IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT336/2017

In the matter between:

ARRIE WILLEM KRUGER Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

THE APPLICANT'S CONCISE HEADS OF ARGUMENT

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1. INTRODUCTION AND IDENTIFICATION OF DISPUTES

1.1. The applicant sued the respondent for wrongful and malicious legal proceedings instituted against him, which malicious proceedings *inter alia* included the prosecutor's opposition of bail.

See: Judgement of the High Court, p 2, par 3

1.2. The action was set down for hearing in the High Court, Pretoria and the parties agreed at the beginning of the trial that there should be a separation of issues as provided for in terms of Rule 33(4) and that the

matter should only proceed to trial in respect the respondent's special plea of prescription.

1.3. The appeal involves an interpretation of Section 12(3) of the Prescription Act of 68 of 1969, which deals with when prescription shall begin to run and the section determines as follows:

> "3. *A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor* ***and 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 the exercise of reasonable care.*"

1.4. The respondent conceded at the commencement of the trial that the applicant's attorney had taken all reasonable steps to acquire knowledge of the facts relating to the claim and did not rely on the proviso at the end of Section 12(3). In consequence of the aforementioned concession any deemed knowledge will not have bearing on this dispute.

1.5. The respondent's case was simply that the applicant acquired knowledge of the facts necessary to institute action on 13 October 2009 when all charges against him were withdrawn.

See: Judgement of the High Court, p 2, par 3.1

1.6. The case of the applicant is that he only became aware of the facts and the reason for his detention when the respondent made a copy of the SAPS Police docket available to him on 31 August 2012, after same had been refused in writing and after he had compelled same in terms of the provisions of Rule 35(7). The content of the docket showed that the SAPS officer recommended bail. Additionally the content of the criminal court file which was obtained on 8 November 2012 (in consequence of the information gleaned from the docket) revealed to the applicant that, whereas the investigating officer advised the prosecutor before he had opposed the applicant's bail application that the applicant should be granted bail and that the issue between him and the complainant was a civil dispute rather than a criminal matter, the bail application on 6 October 2009 had been opposed.

See: Judgement of the High Court, p 3, par 3.2

1.7. The honourable court issued directions in terms of which written submissions were asked with regards to the following issues, namely:

1.7.1. Whether the High Court was justified in upholding the respondent's special plea of prescription on the basis that the facts the applicant and his attorneys knew on 13 August 2009 (the date is incorrect and should be 13 October 2009), when the charges against the applicant were withdrawn, were enough for him to institute action against the respondent;

1.7.2. 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 attorneys got access to the SAPS Police docket and discovered that the respondent had no basis for not allowing the applicant be released on bail and/or for not withdrawing the charges;

1.7.3. Whether, in view of the facts giving rise to the claim as contemplated in Section 12(3) of the Prescription Act 68 of 1969, 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;

1.7.4. What the implications this court's decision in the matter of **Links v MEC of Health 2016 (4) SA 414 (CC)** has on the questions raised in the present application.

1.8. At the outset, the applicant submits that the present matter falls squarely within the ambit of the principles enunciated in the matter of **Links v MEC of Health**. The Links v MEC of Health judgement strongly supports the arguments made by the applicant.

2. **The applicant's submissions in response to directions issued on 23 May 2018:**

2.1. The question for determination is whether the applicant's claim had prescribed by 13 October 2012 when all charges against him were withdrawn on 13 October 2009 after he had spent seven days in the Diepkloof Prison. That in turn depends upon the interpretation of the provisions of Section 12(3) of the Prescription Act.

2.2. The respondent bears the onus to prove that the applicant's claim had prescribed by the given date being 13 October 2012. In the context of Section 12(3) the respondent must show what facts the applicant was required to know before the prescription could commence running.

See: Links v MEC of Health 2016 (4) SA 414 (CC) at paragraph 24

2.3. Section 12 seeks to strike a fair balance between, on the one hand, the need for a cut-off point beyond where a person who had a claim to pursue against another may not do so after the lapse of a certain period of time if he/she had failed to act diligently, and on the other hand, the need to ensure fairness in those cases in which a rigid application of the prescription legislation would result in injustice.

See: Links v MEC of Health 2016 (4) SA 414 (CC) at paragraph 25

2.4. The respondent did not call any witness to testify at the trial of the matter and sought to discharge its onus by relying only on the fact that all charges against the applicant were withdrawn on 13 October 2009.

2.5. According to the respondent, the fact that the charges were withdrawn was, in the words of Section 12(3). "knowledge....from which the debt arose" which should have lead to applicant to believe that he had a claim against the respondent.

2.6. The applicant and his attorney's undisputed evidence were as follows:

2.6.1. The applicant appeared in the Magistrates Court of Randburg on 6 October 2009. At the time he was in court he could not hear what the prosecutor was saying;

2.6.2. The next fact he remembers is the Police Ordinance telling him that he should accompany him. He was then taken in a truck, together with other accused persons and transported to the Diepkloof Prison where he was detained for seven days;

2.6.3. On 13 October 2009, the applicant was again brought before the Randburg Magistrates Court and all charges against him were withdrawn;

2.6.4. The applicant consulted with his attorney on or about March or April 2010. The attorney was not able to issue summons against the respondent because he had no knowledge of facts, which would justify holding the respondent liable for the applicant's detention in the Diepkloof Prison;

2.6.5. Only after the attorney was placed in possession of the SAPS Police docket, and which facts were supported by the criminal court file documents, did facts come to his knowledge, which justified the issuing summons against the respondent as the content of the docket and the court file revealed that the respondent had opposed his bail application and in doing so had caused him to be sent to the Diepkloof Prison despite being advised by the police that the applicant should be granted bail and the matter was a civil dispute. Before receiving the docket and the court file the applicant had no reason to believe that the respondent was to blame for his detention in the Diepkloof Prison.

See: Judgement of the High Court

2.7. The issues to be considered are:

2.7.1. First, from what facts does the applicant's claim or "*debt*" arise?

2.7.2. Second, was the applicant in possession of sufficient facts to cause him on reasonable grounds to think that the detention and / or damage and / or injuries he sustained were due to the fault of the respondent?

2.8. To succeed with a claim for malicious legal proceedings, the applicant would have to allege and prove all of the following:

2.8.1. The respondent set the law in motion (instigated or instituted the proceedings);

2.8.2. The respondent acted without reasonable and probable cause;

2.8.3. The respondent acted with malice (or *animo iniuriandi)*;

2.8.4. The prosecution failed.

See: Minister of Justice and Constitutional Development and Others v Moleko (2008) 3 All SA 47 (SCA)

2.9. In a claim for liability based on malicious prosecution, malice or *animo iniuriandi* and causation are essential elements of the cause of action. Malice and causation have both factual and legal elements.

2.10. A party relying on prescription must at least show that the applicant was in possession of sufficient facts to cause him on reasonable grounds to think that the damage and / or detention and / or injuries were due to the fault of the respondent.

2.11. When all charges were withdrawn against the applicant on 13 October 2009, he was unaware of the fact that investigating officer dealing with

the matter had advised the respondent to grant the applicant bail because the matter was civil dispute.

2.12. Until the applicant had knowledge of the fact that the respondent's representative was advised to grant the applicant bail because the dispute between the parties was a civil one, the applicant and his attorney had no reason to believe that the respondent had acted wrongfully and maliciously (that respondent acted with malice (or animo iniuriandi)) and had caused the applicant's subsequent detention in the Diepkloof Prison for seven days. The evidence of the applicant in this regard stands unchallenged and undisputed.

2.13. The respondent bore the onus of having to show what facts the applicant was required to know before prescription would start to run with regards to his claim and that he had knowledge of those facts on or before 13 October 2009. The respondent failed to discharge the onus and he called no witnesses. It only relied on the fact that all charges were withdrawn against the applicant on 13 October 2009. This fact by itself could not have led the applicant to believe that he has a possible claim against the respondent so as to trigger the running of prescription as, simply stated, if this reasoning were correct each and every criminal claim that was / is withdrawn should attract a malicious proceedings civil claim. The respondent has failed to discharge the onus of proving its special plea of prescription.

2.14. Furthermore, in a claim for delictual liability, causation is one of the essential elements of the cause of action. There is no reason why in the present claim causation should also not play an equally important role.

See: Links v MEC of Health 2016 (4) SA 414 (CC) at paragraph 45

2.15. Until the applicant had knowledge of the facts that would have led him to think that possibly the respondent had acted with malice or *animo iniuriandi* and that this had caused his detention in the Diepkloof Prison, he lacked knowledge of the necessary facts as contemplated in Section 12(3) of the Prescription Act.

See: Links v MEC of Health 2016 (4) SA 414 (CC) at paragraph 45

3. CONCLUSION

To sum up:

3.1. The High Court was not justified in holding that the applicant and his attorney already had sufficient knowledge of the necessary facts on 13 October 2009 for him to institute action against the respondent.

3.2. On 13 October 2009, the only facts, which the applicant and his attorneys knew were that the criminal case against him, had been withdrawn.

3.3. In the context for a claim for malicious prosecution, prescription cannot begin to run when charges against someone are simply withdrawn. Something more is needed and in this specific matter one must realise that the respondent has simply relied on knowledge one of the four required elements to a malicious prosecution claim which in itself cannot be sustained.

3.4. The facts, which pointed the applicant and his attorneys in the process of instituting a claim against the respondent, only came to light when the police docket was provided to the applicant and once the court file showed that the bail application was in fact opposed. The documents in the docket clearly showed that the representative of the respondent was informed and advised to grant bail because the dispute between the applicant and the complainant was civil in nature. However, the court file shows that on 6 October 2009 bail was opposed, more specifically "*bail opp. Sch 6. Knobkierrie used.*"

3.5. The decision **Links v MEC of Health** support the applicant's contentions because in the judgement it was held that in a claim for delictual liability, causation is one of the essential elements of the

cause of action. There is no reason why in the present claim causation, more specifically that the respondent acted without reasonable and probable cause and that the respondent acted with malice (or *animo iniuriandi*) should also not play an equally important role.

3.6. Thus, until the applicant had knowledge of the facts that would have led him to think that possibly the respondent had acted without reasonable and probable cause and with malice or *animo iniuriandi* and that this had caused his detention in the Diepkloof Prison, he lacked knowledge of the necessary facts as contemplated in Section 12(3) of the Prescription Act

4. Under the circumstances, the applicant will ask the court for an order in the following terms:

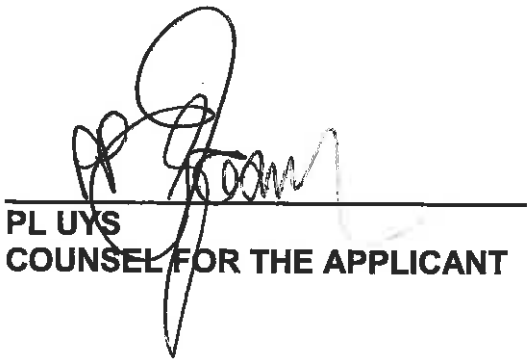
4.1. That the applicant be granted leave to appeal against the judgment in the matter of **Arrie Willem Kruger and the Director of Public Prosecutions** under case number 37681/2011 and that the costs of the applications for leave to appeal (in the court a quo, the Supreme Court of Appeal and the Constitutional Court) be costs in the appeal.

4.2. That the appeal be upheld with costs and that the judgement and order of the High Court be replaced with an order in the following terms:

4.2.1. That the special plea of prescription raised by the respondent is dismissed;

4.2.2. That the respondent be ordered to pay costs of the appeal.

DATED and **SIGNED** at **PRETORIA** on this 21 day of **JUNE 2018**



PL UYS
COUNSEL FOR THE APPLICANT

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 336/2017

In the matter between:

ARIE WILLEM KRUGER **APPLICANT**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

RESPONDENT'S WRITTEN SUBMISSIONS

A. INTRODUCTION

1.

The Chief Justice has issued the following directions:

"*(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 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 Department of Health, Northern Province*** *2016 (4) SA 414 (CC) has on the questions raised in this application."*

B. RESPONDENT'S WRITTEN SUBMISSIONS

2.

The Respondent will give his written submissions in the same order as they are listed in the directions from the Chief Justice.

B.1 First Direction

3.

Withdrawal of the charges against the Applicant carries the corollary that the Respondent thereby intimated that he did not have sufficient evidence or, for that matter, evidence sufficient to establish a *prima facie* case against the Applicant.

4.

It has the further effect that supports the Respondent's contention that the Prosecutor on 6 October 2009 could have had no basis, either factually or in law, to have requested the lower court to postpone the proceedings in terms of section 50(6)(d) of the Criminal Procedure Act.[1]

5.

Once the Respondent had withdrawn the charges against the Applicant, the Applicant having been represented by an attorney and counsel on that day (13 August 2009), it stands to reason that the Applicant would (or should) have enquired from his legal representatives what the effect of such withdrawal was. They could only have advised the Applicant that the prosecuting authority did

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1 51 of 1977 (as amended) – the "CPA".

not have a case against him, that the Prosecutor in all probability acted unlawfully on 6 October 2009 when the application in terms of section 50 of the CPA was moved and granted with the result that the Prosecutor who appeared on 6 October 2009 could not have had reasonable and probable cause to have opposed the Applicant's bail application.

6.

Malice, or, *animus iniuriandi*, is a legal fact that must be determined with reference to the other facts before Court. It follows that where the Prosecutor without reasonable and probable cause unlawfully opposed the Applicant's bail application, the inference appears, at least *prima facie*, to be unavoidable that the Prosecutor acted with the necessary *dolus*.

7.

All of the above would have been sufficient for the Applicant to have had reasonable grounds for suspecting fault on the part of the Prosecutor which should have caused him to seek further advice from his legal representatives regarding the potential liability of the Respondent. The record does not disclose whether he had done so. If he had done so, he would in all probability have been advised that withdrawal of the charges against him carries all the ramifications set out above with the result that it would have been sufficient for

the Applicant (and his legal team) to have instituted an action against the Respondent for malicious prosecution.

8.

This is in line with the judgment in ***Minister of Finance and Others v Gore N.O.***[2]

B.2 Second Direction

9.

The submission has already been made that withdrawal of the charges would have been sufficient to satisfy the *facta probanda* in the context of a claim for malicious prosecution.

10.

The Applicant need not have been aware of the full extent of his legal rights nor that he has evidence that would have enabled him to prove his case "*comfortably*". Prescription begins to run against a creditor when he has the minimum facts that are necessary to institute action.[3]

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2 2007 (1) SA 111 (SCA), para. [17].

3 ***Truter and Another v Deysel*** 2006 (4) SA 168 (SCA), para. [14].

11.

Even if the Applicant had not appreciated the legal consequences which flow from the fact that the charges against him were withdrawn, his failure to do so did not delay the running of prescription.[4]

12.

The information contained in the police docket and more in particular that of the constable who deposed to the affidavit to the effect that he has no objection against the Applicant being granted bail, constitutes evidence in support of the contention that the Prosecutor did not have reasonable and probable cause to have opposed the Applicant's application for bail and to move for a postponement for seven (7) days. It is trite that the Applicant need not be privy to such evidence before prescription will begin to run.[5]

13.

It is common cause that the Applicant instituted action against the Minister of Police without having had access to the police docket. It stands to reason that on the same supposition he could have instituted action against the Respondent.

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4 ***Truter and Another v Deysel*** (*supra*), para. [15].

5 ***Van Staden v Fourie*** 1989 (3) SA 200 (A), p.216D.

This was recognised by the Court of first instance in paragraphs 22 and 32.1.1 of its judgment.[6]

14.

The submission is therefore that prescription had begun to run when the charges against the Applicant were withdrawn and not only when his lawyers got access to the SAPS docket.

D.3 Third Direction

15.

The submission has already been made that absent information in the SAPS docket, 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[7] for the Applicant to have instituted action against the Respondent.

16.

The Applicant knew and it stands to reason that he must have conveyed to counsel about the background to his incarceration as summarized by the Court

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6 Delivered on 29 April 2016 in the matter between ***Arie Willem Kruger v Director of Public Prosecutions*** under Case No.: 37681/2011 – attached to the notice of application for leave to appeal to this Court as **Annexure "AWK1"** – paginated pages 34 to 35 and 37 to 38.

7 68 of 1969.

of first instance in paragraph [10] of the judgment.[8] The upshot of what he said and what the Court of first instance found is that one Brian Johnston laid a false and unfounded criminal complaint against him with the SAPS.

17.

Viewed collectively, the inference appears to be ineluctable that the Respondent had no case against the Applicant and that the Prosecutor clearly acted unlawfully in opposing the Applicant's bail application and moving for a postponement for seven (7) days. It is unthinkable that the Applicant's counsel would not have advised him thereanent at the time when the charges were withdrawn. The submission has already been made that withdrawal of the charges obviously connotes the Prosecutor acted without reasonable and probable cause when he or she opposed the Applicant's bail application. This then also led to withdrawal of the charges.

18.

Viewed differently, nothing stood in the Applicant's way to make enquiries from his legal team about the consequences of the withdrawal of the charges and whether a claim may lie against the Respondent.

19.

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[8] Typed pages 6-8 of the application for leave to appeal to this Court.

The submission has already been made that the information in the SAPS docket constitutes evidence with which the Applicant would have been able comfortably to prove an absence of reasonable and probable cause on the part of the Prosecutor. That however is not required for prescription to begin to run.

D.4 Fourth Direction

20.

The main findings of this Court in ***Links v Department of Health, Northern Province*** [9] are supportive of the Respondent's arguments in this matter.

21.

The main finding in paragraph [42][10] supports the Respondent's argument that with the assistance of professional individuals (in this case counsel and attorney), the Applicant was in the favourable position to have sought further advice in regard to the potential liability of the Respondent. This finding is further supported in paragraph [47] of ***Links***[11] where this Court found that it would be unrealistic for the law to expect a litigant who has no knowledge of medicine (*in casu* the law) to have knowledge of the potential liability of the

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9 2016 (4) SA 414 (CC).
10 pp.428C-E.
11 pp.429F-I.

respondent without first having had an opportunity of consulting a relevant (legal) professional or specialist (like an advocate) for advice.

22.

Unfortunately there is a dearth of evidence of what the Applicant had enquired from his counsel in regard to the potential liability of the Respondent. Even the attorney in evidence did not disclose what advice he and counsel had given the Applicant in this regard.

23.

It is submitted that the judgment of this Court in ***Loni v Member of the Executive Counsel, Department of Health, Eastern Cape, Bisho***[12] underscores the Respondent's argument in this matter. Not only did the Applicant *in casu* have sufficient facts at his disposal to make further enquiries with his legal representatives regarding the potential liability of the Respondent, but waited, for a period of nearly four (4) years before action was instituted. It is reminiscent of what this Court found in paragraphs [33] and [34] of ***Loni***.[13]

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12 (CCT54/17) [2018] ZACC 2; 2018 (3) SA 355 (CC) (22 February 2018) – "***Loni***".

13 pp.14-15.

C. CONCLUSION

24.

It is submitted that the application for leave to appeal falls to be dismissed, with costs, inclusive of the costs of two counsel.

DATED at PRETORIA on this the 27th 6DAY of JUNE 2018.

A C FERREIRA SC
L A PRETORIUS
COUNSEL FOR RESPONDENT

Annexure "DPP1"

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO.: 336/2017

In the matter between:

ARIE WILLEM KRUGER **APPLICANT**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

RESPONDENT'S LIST OF AUTHORITIES

NO.:	DESCRIPTION
1.	***Minister of Finance and Others v Gore N.O.*** 2007 (1) SA 111 (SCA)
2.	***Truter and Another v Deysel*** 2006 (4) SA 168 (SCA)
3.	***Van Staden v Fourie*** 1989 (3) SA 200 (A)
4.	***Links v Department of Health, Northern Province*** 2016 (4) SA 414 (CC)
5.	***Loni v Member of the Executive Council, Department of Health, Eastern Cape, Bisho*** (CCT54/17) [2018] ZACC 2; 2018 (3) SA 355 (CC) (22 February 2018)