



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A2025-059892

1. Reportable: No
2. Of interest to other judges: No
3. Revised

A handwritten signature in black ink, appearing to be "Wright J", is written over a light blue rectangular background.

WRIGHT J

In the matter between:

M and J DA COSTA BROTHERS (Pty) LTD

FIRST APPELLANT

MANJOH RANCH (Pty) LTD

SECOND APPELLANT

and

IVOR MICHAEL KARAN

RESPONDENT

ORDER

1. The appeal is upheld with costs, including those of two counsel. Scale C applies.
These costs include those relating to all condonation and lapsing applications on the same basis.
2. The order of the court below is set aside and replaced with an order reading
“The exception is dismissed with costs, including those of two counsel where so employed. Scale C applies.”

JUDGMENT

Wright J

1. This appeal is about an exception taken by the defendant/respondent against the plaintiffs'/appellants' particulars of claim. The exception succeeded a quo. With

leave from the SCA, the appeal comes before the Full Court. The sole question is whether the exception should or should not have been allowed.

2. The papers are complicated. I shall attempt to simplify. The appellants, to whom I shall refer as Costa, and the respondent, Mr Karan concluded a written agreement on 29 August 2018. Costa sold its farm, including land, equipment and a farming business as a going concern, to Mr Karan.
3. It is a particular feature of the written agreement that the movable tangible assets sold are specified separately as “ *fixed assets* “, like plant and machinery and “ *other assets* “ like raw materials, seeds, standing crops and fertilisers.
4. After Costa’s attorney had written to Mr Karan on 10 June 2021, demanding payment of money, action was instituted by Costa.
5. Mr Karan took exception to some of the claims in the particulars of claim. F Bezuidenhout AJ upheld the exception and granted Costa fifteen days in which to amend its particulars of claim. It appears that Costa chose not to attempt an amendment.
6. Under clause 7.3.1, the purchase price for “*other assets*” shall be “ (i) *an amount equal to the aggregate of the costs reflected on Annexure W and (ii) where the cost of any item specified on Annexure W is not reflected on Annexure W or is still to be calculated or finalised as indicated on Annexure W, the aggregate of such costs calculated in accordance with the principles set out in Annexure W*

and where applicable as read with the relevant line item/s on pages 84,96 and 172 of the Mechanisation Guide, copies of which are attached to Annexure W. “ (My emphasis)

7. Below clause 7.3, an unnumbered clause reads “ *For the purposes of clarity it is recorded that if no item of cost is specified on Annexure W then no amount shall be payable by the purchaser in respect thereof such as depreciation and/or salaries and wages.*”
8. This unnumbered clause, with its proscription against anything not listed in Annexure W being payable, contradicts the words “ *is not reflected on Annexure W* “ in clause 7.3.1. which clause expressly allows for items not reflected on Annexure W to be taken into account when finalising the price for “ *other assets* ”.
9. The unnumbered clause does not provide clarity. It creates the opposite.
10. Clause 7.4 reads “ *As soon as practically possible after the effective date, the sellers and the purchaser shall attempt to agree the quantum of the purchase price payable by the purchaser for the ...other assets...*”
11. Clause 7.5 provides for a dispute about the price of the “*other assets* “ to be determined, if necessary, by an independent accountant, sitting as an expert.

12. Clause 12 deals with an interim period between signature and the effective date.

The effective date is the date of transfer of the farms into the name of Mr Karan.

Under this clause, Costa is obliged to carry on the business in the ordinary course. It must do so in a normal and efficient manner, preserve the business, maintain assets, continue best farming practice and insure the business. It is clear that these obligations require ongoing effort and the payment of money to staff and suppliers.

13. Clause 22 refers to an adjustment account. Within thirty days of the effective date, or such extension as Mr Karan may require, he is to prepare an adjustment account, crediting Costa with all expenses prepaid by Costa but relating to the period subsequent to the effective date. Likewise, the account is to credit Mr Karan with expenses payable by Mr Karan after the effective date but which relate to any period before the effective date.

14. Clause 31.1 records that the written agreement is the entire agreement and that neither party shall be bound by any “*undertakings, representations, warranties, promises or the like not recorded herein or in such other agreements.*” (My emphasis).

15. Clause 31.2 records that “*no alteration, variation, novation or cancellation by agreement of, addition or amendment to, or deletion from this agreement shall be of any force or effect unless in writing...*”

16. The particulars of claim, in relation to some claims, plead an oral agreement concluded between the parties during or about September/October 2018 “*in respect of the interim period of 29 August 2018 to the effective date...*”
17. In short, Costa seeks payment of amounts allegedly owing but which fall under obligations allegedly incurred by Mr Karan under the oral agreement.
18. It is pleaded in paragraph 8.2.1 of the particulars of claim that the oral agreement would be in respect of “*the purchase of raw material, seed...not identified or recorded in Annexure W and which was not on or worked into the properties of the Plaintiffs ..*”
19. It is pleaded in paragraph 8.3 of the particulars of claim that “*The expenses incurred and referred to in paragraph 8.2 above shall be included in, alternatively compounded separately for payment when the adjustment account in respect of Annexure W was prepared.*”
20. In paragraph 9 of the particulars of claim it is alleged that Mr Karan or his farm manager or his son issued directives and instructions to Costa for the purchase of the items referred to in paragraph 8.2 of the particulars of claim.

21. In paragraph 10 it is alleged that from the date of the oral agreement Costa executed the instructions of Mr Karan and purchased seed and did other things necessary to maintain the farm.
22. Annexed to the particulars of claim is the letter sent by Costa's attorney to Mr Karan on 10 June 2021. This letter is pleaded in the particulars of claim. The letter contains many allegations, all of which form part of the particulars of claim.
23. Included in the letter are allegations that Mr Karan commenced taking control of the farm and conducting operations the day after signature, that Mr Karan, apart from paying for items referred to in Annexure W, also paid for items not included therein and "*is now try to "set off" or claim.*"
24. In essence, the exception is to the effect that the written agreement is the sole memorial of the agreement between the parties, evidence of the oral agreement would be inadmissible and that clauses 31.1 and 31.2 exclude reliance by Costa on the oral agreement.
25. In my view, it is arguable that the exception misses the point. The alleged oral agreement, read with the allegation that Mr Karan himself is implementing the oral agreement by paying pursuant to it and trying to use it as a basis for a set off, amounts to an allegation that the parties have not only concluded, but have implemented at least partially, a separate agreement, albeit oral.

26. It is important to bear in mind the open-endedness of the written agreement. I refer here particularly to clause 7.4 with its reference to an attempt to agree the purchase price of the “*other assets*” and to clause 22 and the need for the adjustment account. This open-endedness requires the parties to spend time and money during the interim period. The written agreement clearly envisages the need for later finalisation of the net amount owing by one side to the other.
27. The unnumbered clause below clause 7.3, with its recording that no amount is payable unless referred to in Annexure W, read together with the whole agreement and non-variation clauses holds superficial attraction for the exception. The problem with upholding the exception is that it leaves the written agreement impossible to implement to finality without further agreement. The parties appear to have envisaged further agreement, firstly by the open-endedness of the written agreement and secondly by their use of the words “ *in such other agreements* ” in clause 31.1.
28. It is these latter words which, if nothing else, allow for a later agreement, oral or otherwise.
29. The employment of an independent accountant, under clause 7.5 may, from an accounting point of view, save the fixing of the price for the “ *other assets* ” from being merely an agreement to agree but clause 7.5 does not, on its own or read

with the balance of the written agreement, oust the freedom of the parties to conclude the alleged oral agreement.

30. What the accountant may not do is attempt an interpretation, as a matter of law, of the written agreement. In any event, it is difficult to see how an expert accountant, no matter how skilled she is in accounting, could possibly reconcile, as a matter of law, the contradiction between clause 7.3.1 and the unnumbered clause.

31. The question, at this stage in the proceedings, is why should further agreement have to be in writing. In my view, it need not.

32. The text of the written agreement is fraught with complication. The implementation of the written agreement invites debate and the need for further agreement. To allow the unnumbered clause and the whole agreement and non-variation clauses to get the better of the open-endedness of the written agreement, at this stage in the proceedings, would be to place form over substance.

33. The words “*is not reflected on*” in clause 7.3.1 show that when the written agreement was signed the parties appear not to have known what was on Annexure A. This somewhat unusual uncertainty would allow evidence to be led as to what was listed on Annexure A, not only at the time of signature but thereafter. I say thereafter, as this appears to be the import of the words “*or is*

still to be calculated or finalised as indicated on Annexure A...” The words “ *in such other agreements* ” in clause 31.1 strengthen this latter point.

34. The written agreement does not provide, as it could not, that the parties are not free to contract afresh in the future.

35. When one considers text, context and the purpose of the agreement, the alleged oral agreement gives business efficacy to the written agreement.

36. The exception ought to have been dismissed.

37. This being a case on exception, no findings are made on any allegation pleaded.

38. In the run up to the appeal, the opposing attorneys fight long and hard about security for costs, delay, the sufficiency or otherwise of the record and about other preliminary and procedural things.

39. Mr Karan’s attorney delivered an application, dated 29 September 2025, in which orders are sought that the appeal has lapsed and that the late delivery of the application itself, by two days, be condoned. No reason, other than “ *an oversight* ” for the two-day delay is given.

40. It is disputed, in a detailed answering affidavit, that the appeal has lapsed. On the papers, it cannot be held that the appeal has lapsed.

41. At the commencement of the hearing, it was sensibly agreed by counsel for both sides that the appeal proceed and that the costs of all condonation and lapsing applications go with the result of the appeal.

ORDER

1. The appeal is upheld with costs, including those of two counsel. Scale C applies.
These costs include those relating to all condonation and lapsing applications on the same basis.
2. The order of the court below is set aside and replaced with an order reading
“The exception is dismissed with costs, including those of two counsel where so employed. Scale C applies.”



WRIGHT J (with whom Sutherland DJP and Carrim AJ concur)

HEARD : 12 November 2025

DELIVERED : 20 November 2025

APPEARANCES :

APPELLANTS Adv JGW Basson

Adv L Meintjies

Instructed by

Kyriakou Inc

legal@kincorporated.co.za

RESPONDENT

Adv BH Swart SC

Adv M Louw

Instructed by

Jaco Roos Attorneys Inc

jaco@jacoroos.co.za