned passage in Truter was quoted with approval by the Constitutional Court in *Links*.[12] Wrongful arrest and detention is a delictual debt.[13] Such a debt is generally due as soon as a delictual cause of action arises.[14] **'Cause of Action' is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the defendant's "debt", the word used in the Prescription Act."**[15] In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action. They constitute legal conclusions which are drawn from the facts.[16] The facts in that sense are limited to the facts which are material to the creditor's claim.[17] The facts material to a delictual debt are accordingly a combination of the facts which must enable the court to arrive at legal conclusions regarding the constituent elements of the delictual cause of action in question, such as a causative act, harm, unlawfulness and fault.

> **"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."**[18]

[12] The question then, is what combination of facts must a plaintiff have in order to pursue and prove his claim for damages for wrongful arrest and detention. The arrest

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and *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd and another* 2017 (1) SA 185 (SCA) at para [24].
[12] Supra fn 3 at para [31].
[13] Joubert, The Law of South Africa vol 15, 3ed at para 189.
[14] Loubser op cit at page 80.
[15] *Evins* supra fn 6 at 825 F – H.
[16] *Truter* supra fn 10 at para [17] and *Links* supra fn 3 at para [31].
[17] *Links* supra fn 3 at para [32].
[18] Truter fn 10 at para [17]. See also *Links* supra fn 3 at para [32], and Loubser op cit at page 80.

and detention of a person constitutes an infringement of his or her right to bodily freedom (*libertas*). It is a right that is protected at common law and in terms of the Constitution. The infringement of this right gives rise to a fundamental right to claim, and the obligation to pay damages for an injury to personality (*iniuria*).

[13] As a form of *iniuria* that does not require fault to found liability, the constituent elements of an action for wrongful arrest and detention simply consist of a person being deprived of his or her freedom without justification.[19] The injury to the person's personality interest and the occurrence of harm take place simultaneously with the arrest and detention, and continue until the person is released, and his or her freedom is restored. It constitutes a continuous wrong that **"… results in a series of debts arising from moment to moment, as long as the wrongful conduct endures."**[20] Justification, or put differently, the authority for the arrest, must exist at the time a person is arrested and detained. It is the absence of such authority at the time of the arrest that renders the arrest, and the detention that follows thereafter, wrongful.

[14] All that a plaintiff must prove to succeed in an action for unlawful arrest and detention, is that the defendant himself, or a person acting as his agent or servant, deprived him of his liberty.[21] The deprivation of a person's physical liberty is *prima facie* illegal and therefore wrongful.[22] It is consequently unnecessary for the plaintiff to allege wrongfulness, and the burden of proof in respect thereof at trial is on the defendant once the plaintiff has proved, or it has been admitted, that the defendant was arrested and detained. It is for the defendant to allege and prove the existence of grounds of justification. The reason lies in the plain and fundamental rule that every individual's person is inviolable[23]. In *Zealand v Minister of Justice and Constitutional Development*[24] Langa CJ explained it as follows:

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[19] Neethling, Potgieter and Visser op cit at page 349.
[20] *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) at para [20]. See also *Lombo v African National Congress* 2002 (5) SA 668 (SCA) at para [26], and *Minister of Police v Yekiso* 2019 (2) SA 281 (WCC) at para [19].
[21] *Relyant* supra fn 2 at 378.
[22] *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 153 E – F.
[23] Ibid at 153E.
[24] 2008 (4) SA 458 (CC).

"This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification. In *Minister van Wet en Orde v Matshoba*,[25] the Supreme Court of Appeal again affirmed that principle,[26] and then went on to consider exactly what must be averred by an applicant complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the *rei vindicatio* a useful analogy.[27] The simple averment of the plaintiff's ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common-law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant.[28] The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution."[29] (my emphasis)

[15] The fact that the plaintiff is not required to allege and prove the absence of justification for his or her arrest and detention, means that the facts from which it must be concluded that authority for the arrest of the plaintiff did, or did not exist, are not material facts from which the delictual debt is said to arise. As emphasised in *Minister of Finance and Others v Gore NO*[30], **"… time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of**

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[25] 1990 (1) SA 280 (A).
[26] Ibid at 286 A - C.
[27] Ibid at 285 to 286.
[28] Ibid at 286.
[29] *Zealand* supra fn 24 at para [25].
[30] 2007 (1) SA 111 (SCA) at para [17].

its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'." Applied to the facts of this case, the full extent of the plaintiff's cause of action was complete and the debt became due when he was released from detention on 12 March 2014. There was nothing that prevented him from giving instructions to an attorney to institute proceedings. That the plaintiff may not have known what his legal rights were, did not delay the running of prescription. This aspect will be dealt with more fully hereinunder.[31]

[16] On this basis the plea of prescription should accordingly have succeeded. In what follows, it will be shown that section 12(3) at any rate does not envisage the plaintiff to have had knowledge that the conduct of the police was unlawful, or that he had a legal right to bring a claim against the defendant. The sub-section has two constituent parts: It requires the creditor to have **"knowledge"** of the identity of the debtor, and of the **"facts."** In *Gore*[32] the meaning attributed to the words **"knowledge of …"** in section 12(3) of the Act was that of a justified belief. A belief in this sense is more than a suspicion and less than the product of personally witnessing or participating in events, or of being the recipient of first-hand evidence. It extends to a belief that is engendered by, or inferred from attendant circumstances.[33]

[17] The question then is, what is the nature of the facts from which the debt arises, which the creditor must have knowledge of. The **"facts"** in sub-section (3) is qualified by the words **"from which the debt arises"**. In *Links*, the Court emphasised that the facts are those **"facts which are material to the debt"**[34] (the *facta probanda*). A fact is a material fact if it would be necessary for a plaintiff to prove it, if traversed, in order to support his or her right to judgment. The facts are accordingly determined, as a point of departure, with reference to the constituent elements of the plaintiff's claim. What the nature of those facts are, may conveniently be stated with reference to what has been found in decided cases not to constitute facts for the purposes of section 12(3).

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[31] See paras [18] and [27] below.
[32] Supra fn 30 at para [19].
[33] Ibid at para [19].
[34] Supra fn 3 para [32].

Knowledge of the material facts does not mean that the creditor must have knowledge of all the facts underlying the cause of action as pleaded, or of all of the alleged facts as they appear from the pleadings.[35] The facts also do not include the evidence necessary to prove each fact (the *facta probantia).* **"It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."**[36]

[18] It is further not necessary for the creditor to have knowledge of the full extent of his or her legal remedies, or what the full legal implications of the known facts are. "**The running of prescription is not postponed until a creditor becomes aware of the full extent of its rights, nor until the creditor has evidence that would enable it to prove a case "comfortably",**[37] and, **"[i]t may be that the applicant had not appreciated the legal consequences which flowed from the facts, but its failure to do so does not delay the date prescription commenced to run."**[38] In *Mtokonya*[39] the Constitutional Court held that the facts, for purposes of section 12(3), are distinct from questions of law, or of a value judgment. Consequently, knowledge that the conduct of the debtor is wrongful or negligent, which is a legal conclusion and not a fact, is not required before prescription begins to run.[40] Rather, what is required are the material facts from which the legal conclusion of the elements of wrongfulness and fault in a delictual claim may be drawn. It follows, by way of example, that it is insufficient for a plaintiff to allege negligence without also detailing the grounds of such negligence.[41]

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[35] *Drennan Maud and Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 212 F – H.
[36] *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23 and *Evins* fn 6 at 838 D – H. See also *Ascendis Animal Health (Pty) Ltd v Merck Dohme Corporation and others* 2020 (1) BCLR 1 (CC) at para [52].
[37] *Gore* supra fn 30 at para [22] and *Mtokonya* fn 3 at para [36].
[38] *Yellow Star Properties 1020 (Pty) Ltd v MEC Department of Development Planning and Local Government, Gauteng* 2009 (3) SA 577 (SCA) at para [37]. By way of an example, in *Van Staden v Fourie* 1989 (3) SA 200 (A) the Court held (in the context of a statutory provision permitting recovery of monies paid), that the running of prescription is not postponed until the creditor has established the full extent of his rights. It followed that prescription started running when the creditor knew the facts which the statute postulated for recovery, even though the creditor only later learned what requirements the statute posed, and what rights he acquired when the payee failed to fulfil those requirements (at 216 B – F). See also *Gore* supra fn 30 at para [17].
[39] Supra fn 3.
[40] Ibid at para [45]. See further paragraph [28] of this judgment.
[41] *SA Fish Oil Producers' Association (Pty) Ltd v Shipwrights & Engineers Holdings Ltd* 1958 (1) SA 687 (C), and *Honikman v Alexandra Palace Hotels (Pty) Ltd* 1962 (2) SA 404 (C).

In other words, the plaintiff is required to plead the facts from which he seeks to draw the conclusion that the defendant acted negligently. It is those facts, which the plaintiff must have knowledge of, as opposed to knowledge that those facts support a conclusion of negligence.

[19] In *Links*[42] the Constitutional Court further outlined what the nature of the facts are for purposes of section 12(3) of the Act. It held, in the context of negligence as a constituent element of a delictual claim for damages involving professional negligence, that knowledge of the facts from which the debt arises are, **"… sufficient facts to cause [the creditor] on reasonable grounds to think that the injuries were due to the negligence of the medical staff."**[43] This finding was confirmed by the same court in *Loni v Member of the Executive Council for Health, Eastern Cape*.[44] With reference to the judgment in Links, the Court in *Loni* said the following:

> **"This court opined [in *Links*] that it would be setting the bar too high to require knowledge of causative negligence. In answer to this issue, this court held that in cases involving professional negligence, the facts from which the debt arises are those facts which would cause a plaintiff, on reasonable grounds, to suspect that there was fault on the part of the medical staff and that caused him or her to 'seek further advice'."**[45]

[20] What the facts are for purposes of sub-section (3), would accordingly extend to include such facts that would cause the creditor to reasonably believe that a constituent element of the delict in question is present. This approach cannot be criticised. To raise the bar any higher would not afford a debtor the protection **"… from undue delay by litigants who are laggard in enforcing their rights,"**[46] and would be at odds with the rationale that prescription promotes **"certainty and stability to social and legal affairs**

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[42] Supra fn 3.
[43] Ibid at para [42].
[44] 2018 (3) SA 335 (CC).
[45] Ibid at para [23].
[46] *Gore* supra fn 30 at para [16].

and maintain the quality of adjudication."[47] Further, it conforms with the finding in Gore[48] that **"knowledge"** for purposes of section 12(3) extends to a belief that is engendered by, or inferred from attendant circumstances.

[21] Applied in the context of the claim in the present matter, the plaintiff was not required to conclusively know that the arresting officer did not have authority to arrest him or her, but rather that the plaintiff had knowledge of sufficient facts which would reasonably have placed him in a position to form the belief that the arrest was without justification, and to investigate the matter further.

[22] As stated earlier, the defendant had to prove that the plaintiff's claim had prescribed.[49] The trial court found that the defendant failed to discharge the onus in this regard by having failed to place any evidence before it as to why the claim is said to have become prescribed. However, the Court's assessment of the evidence and its application of the burden of proof failed to account for two important aspects: Firstly, *prima facie* the claim had become described, which constrained the plaintiff to plead that he did not have the required knowledge as envisaged in section 12(3) of the Act. Secondly, a determination whether the defendant had discharged the burden of proof is informed by the fact that the facts that were possessed by the plaintiff, at the relevant time, is an aspect which fell within the exclusive knowledge of the plaintiff. The difficulty facing a debtor who pleads prescription to establish when the creditor required knowledge of his identity and of the facts from which the debt arises, was recognised by the Court in *Gericke*[50] where this aspect was pertinently dealt with. The Court said that in determining whether the debtor has managed to discharge the burden of proof, that **"the Courts take cognizance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in**

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[47] *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) at paras [2] and [8]. See also *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para [11] and *Frieslaar and Others v Ackerman and Another* (1242/2016) [2018] ZASCA 3 (2 February 2018) at paras [17] and [18].
[48] Supra fn 30 at para [19].
[49] See para [7] of this judgment.
[50] Supra fn 5.

consequence held, as was pointed out by Innes, J., in *Union Government (Minister of Railways) v Sykes*, 1913 A.D. 156 at p. 173, that

> **'less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.'**[51]

In *Ex Parte the Minster of Justice: In re Rex v Jacobson & Levy*, the Court similarly referred to the fact that the question whether evidence is sufficient to establish a *prima facie* case, is dependent upon **"the nature of the case and the relative ability of the parties to contribute to evidence on that issue."**[52]

[23] On the plaintiff's evidence he clearly believed that he should not have been arrested. Such belief could only have been based on his insistence from the outset that he was innocent, coupled with the fact that the charge against him was later withdrawn once the results of the DNA analysis came to hand. The identity of the police officer who arrested him was known to him. Any suggestion that the plaintiff did not know that the policemen concerned was employed by the defendant, can be rejected without further ado. That was in any event not the plaintiff's evidence. It is not clear from his testimony exactly what it is that he had learned for the first time when he listened to a program about legal rights on the radio. On a reading of the plaintiff's evidence as a whole, which is characterised by its vagueness and lack of detail, it must be concluded that the information which he obtained from the radio program was no more than a realisation that he may have a claim against the policeman who arrested him, as opposed to the material facts relating to his arrest and detention that he would need to prove in order to establish the liability of the defendant. It goes without saying that the plaintiff could not have obtained any facts relating to his own arrest from listening to the program. The

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[51] Ibid at 827 E – G.
[52] 1931 AD 466 at 479. See also *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 40 A – C.

plaintiff's evidence, which in itself was contradictory,[53] goes no further than to contend, at best, that he did not know that he had a legal remedy against the defendant. This cannot assist the plaintiff. As stated by the Constitutional Court in *Mtokonya*,[54] **"Section 12(3) does not require the creditor to have knowledge of any right to sue the debtor."**[55]

[24] In this Court, as in the trial court, the plaintiff in argument placed reliance on the decision in *Makhwelo v Minister of Safety and Security*[56] in support for the proposition that the plaintiff did not acquire knowledge of the facts until such time as he had access to the police docket. In his plea, the defendant pleaded that the arresting officer had entertained a reasonable suspicion that the plaintiff had committed the crime of rape, and that the arrest had been justified in terms of section 40(1)(b) of the Criminal Procedure Act (CPA)[57]. The plaintiff's proposition is essentially that in the absence of having been provided with the police docket, and particularly the complainant's affidavit, the plaintiff did not know whether the information on which the decision to arrest him, was sufficient for the arresting officer to have entertained a reasonable suspicion as required by section 40(1)(b) of the CPA. In other words, the plaintiff did not have knowledge of the lawfulness or otherwise of his arrest.

[25] In *Makhwelo*[58] the Court, departing from the incorrect premise that the plaintiff in a case of unlawful arrest and detention bears the burden of proving that the arresting

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[53] Regard being had to the plaintiff's answer as to his lack of action once the charges were withdrawn in 2014. Significantly, the plaintiff did not contend that he took no action as he was unaware of his remedies at that stage. Instead, he contended that his lack of action was attributed to him only having been interested in going home once he had heard that the charge had been withdrawn.

[54] Supra fn 3.

[55] Ibid at para [36]. See also *Gore* supra fn 30 at para [17].

[56] 2017 (1) SA 274 (GJ).

[57] Act 51 of 1977. It reads:

"(1) A peace officer may without warrant arrest any person

(a) …

(b) **Whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody."**

[58] Supra fn 55.

officer had no reasonable suspicion that the plaintiff had committed or was going to commit a Schedule 1 offence,[59] reasoned as follows:

> **"It is difficult to appreciate that at the time of the arrest or even during detention the suspect would have sight of the docket in order to form a view that the arresting officer did not have a reasonable suspicion that an offence had been committed. The officer may have received a fabricated complaint from alleged eyewitnesses who were intent on falsely incriminating the suspect for their own ends. Accordingly, the complainant would not know at the time of arrest whether the arresting officer was reasonably relying on the accounts of a complainant who turned out to be fabricating events (in which case the claim would lie against the complainant and not the police), or whether the arresting officer in fact did not have a reasonable suspicion that the suspect had committed the offence. Since the docket is not available to an accused until the investigation is completed and he is presented with the indictment, it is most unlikely that the identity of the complainant or the evidence that was available when the arrest was made would be known to a would-be plaintiff. Without that knowledge a plaintiff cannot assume that the arresting officer was acting unlawfully when effecting the arrest rather than that the complainant has falsified a charge against him."**[60]

[26] I agree with the defendant's submission that *Makhwelo* was wrongly decided. As stated earlier, the burden of proving that an arrest and detention are justified, rests on the person who effected the arrest.[61] The judgment in *Makhwelo* further conflates the strength, or the prospects of success of a claim, with the knowledge required for the institution of a claim in order to interrupt the running of prescription. As stated in *Gore*,[62] prescription is not postponed until such time as the creditor is in a position to

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[59] Ibid at para [54].
[60] Ibid at para [55].
[61] See paragraph 14 of this judgement.
[62] Supra fn 30 at para [17].

comfortably prove his or her case. It is also not necessary for the creditor to have certainty **"in regard to the law and the defendant's rights and obligations that might be applicable to such debt."**[63]

[27] The decision in *Makhwelo*[64] is also in conflict with the judgment of the Constitutional Court in *Mtokonya*.[65] In *Mtokonya* the Court dealt with a case of unlawful arrest and detention. The case was **"about whether section 12(3) of the Prescription Act requires a creditor to have knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable before prescription may start running against the creditor".**[66] The Court concluded that section 12(3) does not require knowledge of legal conclusions or the availability in law of a remedy**.[67] "Whether the police's conduct against the applicant was wrongful and actionable is not a matter capable of proof. In my view, therefore, what the applicant said he did not know about the conduct of the police, namely whether their conduct against him was wrongful and actionable, was not a fact and, therefore, falls outside of s 12(3). It is rather a conclusion of law,"[68]** and **"[k]nowledge that the conduct of the debtor is wrongful and actionable is knowledge of a legal conclusion and is not knowledge of a fact. Therefore, such knowledge falls outside the phrase 'knowledge … of the facts from which the debt arises' in s 12(3). The facts from which a debt arises are facts of the incident or transaction in question which, if proved, would mean that in law the debtor is liable to the creditor."**[69] The finding in Gore[70] that the running of prescription is not delayed until a creditor is aware of the full extent of his legal rights, is consistent with the **"well known principle in our law that**

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[63] *Eskom v Bojanala Platinum District Municipality* 2003 JDR 0498 (T) at para [6], which was quoted with approval in Mtokonya supra fn 3 at para [46].
[64] Supra at fn 55.
[65] Supra at fn 3.
[66] Ibid at para [1].
[67] Ibid at para [37]. See also *Fluxmans Inc v Levenson* 2017 (2) SA 520 (SCA) at paras [10] and [32], and *Claasen v Bester* 2012 (2) SA 404 (SCA) at para [15].
[68] Ibid at para [44].
[69] Ibid at para [45].
[70] Supra fn 30 at para [22].

ignorance of the law is no excuse. A person cannot be heard to say that he did not know his rights."[71]

[28] Accordingly, and for these reasons, I am satisfied that the defendant had discharged the burden of proving, firstly that the plaintiff had knowledge of the identity of the debtor, and secondly, that the plaintiff had knowledge of the facts from which the debt arose, as envisaged in section 12(3) of the Act, more than three years prior to the institution of proceedings for the recovery of damages. In the result, the plaintiff's claim had become prescribed, and the decision of the court *a quo* must be set aside. It is therefore ordered that:

1. The appeal is upheld with costs, such costs to include the costs occasioned by the employment of two counsel;

2. The order of the court *a quo* is set aside, and is substituted with the following order:

"The plaintiffs claim is dismissed with costs."

SIGNED

D VAN ZYL
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree:

SIGNED

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[71] *Otto v Schurink and another* 1911 TPD 367 at 370. In criminal law where fault (*mens rea*) is an element of an offence, ignorance of the law may be a valid defence. See S v Blom 1977 (3) SA 513 (A). An error in law may in certain instances be a ground for relief in a civil matter, such as for purposes of the *condictio indebiti*. See Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A).

B.N. MAJIKI
JUDGE OF THE HIGH COURT

I agree:

SIGNED

I.T. STRETCH
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff:	R Quinn SC & V Sangoni
Instructed by:	State Attorney Old Spoornet Building 17 Fleet Street Quigney EAST LONDON
Counsel for the Defendant:	A Bodlani & L van Vuuren
Instructed by:	Cinga Nohaji Attorneys 29 Gladstone Street 1st Floor Office 7 – 8 Central Square Building

EAST LONDON