THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20866/2014

In the matter between:

FEEDPRO ANIMAL NUTRITION (PTY) LTD **APPELLANT**

and

READA ANNA NIENABER NO **FIRST RESPONDENT**
MARITA ELIZABETH NIENABER NO **SECOND RESPONDENT**

Neutral citation: *Feedpro Animal Nutrition v Nienaber NO* (20866/2014) [2016] ZASCA 32 (23 March 2016).

Bench: Lewis, Petse, Willis, Saldulker JJA and Kathree-Setiloane AJA

Heard: 19 February 2016

Delivered: 23 March 2016

Summary: Prescription – Dismissal of special plea: the trial court erred in separating the special plea from the remaining issues in the trial where the agreed facts in the stated case were inadequate: need for evidence to be led: matter remitted to the trial court for determination of the special plea together with the

remaining issues in light of evidence to be led.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Naidoo J sitting as court of first instance):

(1) The appeal is dismissed with costs save that the order is substituted in the following terms:

'(a) The order of the trial court dismissing the appellant's special plea of prescription is set aside.

(b) The matter is remitted to the Free State Division of the High Court for determination of the special plea of prescription together with the remaining issues in light of evidence to be led'.

JUDGMENT

Kathree - Setiloane AJA (Lewis, Petse, Willis, Saldulker JJA concurring):

[1] In November 2012, Feedpro Animal Nutrition (Pty) Ltd (Feedpro) instituted action in the Free State Division of the High Court against the trustees of the Nienaber Trust (the Trust) for payment of the purchase price of R502 895 for fertilizer products which it provided to the Trust. The Trust instituted a counterclaim in the amount of R1 086 650 for damages sustained as a result of the late delivery of the fertilizer products.

[2] Feedpro raised a special plea of prescription, which by order of the trial court, in terms of rule 33(4) of the Uniform Rules of Court, was adjudicated upon separately from the remaining issues in the trial. The parties agreed, in terms of rule 33(1) of the Uniform rules, that the special plea would be adjudicated upon with reference to a written statement of agreed facts in the form of a stated case.

[3] The stated case records that the special plea of prescription should be adjudicated with reference to the pleadings (including the request for further particulars and further particulars) and the agreed facts. The agreed facts for purposes of the special plea of prescription are, inter alia, these:

(a) The Trust ordered fertiliser products from Feedpro on 1 December 2009.

In terms of the oral agreement between the parties, the fertiliser products ordered on 1 December 2009 had to be delivered by no later than 22 December 2009. They were, however, only delivered on 5 January 2010. This constituted a breach of the agreement by Feedpro.

(b) The Trust sent a letter, dated 22 January 2010, to Feedpro recording that as a result of the late delivery of the fertiliser products it had suffered damages, and that because the damages could not be accurately determined, at that stage, it proposed that the parties agree that the damages be calculated during the harvest of the crop. The concluding paragraph of this letter reads:

'Die skade kan nie nou akkuraat bepaal word nie, ek sal verkies dat daar nou 'n ooreenkoms aangegaan word dat die skade tydens strooptyd bepaal word.'

When the parties failed to reach the proposed agreement, the Trust's attorney sent a letter, dated 11 February 2010, to Feedpro recording that the Trust had suffered damages but, at that stage, the damages could not be ascertained with any certainty. This letter reads:

'U het egter kontrakbreuk gepleeg en eers op 5 Januarie 2010 afgelewer. Weens die laat ontvangs van die blyk dit dat ons kliënt 'n misoes het. Ons kliënt het dus skade gely, welke skade nie op hierdie stadium met sekerheid bepaal kan word nie. Ons stel u ook hiermee in kennis dat sou u dagvaarding hierin uitreik dit ons instruksie is om 'n teineis in te stel.'

(c) On 26 February 2010, the Trust requested Herman Smith, an assessor, to conduct an assessment of the loss sustained by the Trust as a result of the crop failure. The assessment report of Smith was made available to the Trust after February 2010. The exact extent of the damages suffered by the Trust due to the crop failure only became known to it after this date. The Trust's counterclaim for damages was served on Feedpro on 27 February 2013.

[4] The parties' respective contentions are recorded in the statement of case. Feedpro contended that prescription of the Trust's counterclaim commenced to run by no later than 26 February 2010 (thus before 26 February 2010), with the result that the Trust's counterclaim had become prescribed. The Trust, in turn, contended that the prescription of its counterclaim did not commence to run before 26 February 2010 (thus after 26 February 2010), with the result that its counterclaim has not become prescribed. The trial court (per Naidoo J) found in favour of the Trust, and dismissed Feedpro's special plea on the basis that the Trust only became aware that it suffered damages in March 2010. Feedpro appeals with leave of the court below.

[5] The primary issue in this appeal is whether the Trust became aware before 26 February 2010 that it had suffered damages as a result of Feedpro's breach of contract. In terms of s 12(3) of the Prescription Act 68 of 1969 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. However, in terms of the proviso to s 12(3),

a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.[1] It is well established that the defendant bears the onus of proving when the plaintiff acquired or should be deemed to have acquired the knowledge to institute a counterclaim against it.[2]

[6] Feedpro's contention, that the Trust had become aware of the loss suffered prior to 26 February 2010 is premised upon the contents of the two letters, dated 22 January 2010 and 11 February 2010, respectively which, it submits, explicitly establish that the Trust had sustained damages as a result of Feedpro's breach of contract prior to 26 February 2010. In support of this contention, Feedpro argues that the Trust would not have advised it that it had sustained damages as a result of the delay in the delivery of the fertiliser products, and threatened it with a counterclaim, if the loss sustained was totally unconnected to its breach of contract. In addition, Feedpro contends that the Trust's appointment of an assessor, on 26 February 2010, to conduct an assessment of its loss, also confirms that the Trust became aware, before this date, of the loss sustained as a result of Feedpro's breach of contract. Feedpro, therefore, submits that on the agreed facts there was sufficient evidence before the trial court to find that damages would on a balance of probabilities eventuate, and that it was only the extent of the damages sustained by the Trust that was uncertain prior to 26 February 2010.

[7] I disagree. It is evident from the agreed facts that there is indeed insufficient evidence to determine when the Trust became aware that it had sustained a loss as a result of the late delivery of the fertiliser products by Feedpro. The contents of

[1] It is common cause that the counterclaim is a debt as envisaged by s 10 of the Act and that the applicable prescription period in respect of the debt forming the subject matter of the counterclaim is three years. In terms of s 11(*d*) read with s 12(1) of the Act, civil debts prescribe three years from the date the debt is due.
[2] *Minister of Finance & others v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA) para 13.

the two letters relied upon by Feedpro are, to my mind, ambivalent in relation to when the Trust became aware that it had sustained damages as a result of crop failure. The concluding paragraph of the first letter – which is all that this court is privy to − merely states that damages cannot, at this stage, be accurately calculated and proposes that the parties reach an agreement that the damages would only be calculated during harvest of the crop.

[8] By contrast, the second letter appears to suggest that, due to the late delivery of the fertiliser products, the Trust has suffered a crop failure and hence damages but that damages could not, at that stage, be calculated with any certainty. When viewed together, the contents of the two letters are not harmonious. While the latter seems to suggest crop failure, the former does not. Moreover, if the crops had actually failed, there is simply no indication from the agreed facts when this occurred. It is also not clear from the letters when crop failure is discernible – is it before or after harvest of the crop? Crucially, the date of harvest is starkly absent from the agreed facts.

[9] When the inadequacy of the agreed facts, as recorded in the stated case, was put to counsel for Feedpro during argument of the appeal, he submitted that any such inadequacy may be balanced by drawing the necessary inferences from the agreed facts. While a court may in a stated case, in terms of rule 33(3) of the Uniform rules, draw any inference of fact from the agreed facts as if proved at trial, the Rule presupposes that the agreed facts are adequately stated for determination of the issues in question. Where, as in this case, the agreed facts are discordant, ambivalent, and inadequately stated for purposes of deciding whether the Trust's counterclaim has prescribed, the process of inferential reasoning has no place.

[10] That said, what Feedpro seeks is for the court to embark upon a process of assuming certain core facts which are absent from the agreed facts. This, in my view, will do violence to the purpose of a stated case as contemplated in rules 33(1) and (2) of the Uniform rules, which is that the resolution of a stated case proceeds on the basis of agreed facts, without the necessity of leading evidence. It is clear, therefore, that a stated case must be decided upon the agreed facts and any inferences of fact that may be drawn from them. In other words, it would be impermissible for a court, which is adjudicating a dispute on a statement of agreed facts, to have regard to, or assume facts, which fall outside the scope and ambit of the agreed facts – in order to compensate for inadequately stated agreed facts vis - á - vis the question for determination. In *Minister of Police v Mboweni & Another,*[3] this court cautioned against deciding a stated case on inadequate facts. Wallis JA stated:

'It is clear therefore that a special case must set out agreed facts, not assumptions. The point was re-emphasised in *Bane & Others v D' Ambrosi,*[4] where it was said that deciding such a case on assumptions as to the facts defeats the purpose of the rule, which is to enable a case to be determined without the necessity of hearing all, or at least a major part, of the evidence. A judge faced with a request to determine a special case where the facts are inadequately stated should decline the request. The proceedings in *Bane v D' Ambrosi* were only saved because the parties agreed that in any event the evidence that was excluded by the judge's ruling should be led, with the result that the record was complete and this court could then rectify the consequences of the error in deciding the special case.'

[11] The agreed facts in the current appeal are inadequately stated for purposes of determining if the Trust had the requisite knowledge contemplated in s 12(3) of the Act for prescription of its counterclaim to commence running. Crucially, the

[3] [2014] ZASCA 107; 2014 (6) SA 256 para 8.
[4] [2009] ZASCA 98; 2010 (2) SA 539 (SCA) para 7.

agreed facts do not indicate when the Trust became aware of whether any loss was sustained as a result of Feedpro's breach of contract. As the Trust argued, it could not have instituted a claim against Feedpro until it had knowledge of whether it had sustained any damage. If regard is had to the agreed facts, as well as the pleadings, including the request for further particulars and the further particulars, it is unclear whether, by 26 February 2010, (when the Trust had instructed Smith to assess the damages suffered), it was aware that it had sustained loss at all. Significantly, in its request for further particulars, Feedpro pertinently requested the Trust to state when and how it first became aware of the crop failure. The Trust's reply to the former request is: 'Nadat met die stroop van die mielie[s] begin is…' and its reply to the latter is: 'Daar is reeds gedurende die groeitydperk opgemerk die plante het 'n stikstof tekort, maar die misoes is bevestig met die stroop van die mielies.' The further particulars of the Trust reveal that the Trust could only have become aware of the loss sustained once harvest of the crop had been completed. However, neither this fact, nor the date of harvest is apparent from the stated case. It is simply impossible, in my view, for the court to determine the date when prescription commenced to run in respect of the Trust's counterclaim, without hearing evidence on, amongst other things, when the crop was harvested and thus when it was established that loss had been suffered.

[12] Feedpro's reliance on the contents of the two letters, which form part of the agreed facts, is misplaced. Although the Trust may well have been of the view, at the time, that Feedpro's breach would result in it suffering damages, this was not sufficient to constitute knowledge for purposes of s 12(3) of the Act. As to the nature of knowledge that a creditor should have in order for prescription to commence running for purposes of s 12(3) of the Act, this court stated as follows

in *Minister of Finance & Others v Gore NO* (in relation to the defendant's knowledge):[5]

'The defendants' argument seems to us to mistake the nature of "knowledge" that is required to trigger the running of prescriptive time. Mere opinion or supposition is not enough: there must be justified, true belief. Belief, on its own, is insufficient. Belief that happens to be true (as Rabie had) is also insufficient. For there to be knowledge, the belief must be justified.

'It is well established in our law that:

(a) Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them.

(b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.

(c) On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge.

It follows that belief that is without apparent warrant is not knowledge; nor is assertion and unjustified suspicion, however passionately harboured; still less, is vehemently controverted allegation or subjective conviction.'

[13] I do not consider the tentative assertions of the Trust, in the letters of 22 January 2010 and 11 February 2010 respectively, to mean that it had actual or deemed knowledge of the damages it sustained. The suggestion of an agreement that the damages be ascertained during harvest of the crop, demonstrates the Trust's uncertainty on the question of whether it suffered damages or not at that stage. Logically, and on the probabilities, it would have been impossible for the Trust to have knowledge of any loss or damages sustained prior to 26 February 2010. The fertilizer could have only been provided to the crop after its delivery on 5 January 2010, after which the crop would have continued with its growth until it

[5] 2007 (1) SA 111 (SCA) paras 18 and 19; [2007] 1 All SA 309 (SCA).

was harvested some months later. It would have been only at this stage that a determination could have been made as to whether a loss was suffered. Harvest time is clearly the determinative date – yet it is not apparent from the agreed facts when harvest of the crop occurred.

[14] Quite clearly, therefore, it is impossible from the agreed facts to determine when the Trust first became aware that it suffered loss for purposes of s 12(3) of the Act. It is perplexing how the trial court could have determined that the Trust only became aware that it had suffered damages in March 2010, when that was not an agreed fact. The trial court, accordingly, erred in assuming March 2010 to be the period during which the Trust became aware that it had suffered damages as a result of Feedpro's breach of contract. The trial court also erred in assuming that the harvest of the crop would only take place in June 2010 – when that too was not an agreed fact.

[15] It is regrettable that the trial court, despite ample guidance from this court,[6] deemed it appropriate, in terms of rule 33(4) of the Uniform rules, to separate the special plea from the remaining issues in the trial, without first applying its mind to whether the separation of the special plea was convenient and appropriate in circumstances where, the agreed facts were wholly inadequate and, evidence needed to be led in order to determine the special plea of prescription. In the absence of evidence on when the crop failure occurred, the trial court was simply not in a position to determine the special plea in the Trust's favour. The trial court, accordingly, erred in: (a) separating the determination of the special plea from the remaining issues therein, without giving proper consideration to the issues in the

[6] *Denel (EDMS) Bpk* v *Vorster* [2004] ZASCA 4; 2004 (4) SA 481 (SCA) para 3, *Absa Bank Ltd* v *Bernert* 2011 (3) SA 74 (SCA) para 2.

trial, and the need for evidence to be led by the parties on these issues, and (b) deciding the special plea on inadequately stated agreed facts.

[16] In the result, I make the following order:

(1) The appeal is dismissed with costs save that the order is substituted in the following terms:

'(a) The order of the trial court dismissing the appellant's special plea of prescription is set aside.

(b) The matter is remitted to the Free State Division of the High Court for determination of the special plea of prescription together with the remaining issues in light of evidence to be led'.

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F Kathree-Setiloane

Acting Judge of Appeal

APPEARANCES:

For Appellants:	R Grundlingh Instructed by: Lampen Attorneys, Bloemfontein
For Respondent:	D T v R Du Plessis SC Instructed by: HW Smith & Marais, Bloemfontein