IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / ~~NO~~

(3) REVISED

29/04/2016
DATE

SIGNATURE

29/4/2016

Case Number: 37681/2011

ARRIE WILLEM KRUGER **PLAINTIFF**

and

DIRECTOR OF PUBLIC PROSECUTIONS **DEFENDANT**

JUDGMENT

STRYDOM AJ:

1. The Plaintiff's cause of action is based upon alleged *"wrongful and malicious proceedings, instigated against the Plaintiff by persecutors, prosecuting the matter whilst acting in the course and scope of there employment with Defendant."*[1]

2. At the commencement of the trial the parties applied by agreement, that there should be a separation of issues as provided for in terms of Rule 33(4) and that the trial should only proceed in respect of the Defendant's first special plea of prescription. I accordingly granted separation of the issues as requested.

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[1] See: Record p 3, par 3.

SPECIAL PLEA OF PRESCRIPTION

3. The Plaintiff *inter alia* alleges that, on *6 October 2009*, the prosecutor prosecuting the matter, opposed the Plaintiff's bail application[2] and insisted that the Plaintiff remains in custody for a further period of seven (7) days in the Diepkloof Correctional Facility.[3] It is *common cause* between the parties that (a) all the criminal charges against the Plaintiff were withdrawn by a Prosecutor of the Defendant on 13 October 2009 in the Plaintiff's and his legal representatives' presence; and that (b) the Plaintiff's summons was served on the Defendant on 31 January 2013.

3.1. The *Defendant's case* is that since all charges was withdrawn against the Plaintiff on *13 October 2009*;[4] all the facts necessary for the Plaintiff to institute an action against the Defendant (as pleaded by the Plaintiff), were within the knowledge of the Plaintiff on the latter day, as envisaged by section 12(3) of the Prescription Act, 1969,[5] (hereafter ***"the Act"***). The Defendant further submitted that it is the only institution in the Republic of South Africa that has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto. The Plaintiff, being represented by a legal team on *13 October 2009* by necessary inference had to know that the Defendant is the only entity which has the authority to institute criminal proceedings or withdraw them. It is therefore the Defendant's case that, having regards to the fact that the Plaintiff's summons was served on the

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2 See: Record, p 7, par 9.1.

3 See: Ibid, par 9.2

4 The Defendant alleged in its Plea (Record, p 15, par 3) *"that the Plaintiff's claim fell due on 6 October 2009"*. However in opening address Counsel for the Defendant submitted that prescription of the Plaintiff's claim began to run on 13 October 2009. The Plaintiff never raised the issue that the latter date is not in accordance with the Defendant's plea. I will deal with this issue in more detail hereunder.

5 Act No. 68 of 1969.

Defendant on 31 January 2013, the Plaintiff's claim has become prescribed in terms of Section 11 of the Act, due to the fact that summons was served more than three (3) years after the date on which the Plaintiff's claim arose, being *13 October 2009*.

3.2. The *Plaintiff's case* on the other hand, is that the Defendant (debtor) wilfully prevented him from coming to know of the *Identity* of the debtor and the *existence of the debt*, as envisaged by Section 12(2) of the Act. The Defendant did this by withholding the South African Polices Services (hereafter ***"the SAPS"***) *Docket* pertaining to the arrest and detention of the Plaintiff and the *Court file* (of the proceeding in the Magistrate's Court for the District of Randburg), from the Plaintiff, and only made these documents available on 31 August 2012. Only after the Plaintiff was placed in possession of the latter documents did he gain the necessary knowledge to issue Summons against the Defendant. The Plaintiff relied for this rebuttal of the Defendant's First Special Plea of prescription on the provisions of Sections 12(2) and (3) of the Act.[6]

4. At the commencement of the trial the Counsel for the Defendant conceded that the Plaintiff through his attorneys had taken reasonable steps to acquire knowledge of the facts, from which the Plaintiff's claim arose.

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[6] Sections 12(2) and (3) of the Prescription Act 68 of 1969 provides as follows:
"When prescription begins to run -
(1) ...
(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

4.1. The Defendant's Counsel, Adv Pretorius, submitted that the documents the Plaintiff's attorneys acquired during August 2012 played no rol in the running of prescription; because the Plaintiff had acquired sufficient knowledge of the facts of his claim against the Defendant on 13 October 2009[7] to trigger the running of prescription of his claim on that day.

4.2. In accordance with her submission, Adv Pretorius further submitted that the parties should prepare and submit a Stated Case to Court, which the Plaintiff's Counsel, Adv Uys, rejected.

5. The parties relied on the same authority in support of their respective cases.

RELEVANT LEGAL PRINCIPLES

6. It is trite law that in regard to Extinctive Prescription:[8]

> ***"... time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case 'comfortably'."***

7. The facts in the judgment of ***Truter EA v Deysel***[9] are analogous to the facts *in casu*, therein that both matters dealt with extinctive prescription of debt in the form of a delict.

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[7] Counsel for the Plaintiff submitted that this submission was made with reference to the date of 6 October 2009. My notes however indicate that the date on 13 October 2009 in this regard.

[8] See: *Minister of Finance and Others v Gore N.O.* 2007 (1) SA 111 (SCA) [2007] 1 All SA 309 at par. [17] per Cameron JA and Brand JA. Judgment quoted in *Truter EA v Deysel* 2006 (4) SA 168 (SCA) at par [14].

[9] See: *Truter EA v Deysel* 2006 (4) SA 168 (SCA).

The court a quo in the matter of *Truter* found in favour of the plaintiff and held that ***"... prescription did not start to run in respect of Deysel's alleged claim until such time as Dr Steven's opinion was obtained, and the special plea had no merit."*** The Supreme Court of Appeal however disagreed and found as follows:[10]

> ***"[16] I am of the view that the High Court erred in this finding. 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 the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and pursue his or her claim.***
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> ***[17] In a delictual claim, the requirements of fault and unlawfulness do not constitute factual ingredients of the cause of action, but are legal conclusions to be drawn from the facts: 'A cause of action means the combination of facts that are material for the Plaintiff to prove in order to succeed with his action. Such facts must enable a Court to arrive at certain legal conclusions regarding unlawfulness and fault, the constituent elements of a delictual cause of action being a combination of factual and legal conclusions, namely a causative act, harm, unlawfulness and culpability or fault.'***
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> ***[18] In the words of this Court in Van Staden v Fourie (1989 (3) SA 200 (A) at 216D):***
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> > ***'Artikel 12(3) van die Verjaringswet stel egter nie die aanvang van verjaring uit totdat die skuldeiser die volle omvang van sy regte uitgevind het nie. Die toegewing wat die Verjaringswet in hierdie verband maak, is beperk tot kennis van 'die feite waaruit die skuld ontstaan.'***

[10] See: Ibid, paras. [16], [17], [18] and [19].

[19] ***'Cause of action' for the purposes of prescription this means:***

> ***'... 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.'"***

8. In the judgment of ***Claasen v Bester***[11], the principles enunciated in the matters of ***Truter*** and ***Gore*** were confirmed and applied. In ***Truter*** it was found that:

> *"[15]* ***These cases clearly do not leave open the question posed and not answered in Van Staden. They make abundantly clear that knowledge of legal conclusions is not required before prescription begins to run. There is no reason to distinguish delictual claims from others. The principles laid down have been applied in several cases in this court including most recently Yellow Star Properties 1020 (Pty) Ltd v MEC Department of Development Planning and Local Government Gauteng 2009 (3) SA 577 (SCA) [2009] 3 All SA 475, par.[37] where Leach AJA said that if the applicant had not appreciated the legal consequences which flowed from the facts its failure to do so did not delay the running of prescription."***

THE EVIDENCE

9. Two witnesses testified on behalf of the Plaintiff, being the Plaintiff himself (Mr A W Kruger) and his attorney of record (Mr Greyling Erasmus). The Defendant did not call any witness to testify on its behalf. The witnesses testified in Afrikaans, while the trial was conducted in English.

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[11] 2012 (2) SA 404 (SCA).

The Plaintiff (Mr A W Kruger)

10. The Plaintiff testified pertaining to the events that lead up to his arrest and incarceration on 6 October 2009. During 2008 he had business dealings with a person by the name of *Brain Johnston* (hereafter ***"Johnston"***) who undertook to repair motor cycles for him. A dispute arose as a result of which the Plaintiff collected his motor cycles and spare parts from the premises of Johnston. Johnston laid a false and unfounded criminal complaint against the Plaintiff with the SAPS. During October 2009 the Plaintiff was contacted by the Investigating Officer, dealing with the Complaint of Johnston, and he was asked to attend to the Douglasdale Police Station in order to finalise the charged which was laid against him. The Plaintiff was under the impression that he was only required to sign a document. However on his arrival at the said Police Station he was asked by the Investigating Officer to accompany him to the Randburg Magistrates' Court. The witness was adamant that he was not arrested at that time by the SAPS.

11. At the Magistrates' Court he followed the Investigating Officer into the Court cells. The Investigating Officer turned around and closed the cell door behind him, thereby locking the Plaintiff into the cell. When he asked the said Officer what was going on, he was told: ***"Jy weet wat jy gedoen het"***.

12. When the Plaintiff appeared in Court he was asked whether he wanted legal representation, which he confirmed. He cannot recall that any enquiry was made in respect of bail. Mr Kruger testified that he could not hear clearly what the prosecutor and the presiding Magistrate was saying to him and one another. He was informed by a person who sat next to him what was happing in court. It never occurred to the witness to inform the court that he was not able to hear what was

said. The next fact he remembers is that the Police Ordinance told him that he should accompany him. He was taken in a truck, together with other accused persons, to the Diepkloof Correctional Facility, where he was detained for seven (7) days. Whilst on the way to the latter prison (and while still in the Truck) he managed to contact his brother on a cell phone and arrange for an attorney to defend him. The Plaintiff's brother secured the services of an attorney who consulted with him while he was still incarcerated in the Diepkloof Correctional Facility.

13. During *cross examination* the witness indicated that his present attorney of record (Mr Erasmus) was not part of his legal team at that time. His attorney of record was Mr Gerhard van Willige, but Adv Uys, his present Counsel, was part of his legal team. Mr Kruger indicated that both Adv Uys and Mr van Willige consulted with him on the third day after he was detained in the said Prison.

14. On *13 October 2009* the Plaintiff was again brought before the Randburg Magistrates' Court. At this time he was represented in Court by Adv Uys. All the charges were withdrawn against the Plaintiff in his, as well as his legal teams', presence.

15. The Plaintiff testified in his affidavit, which was prepared by his legal team on his behalf for purposes of his bail application intended to be submitted to Court on 13 October 2009, that he was advised by his attorney of record to institute a *civil claim* against the complainant (Mr Johnson) *alternatively* against the Minister of Police on the grounds of unlawful arrest.[12] Mr Kryger confirmed in *cross examination* that he disposed of the affidavit, that the content thereof was correct and that it was drafted by his legal representatives.

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[12] See: *Trial Bundle D*, page 111.

16. He further testified that he consulted the first time with Mr Greyling Erasmus, his present attorney of record, during or about July 2010. Mr Erasmus requested him during this consultation to attempt to obtain the SAPS Docket, which he did, but was unsuccessful in his attempts.

Mr Greyling Erasmus

17. Mr Erasmus testified that he consulted with the Plaintiff during on or about *March or April 2010.* He initially advised the Plaintiff to institute action against the person who laid a criminal complaint against him with the SAPS (Mr Johnson) upon which he was arrested. Mr Erasmus however advised the Plaintiff that he do not foresee any prospects of success in recovering monies for damages suffered from Mr Johnson. The witness further testified that he then advised the Plaintiff that he should rather instituted a claim for damages against the Minister of Police.

18. The Plaintiff at one stage indicated to Mr Erasmus that the events and procedure were too traumatic for him and that he did not want to proceed with it any further. Mr Erasmus, as a consequence hereof, closed the Plaintiff's file with his attorney's firm.

19. The Plaintiff however contacted Mr Erasmus again in July 2010 and indicated that he was then desirous to proceed with civil action for damages against the Minister of Police. Mr Erasmus testified that he did not immediately after consultation with the Plaintiff proceed to issue summons against the said Minister. He first initiated steps to attempt to obtain a copy of the Plaintiff's Docket from the SAPS. He did this, because he did not have sufficient information to institute civil action for damages against the Minister of Police. Mr Erasmus was however not able to secure a copy of

the said SAPS Docket; but notwithstanding that he did eventually issued Summons against the Minister of Police.

20. 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 became came 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 *August 2012*, subsequent to which summons was issued against the Defendant and served on it on *31 January 2013*.

21. Mr Erasmus testified during cross examination that when the prosecution withdraw criminal charges against an accused person he understand that it means that ***"Die Staat gaan nie voort met vervolging nie."*** On further prompting of Mr Erasmus by Counsel for the Defendant on what he understood the legal consequences is of withdrawal of a criminal case by the State[13] his cryptic answered was: ***"Wanneer hulle nie 'n saak het nie."***

22. It was pointed out to Mr Erasmus in cross-examination that it does not make sense that he was able to issue summons against the Minister of Police, *without the content of the SAPS* Docket, but not against the Defendant. Mr Erasmus was asked why he did not deem it prudent to also institute action against the Defendant (The Director of Public Prosecutions) without being in possession of a copy of the SAPS Docket and a copy of the Court file. Mr Erasmus insisted that he was unable to issue summons

[13] The question that was asked by Adv Pretorius was ***"Wanneer trek die Staat 'n saak terug?"***

without having knowledge of the SAPS Docket pertaining to the prosecution and detention of the Plaintiff by the Defendant.

23. Mr Erasmus conceded in cross examination that he issued Summons against the Minister of Police in order to prevent the claim from prescribing. He indicated that the reason for this was because his instruction from his client was that the SAPS detained the Plaintiff after they mislead him to come to the relevant SAPS Station. According to his instructions the criminal complaint by Johnston was false. On the information Mr Erasmus had, the SAPS wrongfully arrested his client. Mr Erasmus had no information that indicated that the Prosecuting Authority went on a frolic of their own. Hence he did not issue summons against them.

24. 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,[14] made a copy thereof available to him. His answer was:

"Ek het geen rede om dit te betwis nie."

25. 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 curtesy. There was no duress placed on Mr Erasmus to make the concession. In my view the answer was given truthful by Mr Erasmus. I accordingly *for the record, noted the aforesaid concession* made by Mr Erasmus.

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[14] See: *Court Bundle A*; *Annexure "AWK1"*, page 28.

Parties closed rest there cases

26. The Plaintiff hereafter closed its case in respect of the Defendant's First Special Plea.

27. 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.

EVALUATION & DISCUSSION

28. It is clear from the *evidence of Mr Kruger* that he was, shortly after his detention (on 6 October 2009) and thereafter at all relevant times, represented by legal representatives.

29. On 13 October 2012 all criminal charges against Mr Kruger was withdraw by the prosecutor who acted on behalf of the Defendant in open court; and, more in particular in the presence of the Plaintiff and his legal team. Most notable, Mr Uys, the Plaintiff's present counsel also represented the Plaintiff in court on 13 October 2009 when all criminal charges were withdrawn against him.

Wilfully prevention by the debtor

30. The legal consequence of the concession made by Mr Erasmus is that the Defendant failed to prove that the Defendant wilfully prevented the creditor (Plaintiff) *"from coming to know of"* the existence of a debt as envisaged by Section 12(2) of the Act, because there is no evidence to support this inference.

30.1. In his Heads of Argument, the Counsel for the Plaintiff indicated that he intends to *"only focus on Section 12(3) of the Prescription Act."* In my view

this was done because there is no evidence to support any reliance by the Plaintiff on section 12(2) of the Act.

30.2. A careful examination of the pleadings indicates that the Plaintiff blames the Minister of Police (as a creditor) and not the Defendant, from preventing him from ascertaining the aforesaid *existence of a debt*. The Minister of Defence is not a party to these proceedings. *Abudandum cautella*, the Defendant, on the pleadings, did not *prevent* the Plaintiff from gaining access to the SAPS Docket (or the Court file) in order to obtain the information it allegedly needed.

31. It follows accordingly that the Plaintiff failed to prove that the Defendant wilfully prevented him (as the creditor) from coming to know of the existence of the debt (cause of action), as envisaged by Section 12(2) of the Act.

Identity of the debtor

32. The next question to consider is the Plaintiff's *"knowledge of the Identity of the debtor"*, as envisage 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 where place 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 prosecution (and be liable for unlawful arrest and / or wrongful and malicious proceedings) in respect of the Plaintiff after Johnson made a false criminal complain 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 withdraw 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).

Actual of deemed knowledge

34. 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 Act, on 13 October 2009.

34.1. The only facts 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 was withdrawn by the Defendant.

34.2. The legal consequence of a withdrawal of all charges against an accused is that the State (represented by the Defendant) no longer intends to prosecute the accused for an alleged criminal offence, primarily because it do not have a *prima facie case against the accused.* The absence of a *prima facie case* ultimately signifies that there is *no reasonable prospect of a successful prosecution of the accused by the State.*[15] The evidence indicates, as repeatedly found above, that all charges were withdrawn against the Plaintiff on 13 October 2009, in open court and in the presence of the Plaintiff's and his legal team.

34.3. I have absolute no doubt that the Plaintiff's attorney know exactly what the legal (and factual) consequences is when the state withdraw a criminal charge against an accused. This notwithstanding his cryptic answers in cross examination in this regard. In the event the Plaintiff did not understand what the legal consequences of the fact was, that the Defendant withdrew all charges

[15] See: Du Toit, De Jager, Skeen &Van der Merwe, *Commentary on the Criminal Procedure Act*, p 1-49, par 2; Comp. *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA).

against him, he could have acquired that that knowledge by exercising reasonable care and seeking an answer from his legal team. Moreover, the Plaintiff's legal team had a *legal duty* to inform him what the legal effect the withdrawal of the charges by the Defendant was, and advise him about his rights in this regard, including claims that he may have had against any wrongdoer.

34.4. Actual knowledge of the Identity of the Defendant as well as of the facts that sustain the Plaintiff's claim was proved and therefore the Defendant was not required to prove constructive knowledge of the facts (from which his cause of action arose) by the Plaintiff. The Defendant accordingly correctly conceded at the commencement of the trial that the Plaintiff had taken reasonable care through his attorney to acquire knowledge of the facts relating to his claim.

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

36. The submission on behalf of the Plaintiff, that the Plaintiff (or his legal team) only acquired knowledge of the facts from which his claim against the Defendant arose during the end of August 2012, after receiving a copy of the SAPS Docket and procuring a copy of the court file; and, that prescription thus only started to run from this date, is rejected.

36.1. No so-called *"new cause of action"* arose once the SAPS Docket and/or the court file was obtained by the Plaintiff and his legal team. As indicated above, the cause of action arose the moment when the all the criminal charges were withdrawn against the Plaintiff and the criminal proceedings were ended on 13 October 2009.

36.2. The procurement of the content of SAPS Docket and/or the court file only confirmed *facta probanda* (i.e. the facts to be proved in order to establish the cause of action). The facts contained in the documents the Plaintiff (and/or his legal team received during August 2012 were only *facta probantia* (facts proving the *facta probanda*). It is *trite law* that a Plaintiff need not have every jot and tittle of evidence to be aware of the fact that he has a *cause of action* against the Defendant. The only facts required to establish a cause of action are the *facta probanda, (and not the facta probantia)* which in this case is that all the criminal charges were withdrawn against the Plaintiff. The *facta probantia* is irrelevant with regards to the question as to whether a cause of action arose or not (in casu whether the debt has become due and payable).

37. The Defendant, who raised extinctive prescription against the claim of the Plaintiff, was required to *allege* and *prove* the *date of inception* of the period of prescription.[16] The Defendant alleged that the *"Plaintiff's claim fell due on 6 October 2009"*.[17] The Defendant however went further and pleaded: *"The Plaintiff's summons was served*

[16] See: *Gericke v Sack* 1978 (1) SA 821 (A).
[17] See: Record, Pleadings, p 15, Par. 3.

on the Defendant on 31 January 2013, which is more than three (3) years after the date on which the plaintiff's claim arose."[18]

38. Pleadings are made for the Court and not the Court for pleadings.[19] It is my duty to determine what the real issues between the parties are, provided that no possible prejudice can be caused to either party, and to decide the case on the real issues.[20]

38.1. The evidence of the Plaintiff is that the charges against him by the Defendant's employees were withdrawn on *13 October 2009*, being 7 days later, than the date alleged by the Defendant.

38.2. Adv Pretorius submitted, in *Opening Argument*, that the prescription against the Plaintiff started to run on *13 October 2009*. She also indicated this date in her Closing Argument and in her Heads of Argument. No amendment was sought by the Defendant in this regard. Counsel for the Plaintiff did not at any relevant time object to the submission in respect of the date on the ground that it is contrary to the Defendant's pleadings.

38.3. Adv Uys *correctly* pointed out, in his Heads of Argument, that the Plaintiff could not have had knowledge of the facts relating to his claim on 6 October 2009. This is so because according to the evidence (presented by the Plaintiff), the Plaintiff was charged and incarcerated on the latter day. The Plaintiff however shortly hereafter (in fact 7 days) gained the required extent of knowledge when all criminal charges against him were withdrawn.

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[18] See: Ibid, Par. 4.

[19] Comp. *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.

[20] See: Erasmus, *Superior Court Practice*, 2nd Ed. Van Loggenberg, Vol 2. p D1-229 and the authority quoted in footnote 1.

39. I can foresee no prejudice for the Plaintiff if I make a finding on the proven facts. It was proved, albeit by the evidence of the Plaintiff, that prescription started to run on *13 October 2009 instead of 6 October 2009.*

39.1. It is *common cause* that summons against the Defendant was only issued on 31 January 2013. This a substantial time longer than three years after the cause of action arose. I can think of no reasonable ground to consider that further examination of the facts will lead to a different conclusion.[21]

40. Accordingly the Defendant in my view is not required to amend its Plea in respect of the date of inception of prescription of the Plaintiff's claim from 6 October 2009 to 13 October 2009.

CONCLUSION

41. On a conspectus of the evidence presented before me and the authority referred to *above* the unavoidable inference is that the Plaintiff's claim has prescribed in terms of the provisions of Section 11 of the Prescription Act no. 68 of 1969, before the Plaintiff's Summons was delivered on the Defendant on 31 January 2013.

COSTS

41.1. The remaining issue to consider is costs. Counsel for the parties was of view that the costs should follow the result. I can see no reasonable reason to deviate from their submission.

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[21] Comp. Middleton v Car 1949 (2) SA 374 (A) at 386.

ORDER

The following order is made:

1. The Defendant's First Special Plea is upheld and the Plaintiff's claim is dismissed.

2. The Plaintiff is ordered to pay the Defendant's cost.

J.S. STRYDOM
ACTING JUDGE OF THE
NORTH GAUTENG HIGH COURT,
PRETORIA

Appearances:

Counsel for the Plaintiff:	*Adv. PL Uys*
Instructed by:	*Gildenhuys Malatje Inc.*
Counsel for the Defendant:	*Adv. LA Pretorius*
Instructed by:	*State Attorney, Pretoria*
Date of Trial:	15 October 2015
Date of Judgment:	28 April 2016