REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 76577/10

4/4/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

04/04/17
DATE

SIGNATURE

In the matter between:

PETRUS WILHELM TERBLANCHE Plaintiff

and

THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS Defendant

JUDGMENT

TEFFO, J:

[1] The plaintiff and six others instituted similar actions under different case numbers in this court against the defendant for damages suffered as a result of the suspension of water supply to their properties by officials of the department of water and environmental affairs (the "*department*").

[2] The parties elected to proceed with the action instituted by the plaintiff only and the other matters were removed from the roll. It was agreed that I should only determine liability on the understanding that the outcome thereof will also apply to the other matters in so far as the facts are not distinguishable.

[3] The plaintiff is the registered owner of Portion 97 of the farm Cornelia, measuring 457 1440 hectares in extent in terms of Deed of Transfer T 1067/1975 (the "*property*") situated downstream of the Koppies and Roodepoort dams.

[4] He was a water user in terms of the provisions of section 22(1)(a)(ii) read with section 32 of the National Water Act, 36 of 1998 (the "*NWA*") and entitled to water supply through a canal system from the Koppies dam.

[5] It is alleged in the particulars of claim that during 2003 the officials of the department acting in their capacity as such, stopped water in the canal which supplied water to the property thereby infringing on the water use rights of the plaintiff on the basis that the water use charges of the plaintiff were in arrears.

[6] It is further alleged that the said infringement was unlawful as the officials failed to comply with the provisions of section 54(4) of the NWA, alternatively section 59(4) in that the plaintiff was not given an opportunity to make representations.

[7] At paragraph 9 it is further alleged that the said infringement was negligent in that a reasonable man in the position of the officials of the department would have complied with the provisions of sections 54 and 59 of the NWA, that nothing prevented them from complying with the provisions of the aforementioned sections and that a reasonable man in their position would have acquainted himself with the provisions of the NWA and did everything in his power to comply with the Act.

[8] It is alleged that as a result of the infringement of the plaintiff's water use rights, the plaintiff suffered damages in the amount of R250 000,00 (two hundred and fifty thousand rand).

[9] In paragraphs 12 and 13, the plaintiff alleges that at the time the officials of the department suspended the water supply to his property, they were aware that he used the water for irrigation. They acted negligently by suspending the water supply. The officials were also aware at the time that the canal system was not well maintained and that there was drought and drought relief was approved on 6 August 2007, so it was alleged.

[10] In July 2013 the defendant delivered a plea on the merits and in November 2014 the defendant amended her plea to include a special plea.

[11] The special plea reads:

"1. *The plaintiff claims the amount of R250 000,00 in respect of the loss incurred as a result of the alleged negligent and unlawful suspension of the water supply through a canal system to the plaintiff's properties by the defendant during or around 2003.*

2. *Accordingly, as at no later than December 2003, being a period of more than three years before service of the plaintiff's summons, the plaintiff knew or ought to have reasonably known:*

2.1 *that the defendant has suspended water distribution from the canal to the plaintiff's properties;*

2.2 *there was no longer any irrigation taking place on his properties;*

2.3 *that the plaintiff has suffered, alternatively, would suffer loss as a result of the suspension of the water distribution, and*

2.4 *the identity of the defendant (its alleged debtor) and of the material facts giving rise to his claim.*

3. *In the premises, the plaintiff's claim in respect of the loss in annexure "A" of his particulars of claim has prescribed in terms of section 11 of the Prescription Act 68 of 1969 and falls to be dismissed with costs.*"

[12] In her plea the defendant admitted the following: that the plaintiff was the owner of the property which formed part of the Rhenoster river Koppies dam State Water Works, was the holder of a water usage licence and water rights as contemplated in section 22 read with sections 42 and 32 of the NWA in respect of the property and that on 6 October 2010 she purchased the water rights of the plaintiff. Furthermore that at all material times she was responsible for the proper upkeep and maintenance of the canal, that since and/or around 2003 the canal disintegrated into a dilapidated state and that the water users in the Rhenoster river applied for and were granted drought relief in 2007.

[13] The defendant however pleaded that the plaintiff's water use rights were subject to the plaintiff paying his water charges in order to access water distribution from the Koppies dam through the canal system.

[14] She further pleaded that in terms of the provisions of section 56 of the NWA, water use charges are used to fund among others, the maintenance of the canal system. The plaintiff as a holder of the water use rights was therefore obliged to pay for the water use charges, but he failed to pay, so it was pleaded.

[15] The defendant further pleaded that her duty and responsibility for the upkeep and maintenance of the canal is/was dependent on the effective collection of water use charges which would be used for the maintenance of the canal.

[16] It was also pleaded that the canal system has disintegrated into a dilapidated state due to lack of maintenance to a point that proper distribution of water was not possible. However, failure by the water users to pay for their water use charges made the defendant's task to maintain the canal system impossible.

[17] The defendant denied that the plaintiff utilised water through the canal system during 2003.

[18] She further denied that there was any suspension of the water supply to the plaintiff's property as contemplated in the NWA in 2003.

[19] In paragraph 11 of her plea, the defendant pleaded that during or about January 2005, she suspended water distribution through the canal to the plaintiff's farm on the basis that the plaintiff was in arrears in respect of payment of the water usage charges, the canal was dilapidated and not in a proper functioning state and that no water distribution was effected through the canal as at that time. She denied that she did not comply with the provisions of the NWA.

[20] The defendant further denied that the failure to comply with the provisions of the NWA as alleged was unlawful and/or negligent and pleaded specifically that the actions of the officials of the department constituted administrative actions in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*"). They remain valid until declared unlawful and set aside by a court of law.

[21] The defendant also pleaded at paragraph 12 that during or about January 2005 a notice of "*suspension of entitlement to use water in terms of section 54(1) of the NWA*" was served on the plaintiff and that during or about July 2007 she received representations in respect of the said notice from the third plaintiff.

[22] It was denied that the conduct of the officials of the department caused the plaintiff any damages as alleged and that there was any irrigation taking place on the plaintiff's farm using water from the canal during or around the time the suspension was effected.

[23] The plaintiff's replication reads as follows:

> "2. *Unless expressly admitted herein, all the allegations raised in the special plea and the plea on the merits must be regarded as having been denied and specially traversed.*
>
> 3. *With reference to the special plea, the plaintiff denies that its claim against the defendant has prescribed.*
>
> 4. *It is specifically pleaded that the plaintiff together with other water users scheduled under the Rhenoster river Government Water Scheme applied for drought relief for the 2003 period, which drought relief was only granted by the defendant, to the plaintiff and other water users on the Rhenoster river Government Water Scheme, on 6 August 2007. A copy of the approved submission to the Director-General of the defendant is attached hereto as 'PWT1'.*
>
> 5. *By approving the said application for drought relief, the defendant represented by her Director-General, conceded that the plaintiff is entitled to receive water from the Rhenoster river Government Water Scheme.*
>
> 6. *The sole reason why the defendant failed to provide water to the plaintiff, is the fact that the defendant did not maintain the Rhenoster river Government Water Scheme.*
>
> 7. *The fact that the Rhenoster river Government Water Scheme was not maintained, was brought to the attention of the defendant and her officials on various occasions on behalf of the plaintiff and the other water users, on the said Government Water Scheme.*
>
> 8. *The defendant, alternatively her officials, further undertook on various occasions, since 2003, to address the issues regarding maintenance of the Rhenoster river Government Water Scheme, and thereby admitted that the plaintiff is entitled to receive water from the Government Water Scheme.*

9. *The defendant did not comply with her, alternatively her officials' undertakings, as set out above.*

10. *The defendant further persisted in levying water use charges against the plaintiff's property up to date in terms of the provisions of section 59 of the National Water Act, 1998 (Act 36 of 1998).*

11. *The defendant's continued suspension of water to the plaintiff's property therefore constitutes a continuous wrong.*

12. *The continuous wrong only came to an end when the defendant offered to buy the plaintiff's existing lawful water use entitlement, which was scheduled under the Rhenoster river Government Water Scheme and performed in terms of that offer, on or about 6 October 2010."*

[24] The plaintiff, Mr Petrus Wilhelm Terblanche testified in support of his case. The defendant closed her case without calling any witnesses.

[25] A brief summary of the evidence led by the plaintiff is as follows: He is an adult male of 81 years. He resides at Cornelia farm situated at the Koppies district. He is a farmer and has been farming from 1972 to date at the farm, Cornelia. He was involved in dairy farming between 1996 and 2003. He has been feeding his dairy cows with lucerne. He could produce it at a cheaper price than buying it. He planted lucerne through irrigation on plus minus 5 hectares on his farm. He received water to irrigate the lucerne from the Rooipoort dam through the medium of a canal system. Water officials who worked for the department supplied water. Before 2003 he would make an application for the quantity of water for a specific period in order to get scheduled water from the Koppies dam system. The period depended on the date given to him and the amount of the water. The canal got dilapidated

because its maintenance was not done. He made 6 cuts in overall of the lucerne per year that he planted per irrigation before 2003. On the dry land he made 3 to 4 cuts per year. The irrigated lucerne dries out if it is not irrigated and he will suffer damages because the seed also dries out as they will not be getting enough water. If the irrigated lucerne does not have water, its yield would not grow. It is cheaper to plant and produce one's own lucerne as he saves up to 70%. Because he did not have water, he had to buy lucerne and it also cost him transport, his dairy production totally deteriorated and without sufficient fodder he reduced the number of dairy cows. It was no longer costly for him to keep the cows. He suffered financially.

[26] There was drought in the Koppies dam between 2002 and 2005. He was referred to a document appearing on page 135 of file 6, Bundle 12 and asked whether he ever saw the document. His response was, "*Yes*", he saw it in the morning of the day he was giving evidence in court at his counsel's chambers. The document is addressed to the Acting Regional Director: Free State and it reads:

> "*SUSPENSION OF ENTITLEMENT TO USE WATER IN TERMS OF SECTION 54(1) OF THE NATIONAL WATER ACT: RHENOSTER RIVER GWS*
>
> *Attached please find a list of water users at the Rhenoster River GWS who did not pay the water use charges which were payable on 31 July 2004.*
>
> *The Regional Director has been delegated in terms of section 54(1) of the National Water Act to suspend the entitlement to use water to users who fail to pay charges which are payable in terms of the Act.*
>
> *Your approval is required to suspend the supply of water on 10 January 2005 to users whose names appear on the attached list, and*

who, by that date, have failed to pay or make arrangements for the payment of outstanding water use charges.

Recommended.

Chief Engineer: Middle Vaal MWA

Approved.

Regional Director Free State."

[27] He was never summoned by the defendant for an outstanding water account before 2010. He never received any document from the defendant before January 2005. He was never asked to make any representations. If he was asked to make any representation, he would have told the Committee about the request. If they had decided to suspend his water supply, he would have made an application for drought relief because at that time they were in a drought period. His problem would be resolved but due to the lack of maintenance on the canal system, the ground canals were dilapidated. According to his knowledge the application for drought relief was made in 2005.

[28] Under cross-examination he testified that he completed a form for the supply of water and registered 5 hectares before 2001 because the drought started in 2001. He conceded that he testified in his evidence-in-chief that there was drought from 2002 to 2005. When asked whether he testified that he registered in 2001, he said there was drought prior to that and that he did not register but there was a routine of completing application forms. He was then asked whether he completed the forms in 2001 and his response was

that he did not say he completed the forms in 2001, he cannot say when the forms were completed and that it was a long time ago.

[29] He further testified that he farmed dry land lucerne between late 1980 and early 1990 and the irrigable lucerne from 1976 up to the time he did not have water. When asked as to when did he not have water, he said the time there was drought and the canals were not maintained. Dry land lucerne lasted only for three years from 1988 to 1991 and it died because there was no rain. Irrigable lucerne dies if he does not irrigate. He used the irrigable lucerne to feed his dairy cows. Without the fodder to feed his cows he would not run his dairy farming as it would be expensive.

[30] He also testified that the canal from the Koppies dam to the Rooipoort dam was in a bad dilapidated stage. It could not transport the water properly. The water went all over the open place. He was asked as to when did he notice this. He said the time he did not get water. When asked when was that, he said he could not precisely say. He was referred to the letter of demand dated 25 October 2010 and appearing on page 15, File 1, Bundle 1, paragraph 2 which reads:

> "2. *It is placed on record that officials of your department closed down the sluices with which our client received water, during 2003. It is further placed on record that your department has not complied with the provisions of section 59(4) of the National Water Act, 1998 (Act 36 of 1998) and did not give our client the opportunity to make representations before the suspension of the water supply to our client has been imposed. It is further placed on record that your department has failed to maintain the canals that form part of the Rhenoster River Government Water Central Area.*"

The letter of demand is from his attorney of record and has been addressed to the Director-General of the department. He testified that he did have any knowledge of the letter. He has never seen it before. When asked whether he knew Mr Taute, the attorney, who wrote the letter, he said he only met him on the morning of the trial, he knew that he was the attorney representing him in the matter and the person who wrote the letter on his behalf.

[31] He was referred to a diagram with a heading "*Koppies Canal*" on page 13 of File 6, Bundle 12 and he testified that the state canal called the Vredefort Canal is situated 50 metres behind his house. He also explained how an application was made to the state water officials for the supply of water through the canal, that they completed a form indicating how much water they required and for how many hectares, that the form was submitted to the controller of the Scheme and after receipt of the application, the water officials opened the canal to supply the water. When asked how many times did they submit the forms, he testified that it depended on the climate and the drought at that stage. He was asked as to when last did he submit the application for water irrigation and his response was, he cannot answer that correctly. He was also asked whether there was a stage where he submitted a form and water was not supplied to him and he testified that he cannot remember. He further testified that no water would be supplied to him without an application.

[32] He was again referred to the letter of demand from his attorneys of record dated 25 October 2010 on File 1, Bundle 1, page 15 and told that

according to it the officials of the department closed the sluices with which he received the water in 2003. He was asked whether that was indeed the case according to his knowledge even though he testified that he did not recognise the letter. He testified that according to the letter it must be true. He was further asked if the supply of water to his property was ever stopped in 2003 and he said he cannot remember. He was also asked whether he forgot when he stopped irrigating his crops and his response was when the supply was no longer there. It was put to him that but he knew that at some stage he was not able to grow the lucerne because there was no water supply to his property and he said "*Yes*". When asked whether that happened in 2003, he testified that he cannot give an answer. When asked whether he was irrigating in 2004, 2005, 2006 and 2007, he said "*No*".

[33] He was further asked as to what did he do when he was not irrigating and not getting water. He testified that he brought the matter to the attention of the Water Users Association Committee (the "Committee") led by Mr Scheepers and Mr Crafford. When asked what did he tell them, he testified that it was about the circumstances relating to the maintenance of the canal and that there was no water supply due to that. He was referred to the application on page 189 on File 2, Bundle 4, which he confirmed was launched in 2009 and that he was one of the applicants who were represented by Mr Crafford. When told that the application was to force the department to maintain the canals and supply water, he testified that he was not that much involved. He was semi-retired at that stage. He was also referred to a supporting affidavit signed by him in relation to the application

that was launched in 2009 on page 611 in File 3, Bundle 7 and conceded that at that stage he was not able to grow his crops. It was put to him that in his evidence-in-chief he testified that he suffered damages when he could not grow the lucerne yet in 2009 he went to court but did not claim damages. He responded by saying he cannot respond because he was not personally involved.

[34] It was further put to him that at that time he knew he was not getting water, he could not grow the lucerne and was suffering damages and his response was "*Yes*". He conceded that he testified that he knew much earlier in 2004 and he approached the committee. He was shown a document called "*pre-feasibility study of the Koppies irrigation scheme on page 1022, File 4, Index 6 Bundle 9*" and he testified that he has never seen it before.

[35] He was asked whether he remembers the tariff that he was paying at the time and he testified that he did not. When asked whether he remembers if the tariff was reduced or not acceptable, he testified that it was too high and not acceptable. He was further told that the report did not taint a good picture of the situation with the dam and he did not agree as he testified that if the canals were maintained they would have been supplied with water necessary to irrigate their lands. He further testified that he did not have knowledge as to whether the report was submitted to the Water Users Association (the "WUA") in 2007 shortly after it was issued. When told that the WUA rejected the report, he testified that the only issue that was rejected related to the tariff.

[36] He conceded that as early as mid-2007 the WUA were aware of the contents of the report but indicated that he was not involved. He also conceded that members of the WUA including him were not paying their water use tariff and that there were outstanding payments in 2005. When asked whether he or the WUA came up with the solution after being presented with the report, he testified that he did not know what was arranged by the WUA.

[37] He was referred to letters from the department dated 20 January 2003 on page 1, File 2, Bundle 4, Index 1, dated 16 July 2007 on page 2 same bundle and a recommendation contained in the letter dated 19 August 2007 on page 6, the same bundle. The letter dated 20 January 2003 from C J van Staden is addressed to all water users and reads:

> "*Rhenosterrivier CWS Waterbeperkings*
>
> *Weens die gebrek aan voldoende reën en die lae damstand is hierdie kantoor verplig om waterbeperkings soos volg in te stel.*
>
> *Watergebruikers word beperk tot 'n 80% van die oorblywende kwota vir die waterjaar 2003/2004 wat op 31 December 2003 nog oor was vir gebruik tot 31 Maart 2004. Die beperking sluit ook Ngwathe Munisipaliteit in.*
>
> *Sterkte met die boerdery.*
>
> *Gebiedsbestuurder*"

The letter dated 16 July 2007 is addressed to the Director-General from Ms Thandeka Mbassa DDG Regions. The subject matter is Rhenoster River (Koppies) Government Water Scheme: Request by Free State Agriculture for

a reduction in water charges in the light of the drought situation during 2003/4 and 2004/5. It only reads "*find attached documents for your approval*".

The recommendation on page 6 reads:

> "*Based on the rules to be applied during droughts in terms of the new Pricing Strategy, the following rebates on charges are proposed:*
>
> *Table 3: Percentage rebate (discount)*

Category of charge	*Rhenoster River 2003/04 (30% quota)*	*(Koppies) Scheme 2004/5 (0% quota)*
Depreciation charge	*100%*	*100%*
OTM charge	*70%*	*100%*
WRM charge	*0%*	*0%"*

[38] After being referred to his evidence that he testified that the drought started in 2002 he was requested to comment after seeing the above letters and he could not comment on the letter from C J van Staden. As regards the recommendations he was asked if he was aware of the request for water use charges and he said he was not fully informed about it. When asked whether he knew of any application for drought relief, he testified that he had knowledge of it but was not directly informed. He has never seen any document in relation thereto. He confirmed that the application for drought relief was done on his behalf.

[39] After being referred to the water situation during 2003/4 and 2004/5 at the Koppies Scheme as summarised on page 5 paragraph 3, the same bundle, he was asked as to when did he not get water. He testified that water was supplied because of the drought situation and that he cannot dispute the table and its findings. When asked why he was not getting the water account,

he said he did not want to open a dispute on the day he was testifying and that the main issue was that the canals were not properly maintained and the water could not reach its destination. He further said what he heard was that it was too costly to repair the canals to what it was before in its original stage.

[40] He was asked whether his evidence was that he did not have water because the canals were dilapidated or not maintained or because the water was suspended and he said he will leave it to his counsel to answer. After the question was repeated, he said "*Yes*" maintenance was also involved during that time. He conceded that he was obliged in terms of the law to pay water charges irrespective of whether there was a suspension or restriction but further testified that he never received any warning, document or account to pay the outstanding water tariffs.

[41] After being shown the outstanding accounts for registered Koppies farmers including him on pages 829 and 830 of File 4, Bundle 8, Index 5 which record reflected his account of R43 900,71, together with a total amount R3,7m, he was asked when last did he pay for water use charges and he testified that he cannot remember. He conceded that in terms of section 56 of NWA the tariffs for water use charges are for the funding of the Water Resources Management ("*WRM*"), the management of the Water Resources Development ("WRD") and the use of water works. He further testified that the amount shown to be owed by him in respect of water use charges is out of heaven and just takes farmers out of the State Water Scheme. After he was told that some farmers decided not to join the scheme when the new NWA

came into operation while some decided to sell their water use rights to De Beer mine, and that the tariff was calculated to determine what was affordable to those remaining, he conceded that the fewer they remained on the scheme, the more the tariffs became expensive and that the tariff was not implemented to get rid of the farmers.

[42] When asked why he did not pay his tariffs, he testified that water was not supplied, this caused total damage to his lucerne and the tariff became too costly for him. He further testified that in the past the tariffs were reasonable to pay and the increase thereof made most farmers to sell their water use rights.

[43] After being referred to an internal document in Bundle 9, File 4, page 1006 which is also found in Bundle 12, File 6, page 135 which related to the notice of suspension of entitlement to the use of the water, counsel for the defendant indicated that he was not able to locate the notice allegedly sent to the plaintiff. He conceded that the plaintiff did not receive the notice.

[44] The plaintiff was referred to an undated letter on page 1078 of the same bundle and told that it was from some of the members of WUA who were part of the 2009 application, who withheld payment because they also complained about the poor maintenance of the canals. The letter was addressed to the Director of the department. They stated their willingness to pay certain amounts towards their outstanding water use charges in the form of representations to the department. He did not take issue with the contents

thereof. He was also referred to an acknowledgement of receipt of the request to pay off the outstanding balances by a certain Mr Pieterse and others on pages 62-64 of Bundle 12, File 6 and he testified that he was concerned about the dates on the letters, viz, 20 July 2007, it was too late for anybody to do anything. The damage has been done at his farm. Why did they not receive warnings before the suspension of the water supply?

[45] He conceded that after what Mr Groenewald did, the water supply was suspended in January 2005. Despite the letters written by some farmers offering to pay, Mr Blair only acknowledged receipt of the letters. The water entitlement remained suspended since then and his water use charges remained outstanding.

[46] After both parties had closed their cases and before the matter was argued on the merits, the plaintiff launched an application in terms of Rule 28(1) to amend his replication to include the following paragraphs and to read:

> "*14. Over and above what was pleaded before, it is pleaded that:*
>
> *14.1 The suspension of the plaintiff's water use entitlement was not brought to the attention of the plaintiff as the defendant did not comply with the provisions of section 54 and 59 of the National Water Act, 1998.*
>
> *14.2 The plaintiff therefore did not have knowledge of the facts giving rise to the debt based on the suspension that occurred on 10 January 2005.*
>
> *14.3 In terms of section 12 of the Prescription Act, 1969 (Act 68 of 1969) the plaintiff's claim only prescribed three years after the plaintiff obtained knowledge of all the facts giving rise to the debt.*

14.4 The plaintiff therefore prays that the special plea on this ground must also be dismissed with costs."

[47] Mr Saunders on behalf of the plaintiff submitted that the application is launched to bring the plaintiff's replication in line with the evidence with regard to the water use suspension on 10 January 2005. He also pointed out that according to the plaintiff's evidence, he only saw the document relating to the intention to suspend the water use entitlement of the water users including him on the morning of the trial at his counsel's chambers. He argued that no prejudice was suffered by the defendant as there was no evidence before court to counter the proposed amendment and that the plaintiff was tendering costs for the amendment. Mr Saunders further submitted that in addition to the evidence, at the end of the cross-examination of the plaintiff by the defendant's counsel, concessions were made on behalf of the defendant that the defendant cannot prove that the plaintiff received the notice to suspend the supply of his water use entitlement to his property through the government water scheme. He further pointed out that the amendment goes to the special plea of prescription regarding the fact that the plaintiff did not receive the notice of suspension and does not change the cause of action.

[48] Mr Chabedi on behalf of the defendant objected to the proposed amendment on the basis that the plaintiff did not lead any evidence that supported the proposed amendment in that the fact that the water supply suspension was only effected in January 2005 by the officials of the department, did not arise from the plaintiff's evidence as alluded to by his counsel. It was pleaded in the defendant's plea which was amended in 2014

in response to paragraph 7 of the plaintiff's particulars of claim. According to the plaintiff the water supply to his property stopped in 2003 and the defendant disputed that and maintained that the suspension was only implemented in 2005, so it was argued. He also referred to the supporting affidavit of the plaintiff to the 2009 application, the discovered internal document relating to suspension and submitted that the replication has 12 paragraphs in which the plaintiff never led evidence in relation thereto. He went on to argue that the plaintiff's evidence and his particulars of claim give a different cause of action and that the concession that he made that the plaintiff did not receive the notice of suspension does not go to the cause of action but to the question whether the amendment does not render the claim excipiable. It was also submitted that the amendment does not indicate which parts of the replication the plaintiff intends to amend.

[49] Mr Saunders in reply submitted that the notice of suspension of the water supply although referred to in paragraph 12 of the defendant's plea, was not attached and neither was the discovered internal notice attached.

[50] A trial court may during the hearing of the matter, at any stage before judgment, grant leave to amend any pleading or document on appropriate terms unless the amendment would render the pleading excipiable. See Gollach & Gomperts(1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) 1978 (1) SA 914 (A) at 928D. The plaintiff testified under cross-examination that he only saw the internal document, addressed to the Acting Regional Director: Free State and relating to the suspension of the water supply in

terms of section 54(1) of the NWA, in the morning of the day he was giving evidence in court at his counsel's chambers. Counsel for the defendant conceded that the defendant could not prove that the plaintiff received the notice of suspension of the water supply to his property. The plaintiff admitted under cross-examination that the water usage supply to his property was suspended in January 2005 although in his particulars of claim it was alleged that the water use on his property was suspended in 2003. I agree that the fact that the plaintiff's water use supply was suspended in 2005 although admitted by him under cross examination, was alleged in the defendant's plea when she denied the allegation by the plaintiff that the water supply was suspended in 2003. It does not come from him. Even though there is no evidence to counter the proposed amendment, it will, in my view, render the pleading excipiable. It is therefore dismissed with costs.

[51] The next issue to deal with is the special plea of prescription. Counsel for the defendant argued that the plaintiff is claiming damages suffered as a result of the suspension of the water supply to his property during 2003. He served summons on the defendant on 14 December 2010, seven years after his cause of action arose. He conceded that he knew and was aware of the fact that there was no irrigation taking place on his property since 2003 and the years immediately thereafter, so it was pointed out. It was submitted that the plaintiff knew as early as 2003 of the reason why he did not receive water to his property, he knew the person responsible for not supplying water to his property and was also aware of the losses he was suffering as damages as he was unable to irrigate his crops which he used to feed his dairy cows. It

was also argued that the plaintiff did not lead evidence to prove the averments made in his replication and did not explain the reasons why he waited for such a long time before he issued summons to claim his damages. It was pointed out that the plaintiff and the other water users were able to bring an application in 2009 to compel the department to maintain the canals and supply water but chose not to institute action to claim damages.

[52] In his replication the plaintiff denied that his claim had prescribed. It was argued on behalf of the plaintiff that he only became aware that his water use entitlement was suspended in terms of the NWA on the morning of 1 August 2016 when he first saw that the internal document relating to the suspension of the water supply that was made to the Acting Regional Director: Free State. Prescription on this ground can only begin to run on 1 August 2016. The plaintiff never received the invoices for the water use charges to warn him that the defendant may intend to terminate his water use entitlements.

[53] The issue for determination concerns the time at which prescription commenced to run in respect of the plaintiff's claim for damages against the defendant. In terms of section 11(d) of the Prescription Act, this claim is subject to a three year prescriptive period. According to the special plea, summons was served on the defendant on 14 December 2010, seven years after the cause of action arose in 2003. Section 12(1) of the Prescription Act provides that prescription shall commence to run as soon as the debt is due. It was argued that in his evidence the plaintiff conceded that he knew and was

aware that there was no irrigation taking place on his property since 2003 and the years that followed immediately thereafter, he knew as early as 2003 of the reason why he did not receive water to his property, who was responsible for not supplying water to his property and the losses he was suffering as damages as he was unable to irrigate his crops which he used to feed his dairy cows. It was further argued that the plaintiff and the other water users brought an application in 2009 to compel the defendant to maintain the canals and supply them with water but chose not to institute an action to claim damages.

[54] On the other hand the plaintiff's counsel submitted that the maintenance of the canal constitutes a continuous wrong and the continuous wrong only ceased when the defendant bought the water use entitlement of the plaintiff on 6 October 2010. It was also pointed out that service of the summons on the defendant on 14 December 2010 fell within the time period before the date upon which the plaintiff's claim became prescribed. The difficulty that the plaintiff has with this submission is that plaintiff's evidence did not support the allegations made in his replication (in particular paragraphs 5, 7, 8, 9, 10, 11 and 12). No evidence was tendered to prove the allegations made in the aforesaid paragraphs.

[55] It was also submitted that the fact that there were three reasons why the plaintiff did not receive water on his property, namely, the failure by the defendant to maintain the canals which eventually dilapidated and could no longer supply water, drought during 2002 to 2005 and the suspension of the

water supply without informing the plaintiff and/or complying with the NWA, is evident that the plaintiff did not have actual knowledge as provided for in the Prescription Act.

[56] Can it be said that the plaintiff did not have knowledge of the facts giving rise to the debt based on the suspension of the water supply to his property in 2003 as alleged in his particulars of claim?

[57] Section 12(3) of the Prescription Act provides:

> "*A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it through exercising reasonable care.*"

[58] It is well established in our law that 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. It extends to a conviction or belief that is engendered by or inferred from attendant circumstances. On the other hand, mere suspicion not amounting to a conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge (compare the judgment of Watermeyer CJ in *R v Patz* 1946 AD 845 at 857, applied in the context of prescription by Vos AJ in *Patterson v Minister van Bantoe-administrasie en Ontwikkeling* 1974 (3) SA 684 (C) at 687A-B).

[59] Cameron JA and Brand JA said the following, in *Minister of Finance and Others v Gore NO* 2007 (1) SA 111, in relation to the nature of '*knowledge*' that is required to trigger the running of prescription time:

> "*Mere opinion or supposition is not enough: there must be justified, true belief. Belief, on its own, is insufficient. For there to be knowledge, the belief must be justified.*"

[60] The plaintiff conceded under cross examination that he knew as early as 2004 that he was not getting water, could not grow the lucerne and was therefore suffering damages. He also conceded that the members of WUA including him, did not pay their water use charges, were in arrears in 2005 and that he was obliged to pay for his water use charges irrespective of whether there was a suspension or restriction.

[61] He was one of the applicants in an application launched by the water users to force the defendant to maintain the canal and supply water in 2009 but did not sue for damages although he was aware at the time that he suffered damages as a result of not being able to irrigate his crops.

[62] I accept that there were three reasons at the time why the plaintiff was not receiving water to his property, namely, the drought that took place between 2002 and 2005, the dilapidation of the canal to such an extent that the water did not reach its destination due to lack of maintenance and the suspension of the water supply to the plaintiff's property by the officials of the department. It is clear from the pleadings and the evidence that the

suspension of the water supply on the plaintiff's property took place because of the failure by the plaintiff and other water users to pay their water use charges which payments the plaintiff conceded were meant among others for the maintenance of the canal. The plaintiff could not tell in his evidence under cross-examination as to when last did he submit an application for the supply of water to his property. He did not pay for his water use charges and the reason that he gave was that he did not receive the account. There is no evidence that he went to inquire as to why he was not receiving his account, yet he knew that he was obliged to pay irrespective of the restrictions or the suspension of the water supply.

[63] He was not receiving water. In my view he anticipated that if he does not pay the water use charges, the water supply to his property would be suspended for as long as he did not comply. The notice of suspension would only confirm what he knew or ought to have reasonably known. It would not change the fact that he knew he was not paying his water use charges as he was obliged in terms of the NWA. It would also not change the fact that he knew or ought to have known that if he did not pay for his water use charges, the supply thereof would be suspended. In view of the concessions made by the plaintiff under cross-examination referred to above, the fact that he was not served with a notice of suspension of the water supply to his property by the defendant or the officials of the department is not of his assistance. He knew or ought to have reasonably known as early as 2004/2005 as to why he did not receive water on his property, who was responsible, he was aware of the losses he was suffering as damages as he was unable to irrigate his

crops, which he used to feed his dairy cows. Further to this at the time the application, for a mandamus to compel the defendant to do maintenance on the canal systems and supply them with water, by the plaintiff and the other water users, was launched in 2009, he knew or ought to have reasonably known that the water supply to his property was suspended, who was responsible and that he was not irrigating his crops because he did not receive water on his property but chose not to sue for damages.

[64] For a debt to be '*due*' for the purposes of the Prescription Act, it has to be a debt that is immediately claimable by the debtor or, stated in another way there has to be a debt in respect of which the debtor is under an obligation to perform immediately. See *The Master v I L Back and Co Ltd and Others* 1983 (1) SA 986 (A) 1004, read with *Benson and Others v Walters and Others* 1984 (1) SA 73 (A) 82. It follows that prescription cannot begin to run against a creditor before his cause of action is fully accrued; i.e., before he is able to pursue his claim (*cf Van Vuuren v Boshoff* 1964 (1) SA 395 (T) 401). See also *De Loitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525.

[65] The term '*debt due*' means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to 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 and to pursue his or her

claim. See *Truter and Another v Deysel* 2006 (4) SA 168 (SCA). In *Truter and Another v Deysel* the court held that the cause of action is complete as soon as the creditor sustains some harm; knowledge of fault or unlawfulness is not required.

[66] The plaintiff knew as early as 2004 that he was not receiving water, could not grow his crops and was therefore suffering damages. Prescription accordingly commenced to run as soon as he sustained the harm and had all the facts to complete his cause of action for the recovery of the debt.

[67] The claim by the plaintiff has therefore prescribed and falls to be dismissed with costs.

[68] Counsel for the defendant prayed for costs including costs of two counsels on the basis of the volume of work done in the matter and counsel for the plaintiff objected. In my view the matter was quite involved and it is only fair to allow costs which include the costs of two counsels.

[69] In the result I make the following order:

69.1 The plaintiff's claim is dismissed with costs which includes the costs of two counsels.

M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES:

FOR THE PLAINTIFF	J H A SAUNDERS
INSTRUCTED BY	POTGIETER, PENZHORN & TAUTE
FOR THE DEFENDANT	M P D CHABEDI AND A THOMPSON
INSTRUCTED BY	STATE ATTORNEY PRETORIA
DATE OF JUDGMENT	4 APRIL 2017