



**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

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|------------------------------|--------|
| Reportable:                  | YES/NO |
| Of Interest to other Judges: | YES/NO |
| Circulate to Magistrates:    | YES/NO |

Case No.: 5473/2017

In the matter between:

**JOHAN BURGER (PTY) LTD**

**Applicant**

and

**M A BROODRYK**

**Respondent**

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**CORAM:** HEFER, AJ

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**JUDGMENT:** HEFER, AJ

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**HEARD ON:** 16 AUGUST 2018

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**DELIVERED ON:** 1 NOVEMBER 2018

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- [1] Although the only issue to be adjudicated upon is the question which party should be held liable for the costs of the application, in order to come to a decision, the facts pertaining to the application need to be set out.
- [2] The Applicant launched the application on an urgent basis for an order in terms of which the Respondent was to be interdicted and restrained from in any way further conducting any farming activities on the farm Smaldeel in the Heilbron district. The Respondent was further to immediately relinquish all possession of the farm referred to and take all necessary steps to restore the Applicant's possession thereof. Furthermore the Respondent was also to pay the costs of the application.
- [3] According to the Applicant, the Respondent and his father approached Johan Burger, the Managing Director of the Applicant during August 2015, enquiring whether the Applicant would be interested in renting out the farm Smaldeel, district Heilbron which the Applicant purchased during the course of 2015.
- [4] On Mr. Burger's insistence Respondent then deposited an amount of R1 000 000,00 in the trust account of Mr. Burger's attorneys, namely Esthe Muller Attorneys in Vereeniging. The arrangement was, according to the Applicant, that the lease agreement would be reduced to writing. Ms. Muller was then instructed by Mr. Burger to attend to the drafting of such an agreement.

- [5] Ms. Muller provided Mr. Burger with a draft agreement during August 2015 which he then discussed with the Respondent. After their discussion, Ms. Muller was then instructed to draft a final agreement.
- [6] According to Mr. Burger, the Applicant insisted that the Respondent replenish the minerals ordinary absolved and lost in the ground each year on the leased property. He was to apply and work in a certain amount of phosphate per ton as well as a certain amount of potassium.
- [7] According to the Applicant, Mr. Burger provided the Respondent with a final agreement but he never signed it. The Applicant alleged that on each and every occasion Burger enquired about the signing of the agreement, he was told that he, that is the Respondent, was extremely busy and would attend to it as soon as he possibly could.
- [8] The Applicant further alleges that the Respondent, however, planted maize on the property for the 2015/2016 year without applying the potassium and phosphate the Applicant had insisted upon. According to the Applicant, Mr. Burger then personally made a study and brought in the help of agricultural experts to determine the effect and damage related to the withdrawal of potassium and phosphate on the land.
- [9] The Applicant then sent a letter, dated 7 October 2016 addressed to the Respondent in which the Respondent was urged to rectify the levels of phosphate and potassium. It was then also

specifically stated that if the said levels was not rectified, it would constitute a breach of the agreement.

[10] In a letter dated 17 October 2016, Mr. H.S.L. du Plessis, an attorney in Kroonstad, acting on behalf of Respondent addressed a letter to Applicant's attorney in which he only dealt with the manner in which the R1 000 000,00 paid by the Respondent was to be dealt with. It is notable that Mr. Du Plessis did not address the potassium and phosphate issue at all.

[11] According to the Applicant the Respondent then again planted maize on the farm without the application of either the phosphate or potassium. This was during October, alternatively November 2016. As the physical harvesting of the maize crop grew closer, Mr. Burger again requested a meeting in Kroonstad with Mr. Du Plessis, the Respondent and his father which was held on 4 May 2017. Mr. Du Plessis drafted a minute of this meeting from which minute the following important aspects appear:

- (i) Mr. Burger handed a written lease agreement and indicated that the Respondent refuses to sign same;
- (ii) According to Mr. Burger the terms of the written agreement, in particular paragraph 4.1 thereof had been verbally agreed upon between the parties to the effect that Respondent is obliged to administer 3.5 kilograms of phosphate per hectare per ton and 4 kilograms of potassium per hectare per ton each year.

- [12] What is important is that it was noted that it was agreed upon that a written lease agreement which was to be approved by both parties was to be drafted.
- [13] Save for the standard clauses which are normally contained in a lease agreement, it was minuted that such written agreement to be drafted, shall contain a specific clause regarding the amount of phosphate which had to be administered by the Respondent during the beginning of 2017.
- [14] According to Mr. Burger, he understood the arrangement was that Mr. Du Plessis, therefore the attorney acting on behalf of the Respondent, was to draft an agreement and provide it to all concerned. The Applicant through Mr. Burger, then states that such agreement was, however, never forthcoming. The Respondent, according to the Applicant, did not apply the phosphate for the two preceding years nor did he pay an additional R33 000,00 per year which was allegedly also agreed between the parties.
- [15] The Managing Director's son, Gert Burger, then wrote a letter addressed to the Respondent's attorney dated 31 August 2017. This letter refers to the amount of R1 077 240,00 which was outstanding in regards to the phosphate and potassium levels which had to be corrected by the Respondent. It is then also stated in this letter that according to information received from a certain Mr. Scheepers, it appeared that the Respondent was going to sublease the farm Smaldeel which fact, according to the Applicant, the Respondent was apparently trying to hide from the Applicant.

This letter then also contains a proposal that the parties agree in writing that no further lease agreement exists between the parties and that the parties will not have any claims against each other in future.

- [16] A letter, dated 19 September 2017 was then written on behalf of the Applicant in which it was confirmed that the Applicant do not wish to continue with the continuance of the lease agreement and that Ms. Muller apparently drafted an agreement of cancellation which was to be signed by the parties concerned. On 5 October 2017 Mr. Du Plessis, on behalf of Respondent indicated that the Respondent intended to continue with the agreement.
- [17] In a letter dated 16 October 2017 Ms. Muller, then indicated that the Respondent repudiated the terms of the agreement dated 4 May 2017 in that, amongst others, he did not rectify the phosphate and potassium levels as allegedly agreed upon. For sake of clarity, the agreement referred to which was concluded on 4 May 2017 is with reference to the meeting which was held and in respect of which a formal written agreement was to be drafted. In a further letter dated 19 October 2017 Ms. Muller then again confirmed that the agreement between the parties had been lawfully terminated by the Applicant.
- [18] The basis for urgency of the matter, was that should the Respondent at that stage continue to plant again on the farm Smaldeel without properly rehabilitating the land it will mean that the “... *situation and relationship between the parties would come even more compounded ...*” in that “... *the company would not be*

*able to utilize – in any way – its property further for the whole of 2017/2018 production season ...”* I will return to this aspect of urgency later herein.

- [19] The Respondent challenges the deponent, being Johan Burger’s authority to depose to the affidavit and to bring the application on behalf of the Applicant. In particular, the Respondent draws the Court’s attention to the fact that the deponent has failed to provide the Applicant’s resolution passed by the Board of Directors authorising this deponent to depose to the affidavit and also to bring the application on behalf of the Applicant.
- [20] The Respondent also draws attention to the fact that the agreement was supposed to be concluded between the deponent, being Mr. Johannes Burger in his personal capacity and the Respondent and at no stage was mention made of the Applicant.
- [21] Importantly, the Respondent relies upon a valid agreement of lease which exists for a period of five years. The Respondent disputes the fact that it was the Respondent who contacted the deponent to the founding affidavit but indeed alleged that it was the deponent himself who contacted the Respondent’s father and requested a meeting in order to negotiate a lease agreement in respect of the property. According to the Respondent, Johan Burger explained that he intended to purchase the property from a certain Mr. Wentzel and needed the money in order to fund the purchase consideration.

- [22] The Respondent disputes that the Applicant ever presented a draft agreement during August 2015 as alleged. According to the Respondent, the only draft which was presented to him was during the meeting on 4 May 2017. The Respondent further disputes the obligation of 3.5 kilogram phosphate to be administered but indeed states that the amount to be administered was 3 kilogram of phosphate.
- [23] According to the Respondent the agreement which was to be drafted pursuant to the meeting of 4 May 2017 was to be drafted by the attorney acting on behalf of the Applicant and not the Respondent's attorney. In this regard the Respondent refers to a letter by Ms. Muller addressed to Mr. Du Plessis dated 5 May 2017. This aspect will also be dealt with herein later.
- [24] The Respondent further draws attention to the fact that the lease agreement which was anticipated and/or purportedly concluded at a later stage did not contain a clause to the effect that the Respondent was not allowed to sublease the property. The Respondent further disputes the urgency of the matter and alleges that any urgency which might exist was created through the Applicant's own doing.
- [25] According to the argument as contained in the Respondent's opposing affidavit, the original oral agreement was novated and replaced by the agreement referred to in the minutes of the meeting held on 4 May 2017.

- [26] Furthermore, according to the arguments set out in the opposing affidavit, the parties to the agreement were the deponent, being Johan Burger himself as well as the Respondent. Because the Applicant was not a party to the original agreement, the Applicant, according to the Respondent does not have the necessary *locus standi* to bring this application.
- [27] I was informed that the parties have reached an agreement thus the reason for only argument in respect of the issue pertaining to costs.
- [28] As far as the reply to Respondent's opposing is concerned, such reply contains a great number of legal argument. Practitioners should keep in mind that affidavits in Motion Court proceedings are there to place evidence and facts before Court. For that reason affidavits should not contain legal argument nor reference to authorities. Legal argument and references to authorities should be reserved for heads of argument and the oral argument presented in Court. The main reason for this, in my mind, is that the purpose of affidavits is to place facts and evidence before Court in the first instance and in the second instance, in most of the matters the deponent himself cannot under oath swear to authorities and legal argument which is the effect if the latter is contained in a sworn affidavit. In appropriate cases a Court should consider punitive cost orders where affidavits do indeed contain such legal argument and/or authorities.

[29] As far as the reply is concerned the deponent, Johan Burger concedes in reply that he is no longer an Managing Director of the Applicant and then further states that he was unaware at the time of deposing to the affidavit of this fact and more in particular that he had been removed as a director entirely. He then, however, states that the facts are within his personal knowledge and therefore he is able to depose to the founding affidavit. In answer to the challenge to his authority, he then refers to a confirmatory affidavit by Gert Burger, his son, who is the Director of the Applicant indicating that *“the Applicant is indeed a company and that I am authorised to institute proceedings on its behalf”*. He then refers to a confirmatory affidavit by Gert Johannes Burger which is appended to the replying affidavit.

[30] It is necessary to consider this point. The words used by the deponent, Johan Burger, is the following:

*“My authority is confirmed by a confirmatory affidavit of Gert Burger, the Director of whom Mr. Broodryk speaks indicating that the Applicant is indeed the company and that I am authorised to institute the proceedings on its behalf. I mark it ‘REP1’.*

[31] REP1 being a confirmatory affidavit does however not indicate that the Applicant is indeed a company and that Johan Burger has been authorised to institute the proceedings on behalf of the Applicant.

- [32] There is judicial precedent for holding that objection may be taken if there is nothing before Court to show that the Applicant has duly authorised the institution of Notice of Motion proceedings.

*“Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution”.<sup>1</sup>*

- [33] It was obvious that the Respondent challenged the authority of the deponent to not only depose to the affidavit but also to institute the application on behalf of the Applicant. The Applicant failed to produce a resolution that the Applicant itself has indeed authorised the deponent to institute the present application. The manner in which the Applicant attempted to rectify the absence of authority does not assist the Applicant in establishing authority on behalf of the Applicant. It therefore appears that the deponent to the founding affidavit do not have the necessary authorisation to both depose to the affidavit as well as to launch the application on behalf of the Applicant.

- [34] According to the Applicant the essence of the dispute is whether there is a legal and validly binding nexus between the parties which allows the Respondent to continue farming on the farm Smaldeel.

- [35] It is common cause that no written agreement was concluded between the parties. Before the meeting of 4 May 2017, according to the Applicant, he produced a draft agreement at some stage,

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<sup>1</sup> Mall (Cape) Pty Ltd v Marino Koöperasie Beperk 1957 (2) SA 347 CPD.

being annexure “JB2” to the founding affidavit which according to the Applicant, the Respondent refused to sign.

[36] Before this draft, final agreement, the Respondent apparently also had a draft agreement prepared by his attorney, Ms. Muller. The first draft as opposed to the final draft was in the name of Mr. Johan Burger personally, in his capacity as lessor of the property and not the Applicant as is in the second draft agreement. Be it as it may, the Respondent denies that any agreement at all had been produced for signature as alleged by the Applicant.

[37] What is of further importance is that after the meeting of 4 May 2017, again no written agreement came into existence. In the minutes in regards to the meeting held on 4 May 2017 it appears that a written agreement was to be drafted which was to be approved by both parties to such an agreement. According to the Applicant it was the responsibility of Respondent’s attorney to draft such an agreement whilst, according to the Respondent, it was the responsibility of the Applicant’s attorney. For purposes of adjudication of the matter, and in particular the question in regards to the costs of the application, it is not necessary for me to find which party’s responsibility it indeed was to draft such an agreement. I need not say more than the contents of the letter by Ms. Muller dated 5 May 2017 addressed to Respondent’s attorneys without doubt shows that it was the responsibility of Applicant’s attorneys to draft such an agreement. This letter refers to minutes, to be provided (referring to the minutes of the meeting of 4 May 2017) in order to prepare an agreement Surely, had it been the responsibility of Respondent’s attorneys to draft the

agreement between the parties, one would have expected this letter to refer to such draft agreement to be drafted by the Respondent's attorneys. In fact there is no correspondence indicating any queries from the side of the Applicant's attorneys enquiring when the final agreement which was to be drafted was to be expected from Respondent's attorneys.

[38] I found it astounding also that since 4 May 2017 the Applicant itself has not taken any steps to have such written lease agreement finalised between the parties. Even if it is accepted that it might have been the responsibility of Respondent's attorneys to draft this draft lease agreement, where this agreement was apparently of utmost importance to the Applicant, why did he not proceed and instruct his attorney herself to proceed with the drafting of the written agreement ?

[39] *Mr. Olivier*, on behalf of the Respondent argued that an agreement came into existence during the meeting of 4 May 2017. I do not deem it necessary to make a finding in this regard. It has, however, been established through the facts common cause that a verbal agreement came into existence during the second half of 2015. This agreement is confirmed by the fact that Respondent occupied the farm since approximately August 2015. It appears from both annexures "JB1" as well as "JB2" that the period of lease of five years commenced on 1 September 2015. It is further common cause that the amount of R1 000 000,00 in regards to the full five year period has already been paid by the Respondent to the Applicant.

- [40] The so-called “*novation*” of this agreement relied upon by the Respondent, with reference to the so-called “*settlement agreement*” which the parties had reached by 4 May 2017 can at most be in regards to the aspects as contained in paragraph 2.6.2 of the minutes in regards to the meeting on 4 May 2017. This so-called “*settlement agreement*” did not alter the provisions regarding the amount of R1 000 000,00 which has already been paid as well as the duration of such lease agreement.
- [41] At the time of the hearing of the matter, the Respondent was also still occupying the farm. Respondent relies upon the so-called “*settlement agreement*” of 4 May 2017 as his right to occupy the farm. Whether it was in terms of the agreement reached during August 2015 or the settlement agreement relied upon by the Respondent reached on 4 May 2017, the Respondent had a right to occupy the farm. The basis upon which the Applicant approached the Court is the alleged repudiation by the Applicant of the agreement whether it being the 2015 or the 2017 agreement. In respect of the repudiation of the agreement, the Applicant firstly relies upon the letter dated 31 August 2017 written by Gert Burger to the Respondent’s attorney. This letter records an outstanding amount of approximately R1 000 000,00 concerning the phosphate and potassium application and also reported the conversation which the deponent apparently had with Mr. Scheepers concerning the possibility that Mr. Scheepers was to sub-lease the farm from the Respondent. In this letter we find that the Applicant is already willing to terminate the agreement between the parties on the basis that each party goes its own way. It is evident that nothing is

being said about the R1 000 000,00 which has already been paid for the full five year term of the lease agreement.

[42] According to the Applicant there was no reply by the Respondent to the latter by the Applicant. Then follows a letter dated 19 September 2017 by a certain Ms. Erasmus, in the conveyancing department of Applicant's firm of attorney's, merely stating that because it is now the Respondent who is not interested in the continuation of the lease agreement, an agreement of cancellation of the agreement should be signed. In response to this letter Mr. Du Plessis, the attorney acting on behalf of Respondent then sent an e-mail dated 5 October 2017 in which Ms. Muller was informed that the Respondent does not wish to terminate the lease agreement. Then follows an e-mail by Ms. Muller merely stating that according to the Applicant the Respondent has repudiated the agreement, which repudiation was accepted by the Applicant and therefore the agreement was cancelled. This letter does not contain any grounds concerning the repudiation of the agreement. When the attorney acting on behalf of the Respondent then responded to the effect that the Respondent still wishes to continue with the agreement, Ms. Muller then sets out such grounds for cancellation in a further letter dated 16 October 2017. According to this, the grounds would be:

- (a) Respondent's failure to administer the agreed amount of phosphate ; and

- (b) Respondent's failure to pay the additional amount of R33 000,00 per year in regards to the periods of 20174/2018 and 2019 as apparently agreed on 4 May 2017.

Ms. Muller then further refers to the fact that Respondent apparently indicated that he did not wish to continue with the lease agreement and that he wished to cede this agreement to Mr. Scheepers. This letter by Ms. Muller must be compared with the e-mail by Gert Burger addressed to Mr. Du Plessis dated 31 August 2017. In the latter e-mail Mr. Burger merely refers to an outstanding amount in the first instance and in the second instance that Mr. Burger is apparently concerned about the alleged sub-lease of the property. Nothing is being said about the grounds relied upon in Ms. Muller's letter of repudiation referred to. Unlike the letter almost a year before by Mr. Burger dated 7 October 2016 Respondent's attention is not drawn to the fact that Respondent's failure to administer the phosphate and potassium constitutes a breach of the agreement. From the e-mail dated 31 August 2017 it appears that the Applicant was more than willing to terminate the agreement between the parties on the terms as set out in the draft cancellation agreement. When the Respondent was not willing to terminate the agreement, it appears that the Applicant was in fact looking for any excuse to terminate the agreement between the parties. Support for this is the fact that before the letter of repudiation by Ms. Muller, the Respondent was not put on terms before cancellation of the agreement by the Applicant.

- [43] The contents of the e-mail dated 31 August 2017 as well as Ms. Muller's letter of repudiation coupled with the Respondent's denial

Muller's letter of repudiation of the agreement, coupled with the Respondent's denial of repudiation of the agreement, lead to the inevitable conclusion that the Applicant's real reason for termination of the agreement, are those as contained in the e-mail of 31 August 2017. Whereas neither one of the agreements contained a clause to the effect that the Respondent was not allowed to sublease the property and the alleged outstanding amount in regards to the rehabilitation of the property, could be claimed by way of the action procedure, termination of the agreement by the Applicant was therefore unlawful. The Applicant therefore did not approach the Court with the proverbial clean hands . It is quite significant that it was the Respondent who enrolled the matter for hearing pertaining to costs and not the Applicant.

[44] As far as the urgency is concerned I am also not convinced that the Applicant was entitled to approach the Court on an urgent basis. On the version of the Applicant itself it allowed the Respondent to continue farming without administering the alleged agreed amount of phosphate and potassium for a considerable time .

[45] I have been informed that the parties have come to an agreement in regards to the present application and from what I could understand a new lease agreement was concluded between the parties. The fact that the deponent to the Applicant's founding affidavit did not have the necessary authority not only to depose to the affidavit but also to launch the application, as well as the facts relied upon by the Applicant in regards to the alleged repudiation

by the Respondent, clearly shows that the Applicant would not have been successful in the application. In those circumstances only the Applicant can be held liable for the costs of the application.

[45] Therefore the following order is made:

### **ORDER**

Applicant is ordered to pay the costs of the application.

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**J.J.F HEFER, AJ**

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| On behalf of the Applicant : | Adv. A. Sander<br>Instructed by Kramer Weihmann &<br>Joubert Incorporated<br>BLOEMFONTEIN |
| On behalf of Respondent:     | Adv. J.L. Olivier<br>Instructed by Symington & De Kok<br>Attorneys<br>BLOEMFONTEIN        |