



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO.	
(2) OF INTEREST TO OTHER JUDGES: NO.	
(3) REVISED.	
2023-12-12	
<u>DATE</u>	<u>SIGNATURE</u>

Case Number: 15023/2021

In the matter between:

RFS HOMELOANS (PTY) LTD

Plaintiff

(REG. 2005/006823/07)

and

NATIONAL FUND FOR MUNICIPAL WORKERS

Defendant

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 12 December 2023.

JUDGMENT

POTTERILL J

Introduction

[1] The issue to be decided is that of a special plea of prescription; i.e. did a portion of the claim prescribe? The plaintiff, RFS Homeloans (Pty) Ltd [RFS] instituted a claim for undue enrichment [*conditio indebiti*] against the defendant, National Fund for Municipal Workers [NFMW]. In the alternative, the claim is based on payment *sine cause*.

[2] At the outset I find it necessary to set out the relevant parts of the particulars of claim, the special plea, plea and reply as pleaded:

Particulars of claim

“For the period from 1 April 2011 to 31 August 2019, the plaintiff made the following payments to the defendant:

4.1	2011	R 776 825
4.2	2012	R 1 062 532
4.3	2013	R 1 099 743
4.4	2014	R 1 164 177
4.5	2015	R 1 324 418
4.6	2016	R 1 464 554

4.7	2017	R 1 602 114
4.8	2018	R 1 756 491
4.9	2019	<u>R 1 265 958</u>
	TOTAL	<u>R11 517 811"</u>

This constitutes the amounts claimed.

The Plea

The defendant pleaded to this paragraph as follows:

- "12. In the paragraph under reply (and the particulars of claim as a whole) the Plaintiff does not disclose whether the amounts allegedly made by the Plaintiff to the Defendant during the years 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018 and 2019 were made in each year:
- 12.1 in a singular payment for each identified year that are reflected in the figures provided in sub-paragraphs 4.1 to 4.9; or
- 12.2 in multiple payments in each identified year, that are reflected only in the total amounts reflected in the figures provided in sub-paragraphs 4.1 to 4.9."

The Defendant's special plea reads as follows:

- "1. The Plaintiff's claim is, inter alia for a payment of amounts allegedly made by the Plaintiff to the Defendant during the years 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018.
2. The amounts claimed in respect of the years identified in paragraph 1 above, constitutes a debt as contemplated by the provisions of section 11(d) of the Prescription Act, 68 of 1969 ("the Prescription Act").
3. The Plaintiff's claim is based on enrichment.
4. The running of prescription of the claim commenced immediately after the alleged payments were made.

5. In consequence, the alleged debts claimed for the years 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018 were extinguished by prescription, as intended by the provisions of section 10(1) of the Prescription Act.
6. The Defendant accordingly pleads that the Plaintiff's claim in respect of amounts allegedly made by the Plaintiff to the Defendant during the years 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018 be dismissed, with costs."

In reply the plaintiff claims that:

"It is denied that the plaintiff's claim based upon unjustified enrichment constitutes a debt as contemplated in sections 10 and 11 of the Prescription Act, 68 of 1969.

- 2.1 In the alternative to paragraph 1 hereof, the plaintiff did not have knowledge of the facts from which the debt arose until at least 31 August 2019, and could not before 31 August 2019, have acquired such knowledge by exercising reasonable care.
- 2.2 In the premises, prescription only commenced to run after 31 August 2019 and the debt has not become prescribed."

[3] Before the trial commenced counsel for RFS abandoned the proposition in the reply that a claim for unjustified enrichment does not constitute a debt in terms of the Prescription Act 68 of 69 [the Act].

[4] NFMW made a formal tender of settlement in terms of Rule 34(5)(a) for the amount of R2 456 938.91 in respect of the capital claimed for only the period from 8 April 2018, constituting three years before the service of the summons on 7 April 2021. It also offered interest in terms of the Prescribed Interest Rate Act 55 of 1975 from the date each such payment was received till date of payment. Costs on a party and party

scale as agreed or, taxed was offered, excluding the costs of the application to compel dated 8 August 2022.

Background

[5] On 18 May 2007 NFMW's home loan book was sold to RFS in terms of a memorandum of agreement [the 2007 contract]. In practical terms RFS loaned monies from NFMW which RFS then loaned to its members. A plethora of further agreements were concluded between the parties: a surety agreement by NFMW in favour of RFS; a guarantee by RFS to NFMW; a deed of pledge with RFS being the pledger and NFMW being the pledgee and a "Global Master Securities Lending Agreement". However, none of these contracts, or the 2007 contract, provide for the repo-fees which were paid by RFS to NFMW. The repo fees paid constitute the amount claimed.

[6] In March 2012 NFMW and RFS concluded a further agreement [the 2012 agreement] whereby RFS bought NFMW's home loan book for R401 130 183.00. The price was to be paid off in instalments of 1 % per year on the capital outstanding with the balance of the purchase price to be paid on or before 30 June 2035. It is common cause that this agreement superseded the 2007 agreement and is extant. Again this agreement is silent on any repo fees to be paid.

[7] I venture to say that both parties agree that the many agreements between the parties is as clear as mud. The 2012 agreement thus had as purpose the following:

"Since 18 May 2007 when NFMW and RFSHL concluded a Memorandum of Understanding for the sale of the NFMW Home Loan book to RFSHL, the Parties have concluded various subsequent agreements regarding the loan provided by NFMW to RFSHL. They hereby wish to consolidate and record all the terms and conditions of the loan provided, without detracting from or changing the Surety Agreement concluded between the parties on 6 November 2007 or the Global Master Repurchase Agreement (Repo Agreement) concluded by the Parties on 23 September 2008."

[8] The agreements relied on constituting provision for repo fees are an undated agreement with the heading “Global Masters Repurchase Agreement” [Repo Agreement] and a dated agreement; “Instruction to commence with repurchase Transactions [Instruction to commence contract.]” Both these agreements were duly authorised to be signed on behalf of NMWF and RFS by a representative of Specialised Portfolio Services (Pty) Ltd [SPS]. In the 2012 agreement no mention, or incorporation of these agreements, are set out. All of the other agreements specified in par [4] are incorporated in the 2012 agreement.

[9] SPS acted as the duly appointed securities lending agent for both RFS and NMWF. It was recorded that both parties authorised SPS to conclude the Rep Agreement. In the Instruction to commence contract paragraph 4.3 reads as follows: “RFS will during the period, pay the Fund, on the debt obligation, a floating interest rate linked to the prime overdraft rate minus 3 %, and a premium of 0,30 % per annum ...” NMWF charged the premium as repo fees in terms hereof.

The evidence

[10] NMWF did not call any witnesses, but Mr du Plooy, the Chief Executive Officer, since 2007, of RFS testified that RFS and NMWF concluded these agreements and he was personally involved in the conclusion thereof. He testified that he understood there were three payments due; the instalments on the capital amount; a monthly payment to SPS and the repo fees for which he received invoices from NMFW and to date receives same. The intention of the 2012 agreement was to replace all the previous agreements. He conceded that the Instruction to commence contract was not replaced by the 2012 agreement but denied that the fees were to be lawfully paid. He stopped paying the fees in 2019 hoping that NMFW would sue him for payment, but it did not. He did not know in terms of what he had to pay the repo fees.

[11] He had gone to see an attorney at Werksmans Inc. and this attorney orally informed him that the contracts were a scam and a “foefie” and in fact null and void. A written opinion on the contracts were provided dated 24 June 2016. It was opined that

the “loans” did not expose NMWF and no further securities were needed by NMWF. His auditor from KPMG also told him that the payment of the fees to SPS and the repo fees were a scam. He in fact stopped paying the SPS fees in May 2015 informing SPS of such by means of a letter. Although he in this letter threatened to claim the monies back he never did so due to the relationship between FSB and NMFW.

[12] As for the repo fees he had asked NMFW in terms of what must it be paid and in fact even filed a request in terms of section 53 of the Promotion of Access of Information Act 2 of 2000 [PAIA] seeking disclosure for the source of these fees payment. As he did not receive an answer he stopped payment in 2019.

[13] Exhibit A was handed up as evidence before me. It consisted of emails from Mr du Plooy to employees of NMFW and their answers to his emails. In essence he was enquiring in terms of what must he pay this repo fee. On 5 August 2019 he received the following answer from Ms Renette Erasmus forwarded by Ilze Pachonick, “Die Repofoeie is nog steeds betaalbaar. Ingevolge die ooreenkoms is dit ‘n tipe waarborg/versekering vir die uitstaande leningsbedrag, dus is dit nog steeds betaalbaar op die balans van R570 miljoen.”

[14] Mr Samons of NMFW on 12 August 2019 sent an email with the following content to Mr du Plooy:

“Your enquiry about the monthly fee being paid to NMFW refers. Thank you for making payment of the amount Renette was enquiring about last week. This fee is payable and has been paid since 2008 in terms of paragraph 4.3 of the attached. There is no other insurance policy indicated below in your mail of 6 August 2019.”

Mr du Plooy reacted to NMFW on 13 August 2019 to that email as follows:

“Your answer to my queries send to Renette is not satisfactory as you know better than me that the Funds previous auditor ... the ‘repo fees’ a ‘foefie and

a scam' in 2015 already. You also know that the agreement with SPS stopped with your and ... consent. To rely on a paragraph that is not applicable anymore is outrageous.

The two questions from the FSCA in short are: Can you please supply us with a document or policy on the product and ... is the monthly premium paid." [the emails are cut off on the right hand side and therefore the "..."]

[15] In cross-examination Mr du Plooy denied that he already in 2015 knew that there was no legal basis for the payment of the repo fee. He explained that his e-mail was not referring to repo fees, although it expressly set out "repo fees", but in fact to the SPS fees that he had stopped. He was adamant that in fact no repo agreement had been concluded. He testified that the agreement with SPS had been cancelled in 2015 and NMFW could not rely on clause 4.3 of a cancelled agreement. He was only indicating that NMWF knew what had been found in terms of the SPS fees. i.e. a "foefie" and a scam.

Argument on behalf of RFS

[16] Much was made of the fact that NMFW did not plead sufficient facts to sustain a plea of prescription and on that basis alone it did not prove its defence of prescription. Reliance was placed on the matter of *Greater Tzaneen Municipality v Bravospan* 252 CC¹ at par [12] which set out as follows:

"Rule 22 of the Uniform Rules of Court, provides that a party who raises a plea shall, in his plea, 'clearly and concisely state all material facts upon which he relies'. In *Hurst, Gunson, Cooper, Taber Ltd v Agricultural Supply Association (Pty) Ltd*,² the court held that in order to found a plea of prescription based on a 3-year period, it is essential and material to expressly allege the facts on which the plea is based.³ The defendant must prove the facts that the plaintiff was required to know before prescription could commence and must allege that

¹ (428/2021) [2022] ZASCA 155 (7 November 2022)

² *Hurst, Gunson, Cooper, Taber Ltd v Agricultural Supply Association (Pty) Ltd* 1965 (1) SA 48 (W) at 52

³ *Hurst ibid*

the plaintiff had knowledge of those facts on or before the date upon prescription is alleged to commence.⁴ In *MEC for Health, Western Cape v Coboza*, Van der Merwe JA held that the appellant in that case failed to allege the facts that were necessary to determine when the respondent knew of the primary facts or should have reasonably have known them. Therefore, the court held that the determination of the 'plea of prescription was an exercise in futility'.⁵

[17] I was thus urged to ignore the evidence of Mr du Plooy because NMWF did not lead evidence on what dates the payments were made and on what dates the payments prescribed. It did not plead this, and did not lead evidence on these facts that it had to prove.

[18] But, in any event prescription only ran from 31 August 2019 and RFS could not have acquired such knowledge by exercising reasonable care before such date.

Arguments on behalf of NMWF

[19] It was submitted that it had pleaded that the payments constituted a debt and therefore the prescription period was three years. Because the claim is based on undue enrichment prescription started running immediately upon payment, reliance for this submission was placed on the matter of *Van Staden v Fourie* 1989 (3) SA 200 (A) at 215. Consequently, the claims for the period from 2011-2018 became prescribed in terms of s10(1) of the Act. Accordingly, NMWF did not have to plead when the identity of the debtor and the facts from which the debt arose was in the knowledge of RFS; it simply did not enter the fray.

⁴ See *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC) para 24

⁵ *MEC for Health, Western Cape v Coboza* 20202 ZASCA 165 para 13

[20] In terms of section 12(3) of the Act prescription does not begin to run until the creditor has knowledge of the identity of the debtor and the facts from which the debt arose. The facts so required are the minimum facts that are necessary to institute a claim. The creditor need not be aware of the full extent of its legal rights.⁶ It was argued that RFS had all the facts. It knew that after the 2007 and the 2012 agreements no repo agreement was concluded and that payment was made to NMWF. It knew that the Instruction to commence contract was not included in the 2012 agreement. On its own evidence thus RFS had the identity of the debtor and all the facts necessary to institute a claim. Knowledge of the legal conclusion that the payments were not due in terms of the contracts is not a fact he would need to know before RFS could institute a claim.

[21] I was referred to *Truter and Another v Deyssel* 2006 (4) SA 168 (SCA) wherein the Court found that a debt is due “when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.”⁷ Also in *Fluxmans Inc v Levenson* 2017 (2) SA 520 (SCA) at par [41] and [42] :

“[41] The question, therefore, is whether before February 2014 the respondent had knowledge of the facts from which his claim arose. In my view, the respondent did have knowledge of such facts. Immediately after he paid the fees to the appellant on 20 August 2008 the respondent knew all the facts even though he did not know the legal conclusion flowing from those facts. The respondent knew that fees which he paid to the appellant on 20 August 2008 were calculated on the basis of the oral contingency fees agreement which he concluded with the appellant (Perlman). On his own evidence, the respondent then also knew all the other facts that he relied upon in his founding affidavit for the conclusion that the contingency fees agreement was invalid. He knew that the appellant’s fees were not limited to double their normal fee of 25 % of the amount awarded, whichever was the lower. He also knew that before the agreement was entered into he was not advised of any other

⁶ *Minister of Finance and Others v Gore N.O.* (230/06) [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) (8 September 2006)

⁷ Par [16]

ways of financing the litigation and of their respective implications; he was not informed of the normal rule that in the event of him being unsuccessful in the proceedings he may be liable to pay the taxed party and party costs of the RAF in the proceedings; and he was not advised that he would have a period of 14 days, calculated from the date of the agreement, during which he would have the right to withdraw from the agreement by giving notice to the appellant in writing. He knew that none of this formed part of the contingency fees agreement. Therefore, even if the contingency fees agreement should be regarded as a written agreement, by 20 August 2008 the respondent knew all the facts that he relied upon for his claim in his founding affidavit. According to him, what he did not know, however, was the legal conclusion flowing from these facts, namely that it was invalid because of its failure to comply with the Act. In [21] of the judgment Mpati AP states that counsel for the appellant only dealt in their heads of argument and before us with the issue relating to the invalidity of the agreement and ignored the second part of the respondent's case, namely, that the agreement did not comply with the provisions of the Act. I disagree.

- [42] Knowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. This court stated in *Gore No* para 17⁸ that the period of prescription begins to run against the creditor when it has minimum facts that are necessary to institute action. The running of prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case 'comfortably'. The 'fact' on which the respondent relies for the contention that the period of prescription began to run in February 2014, is knowledge about the legal status of the agreement, which is irrelevant to the commencement of prescription. It may be that before February 2014 the

⁸ *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) ([2007] 1 All SA 309; [2006] ZASCA 98)

respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run. Knowledge of invalidity of the contingency fees agreement or knowledge of its non-compliance with the provision of the Act is one and the same thing otherwise stated or expressed differently. That the contingency fees agreements such as the present one, which do not comply with the Act, are invalid is a legal position that obtained since the decision of this court in *Price Waterhouse Coopers Inc* and is therefore not a fact which the respondent had to establish in order to complete his cause of action. Section 12(3) of the Prescription Act requires knowledge only of the material facts from which the prescriptive period begins to run – it does not require knowledge of the legal conclusion (that the known facts constitute invalidity) (*Claasen v Bester* 2012 (2) SA 404 (SCA) ([2011] ZASCA 197)).”

[22] It was submitted that because the cause of action arose immediately after payment and because RFS had knowledge of the identity of the debtor and the facts it is unnecessary to entertain whether the RFS could have acquired the knowledge of the debt and the facts by exercise of reasonable care.

[23] But, if the Court should rely on this enquiry then the evidence by Mr Du Plooy was clear that by the exercise of reasonable care it had knowledge of the facts in 2015 and 2016 when Werksmans Attorneys communicated that the agreements were “null and void” and when the auditor informed him that the repo fee was a “scam and a foefie.”

[24] Mr Du Plooy’s attempt to escape the fact that he already in 2015 was informed that the repo fee was not payable, by testifying that that his e-mail in fact referred to the SPS fee, is not feasible. The syntax and language of the email, as well as the context of the preceding email, does not allow for such interpretation. The tender must thus be made an order of court.

Reasons for decision

Can the special plea be dismissed on the special plea itself?

[25] When approaching a special plea of prescription, the injunction in s39(2) of the Constitution must be borne in mind. The court must also recognise that the provisions of s12 of the Act seek to “strike a fair balance between, on the one hand, the need for a cut-off point beyond which a person who has a claim to pursue against another may not do so after the lapse of a certain period of time if he or she has failed to act diligently and on the other the need to ensure fairness in those cases in which a rigid application of prescription legislation would result in injustice.”⁹ Prescription’s purpose is to protect undue delay by litigants who tardily attempt to enforce their rights with the rational being that extinctive prescription promotes certainty and stability to social and legal affairs.¹⁰

[26] Section 12 of the Act reads as follows:

- “(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) A debt which does not arise from contract shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”

⁹ *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC) (2016 (5) BCLR 656; [2016] ZACC 136)

¹⁰ *Minister of Finance and Others v Gore N.O.* (230/06) [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) (8 September 2006 par [16] and *Road Accident Fund and Another v Mdeyide* (CCT10/10) [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC) (30 September 2010) at para 8

[27] The onus is on NMWF to prove prescription. In its special plea of prescription, it did not identify each date on which the debt became due but referred to the years as set out in the particulars of claim. The amounts claimed constituted yearly payments. I am satisfied that since yearly amounts were claimed NMWF sufficiently alleged the dates the payments were due. NMWF also pleaded that prescription started to run immediately upon payment being made. In the special plea it avers that the debt for the years from 2011 to 2018 became prescribed in terms of the provisions of s10(1) of the Act.

[28] On whether NMWF pleaded sufficiently the only question that requires a decision is if indeed prescription started to run immediately upon payment. In the *Van Staden* matter on p215 C-H the Court relied on a string of cases that followed the decision in *The Liquidators of the Paarl Bank v Roux and others* (1891) 8 SC 205 that where money is paid out under the mistake of fact the cause of action is the *condictio indebiti* and the cause of action based on the *conditio indebiti* arises immediately after the payment was made. Prescription therefore starts to run immediately when you are entitled to claim it back. On behalf of RFS this submission was not attacked or expanded on.

[29] Extensive prescription would run “as soon as the debt is due”, but the Constitutional Court in *Links and Mtokonya*¹¹ referred to the proviso in s12(3) as exceptions to this general rule. The first is that the debt is deemed not to be due until the creditor has knowledge of the facts from which the debt arises. The second qualification is that the creditor shall be deemed to have such knowledge if he could have acquired it by the exercise of reasonable care. I am of the opinion that the fact that the cause of action is founded on the *actio indebiti* does not render s12(3) inapplicable. In *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme*¹² Medshield’s pleaded case was that it made payments in the *bona fide* and reasonable but mistaken belief that the payments were owing. Yarona pleaded prescription and the Supreme Court found that “the onus rested on Yarona to establish the date by

¹¹ *Mtokonya v Minister of Police* (CCT200/16) [2017] ZACC 33; 2017 (11) BCLR 1443 (CC); 2018 (5) SA 22 (CC) (19 September 2017)

¹² [2017] 4 All SA 705 (SCA)

which Medshield acquired, or could by exercising reasonable care have acquired, knowledge of the facts giving rise to the claim.”¹³

[30] In summary, NMWF has the onus to prove prescription. It pleaded correctly that the debt was due when the payments were made. When RFS in reply raised s12(3) NMWF had the onus to at trial prove when RFS had knowledge of the facts or could have by exercising reasonable care have acquired knowledge of the facts giving rise to the claim.¹⁴

When did NMWF have knowledge of the facts?

[31] The running of prescription commences when a “debt”, is “due”, and the creditor must have “knowledge”, of the “facts” from which the debt arises. It is common cause before me that enrichment constitutes a debt.

[32] The debt is due when it is owing and payable. The creditor will acquire the legal right to claim when every fact has happened that is necessary for the creditor to pursue his claim. In *Links*, the Constitutional Court cited with approval the following passage from *Truter*¹⁵ where the Supreme Court of Appeal stated that a claim is due for purposes of the Prescription Act:

“When the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.”

What are the facts which a creditor must have knowledge of?

[33] The requisite knowledge is knowledge of those facts which constitute the essence of a creditor’s claim. What those essential or material facts are must be

¹³ Par [61]

¹⁴ *Gericke v Sack* 1978 (1) SA 821 (A)

¹⁵ *Truter and Another v Deyzel* 2006 (4) SA 168 (SCA)

distilled from the essential elements of the creditor's pleaded claim. The creditor need not have knowledge of every such fact, but only "the minimum facts that are necessary to institute action."¹⁶ A fact is material, if without proof of its existence, a court could not find that the creditor had succeeded in proving his pleaded claim. However, it is not necessary that the creditor also has knowledge that a material fact supports a legal conclusion. The creditor is only required to have knowledge of the material facts which underlie the essential elements of his pleaded cause of action, and not also the legal consequence of those facts.

[34] From the evidence of Mr Du Plooy I am satisfied that prior to 2012 he on the facts did not know that the repo fee was not due and payable. In 2012 he knew what payments needed to be made that included a repo fee. He knew he had to pay it to NFMW. He knew the Instruction agreement was not incorporated in the 2012 agreement. He knew that no Repo Agreement was concluded as provided for in clause 3 of the Repo agreement. These two agreements were not incorporated directly or indirectly. However, in these minefield of agreements, there was the Instruction agreement setting out a fee to be paid and the Repo Agreement. It was not incorporated in the 2012 agreement, but it was also not expressly cancelled, with NFMW upholding it and rendering invoices for these fees. I am satisfied that RFS could not then on the facts conclude, even in the broad sense of a claim, that it did have a claim because it did not need to pay these repo fees and could claim the payments back.

[35] I was referred to the Levenson matter¹⁷ however, in that matter the respondent therein knew all the facts, he knew the written agreement did not at all conform to what he had agreed to orally. The majority decision found that he did not have to know the agreement was invalid to institute a claim because he knew the agreement did not conform to what he had agreed to. RFS did not at that stage, as in the Levenson matter, have knowledge of the fact that it could ignore the Instruction agreement, or on what basis the repo fees were not due. Yes, no repurchase agreement was

¹⁶ *Links* par 32-35

¹⁷ *Fluxmans Inc v Levenson* 2017 (2) SA 520 (SCA) at par [42]

concluded, but the repo fees were claimed throughout the whole period from 2007 till 2019 without a repurchase agreement being concluded. The basis for the payment was not known, but it could not be accepted that no basis existed, and therefore RFS did not have the minimum facts as to, why the fees were not due to institute a claim. Mr De Jager's evidence was clear that after he had heard from his auditors in 2015 and consulted an attorney in 2016 he suspected the fees were not due and payable.

Can RFS be deemed to have knowledge and what date is that?

[36] This conclusion then leads to the second enquiry which is framed as a proviso to the deeming provision in the first part of the sub-section [12(3)], that the creditor shall be deemed to have such knowledge if he could have acquired it by the exercise of reasonable care.

[37] Mr du Plooy testified that an attorney of Werksmans already in 2016 verbally advised him that the agreements were null and void. If that is so then he had the knowledge that there was no basis to pay the repo fees and had the minimum facts required to institute a claim. In Mr Du Plooy's email of 13 August 2019 to Mr Samons of NFMW he set out that he was in 2015 informed by his previous auditor that the repo fee was a "foefie and a scam." He then knew it was not due and payable. I am unconvinced by his evidence that the clear language of his email must be interpreted to read in that the "repo fees" actually meant the "SPS fees" payable to SPS. This is specially so if one has regard to the context and background of the string of emails. His enquiry was about the monthly fee being paid to NFMW, not about the SPS fee paid to SPS. He knew the SPS fee was not paid to NFMW. He was clearly advising NFMW that the auditors had advised him that the repo fee was already identified as a "foefie" and a scam by the auditors in 2015. He was alerting NFMW what happened with the SPS fee; payment was stopped, and impliedly threatening that this could happen to the repo fee as well. Upon interpreting these emails and the evidence of Mr Du Plooy thereon the context speaks for itself and the context of the email string must be considered. If consideration is given to the language used with regard to the

ordinary rules of grammar and syntax the meaning as testified to by Mr du Plooy is rejected.¹⁸

[38] I am satisfied that NMWF disproved that knowledge of the claim only came to Mr du Plooy on 31 August 2019. By exercising reasonable care, he would have knowledge, not on 31 August 2019, but already in 2015 of the the minimum fact that no contractual basis existed for the payments of the repo fees. The amounts thus paid by RFS before 7 April 2018 became prescribed when legal proceedings commenced on 8 April 2021.

[39] I accordingly make the following order:

- 39.1 The Defendant is ordered to pay of an amount in the sum of R2 456 938.91 (Two Million Four Hundred and Fifty Six Thousand Nine Hundred and Thirty Eight Rand and Ninety One Cents) in respect of the capital portion of the Plaintiff's claim as is set out in Annexure "A" hereto which stipulates the dates and amounts of payments effected by the Plaintiff to the Defendant between the dates of 8 April 2018, being three years before the service of the summons and 7 April 2021, being the date of the service of the summons.
- 39.2 The Defendant is ordered to pay to the Plaintiff interest on the amounts listed in Annexure "A" from the date that each such payments were received by the Plaintiff until the date of payment, calculated as provided for in the Prescribed Rate of Interest Act, No. 55 of 1975 (as amended).
- 39.3 The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs incurred until the date of this offer to settle. The Defendant's tender for payment of the stipulated costs incurred by the Plaintiff

¹⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) par [18]

excludes any costs incurred by the Plaintiff in respect of the Plaintiff's Application to Compel, dated 8 August 2022.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 15023/2021

HEARD ON: 2-3 OCTOBER 2023

FOR THE PLAINTIFF: ADV. M. SNYMAN SC

ADV. N. NORTJE

INSTRUCTED BY: ML Schoeman Attorneys Incorporated

FOR THE DEFENDANT: ADV. P.G. CILLIERS SC

INSTRUCTED BY: Nysschen Attorneys

DATE OF JUDGMENT: 12 December 2023