IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

**Reportable / Not reportable**

Case no: A188/2023

In the matter between

**DANIE KLUE** **APPELLANT**

and

**MINISTER OF JUSTICE AND CORRECTIONAL SERVICES** **RESPONDENT**

Coram: Naidoo J et Van Rhyn J et Mahlatsi AJ

Heard: 11 October 2024

Delivered: 6 January 2025

Summary: Appeal- civil claim for compensation for wrongful conviction - cause of action - failure to act in accordance with duty of care by magistrate and judges - special pleas of prescription and non-compliance with notice in terms of Act 40 of 2002 - new point raised at hearing of appeal - pleadings not amended accordingly. Appeal dismissed.

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**ORDER**

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1. The appeal is dismissed with costs which costs shall include the Respondent's

counsel fees on Scale B as provided for in Rule 67A read with Rule 69.

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**JUDGMENT**

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**Van Rhyn J (Naidoo J et Mahlatsi AJ concurring)**

[1] The appellant, Mr Danie Klue, (the plaintiff in the court a quo) instituted a delictual claim for compensation against the Minister of Justice and Correctional Services, the respondent (cited as the defendant in the court a quo), for damages emanating from criminal proceedings instituted by the State. This is an appeal against the whole of the judgment of Loubser J, delivered on 18 April 2023, when the following order was made:

'1. The special plea relating to non-compliance with the provisions of Act 40 of 2002 is upheld.

2. The special plea relating to prescription is upheld.

3. The action instituted by the plaintiff against the defendant is dismissed with costs.'

The matter comes before us with leave from the Supreme Court of Appeal.

[2] The relevant facts pertaining to the claim instituted by the appellant are as follows: The appellant was arraigned at the Regional Court, Bloemfontein on one charge of sexual assault in contravention of s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and two charges of rape in contravention of s 3 of the Sexual Offences Act of a minor child. He was convicted on 26 November 2013 and sentenced in respect of the 3 counts to an effective term of life imprisonment on 3 December 2013. The appellant's application for leave to appeal against the conviction was dismissed. Leave to appeal the sentences imposed was granted by Regional Magistrate Sepato (the 'magistrate') on 27 January 2014.

[3] The appellant filed a petition with the High Court, Free State Division, requesting the Judge President for leave to appeal against his convictions. The petition was dismissed on 9 December 2015. On 27 February 2017 the Supreme Court of Appeal granted the appellant leave to appeal to the High Court in respect of count 1, the charge of sexual assault. The Supreme Court of Appeal pointed out that the appellant had an automatic right of appeal in

respect of counts two and three pertaining to which sentences of life imprisonment were imposed by the trial court. On 4 December 2017 the appeal was heard by Mbhele J and Chesiwe AJ (the 'two judges' or 'judges'). On 9 March 2018 judgment was handed down in terms whereof the appellant unsuccessfully appealed against the conviction and sentences in the Free State High Court. The appellant approached the Supreme Court of Appeal for special leave to appeal against the judgment of the two judges. The application for leave to appeal was heard on 18 February 2020 and on 21 April 2020 the Supreme Court of Appeal overturned the appellant's convictions and sentences.

[4] By that time, consequent upon his conviction, the appellant had served a term of imprisonment of seven years. He had been detained for a period of two years prior to his conviction with the result that he was incarcerated for a period of approximately 9 years. Plaintiff's first letter of demand addressed to the defendant is dated the 19th of August 2020. Summons was issued on 22 April 2021 and served at the offices of the State Attorney, Bloemfontein on 26 April 2021. An amendment to the particulars of claim was effected on 17 December 2021. The appellant originally relied upon an alleged breach of duty of care by the Regional Magistrate as a cause of action. The amended particulars of claim included an alleged breach of duty of care by the two judges who heard the appeal on 4 December 2017.

[5] The plaintiff's cause of action as formulated in the amended particulars of claim is that the trial magistrate and the judges '. . . had in breach of their duty in law which is a duty of care towards plaintiff failed to carry out their functions with the necessary professional skill, care, and application. . .'. It is pleaded that their conduct fell short of that expected from the reasonable person in their position. It is furthermore averred that the magistrate and the judges were biased towards the plaintiff, acted intentionally and maliciously, alternatively grossly negligent, and, negligent in that the magistrate allowed the state prosecutor to lead impermissible evidence, convicted the appellant on the charges '. . . in absence of a total lack of credible evidence', failed to have regard to material inconsistencies and contradictions in the State's case and failed to afford the appellant a fair trial in terms of s 35(3) of the Constitution. Regarding the judges, it is alleged that they erred in finding that the evidence presented by the complainant was reliable. Paragraph 10 of the amended particulars of claim reads as follows: 'The Plaintiff's cause of action arose and/or was completed or has fully accrued on 21 April 2020 when the Supreme court of Appeal upheld the Planiff's appeal'.

[6] In the respondent's questionnaire in terms of the provisions of rule 37 of the Uniform

Rules of Court, the appellant was requested to make, *inter alia*, the following admissions:

'3.12 The Plaintiff's alleged cause of action is that the trial court (Magistrate Sepato) breached a duty of care she had during the trial in the magistrates court towards the plaintiff'.

3.13 The Plaintiff's alleged cause of action arises from actions/omissions during the criminal trial, which concluded with the sentencing of the Plaintiff on 3 December 2013.'

The plaintiff admitted both questions as contained in paragraphs 3.12 and 3.13. It was added that the appellant's cause of action furthermore includes a breach of duty of care by the judges as set out in the amendment dated 17 December 2021. The first letter of demand by the appellant referred to his unlawful arrest as cause of action. A second letter of demand is dated the 22nd of September 2020. In the second letter of demand the breach of duty of care of the magistrate towards the appellant, in that she intentionally and maliciously, alternatively, negligently failed to carry out her functions with the necessary professional skill, care and application was indicated to be the cause of action relied upon by the appellant.

[7] It is averred that the magistrate as well as the judges are under the defendant's control, supervision and guidance and therefore vicarious liability has been established. The plaintiff pleaded that both the magistrate and the judges acted within the course and scope of their employment with the defendant. The appellant pleaded that as a consequence of the 'wrongful and intentional alternatively wrongful negligent conduct' of the magistrate and the judges, he was imprisoned and allegedly suffered general and special damages, *inter alia*, for '*contumelia*, impairment of dignity for pain, suffering, discomfort, loss of amenities of life and psychological trauma' in the total amount of R4 500 000 and with further specific amounts in respect of special damages for loss of earnings and medical costs. The appellant claims payment of the total amount of R7 270 000 with interest from date of service of summons and cost of suit from the respondent.

[8] Save for two special pleas of, firstly non-compliance with the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the 'Act') and secondly, prescription of the appellant's claim in terms of the provisions of s 11 of the Prescription Act 68 of 1969 ('Prescription Act'), the respondent denied any wrongful conduct by the magistrate and by the judges or that they, being the two judges, persisted with any wrongful action allegedly committed by the magistrate. In paragraph 13 of the respondent's amended plea, it is denied that the magistrate and the judges breached their duty of care

towards the appellant and failed to carry out their functions with the necessary professional skill, care and application. The respondent pleaded that the appellant failed to set out the nature and extent of the alleged duty of care which the magistrate and the judges allegedly had towards the appellant. It was furthermore pleaded by the respondent that the appellant also failed to set out in what manner the presiding officers did not carry out their functions with the necessary skill, care and application nor did plaintiff set out in what manner the conduct of the presiding officers allegedly fell short of that expected from the reasonable person in their position. Alternatively, the appellant failed to plead how the presiding officers should have conducted themselves differently.

[9] At a pre-trial conference the parties agreed that the two special pleas would be argued first and separately from the merits and the quantum of the appellant's claim. The matter came before Loubser J on 7 February 2023 for the hearing of the two special pleas. Judgment was handed down on 18 April 2023. It is the judgment on the two special pleas that forms the subject of this appeal. The court a quo held that in as far as the appellant relies on a breach of duty of care of the magistrate as well as a breach of duty of care of the judges, his cause of action arose at the latest on the 17 of January 2014 and 9 March 2018 respectively with the result that any claim he may have had, has been extinguished by prescription.

[10] The appellant's grounds on which the appeal is based can concisely be summarized as follows: The court *a quo* erred in:

(a) upholding the two special pleas by finding that the appellant's cause of action was not completed or has not fully accrued on 21 April 2020 when the Supreme Court of Appeal upheld the appellant's appeal;

(b) finding that the debt was not due on 21 April 2020 and that the notices delivered in terms of the Act was therefore not timeously sent to the respondent;

(c) failing to find that on 21 April 2020, and only then, everything has happened which would entitle the appellant to institute action and pursue his claim and therefor appellant's cause of action was only completed or has fully accrued on the said date;

(d) not interpreting the applicable case law pertaining to the matter correctly and failing to take into account that the appellant was prevented from issuing summons due to superior force as contemplated in s 13 of the Prescription Act; and

(e) failing to take into account that a valid court order existed as issued by the Regional Court, Bloemfontein and that the aforesaid court order was not unlawful, until being overturned.

[11] The arguments relied upon by the appellant as it appears in the heads of argument are, inter alia, that the judgment handed down by the magistrate was lawful and remained lawful until being overturned by the Supreme Court of Appeal. It would have been untenable for the appellant to issue summons for damages prior to the conviction being overturned on the basis that the respondent would have pleaded such claim to be premature. Therefore, the cause of action was fully accrued on 21 April 2020. Apart from the above, the appellant furthermore contends that he was prevented from issuing summons due to a superior force (or order of court) as contemplated in s 13*(a)* of the Prescription Act.

[12] In the heads of argument submitted by Ms Wright, counsel on behalf of the respondent, the contention pertaining to the non-compliance with the provisions of the Act is that no replication was served in response to the allegation in the amended plea that the required letter of demand was sent more than six months after the appellant's cause of action arose. Insofar as the appellant relies on a breach of a duty of care by the magistrate, his cause of action arose on 3 December 2013, alternatively on 27 January 2014. In as far as the appellant relies on a breach of duty of care by the judges, the cause of action arose on 9 March 2018. Neither of the two letters of demand indicate the appellant's intention to claim damages following from any wrongdoing by the judges who had dismissed his appeal.

[13] The respondent furthermore contends that the allegations regarding the alleged wrongdoing by the judges who had dismissed the appellant's appeal were only included in the particulars of claim by way of an amendment on 17 December 2021. The respondent carries the burden of proof in respect of the plea of prescription, but only insofar as the provisions of s12 of the Prescription Act are applicable. Section 13 of the Prescription Act provides that in the event that a creditor is prevented by superior force from interrupting the running of prescription, the period of prescription is postponed and will not be completed before a year has lapsed after the day when he was so prevented. During arguments before the court a quo, the appellant did not rely on s 12(3) of the Prescription Act which provides that a debt shall not be deemed to be due until the creditor has knowledge of-

(a) the identity of the debtor; and

(b) the facts from which the debt arises.

From the contents of the heads of argument filed by the appellant, he now not only relies on the provisions of s 12 (3) but also on s 13 of the Prescription Act.

[14] During argument Mr Pretorius, counsel on behalf of the appellant, indicated that as a result of his misunderstanding of the law of delict he had erroneously persisted with the argument that, at the time of the conviction of the appellant on 26 November 2013, a wrong was committed. As a result, and in accordance with his incorrect appreciation of the law, the argument previously on behalf of the appellant was that a delictual debt arose with the conviction of the appellant. However, since perusing the heads of argument filed by the respondent on the day prior to the hearing of this appeal, Mr Pretorius is now convinced that no cause of action or set of facts from which a delictual claim arises existed at the time of the conviction of the appellant on 26 November 2013. This concession was made notwithstanding Mr Pretorius's contention at the commencement of the hearing of the appeal that the conviction of the appellant by the trial magistrate was unlawful.

[15] Mr Pretorius argued that the court *a quo* incorrectly applied the law of prescription to the facts of the matter. The belated argument on behalf of the appellant, that no cause of action or set of facts from which a delictual claim arises existed at the time of the conviction, was not dealt with at the hearing in the court *a quo*. This argument was also not dealt with in the heads of argument filed in this appeal. No supplementary heads of argument were filed. Thus, the argument goes, the period of six months in terms of the Act as well as the period of three years in terms of the Prescription Act only commenced on the date upon which the Supreme Court of Appeal overturned the conviction, being 21 April 2020. The debt became due on the said date with the result that the appellant has complied with the provisions of the Act and his claim against the respondent had not been extinguished by prescription. The appellant therefore prays that the appeal be upheld, that the two special pleas be dismissed and his claim be reinstated with a cost order in favour of the appellant.

[16] Ms Wright, notwithstanding the complete turnabout in the legal arguments by appellant's counsel, argued that even if the delict arose when the Supreme Court of Appeal overturned the conviction, the cause of action still remains as pleaded in the appellant's particulars of claim. The appellant did not request an opportunity to amend the particulars of claim. The appellant averred in the particulars of claim that he suffered patrimonial loss as a

consequence of the breach of a duty of care by the trial magistrate and the judges who were biased towards the plaintiff and acted intentionally and maliciously alternatively negligently. This, as pleaded by the appellant, occurred during 2013 up to March 2018. As already referred to above, the appellant in the rule 37 questionnaire indicated that the cause of action is confined to the issue of the breach of a duty of care by the magistrate and the judges and not malicious proceedings by the defendant.

[17] The respondent contends that this is what ultimately served before the court *a quo*. The court *a quo* did not deal with the new argument as same was only raised at the hearing of this appeal. The respondent, even if the appeal succeeds on the new point raised by the appellant, should in any event not be mulcted with costs. Regarding the 'old argument', the question is how does the concession that no delict occurred at the time of the conviction of the appellant by the trial magistrate nor when the judges dismissed his appeal, impact upon the adjudication of the matter on appeal. Furthermore, how should this court then deal with the assertion that the regional magistrate and the judges acted with bias towards the appellant, intentionally, alternatively negligently or even grossly negligently, by allowing impermissible evidence during the criminal trial, by disregarding the inconsistencies and contradictions in the State's case and by failing to carry out their functions with the necessary professional skill and care, when the appellant now contends that no wrongful and negligent act or omission existed as pleaded in the particulars of claim, but were only established later.

[18] A party should generally not be allowed to argue new issues on appeal that were not raised or considered by the lower court. A question of law may be advanced for the first time on appeal if its consideration then involves no unfairness to the party against whom it is directed.[1] A second requirement for the raising of a new point on appeal is that the point must be covered by the pleadings.[2] There are exceptions and circumstances when a party may be allowed to rely on an issue which was not covered in the pleadings. In *Barkhuizen v Napier* 2007(5) SA 323 the Constitutional Court held as follows regarding a point of law raised for the first time on appeal:

'39. The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on

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[1] *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 290D-F.

[2] *Cole v Government of the Union of SA* 1910 AD 263 at 272-273.

appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial.'

[19] There are material differences between malicious legal proceedings and wrongful legal proceedings. The cause of action for a claim for damages caused by malicious criminal proceedings is the *actio iniuriarum.* The plaintiff bears the onus in respect of all the elements of the *actio iniuriarum.*[3] To succeed with a claim for malicious prosecution, a claimant must allege and prove that:

(a) The defendants set the law in motion – they instigated or instituted the proceedings;

(b) the defendants acted without reasonable and probable cause;

(c) the defendants acted with 'malice' (or *animo iniuriandi*) – that is, with the intention to injure the plaintiff; and

(d) the prosecution failed. [4]

[20] The *actio legis Aquiliae* enables a plaintiff to recover patrimonial loss suffered through a wrongful and negligent act or omission of the defendant. Liability depends on the wrongfulness of the act or omission of the defendant. The plaintiff must allege and prove the act or omission on which the cause of action is based and must allege and prove the facts from which wrongfulness can be inferred. If wrongfulness cannot be inferred from the nature of the loss suffered, the defendant's legal duty to the plaintiff must be defined and the breach alleged. If a specific breach of duty (such as a public authority's duty) is relied on, the nature of the duty must be stated.[5]

[21] The purpose of pleadings is to define the issues for the other party and the trial court and for that matter, any court of appeal. It is the duty of the court to adjudicate upon the disputes and those disputes alone.[6] Since the object of pleadings is to define the issues between them, the parties should, as a rule, be held to their cases as pleaded. A court deciding a case may not have recourse to issues falling outside the pleadings. In *South*

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[3] *Rudolph and Others v Minister of Safety and Security* 2009 (5) SA 94 (SCA).

[4] *Minister of Justice and Constitutional Development and others v Moleko* [2008] 3 All SA 47 (SCA); 2009 (2)

[5] *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A).

[6] Barkhuizen v Napier 2007 (5) SA 323 (CC) para 39.

*African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) the Constitutional Court held as follows regarding the question whether a party may be permitted to raise a new cause of action on appeal:

'[202] It is a principle of our law that a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them. This is a fundamental principle of fairness in the conduct of litigation. It promotes the parties' rights to a fair hearing which is guaranteed by section 34 of the Constitution.'

[22] The cause of action simply means the cause of the plaintiff's (or applicant's) complaint. In a civil action, the cause of action comprises different elements which consists of the combination of facts that are material and which must be alleged in the papers and proved in court in order to be entitled to the relief the plaintiff is seeking from the defendant.[7] Sections 12(1) and (3) of the Prescription Act provide as follows:

'(1) Subject to the provisions of subsection (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) . . .

(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.'

[23] The word 'debt' was described in *Drennan Maud & Partners*[8] as follows: 'In short, the word "debt" does not refer to the "cause of action", but more generally to the "claim". . . In deciding whether a "debt" has become prescribed, one has to identify the "debt", or, put differently, what the "claim" was in broad sense of the meaning of that word.' For purposes of the Prescription Act the term 'debt' has a wide and general meaning. It includes an obligation to do something or refrain from doing something.[9] The Supreme Court of Appeal dealt with the meaning of the phrase 'debt due' in *Truter and Another v Deysel* 2006 (4) SA 168 SCA) and held as follows:

'For 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

[7] *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23.
[8] *Drennan Maud & Partners V Pennington Town Board* 1998 (3) SA 200 at 212G-J.
[9] *Barnett and Others v Minister of Land Affairs and Others* 2007(6) SA 313 (SCA) at 321I-J.

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.'[10]

[24] The appellant's case, now, is that his cause of action only arose and prescription only started running after the Supreme Court of Appeal overturned the conviction on 21 April 2020. This argument corresponds with a cause of action for claim for damages caused by malicious criminal proceedings and wrongful conviction. It has to be kept in mind that the appellant indicated in the Rule 37 proceedings that the claim is based upon a breach of a duty of care and not malicious proceedings.

[25] It is settled law that prescription begins to run as soon as the debt is due and the creditor knows the identity of the debtor and the facts giving rise to the debt. It has authoritatively been held that knowledge of legal conclusions is not required before prescription begins to run.[11] The cause of action as pleaded in the particulars of claim has not been amended to correspond with the argument raised at the hearing of the appeal. The alleged breach of duty of care by the magistrate and the two judges remain the plaintiff's cause of action for his claim for compensation for wrongful conviction. A right not provided for in the Constitution is the right to be compensated for wrongful conviction or miscarriage of justice. Since there is no constitutional or statutory right to claim compensation for wrongful conviction, a claimant has to resort to the law of delict to claim compensation.

[26] In *Nohour and Another v Minister of Justice and Constitutional Development* 2020 (2) SACR 229 (SCA) the accused were tried and convicted of kidnapping and rape. On appeal to the Supreme Court of Appeal, the convictions and sentences were set aside. In their claim for compensation for wrongful conviction the plaintiffs averred that the prosecutor omitted to disclose facts relevant to the charges in the criminal trial to the regional court and to the accused (the plaintiffs). The Supreme Court of Appeal held that the prosecutor's failure to disclose the particular information 'was most certainly gross'.[12] The Supreme Court of Appeal discussed the relevant case law[13] regarding negligence, wrongfulness and causation pertaining to the law of delict and held as follows regarding the issue of wrongfulness:

'[14] Wrongfulness is an essential element in delict. The Constitutional Court held in this regard that

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[10] At para 15.

[11] *Mtokonyana v Minister of Police* 2018 (5) SA 22 (CC) para 45-51.

[12] *Nohour and Another v Minister of Justice and Constitutional Development* 2020 (2) SACR 229 (SCA) [10].

[13] Minister of Safety and Security v Duivenboden 2002 (6) SA 431 (SCA); Kruger v Coetzee 1966 (2) SA 428 (A); Van Eeden v Minister of Safety and Security 2003(1) SA 389 (SCA); Le Roux and Others v Dey 2011 (3) SA 274 (CC); Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC).

the element of wrongfulness acts 'as a brake on liability' and that conduct is not to be regarded as wrongful if public or legal policy considerations determine that it would be 'undesirable and overly burdensome to impose liability'. In Le Roux and Others v Dey, the Constitutional Court confirmed that the criterion of wrongfulness depends on a judicial determination as to whether it would be reasonable to impose liability on the defendants, which reasonableness has nothing to do with the reasonableness of the defendant's conduct or omissions. Therefore, even if it were to be found that there was negligence herein, the mere fact of such negligence may not make the omission wrongful. In order to prevent the 'chilling effect' that delictual liability in such cases may have on the functioning of public servants, such proportionality exercise must be duly carried out and the requirements of foreseeability and the proximity of harm to the action or omission complained of, should be judicially evaluated.'

[27] I am of the view that the change in strategy cannot avail the appellant. Not only because the point is being raised for the first time at the hearing of the appeal, but certainly because the point of law is not covered by the pleadings. The plaintiff's cause of action is a conflated claim based upon the *actio inuriarum*, *actio legis Aquiliae* and wrongful criminal proceedings and conviction. The requirements for a claim based upon malicious proceedings were not pleaded, nevertheless the expression 'malicious' was included in the particulars of claim. It was on this basis that the plea, including the two special pleas, was drafted and filed by the respondent. A delictual debt is generally due as soon as a delictual cause of action arises because a delictual debt is not usually subject to a condition or prior agreement postponing the time of performance. Therefore, with regard to prescription of a delictual debt, it is particularly important to know when the cause of action arises. The generally accepted concept of a delictual cause of action is that it consists of a combination of facts and legal conclusions; namely an act, harm, causation, unlawfulness and, where applicable, fault. When a delictual cause of action arises the defendant's debt becomes due and, subject to the requirement of knowledge in terms of s 12(2) and (3) of the Prescription Act, the prescription period begins to run.

[28] It is common cause that the new point taken on appeal was not argued in the court a quo. In *Notyawa v Makana Municipality and Another* 2020 (2) BCLR 136 (CC)[14] Froneman J, having regard to what the Constitutional Court had re-affirmed in *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* 2019 (7) BCLR 850 (CC) where counsel raised a new point when the matter came before the Constitutional Court, expressed

[14] *Notyawa and Another v Makana Municipality* [2019] ZACC 43; (2020) 41 ILJ 1069 (CC).

the court's disapproval of a litigant changing its case as the matter proceeded through the various courts.[15]

[29] The appellant did not seek an amendment of the particulars of claim. I am not satisfied that, had the new point been so raised earlier, respondent would not have been able to plead facts which would have been an answer to the new point raised on appeal. The court *a quo* dealt with the averments in the particulars of claim, as it still stands, and found that in as far as the plaintiff relies on a breach of a duty of care by the magistrate, the appellant's cause of action arose and the debt became due on 3 December 2013 being the date on which the appellant was sentenced, alternatively, at the latest on the 27th of January 2014 being the date on which the magistrate dismissed the appellant's application for leave to appeal. In as far as the appellant relies on any wrongful and/or negligent conduct by the judges, the appellant's cause of action arose on 9 March 2018, being the date on which the appeal was dismissed. The court *a quo* considered the averment in the appellant's particulars of claim that his cause of action arose and/or was completed or has fully accrued on 21 April 2020 when the Supreme Court of Appeal upheld the plaintiff's appeal in finding that the plaintiff's cause of action did not arise on 21 April 2020 but that the plaintiff had acquired a complete cause of action for the recovery of his debt, and that the entire set of facts which he had to prove against the respondent was already in place when he was sentenced by the trial magistrate on the 3rd of December 2016 and when the trial magistrate dismissed the application for leave to appeal on 27 January 2014, respectively.

[30] Only on the 17th of December 2021 did the appellant amend his particulars of claim to include the alleged conduct of the two judges. It was furthermore held that the appellant's claim in relation to the conduct of the judges had already become prescribed on 10 March 2021, some nine months before the claim in this respect was included in the amended particulars of claim. The court *a quo* held that the appellant's claim had already become prescribed both in relation to the conduct of the magistrate and the judges by the time the summons was served on 26 April 2021. As far as the prior notices in terms of the Act are concerned, it was held that both these notices only referred to the conduct of the trial magistrate and not the conduct of the High Court judges and therefor the notices did not comply with the provisions of the Act. In any event, the said notices were delivered after the expiry of a period of six months from date on which the debt arose.

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[15] Id at [59] and [60].

[31] The findings by the court *a quo* pertaining to prescription the notices in terms of the Act cannot be faulted. On the basis that a party who takes a matter on appeal is bound by the record of the case in the court *a quo* and cannot raise a new point by relying on arguments or circumstances which does not appear, or which cannot be deduced, from the record, I am of the view that the appeal ought to be dismissed.

[32] The further issue to be adjudicated upon is the matter of costs. At the hearing of the matter, Mr Pretorius conceded that due to his lack of knowledge regarding the law of delict, he misunderstood his client's claim against the respondent. He therefore conceded that he did not argue the new point during the hearing in the court *a quo* and it has not been raised in the heads of argument or mentioned to the other party until advanced in court during the appeal. The respondent therefore argued that the appellant, Mr Pretorius's client should not be mulcted with costs as a result of this concession in the event of the appeal being unsuccessful. The respondent furthermore argued that, in any event, the respondent should not be ordered to pay the costs of the appeal. Ms Wright argued that Mr Pretorius, in person, should be responsible for the costs of the appeal.

[33] The purpose of an award of costs to a successful party is to indemnify such party for the expense to which he or she has been put through having been unjustly compelled to initiate or defend litigation, as the case may be. Even the general rule that costs follow the event is subject to the overriding principle that the court has a judicial discretion in awarding costs. Mr Pretorius readily conceded that he is not fully acquainted with the law of delict. He furthermore informed the court that he obtained guidance from a senior colleague on the day prior to the hearing of the matter. This ultimately resulted in the change in the appellant's approach to the matter. However, it is unusual to order a legal representative to pay the costs of litigation on the basis that counsel made an error of judgment concerning the applicable legal principles. There is no indication that counsel on behalf of the appellant acted in an irresponsible, grossly negligent or reckless manner. I am therefore not convinced that a punitive costs order is called for having regard to the concession made by Mr Pretorius and the prevailing circumstances of this matter.

[34] In the result I propose the following order:

1. The appeal is dismissed with costs which costs shall include the Respondent's counsel fees on Scale B as provided for in Rule 67A read with Rule 69.

[redacted]

VAN RHYN J

I concur.

[redacted]

MHLATSI AJ

I concur.

[redacted]

NAIDOO J

**and it is so ordered.**

Appearances

For the Appellant: ADV K PRETORIUS

Instructed by: J G KRIEK & CLOETE ATTORNEYS
BLOEMFONTEIN

For the Respondent: ADV G J M WRIGHT

Instructed by: STATE ATTORNEY
BLOEMFONTEIN