IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Not Reportable

Case no: A305/2024

In the matter between:

SUPERSTRIKE INVESTMENTS (PTY) LTD **APPELLANT**

And

RESPONDENT

ARIELLE VAN DER MERWE

Neutral citation: *Superstrike Investments (Pty) Ltd v Van der Merwe* (Case no A305/2024) [2026] ZAWCHC … (April 2026)

Coram: **NUKU J, PANGARKER J, AND MORRISSEY AJ**

Heard: 18 August 2025

Delivered: 7 April 2026

Summary: ***Prescription* –** Extinctive prescription – Period of prescription – When it commences – claim based on delict – Under s 12 (3) of the Prescription Act of 1969, prescription begins to run from when the creditor has knowledge or is deemed to have knowledge of the identity of the debtor. Whether on the basis of the evidence presented, it was such that the respondent, by taking reasonable steps and/or making reasonable enquiries, could have established the minimum facts which needed to be proved in order for the appellant to be potentially as liable for her damages as the other defendants whom the appellant sued timeously.

ORDER

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1. The appeal is upheld with costs, such costs to include the costs of two counsel, with senior counsel's costs to be taxed on Scale C and junior counsel's costs to be taxed on Scale B.

2. The order of the Court *a quo* is set aside and replaced as follows:

   a. The special plea is upheld with costs, such costs to include costs of counsel to be taxed on Scale B.
   b. The plaintiff's claim against the third defendant in case number 22436/2018 is dismissed with costs.

JUDGMENT

Morrissey AJ (minority):

[1] This appeal is before us with the leave of the Supreme Court of Appeal. The central issue is the merit of the appellant's contention that the alleged debt the respondent pursues it for prescribed at midnight on 22 January 2019. This Court, per Adhikari AJ (the Court *a quo*), rejected that contention.

[2] The respondent, whom I will refer to as the plaintiff in this judgment, alleges that she injured her spine on 23 January 2016. She did so after she swung from a rope tied to a tree near a dam in Stellenbosch. She says she released the rope while she was above the dam and collided with a submerged tree stump when she hit the water.

[3] Almost three years later, during December 2018, the plaintiff instituted action proceedings to recover the damages she claims resulted from her injury. At that stage she directed her claim against two defendants, the ISA Carstens Academy (Pty) Ltd ("*the Academy*") and the University of Stellenbosch ("*the University*").

[4] I discuss the nature of the plaintiff's claim in more detail below. For present purposes all that bears mentioning is that the claim against the Academy was based, in part, on the allegation that it operated the ISA Ladies Residence, a student residence in Stellenbosch at which the plaintiff lived at the time she alleges to have injured her spine.

[5] During April 2019, the Academy responded to the plaintiff's claim against it with a special plea of non-joinder. It also pleaded over on the merits. The essence of the special plea was that Superstrike Investments 121 (Pty) Ltd (the appellant) was the controller of the ISA Ladies Residence, not the Academy. Accordingly, so alleged the special plea, the appellant should have been a party to the proceedings. I will refer to the appellant as "*Superstrike*" for the rest of this judgment.

[6] During May 2020, and as something of a delayed reaction to the Academy's special plea, the plaintiff applied to join Superstrike as the third defendant to her action. That application was served on Superstrike on 15 May 2020.

[7] Superstrike resisted the joinder application on the basis that any debt it owed the plaintiff had prescribed. The Court nevertheless directed the joinder of Superstrike on 13 December 2021. It apparently addressed Superstrike's prescription objection on the basis that it could be raised as part of its defence to the action.

[8] During January 2022 the plaintiff amended her claim to reflect Superstrike's joinder as the third defendant and to extend her claim for damages to it. This was essentially done by adding a paragraph describing Superstrike as the third defendant, and adding the words "*and/or Superstrike*" to each allegation made against the Academy and the University.

[9] For example, paragraph 4.1 of the particulars of claim as originally formulated read as follows:

> "*At all times relevant to this action… Plaintiff was a first year student registered as such at the Academy, and was accepted as a resident of the*

> *ISA Ladies Residence, a residence controlled by the Academy and/or University ("the residence").*"

[10] After the January 2022 amendment, that paragraph read as follows (all emphasis added to quotations is mine, unless otherwise indicated):

> "*At all times relevant to this action… Plaintiff was a first year student registered as such at the Academy, and was accepted as a resident of the ISA Ladies Residence, a residence controlled by the Academy and/or University* ***and/or Superstrike*** *("the residence").*"

[11] Superstrike responded to the amended claim during February 2022 by filing a special plea of prescription and a plea over on the merits.

[12] The special plea contended that the debt the plaintiff pursues against Superstrike has prescribed. It averred that the plaintiff's cause of action arose on 23 January 2016 (the date the plaintiff allegedly sustained her injury), that it would have become prescribed at midnight on 22 January 2019 (three years later), and that the plaintiff had not issued summons against the Superstrike by that date.

[13] The matter served before the Court *a quo* on 19 April 2023. The plaintiff and Superstrike had agreed that the special plea of prescription would be determined separately and on a limited body of evidence. The Court *a quo* recorded the arrangement as follows:

> "*In a joint practice note delivered by the plaintiff and Superstrike, the parties recorded their agreement that the special plea of prescription be heard by way of argument only, and that the Court be requested to have regard to the pleadings in the action as well as the affidavits filed in the joinder application, in adjudicating the special plea. Counsel for the parties confirmed at the commencement of the hearing of the special plea that the agreement between the parties was correctly recorded in the joint practice note.*"

[14] On 28 April 2023, the Court *a quo* handed down Judgment dismissing Superstrike's special plea. It went on to refuse Superstrike leave to appeal. Superstrike then sought leave from the Supreme Court of Appeal. That application was granted and the matter served before us on 18 August 2025.

[15] Without wishing to oversimplify the helpful submissions made by *Mr Stelzner*, assisted by *Mr Rademeyer*, on behalf of Superstrike, the mainstays of Superstrike's case on appeal can be broadly summarised as follows:

a. The case against Superstrike was ultimately founded on it the fact that it was the controller of the ISA Ladies Residence.

b. The fact that someone was in control of the ISA Ladies Residence was known to the plaintiff at all material times, including the moment she allegedly injured her spine on 23 January 2016.

c. The plaintiff incorrectly concluded that either the Academy or the University was the party that controlled the ISA Ladies Residence when she originally issued summons in December 2018.

d. Had she exercised reasonable care, the plaintiff could have ascertained that it was in fact Superstrike that controlled the ISA Ladies Residence.

e. The latter was the only question the Court *a quo* should have been concerned with, and it should have resolved that question in Superstrike's favour on the evidence available.

f. In particular, there was evidence of a written lease agreement for the plaintiff's room that was concluded shortly before the plaintiff's alleged injury occurred and which indicated that Superstrike was the lessor; and there was an affidavit by Superstrike's attorney to the effect that a basic Internet search revealed that Superstrike controlled the ISA Ladies Residence.

[16] *Mr Botha*, who appeared together with *Mr S Botha* for the plaintiff, submitted that the Court *a quo* had correctly dismissed Superstrike's special plea of prescription.

[17] At the risk of damping his considered submissions, *Mr Botha* essentially argued that the plaintiff's case was that she sustained her injury in the course of a so-called "*welcoming event*" for certain first-year students at the University, and that material facts underlying her claims against the defendants were that one or more of them:

a. Had control over the welcoming event; and

b. Employed so-called mentors to run the welcoming event, those mentors being other students at the University.

[18] *Mr Botha* went on to submit that the agreed body of material the Court was to have regard to when considering the special plea did not establish that the plaintiff had knowledge of those facts (either at the time of her injury or at all), and that Superstrike had thus failed to discharge the onus resting on it to establish that

the plaintiff's claims had prescribed. That was essentially what the Court *a quo* had concluded, *Mr Botha* said, and the appeal should thus be dismissed.

[19] For the sake of completeness, three further contentions I understood *Mr Stelzner* to raise were as follows:

a. The facts *Mr Botha* and the Court *a quo* found the plaintiff did not have knowledge of (i.e.: control of the welcoming event and the employment of the mentors) were legal conclusions drawn from facts she did know, and were thus irrelevant to the prescription enquiry.

b. Although Superstrike bore the *onus* of establishing its prescription defence, that onus was a relatively light one because it concerned facts uniquely within the plaintiff's knowledge.

c. The fact that the plaintiff was able to plead a claim against the Academy when she thought it controlled the ISA Ladies Residence meant that the only fact she didn't know was that that residence was in fact controlled by Superstrike, and thus the only question the Court *a quo* was required to consider was whether the plaintiff did or ought to have known that fact.

[20] In my view, the competing contentions of the parties arose more from differences between them of the claims advanced in the particulars of claim than due to differences regarding the law pertaining to prescription. It is nevertheless useful to rehearse that law before adjudicating the competing contentions set out above.

[21] Section 12(3) of the Prescription Act, 68 of 1969, is a deeming provision. It serves to delay the commencement of prescription which, per section 12(1), commences to run as soon as a debt is "*due*". It does so in the following terms:

> "*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 the creditor shall be deemed to have such knowledge if… [she] could have acquired it by exercising reasonable care.*"

[22] The operation of section 12(3) has been the subject of much judicial and academic discussion. Broadly stated, the subsection contemplates an enquiry into when a creditor obtained actual or constructive knowledge of certain information, namely, the identity of the debtor and the facts from which the debt pursued arose.

[23] In *MEC for Health, Western Cape v Coboza* 2020 JDR 2720 (SCA), the Supreme Court of Appeal promoted a two-step approach when conducting an enquiry under section 12(3) to ascertain whether a plaintiff had knowledge of the facts from which their debt arose:

a. The first step is to determine the identity of the debtor and the facts from which the relevant debt arose.

b. The second step is to determine when the creditor obtained actual or constructive knowledge of those facts.

[24] The expression "*the facts from which a debt arises*" has been interpreted as referencing the minimum essential facts that are necessary for a plaintiff to institute action (*Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) at [17]). They were described as the "*primary facts*" in *Coboza*, a

description subsequently endorsed by the majority Judgment in *Le Roux v Johannes G Coetzee & Seuns* 2024 (4) SA 1 (CC) at [36].

[25] To determine what the primary facts in any given case are, one needs to have an understanding of the legal basis on which the creditor pursues the debt in question.

[26] For example, in a case where a plaintiff sues for damages arising from a car crash, the legal basis underlying the debt will often be delictual. An element of a delictual claim is negligence. Accordingly, the primary facts giving rise to the "*debt*" of damages the plaintiff pursues would include those upon which a conclusion of negligence could be drawn, such as the fact that the defendant drove at an excessive speed, failed to keep a proper lookout, or was guilty of some other unreasonable conduct that imperils travel by road.

[27] Importantly, a finding that the defendant in the above example drove negligently is not itself one of the primary facts, but rather a legal conclusion or opinion that is drawn from them.

[28] That distinction is important because section 12(3) is concerned with a creditor's knowledge of facts, not the conclusions of law to be drawn from them. It is thus not open for a plaintiff to contend that the running of prescription was delayed because, although they were aware of the primary facts giving rise to the debt they pursue, they were unaware of the legal conclusions flowing from them.

[29] The distinction between primary facts and conclusions of law is illustrated in *Truter v Deysel* 2006 (4) SA 168 (SCA). Mr Deysel underwent a series of operations to his eye, which he ultimately lost due to complications with the

surgery. He considered that the operations had been conducted negligently and sought to procure reports from experts to that effect before instituting proceedings. He was unable to procure a report concluding that the operations had been negligently carried out *per se*. However, he did ultimately procure a report concluding that it had been negligent for the series of operations he had been subjected to being undertaken so close together. Mr Deysel sued Dr Truter and his claim that was met with a special plea of prescription.

[30] The prescription point was upheld by the Supreme Court of Appeal. It found that prescription had commenced to run once Mr Deysel knew of the primary facts underlying his claim (including the fact that the operations had been carried out in relatively quick succession) and, possibly, because he had formed a suspicion that they had been negligently carried out. Prescription was not delayed, said the Supreme Court of Appeal, until Mr Deysel had knowledge of an expert opinion that analysed those primary facts to draw a conclusion of negligence.

[31] The distinction between primary facts and legal conclusions drawn from them has been endorsed in several cases, including *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC).

[32] Merely because a conclusion is drawn from primary facts does not of itself mean that conclusion is not itself a primary fact, and it is possible for some primary facts to be drawn from others.

[33] An example of such a situation arose in *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC).

[34] In that matter the plaintiff lost the use of his left hand after receiving certain medical treatment. An expert report concluded that the plaintiff's injury was likely caused by staff at the respondent's hospital having applied plaster of paris too tightly to his hand. The plaintiff knew both that the plaster had been applied to his hand and that he had lost the use of his forearm, but he did not know that the former event was causally connected to the latter.

[35] On my reading of *Links*, the Constitutional Court found that factual causation was a primary fact, that prescription accordingly did not commence running until the plaintiff had knowledge of it, and that such knowledge could not be attributed to the plaintiff merely because he had knowledge of the primary facts on which causation was established (i.e.: the application of plaster of paris and the injury to the plaintiff's hand). Rather, the plaintiff would only have such knowledge once he received (or could reasonably have been expected to procure) expert advice revealing the causal connection between those two facts.

[36] Once the primary facts are identified, the question turns to the plaintiff's knowledge of them and when it was acquired. Section 12(3) contemplates actual or constructive knowledge.

[37] What is sufficient to constitute knowledge of a primary fact may be a contentious issue in any given case.

[38] On the one hand, a plaintiff does not obtain knowledge of a primary fact only once it has all the evidence it needs to prove it in court. It just needs knowledge of that fact to enable it to start its case, not to finish it (*Nedcor Bank Bpk v Regering Van Die Republiek Van Suid-Afrika* 2001 (1) SA 987 (AD) at [8] to [10]).

[39] On the other hand, section 12(3) is concerned with knowledge, not speculation or other unsubstantiated belief. Knowledge of the sort required by section 12(3) may be gained by direct observation, inference from other facts or by receiving knowledge of facts from others. However, a mere suspicion of facts is not enough to constitute knowledge of them, as contemplated in section 12(3) (*Gore supra* at [19] – [22]).

[40] *Geldenhuys v Diedericks* 2002 (3) SA 674 (OPD) provides a helpful illustration of both the extent of knowledge a plaintiff must have of the primary facts and how such knowledge can be inferred.

[41] In that case the plaintiff farmer sued a motorist for the loss of a bull that the defendant struck with his car. The farmer did not observe the collision and thus did not have first-hand knowledge of the primary facts regarding the manner in which the defendant drove and which could be relied upon to support a legal conclusion of negligence. The Court found that prescription commenced to run once the farmer had undertaken certain preliminary investigations that enabled him, amongst other things, to determine the probable view the defendant would have had as he approached the scene of the collision. Stated differently, prescription began to run once the plaintiff had knowledge of facts from which it could be inferred that the plaintiff had failed to keep a proper lookout.

[42] *Gore* was an example of a case where the plaintiff did not have knowledge of the primary facts as contemplated in section 12(3), despite alleging that he did.

[43] In that matter the plaintiff's claim was a case based on fraud. The Supreme Court of Appeal found that the plaintiff did not have knowledge of that fraud as

required by section 12(3) because the allegation of fraud was based on speculation of the primary facts underlying it, as opposed to a valid inference.

[44] It follows from this that merely because a plaintiff has pleaded certain facts at a certain date does not necessarily mean that they have knowledge of those facts as at that date. The allegation could be based on a suspicion that they hope to prove during the litigation process, via mechanisms such as discovery, requests for trial particulars and cross-examination.

[45] The decision in *Links* contains *dicta* in passing suggesting that, at least in professional negligence cases, prescription will only commence running as contemplated in section 12(3) when a plaintiff has knowledge of the primary facts, <u>and</u> that knowledge would reasonably lead them to suspect that they had sustained an injury due to the neglect of another.

[46] At paragraph [45] of *Links* the Court said the following:

> "*In a claim for delictual liability based on the Aquilian action, negligence and causation are essential elements of the cause of action. Negligence and, as this Court has held, causation have both factual and legal elements. Until the applicant had knowledge of facts that would have led him to think that possibly there had been negligence and that had caused his disability, he lacked knowledge of the necessary facts contemplated in section 12(3).*"

[47] A similar statement is made near the end of paragraph [42] of the Judgment:

> "*However, in cases of this type, involving professional negligence, the party relying on prescription must at least show that the plaintiff was in possession of sufficient facts to cause them on reasonable grounds to think that injuries were due to the fault of the medical staff. Until there are reasonable grounds for suspecting fault so as to cause the*

> *plaintiff to seek further advice, the claimant cannot be said to have knowledge of the facts from which the debt arises.*"

[48] This suggests that, at least in professional negligence cases, the Constitutional Court was prepared to interpret section 12(3) as requiring a creditor to not only have knowledge of the primary facts, but to also have a reasonable suspicion of neglect on the part of the debtor. That principle was developed in *Le Roux*, where the Constitutional Court held that, at least in cases involving a client suing their lawyer for malpractice, justice may require that prescription will only commence to run once the client has knowledge not only of the primary facts, but also of the legal conclusion that would reveal, or at least give rise to a suspicion of, neglect on the part of their lawyer.

[49] *Links* and *Le Roux* are a reminder that prescription negates section 34 of the Constitution (see *Le Roux* at [29]); and that regard must be had to the purpose of sub-section 12(3) of the Prescription Act when applying it, that being to penalise a plaintiff who has been guilty of an inordinate delay, not a reasonable and unintended one. A plaintiff who has knowledge of primary facts but who does not pursue a debt based on them because they reasonably do not suspect they give rise to that debt can hardly be described as being guilty of an inordinate delay.

[50] For example, assume a surgeon conducts an operation on a plaintiff using what any reasonable doctor would know was a manifestly inappropriate piece of equipment. Assume further that the operation is conducted under local anaesthetic and the plaintiff personally observes the use of the equipment in question injuring their person. Such a plaintiff has knowledge of the primary facts from the moment the operation occurs. However, such a plaintiff might reasonably believe that their injury was the manifestation of an inherent surgical risk as opposed to a

manifestation of neglect, at least for a period after the operation takes place. What I understand *Links* to say is that in such a case prescription will only commence to run once the plaintiff reasonably suspects negligence might be present.

[51] The developments of the law in *Links* and *Le Roux* do not arise directly in this case. But they do help to illustrate different components of a section 12(3) enquiry:

a. *Links* contemplated the situation where a plaintiff knows the primary facts (actually or constructively), but does not reasonably suspect neglect on the part of the defendant. An example is the hypothetical case I have just postulated.

b. That must be distinguished from the situation where a plaintiff does not know the primary facts (actually or constructively), but would nevertheless be motivated to investigate them based on the suspicion of neglect revealed by what they do know. *Geldenhuys* provides an example of this: When Mr Geldenhuys first found that his cow had been struck by a motorist, he would not know the primary facts underlying a finding of neglect on the part of Mr Diedericks. The circumstances were however such as to raise a suspicion of neglect that would motivate a reasonable person to investigate further. That question might be relevant in an enquiry as to when Mr Geldenhuys would have procured constructive knowledge of the primary facts. (As mentioned, the case was ultimately determined on Mr Geldenhuys having sufficient actual knowledge of primary facts indicative of neglect, not when he would have acquired constructive knowledge of them.)

[52] The other requirement of section 12(3) is that a plaintiff must have actual or constructive knowledge of the identity of the debtor. In my view, such a lack of knowledge does not only contemplate the situation where a plaintiff has no idea who the debtor is, but also includes the situation where the plaintiff has identified several potential debtors but is yet to uncover facts, of the limited substance contemplated in *Nedcor* and *Geldenhuys*, that will enable it to determine which of those potential debtors is the debtor.

[53] I consider that distinction was recognised in *Gericke v Sack* 1978 (1) SA 821 (A). In that case the plaintiff had been injured when a speedboat collided with a jetty at the Vaal dam. In response to a special plea of prescription, the plaintiff said that she did not know who had been driving the boat until some time after the incident, and that prescription accordingly did not run until she did. The defendant contended that even if the plaintiff's evidence was accepted, she nevertheless knew the "*identity of the debtor*" because it was enough that she had sufficient details about him to "*.. exclude every other person in the world except that debtor*". The Court rejected that argument (at 829B-F):

> "*I am not persuaded that there is any merit in this contention. The Act provides in express terms that prescription does not begin to run*
>
> *"until the creditor has knowledge of the identity of the debtor",*
>
> *not that prescription will begin to run as soon as the creditor has knowledge of facts or information from which it will be possible for him to deduce or discover the identity of the debtor. So, for example, he may be in possession of the debtor's fingerprints and this may enable him to track down and establish the debtor's identity within a matter of hours or days - on the other hand he may find himself defeated after months of search. Or again he may have the registration number of the motor vehicle which has*

caused him injury; this may lead to speedy identification, but if it is a stolen vehicle, it may not. In the present case the appellant was armed with the knowledge that she was injured by the pilot of a ski-boat - No. 12 - which was competing in a race held under the auspices of the Loch Vaal Aquatic Club on 13 February 1971. This information may have assisted her in establishing the identity of the debtor with little delay; ***on the other hand further investigation might have become necessary when she read the entry form (exh. "C") and found out that there were three persons in the boat anyone of whom might have been the pilot at the moment of impact.***"

[54] *Gericke* is also authority for two further principles that pertain to the appeal.

[55] The first concerns when the plaintiff was required to have actual or constructive knowledge of the primary facts and the identity of Superstrike.

[56] Superstrike alleged that the plaintiff's claim prescribed at midnight on 22 January 2019. It was common cause that the prescriptive period was three years and it thus follows that Superstrike says the plaintiff had or ought to have had knowledge of its identity and the primary facts on the date the plaintiff alleges she was injured, i.e.: 23 January 2016.

[57] In my view, having pleaded its case that way it is not open for Superstrike to argue that the plaintiff procured the relevant knowledge (or ought to have done so) at some date after 23 January 2016, albeit still more than three years before the plaintiff caused her joinder application to be served on Superstrike (i.e.: 15 May 2020). I consider that the requirement of holding Superstrike to its pleaded cases is endorsed in *Gericke* at 828A-B and in *Santam v Ethwar* 1999 (2) SA 244 (A) at 256F-G.

[58] The second principle concerns the question of onus. It was common cause that Superstrike bore the onus to establish that the plaintiff's claim had prescribed. As stated above, I understood *Mr Stelzner* to submit that the onus was relatively light, given that the plaintiff's knowledge of the information referred to in section 12(3) was best known to her. I accept that proposition as far as it goes. As stated in *Gericke* at 827E-F, it is a well-established principle that courts will take cognizance of the handicap faced by an onus-bearing party where the facts they have to establish are within the exclusive knowledge of their opponent. That is a general proposition, not one limited to prescription cases.

[59] I do however consider that Superstrike precluded itself from relying on that principle in this matter, given that it agreed on the evidentiary material to be considered by the Court. Had evidence been led in the ordinary way, and had the plaintiff declined to testify, Superstrike's reliance on that principle of evidence might have been well made. I do not consider that Superstrike can agree to depart from the ordinary way of leading evidence, and then say complain that it is handicapped because the facts it has to prove are exclusively within the plaintiff's knowledge.

[60] Armed with the above general principles, I turn to an analysis of the competing contentions of the parties.

[61] A useful starting point is to understand the legal foundation upon which the plaintiff's claim rests, as set out in her particulars of claim.

[62] After citing the parties in the ordinary way, there is a heading reading "*Vicarious liability*". Under that heading, and slightly paraphrased, the plaintiff goes on to state that the facts extant at all material times included the following:

a. She was a registered first year student of the Academy and a resident of the ISA Ladies Residence, a residence controlled by one or more of the defendants.

b. One or more of the defendants introduced a system of clusters of student residences and private student organisations, with the ISA Ladies Residence forming part of the cluster known as "*Validus*".

c. One or more of the defendants were in control of and responsible for all events and activities of "*its students*", and employed or appointed persons, referred to as "*mentors*", to carry out its/their responsibilities and to exercise control over its students and student events, including a welcoming programme compiled by Validus for its first year students.

d. The mentors who were responsible for and in control of the welcoming programme acted in the course and scope of their employment with, or appointment by, the relevant defendant who employed them.

[63] The particulars of claim go on to explain that:

a. The welcoming programme included an event scheduled between 09h00 and 12h00 on 23 January 2016 and described as "*Kampus Welwesprogram (mentors and first years visit Coetzenberg dam)*".

b. The plaintiff and other first year students went to the Coetzenberg dam to attend that event, and did so under the control of certain mentors.

c. As part of that event, the plaintiff and the other first year students in attendance were either expected or invited to swing from a rope tied to a tree near the dam, and to then let go of the rope at the right moment so as to land in the dam.

d. The plaintiff participated in the aforesaid "*swing-and-fall*" activity, and in doing so injured her spine when she struck a submerged tree stump, as described at the outset of this judgment.

[64] There is then a heading reading "*The legal duties*", under which the following allegation is made:

> "*When the Plaintiff participated in the dam event as a first year student under the control and mentorship of the mentors, the Academy and/or the University and/or Superstrike, represented by the mentors, assumed responsibility for the Plaintiff's care and safety, and the relationship between Plaintiff as a first year student and the Academy and/or the University and/or Superstrike as the educational authorities imposed the following duties on the Academy and/or University and/or Superstrike:*"

[65] Five duties are then set out, including one described "… *general duty to take reasonable care for Plaintiff's safety, and to exercise reasonable supervision and control over Plaintiff during the dam event and the swing and fall activity*".

[66] Paragraphs 10 and 11 are headed "*Wrongfulness and negligence*". The opening sections of those paragraphs read as follows:

"*10. Regard being had to the general level of skill and competence possessed and exercised by educational authorities or entities and its student mentors at the time when Plaintiff was exposed to the dam event and the swing-and-fall activity, the Academy and/or University and/or Superstrike knew or ought reasonably to have been aware of the following possible risks of injury in the swing-and-fall activity:*

...

11. Despite the fact that the Academy and/or University and/or Superstrike and/or the mentors were aware (or ought reasonably to have been aware) of the risks, they wrongfully failed to comply with the legal duties by acting negligently in one or more of the following respects:

..."

[67] The particulars conclude with allegations concerning causation and the quantum of the plaintiff's damages, which need not be discussed.

[68] In my respectful view, the particulars of claim are not a model of clarity.

[69] While it is apparent that the plaintiff's claim is advanced in delict, it is not entirely clear whether she contends that one or more of defendants are liable to her for their own delicts, whether they are vicariously liable to her for delicts committed by the mentors, or whether she pursues both such claims.

[70] Be that as it may, and read in context, I consider that the plaintiff's case advances at least one of the following clams:

a. One or more of the defendants were guilty of conducting the welcoming programme in a negligent way, which they did via their mentor representatives;

b. One or more of the defendants were guilty of negligently omitting to take steps to ensure the plaintiff's safety when she participated in the welcoming programme (and the swing-and-fall activity in particular), with that omission being wrongful given the facts and circumstances of the case (as contemplated in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) at [20] – [23]; *Minister of Justice and Constitutional Development v X* 2015 (1) SA 25 (SCA) at [13]).

c. The mentors who oversaw the swing-and-fall activity acted negligently when doing so, and one or more of the defendants are being liable for those delicts because they were committed by the mentors in the course and scope of their employment with the relevant defendant(s).

[71] As I understood him, *Mr Stelzner* submitted that the only primary the plaintiff needed to know to establish its claim against Superstrike was the relationship that existed between the plaintiff (as a first year student and resident at the ISA Ladies Residence) and the controller of the ISA Ladies Residence (whoever that controller might be).

[72] Stated differently, Superstrike contends it is that relationship that made it wrongful for Superstrike to negligently omit to take steps to ensure the plaintiff's safety during the welcoming programme, and that rendered it vicariously liable for the delicts of the mentors.

[73] I agree that the plaintiff does rely on the relationship between her and the controller of the ISA Ladies Residence to found her claim, at least to some extent. As indicated above, the fact that the plaintiff was a resident of the ISA Ladies Residence is expressly pleaded under a section of the particulars of claim headed "*vicarious liability*". Furthermore, under the section headed "*the legal duties*" the plaintiff avers that certain duties befell Superstrike because of *"… the relationship between Plaintiff as a first year student and… Superstrike as the educational [authority]*".

[74] My difficulty with the submission is that the relationship between the plaintiff and the controller of the ISA Ladies Residence is not the only fact the plaintiff relies upon to support her claim. As I have sought to demonstrate in my summary of the particulars of claim, she also relies on other grounds, including the controller of the ISA Ladies Residence also being in control of the welcoming programme, and being the employer of the mentors who ran it.

[75] As a result of the separation of Superstrike's special plea, the Court *a quo* was called upon to determine the merits of the prescription issue without determining the merits of the plaintiff's case. The investigation into the merits would include a consideration of the facts the plaintiff was able to prove and whether those were sufficient to burden one or more of the defendant's with liability for the damages she alleges to have suffered.

[76] On my understanding of the particulars of claim, I consider that part of the enquiry into the merits will include an investigation into whether the controller of a student residence acts wrongfully if it negligently fails to take steps to ensure the safety of resident students while participating in activities such as the welcoming programme.

[77] Another legal issue to determine may be whether the controller of a residence is vicariously liable for delicts committed by others against its residents (there was a suggestion during the argument that the "*mentors*" referred to in the particulars of claim were all residents of the ISA Ladies Residence, but I am not sure that fact is established on the papers before us).

[78] If the plaintiff were to succeed solely on those legal propositions, and subject to what is said below, then it may well be that she had actual knowledge of all primary facts other than Superstrike's' identity at the time she sustained her injuries.

[79] Be that as it may, it is possible that the mere relationship between the plaintiff and the controller of the residence will not be sufficient to establish legal liability on the part of the latter. On the face of it, and without in any way intending to decide the issue, I have some doubt that that relationship could establish Superstrike's vicarious liability (see: *Messina Associated Carriers v Kleinhaus* 2001 (3) SA 868 (SCA) at [15], where the court stated that the enquiry is whether the relationship between the party committing the delict and the party sought to be held vicariously liable for it is analogous to that between and employer and employee).

[80] Significantly, it might transpire that legal liability is only established based on the relationship between the controller of the residence and plaintiff, <u>and</u> because the controller of the residence also controlled the welcoming programme and employed the mentors who ran it.

[81] While there might be cases where the facts a plaintiff relies on to support a legal finding of wrongfulness or vicarious liability can be determined without the need for evidence, I do not think this is one of those cases (*Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 (1) SA 461 (SCA) at [2]).

[82] For example, had the plaintiff pleaded that Superstrike acted wrongfully by negligently failing to protect her from harm while she participated in the welcoming programme because she was a resident there and because the letter "s" appears twice in the word "*Superstrike*", a court would readily be able to dismiss the second primary fact alleged as being an irrelevant one to the enquiry into wrongfulness.

[83] In this case, in my view, the position is far from clear, and certainly questions of wrongfulness will only properly be capable of being determined once all the evidence is led. Stated differently, at this stage it cannot be determined with certainty whether the plaintiff will be able to establish wrongfulness based on the relationship between her and the controller of the residence, or whether she will also need to establish that the controller of the residence also controlled the welcoming programme and employed the mentors to run it, or even whether wrongfulness will not be established, even if all of those elements are established.

[84] What impact does that uncertainty have on the determination of the special plea of prescription?

[85] This may be an unintended consequence that a separation of issues may cause (*Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at [3]). In my view, the appropriate approach is to proceed on the basis that all of the primary facts

relied on by the plaintiff in her particulars of claim are necessary to establish the legal conclusions of vicarious and delictual liability she pursues against Superstrike.

[86] I arrive at that view not only because I am required to have regard to the pleadings for purposes of determining the prescription issue, but also because that is the claim Superstrike contends has prescribed. Furthermore, the agreement between the parties as to how the prescription issue would be dealt with may have been influenced by what had been pleaded. Although I do not know how the negotiations occurred, the plaintiff might only have been prepared to agree to the separation of the prescription issue on the premise that her claims as alleged prescribed at midnight on 22 January 2019. She might not have been prepared to agree to the separation on the basis that her claims prescribed at some later date, or that those claims could succeed on lesser facts than those pleaded by her. I also consider a defence of prescription must be established on the basis it is pleaded given the constitutional implications of the concept.

[87] My approach also does not mean that a plaintiff in a case such as this can defeat a special plea of prescription by overstating the primary facts underlying a conclusion of wrongfulness. If a defendant considers that such an overstatement has occurred and cannot be dealt with along the lines contemplated in [82] above, that defendant should not seek to have the special plea of prescription separated out for early determination. Indeed, such a separation, if resisted, might well be refused as being inconvenient. Rather, such a defendant should deal with the question of prescription together with the merits, at which stage the primary facts underlying the conclusion of wrongfulness will be conclusively determined.

[88] In the circumstances, I conclude that for Superstrike to succeed with its special plea of prescription, it needed to establish that the plaintiff had actual or constructive knowledge of at least the following primary facts on 23 January 2016:

a. That Superstrike controlled the welcoming programme.

b. That Superstrike employed or appointed the mentors who ran the welcoming programme.

[89] To the extent I correctly understood *Mr Stelzner* to submit that those are legal conclusions as opposed to primary facts, I respectfully disagree with him.

[90] In my view, the question of whether Superstrike had control over the welcoming event is a question of fact. Such control might be established by showing that Superstrike's representatives had meetings to discuss when and where it would take place, and then took steps to implement those decisions and cause the event to go ahead. As I have shown in the discussion above, the fact of control might give rise to the legal conclusion that Superstrike acted wrongfully by failing to take reasonable steps to ensure that those participating in the welcoming event were not injured.

[91] I consider that the position is similar regarding the control or employment of the mentors. The conclusion of a contract is a factual question. The legal consequences of it are questions of law. If a mentor were to say "*I got a job with Superstrike today*", that would be a statement of fact that some sort of interaction had taken place between the mentor and Superstrike (and which might have included handshakes or signatures), from which the mentor considered a contract had arisen. That Superstrike might be vicariously liable for certain delicts

committed by that mentor is a legal conclusion flowing from the nature of the contract in question.

[92] If the plaintiff was unaware of the primary facts identified in [88] above as at 23 January 2016, then the question of whether she actually or constructively knew Superstrike's identity becomes an irrelevant consideration. That is because section 12(3) is conjunctive, in the sense that prescription commences to run once a creditor knows the identity of the debtor and the facts from which the debt arises.

[93] The Court *a quo* found that on the evidence before it the plaintiff did not have actual or constructive knowledge of those contentious primary facts. I respectively agree with its analysis of that evidence and will thus limit myself to making only a few observations here.

[94] First, I consider that the document described as the programme for the 2016 welcoming programme (annexure **POC1** to the particulars of claim) leaves it entirely uncertain as to the identity of the organiser of the welcoming event or the employer of the mentors. At best, it served to reduce the potential debtors to a list of three, namely, the "*controller*" of the Academy, the "*controller*" of the ISA Ladies Residence, or the University. Further investigation would be required to determine which of those three was <u>the</u> person who had control of the welcoming programme and/or employed the mentors.

[95] While Superstrike correctly points out that the content of that document begins with the heading "*Algemente doelwitte van ISA Dameskoshuis verwelkomingsprogram*" ("*General purpose of the ISA Ladies Residence welcoming programme*"), the first word in bold print and capital letters on the cover page is "*VALIDUS*". Validus is pleaded to be a cluster of student residences

and private student organisations. There are also references to the Academy in the body of the document. Further uncertainty is introduced by the second page, which includes the following text:

> "*Die* ***<u>Universiteit se doelwit</u>*** *met die Verwelkomingsprogram is om nuwelinge 'n onvergeetlikeer varingte gesaam met hulle mede student een dat dit op 'n georganiseerde manier gereel is sodat die wat in beheer is, antwoordelikheid neem vir die veiligheid van die nuwelinge."*
>
> *(Loosely translated: The University's goal of the welcoming program is to provide a memorable experience for new students and their fellow, and to ensure that it is organized so that those in charge take responsibility for the safety of those new students.)*

[96] Secondly, and even if the document is interpreted as indicating that the welcoming programme was a programme of the ISA Ladies Residence and thus under its control, for Superstrike to succeed it would need to show that the plaintiff did or ought to have come to that conclusion on the day she sustained her injury. There was no evidence that she did so, and I do not think it can be said that she acted unreasonably by not returning from the Coetzenberg Dam, allegedly having sustained an injury to her spine, and started scrutinising documents in her possession (if it indeed the document was in her possession at the time) in order to ascertain who organised the welcoming programme and who employed the mentors who ran it.

[97] Thirdly, and even if Superstrike had formulated its case on the basis that prescription commenced running at some date in excess of three years from the date the joinder application was served on it, regard must be had to the following statement as alleged in the plaintiff's founding affidavit in that application (an affidavit deposed to on 12 May 2020 by the plaintiff's attorney):

> “*At this stage there is still some uncertainty as to which of First and Second (and now also Third) Respondents controlled the student activities of the students who resided at ISA Ladies Residence at the time, or employed and/or controlled the mentors.*”

[98] That stated lack of knowledge was not contested by Superstrike. That is perhaps not surprising given the disputes on the pleadings regarding the contentious primary facts. Superstrike also did it say that it was unreasonable for the plaintiff not to have had knowledge of those facts, even at the time the affidavit was deposed to. On the contrary, Superstrike seemed to accept that the plaintiff’s uncertainty existed. The relevant extract of the Superstrike’s answering affidavit, deposed to by its attorney, reads as follows:

> “*It is noted that there is still uncertainty as to who controlled the student activities or the students who resided at ISA Ladies Residence at the time or employed and/or controlled the mentors.*
>
> *That is however the Applicant’s problem and has nothing to do with this application.*”

[99] To my mind, and on the evidence we are to have regard to when determining the special plea, even by the time the joinder application was served the plaintiff was, at best, in a position where she had narrowed her potential debtors down to three people, namely, the Academy (as the controller of the ISA Academy), the University (as the controller of the University), or Superstrike (as the controller of the ISA Ladies Residence, and whom the plaintiff had previously thought was also the Academy).

[100] In that respect I consider that the plaintiff was in a position similar to that described in the quotation from *Gericke* at [53] above, which contemplated the plaintiff in that case having an entry form indicating three potential pilots of the speedboat that struck the jetty, and needing to undertake further investigations to identify which one injured her before she could be said to have knowledge of the one who injured her.

[101] I stress that the evidential conclusions I have drawn are based on the agreed material available. Had oral evidence been led by the parties, a different picture might have emerged. Conceivably, cross-examination of the plaintiff might have revealed that she was well aware that the welcoming event was organised by the ISA Ladies Residence and that it engaged the mentors to run it. I do not think that it is open for me to speculate in that regard. Rather, I consider I am bound to respect the agreement between the parties, and must assess the issue on the evidence made available. I have already stated why I do not consider that Superstrike can seek to ease its onus on the basis that the facts it needed to prove were within the plaintiff's knowledge.

[102] For all of the above reasons, I consider that the Court *a quo* was correct both in its determination that the contentious primary facts were indeed primary facts, and that it correctly concluded that Superstrike did not discharge its onus in showing that the plaintiff was aware of them as at 23 January 2016. Had I been in the majority I would thus have dismissed the appeal.

[103] I have had the benefit and pleasure of considering the majority Judgment penned by my learned sister Pangarker J before finalising this judgment. Why I

respectfully differ from the majority view is hopefully apparent from the reasoning set out above, but I would make the following points in closing.

[104] The majority appears to proceed on the basis that, because as at December 2019 the plaintiff was able to articulate particulars of claim against the Academy when she considered it controlled the ISA Residence, she would also have been able to do so vis-à-vis Superstrike had she correctly identified it as being in control of that residence. Thus the only question is whether the plaintiff did or ought to have realised that Superstrike controlled the ISA Ladies Residence.

[105] My difficulty with that approach is threefold.

[106] First, we are concerned with the plaintiff's knowledge as a 23 January 2016. What she may have known in December 2019 is a diversion, at least in the context of the pleaded case.

[107] Secondly, and even if it were appropriate to assess the plaintiff's knowledge as at December 2019, the mere fact that the plaintiff could plead a case at that date does not necessarily mean she knew the primary facts underlying it. As *Gore* shows, a plaintiff might speculate when preparing their particulars of claim. Stated differently, a pleaded case should not necessarily be equated with a plaintiff having actual knowledge of those pleaded facts, as contemplated in section 12(3).

[108] Thirdly the undisputed evidence was that the plaintiff was unaware of which of the Academy, the University or Superstrike had control of the welcoming programme and employed the mentors, at least at the time of her joinder application. I do not consider it is enough for the plaintiff to merely have been able to identify Superstrike as a potential debtor for prescription to start running.

[109] I appreciate that in a complex world a plaintiff might experience difficulty in clarifying facts necessary to establish which of several potential debtors is/are indebted to her. In a delictual claim for personal injuries, such a plaintiff may be well-advised to sue all the potential debtors she has identified within three-years elapsing from the date of loss. If she does not she may open herself up to interrogation about what investigations she ought to have undertaken and what information they might have yielded. That might have been the plaintiff's fate in this case, but the agreed way in which the evidence was presented meant that it was not, in my respectful view.

[110] For instance, we have no idea what investigations (if any) the plaintiff undertook to determine who controlled the welcoming programme and/or employed the mentors, what information those investigations turned up, or what any investigations she did not pursue would have turned up. Without the benefit of that evidence I do not think one can conclude that she ought to have determined it was Superstrike as opposed to one of the other potential defendants she identified. That would be the case even if the Academy did in fact control the ISA Ladies Residence, as the plaintiff originally thought it did. Her lack of knowledge as to who controlled the residence (which might be unacceptable for the reasons given by the majority) is distinct from her lack of knowledge as to who controlled the welcoming event and employed the mentors.

[111] Perhaps a more fundamental difference between my view and that of the majority concerns our respective approaches to prescription.

[112] A successful plea of prescription means that a plaintiff is no longer able to able to pursue a debtor for a debt, even if it is for a significant amount and

otherwise undisputed. Such a result may be justified where a plaintiff has been guilty of an inordinate delay, not because there must be a punishment for tardiness but because there must be a finality to litigation. A debtor, especially one who disputes their indebtedness, should not be left in a state of uncertainty for an unduly long period. But that justification must have limits, especially seeing that the remedy of prescription has constitutional implications.

[113] I thus consider that a defendant who raises prescription should only succeed if they discharge their onus and establish the defence squarely on the basis it was pleaded. I also understand that to be the law as laid down in *Gericke* and *Ethwar*. I do not consider that Superstrike achieved that threshold in this case.

A MORRISSEY

ACTING JUDGE OF THE HIGH COURT

PANGARKER, J (NUKU, J concurring)

[114] I have had the pleasure of reading the judgment of Morrissey AJ (the minority) and while I agree with his chronology of litigation, the summary of facts and discussion of legal principles, I respectfully part ways with him on the issue of deemed knowledge of the identity of the debtor as referred to in section 12(3) of the Prescription Act, his conclusion and order. So as not to repeat what has already

been set out articulately in the minority judgment, this judgment does not traverse aspects already addressed. Rather, it hopes to succinctly address the areas of difference.

[115] The issue in the appeal is a narrow one: whether the respondent is deemed to have had knowledge of the identity of Superstrike, the third defendant. To answer that question requires the court to consider whether the respondent would have acquired such knowledge had she exercised reasonable care and based on information she had at the time of either the incident giving rise to the claim or at the time she instituted her claim. I accept from the facts that the matter before the Court *a quo* did not turn on the respondent's actual knowledge of the identity of Superstrike.

[116] The first important aspect is to remind ourselves of the test applicable in establishing the identity of the debtor, as required by section 12(3) and the onus attached to it. In **Gericke v Sack**[1], the Appellate Division answered the question as follows: in respect of obtaining the identity of the debtor in section 12(3), one must have regard to the particular circumstances of each case, and there should be sufficient information for the creditor to be able to identify the debtor by name and address. The Appellate Division, as correctly argued by counsel for the appellant, made it clear that the onus was on the debtor (defendant) to show on the evidence when the creditor (plaintiff) learned or was deemed to have learned of the debtor's identity[2].

[1] 1978 (1) SA 821 (A) p830
[2] Gericke supra, p822

[117] This onus is described as a light one and rests on the debtor/third defendant, Superstrike. As guidance, the Appellate Division's conclusion in **Gericke** *supra* is apt:

> *"The Act merely requires the creditor to seek such knowledge by the exercise of reasonable care; she is not required to issue summons- she is given a generous three years in which to institute proceedings. All that she is called on to do is to ask one question to establish identity and not to be content to play a purely passive role. If she could have acquired this knowledge by acting diligently, her inertia, ineptitude or indifference will not excuse her delay. The creditor who fails to exercise the reasonable care prescribed by the Act must pay the penalty for he is then deemed to have acquired the knowledge necessary for the debt to become due and for prescription to begin to run."*

[118] The submission by the appellant's counsel is that, having regard to the light onus referred to in **Gericke** supra, what was required was for Superstrike to show that at the time of instructing her attorneys in the action, the respondent (as plaintiff) knew of the identity of Superstrike. The appellant's counsel submitted that the respondent was negligent in not attaching the written Memorandum of Agreement concluded between her and Superstrike on 15 January 2016, to her pleadings as amended[3].

[119] It was further submitted on behalf of the appellant that the Court *a quo* erred when it held that what was required of the respondent was knowledge of the

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[3] Annexure P1 attached to first defendant's special plea of non-joinder

identities of the mentors and Superstrike necessary for vicarious liability[4]. Knowledge of the relationship between the mentors and Superstrike was not needed in order to establish when prescription started running – what was required was knowledge of the debtor's identity and it was submitted that the Court *a quo*'s test which it had applied in its judgment, was incorrect.

[120] The counter argument of the respondent was that the reason why no Memorandum of Agreement was attached to her Particulars of Claim was because she was unaware of it. Furthermore, with reference to the evidence before the Court *a quo*, it was submitted that the respondent acted reasonably when one considers that she was a first year student in early 2016 and until July/August 2020 when she consulted with her legal representatives, she had no knowledge of the existence and involvement of Superstrike in relation to her claim against the Isa Carstens Academy and University of Stellenbosch. As for the Memorandum, the respondent aligns herself with the finding of the Court *a quo* that the document does no more than set out the terms on which the respondent leased a room at the Academy from Superstrike.

[121] Having considered the judgment of the Court *a quo* and the minority judgment, the problematic issue is that the Court a quo's judgment does not address the question as to whether the respondent had deemed or constructive knowledge of the identity of Superstrike. In my consideration of the issue, I refer to **Le Roux and Another v Johannes G Coetzee & Seuns and Another**[5], where Kollapen J writing for the Constitutional Court majority, described deemed

[4] Judgment, para [44] – [51]
[5] [2023] ZACC 46 para [40]

knowledge as knowledge which *"the creditor could have acquired… by exercising reasonable care"*. Referencing **Brand v Williams**[6], a failure to exercise reasonable care within the meaning of section 12(3) of the Act, would include a consideration of all the circumstances relevant to the respondent's conduct[7].

[122] Section 12(3) of the Act stipulates that the knowledge which a creditor, such as the respondent, requires is knowledge of the facts from which the debt arises, and not knowledge of legal opinion or whether the respondent has a legal remedy[8]. It was thus not incumbent that the respondent in this matter was required to have knowledge that/whether Superstrike was the legal entity or juristic person in control of the students' welcoming programme and/or that it employed the mentors who were responsible for arranging the event at the dam. I agree with the appellant's view, therefore, that the findings of the Court *a quo* that it was unclear from the welcoming programme and Memorandum of Agreement that Superstrike was the entity in control of the ladies' student accommodation, the event, and the mentors, were unnecessary and amounted to the incorrect test. This amounted to a legal conclusion as opposed to a question of fact.

[123] Further, the Court *a quo* misapplied the test and elevated knowledge of the facts from which the debt arises to knowledge of the legal relationship between the other defendants and Superstrike, and the relationship between Superstrike and the mentors[9]. In my view, it was unnecessary for the Court *a quo* to have explored and made findings on Superstrike's vicarious liability as this was not required in the

[6] 1988 (3) SA 908 (C)
[7] Le Roux supra, para [41]
[8] Mtokonya v Minister of Police 2018 (5) SA 22 (CC) para [37]
[9] Judgment, para [47]-[67]

determination of the special plea of prescription[10]. For prescription to commence, knowledge of the relationship between the mentors and Superstrike was not needed[11].

[124] The question then arises whether, in the context of the particular circumstances, there was sufficient available information for the respondent, as creditor, to be able to identify Superstrike as a /the debtor in view of the debt which arose? With reference to **Gericke** supra, this question would entail a determination as to whether, on the available evidence before the Court *a quo*, the respondent played a passive role or whether she acted diligently and with reasonable care in obtaining knowledge of the identity of Superstrike. The exercise requires an objective approach when considering the available evidence.

[125] The available evidence was the welcoming programme, which is attached to the Particulars of Claim[12] and the Memorandum of Agreement (lease), which includes the Indemnity, Annexure B, the latter document produced by the Isa Carstens Academy in the Court *a quo*. At paragraphs [60] to [63] of the judgment, the Court *a quo* thoroughly explored the welcoming programme and correctly observed that the document made no reference to Superstrike.

[129] It was common cause between the parties that the respondent did not introduce the Memorandum or the Indemnity attached to the lease agreement. When confronted with the Memorandum in the Academy's Special Plea of Non-

[10] Judgment, para [64]
[11] See Mtokonya supra, para [24]
[12] Prior to the amendment which added Superstrike as third defendant

Joinder[13], the respondent's response was that at the time of instituting the action against the Academy and University, she was unaware of the Memorandum's existence. Furthermore, on perusal of the Memorandum, the respondent's memory was refreshed in that she realised that she had signed the Memorandum on 15 January 2016.

[130] The respondent's further explanation was that her father had co-signed the Memorandum as parent/legal guardian and co-principal debtor on the same date, while the Indemnity was signed by her late mother on 18 January 2016, three days after she (the respondent) signed the written Memorandum. For the period from the end of 2015 to the beginning of 2016, when she applied for registration as a first-year student, until the end of July 2020/August 2021, when she consulted with legal representatives, the respondent had no knowledge of the existence of Superstrike nor its involvement in her case.

[131] She explained that her father oversaw the administration related to her studies, including the financial side, and he simply approached her to sign documents, and she initialled the Memorandum, at his request, without reading the same. The documents referred to above included the first-year student programmes. She could not recall whether she was present when her late mother signed the Indemnity but stated that her mother signed the document without discussing it with her and without her knowledge and consent.

[132] The Court *a quo* proceeded to find that Superstrike's arguments do not accord with the undisputed averments in the respondent's supplementary affidavit. This finding was based on the view that Superstrike failed to set up any evidence

[13] Dated April 2019

either in the Special Plea or the Joinder application, to gainsay the respondent's evidence and version. In the absence of independent evidence presented by Superstrike, or a striking out of the supplementary affidavit, alternatively an application in terms of Rule 6(5)(e), the Court *a quo* accepted the respondent's submissions regarding the nature and extent of her knowledge of the Memorandum, its consent and welcoming program when her action was instituted, as uncontested. The Court *a quo* accepted the evidence and found that the respondent was unaware of the content of these two documents at the time of the incident or when the action was instituted and only had sight thereof at the end of July 2020.

[133] The Court a quo was also critical of Superstrike's documents attached to its answering affidavit in the Joinder application, and stated that there was no indication in the Google search result of Superstrike that it was the legal entity through which accommodation was provided at the Academy. The Court *a quo* further questioned the fact that none of the documents indicated the role played by Superstrike, if any, in relation to student activities at the accommodation, the employment and control of mentors, or that the respondent could have obtained such knowledge with reasonable care.

[134] The welcoming program refers to the Isa Carstens Academy and identifies the mentors involved in, *inter alia*, the dam event. That being the case, the evidence indicates that the respondent was aware of the identity of the Academy prior to the commencement of 2016, and/or on the date of the incident, 23 January 2016. She also knew of the identity of the University, which was the party responsible for the academic program.

[135] In my view, the respondent was not required in terms of section 12(3) of the Act to have knowledge of the legal relationships between the Academy, the University, Superstrike, and the mentors. According to **Gericke** *supra*[14], the respondent *was* required to ask one question to establish the identity of who was in charge of the Academy and was not to be/should not have been content to be supine.

[136] Considering the above, the first point to make is that the welcoming programme was that of the Academy, and this is clear from the document and a fact known by the respondent. She was also aware that the program and event at the dam were run by mentors, who were also resident at or part of the Academy. She also knew- and this is pleaded – of the relationship between the mentors and the Academy. It must also have been clear to the respondent that the welcoming program and dam event were not run or part of the University's academic program.

[137] It is common cause that the respondent signed the Memorandum, that she was 19 years old and failed to attach it to her summons. *Ex facie* the Memorandum, it states that it is entered into between Superstrike Investments 121 (Pty) Limited trading as "Isa Dameskoshuis" and the respondent, who leased accommodation at a monthly rate. Superstrike t/a Isa Carstens Academy is referred to as the supplier of "the room" at "the premises", Isa Dameskoshuis, 3[…] P[…] R[…] Street, Stellenbosch, 7600. Objectively considered, an ordinary reading of these details would cause any reader to realise that the address of "the premises" and that of the supplier, Superstrike, was identical.

[14] Page 832

[138] In those circumstances, a reader of the welcoming program and the Memorandum of Agreement (supply of accommodation) would have realised that Superstrike was responsible for the accommodation, the Academy and the welcoming program. Thus, the respondent's explanation that her father oversaw the administration of her studies (which we accept) and that she simply signed the documents without question does not assist the respondent. To clarify, there is no reasonable explanation why the respondent would have no knowledge of the Memorandum for almost four years and then, when confronted with the document during proceedings in the Court *a quo*, she then refreshes her memory. I say this because when one has regard to the chronology of events and litigation, it is notable that the Memorandum of Agreement was signed about 8 days before the incident at the dam, which was more or less at the same time that the welcoming program was made available to her.

[139] Furthermore, the respondent's explanation of signing documents without reading same and simply entrusting everything to her father is, with respect, indicative of the passive role which the Appellate Division in **Gericke** *supra* warned against. The identity of the party to the Memorandum of lease, which was in control of or supplied the accommodation where the respondent as a first-year student resided and the signature of the Indemnity by her mother, are all issues of fact.

[140] Given what is stated earlier, the respondent could easily have established the following facts: that the two contemporaneous documents, the Memorandum and the welcoming program, plus the Indemnity would lead to a conclusion that

Superstrike was the entity responsible for the ladies' residence, and thus the welcoming program, at the time her claim arose. Regarding the accommodation application, the document bears both Isa Dameskoshuis and Superstrike's names and details. Even excluding the Indemnity, which she indicated her late mother did not disclose to her, my view would still be the same: that the documents at her disposal and/or in her possession were sufficient for the respondent to determine the identity of Superstrike as a potential debtor for her claim.

[141] The respondent's actual knowledge was, in the circumstances of the litigation and proceedings, not required. Section 12(3) permits deemed or constructive knowledge of a debtor's identity, and this would suffice for prescription to start running. In my view the findings of the Court *a quo* are not sustainable because had the respondent, armed with the aforementioned documents, exercised reasonable care and made the necessary enquiries, she would have been able to obtain knowledge of the debtor, Superstrike. I also agree with the appellant's counsel that the focus of the case in the special plea raised by the appellant, should have been the deeming provision in section 12(3); instead the Court *a quo* focused on actual knowledge of the identity of Superstrike and knowledge of the law and legal conclusions on vicarious liability.

[142] In my view, and with reference to **Gericke** *supra* and **Macleod v Kweyiya**[15], the respondent was negligent in failing to request and peruse the Memorandum of Agreement and also failing to obtain the Indemnity from her mother, because if she had, she would have realised that Superstrike was in control of the ladies' residence. Furthermore, she was also negligent in failing to simply

[15] 2013 (6) SA 1 (SCA) para [14]-[15]

ask the question about Superstrike when she signed the Memorandum. In these circumstances, the respondent would have established that Superstrike was a potential debtor.

[143] Having regard to the submissions, I agree with the appellant's counsel that the judgment of the Court *a quo* paid little or no attention to the deeming provision in section 12(3) of the Act. Had the section been properly considered and as the appellant only bore a light onus, the Court *a quo* should have objectively found that had she taken reasonable steps, the respondent could (and/or should) have established by the time she instituted action against the Academy and University, that Superstrike was itself a potential debtor in respect of her debt.

[144] The Court *a quo* should also have found that the respondent was deemed to have knowledge of the facts needed to identify Superstrike as a defendant at least at the time of institution of the action in December 2018, against the other defendants. In addition, the Court *a quo* was also incorrect in finding that the respondent was required to know of the appellant's control over student activities at the Academy.

[145] In view of the above findings and that the respondent's cause of action arose on 23 January 2016, having regard to section 11(d) of the Act, the claim would have prescribed by midnight on 22 January 2019. At least by the time of service (or institution) of the Summons on the Academy on 10 December 2018, the respondent had deemed knowledge of the identity of the appellant insofar as she could have gained such knowledge through the exercise of reasonable care.

[146] The Summons was not served on the appellant. Rather, the Summons was served on Superstrike after the joinder application on 26 January 2022. Clearly, the respondent had not issued Summons against the appellant by midnight of 22 January 2019. In such circumstances, the respondent's claim against the appellant prescribed and the Court *a quo* should have upheld the special plea of prescription.

[147] In the circumstances, I find that the Court *a quo* erred and thus respectfully differ from the findings and conclusion made in the minority judgment. The result of my finding that the special plea should have been upheld would mean that the respondent's claim against Superstrike falls to be dismissed.

Order

[148] In the result, I propose the following order be made:

1. The appeal is upheld with costs, such costs to include the costs of two counsel, with senior counsel's costs to be taxed on Scale C and junior counsel's costs to be taxed on Scale B.

2. The order of the Court a quo is set aside and replaced as follows:

a. The special plea is upheld with costs, such costs to include costs of counsel on Scale B.

b. The plaintiff's claim against the third defendant in case number 22436/2018 is dismissed with costs.

M PANGARKER
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

L G NUKU
JUDGE OF THE HIGH COURT

Appearances

For appellant: RGL Stelzner SC with H Rademeyer
Instructed by: Kluver Markotter Inc.
Stellenbosch

For respondent:	JJ Botha SC with S Botha
Instructed by:	DSC Attorneys
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