

SOUTH AFRICA / JUDGMENT

# AECI Limited v Kotze (237/24) [2025]

## ZANWHC 147 (28 March 2025)

**[2025] ZANWHC 147****COURT**

North West High Court, Mafikeng

**BEFORE**

Maodi

**CASE / FILE NUMBER**

237/24

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**Policy****IN****THE HIGH COURT OF SOUTH AFRICA****NORTH WEST DIVISION -****MAHIKENG****Case****No.: 237/24****Reportable: YES / NO****Circulate to Judges: YES****/ NO****Circulate to Magistrates:****YES / NO****Circulate to Regional****Magistrates: YES / NO**

In the matter between:

AECI

LIMITED

APPLICANT

(Registration number:

1924/002590/06)

and

PAUL JOHANNES MARAIS

KOTZE

RESPONDENT

(ID No.: 9[...])

CORAM: MAODI AJ

Date

judgment reserved: 06 February 2025

The judgment was handed

down electronically by circulation to the parties'

representatives via email. The date and time for

hand-down is deemed

to be 28 March 2025 at 14H00pm.

ORDER

1.

Judgment is granted in favour of the applicant against the respondent

for payment of the capital amount in

the sum of R 843 821, 51.

2.

Interest on the said amount at a rate of 2% per month, calculated

from 25th December 2023 until date of payment.

3. The

respondent to pay costs as between attorney and client.

## JUDGMENT

MAODI AJ

### Introduction

- [1] The applicant launched an application for judgment against the respondent for payment of the capital amount and interest in the amount of R 843 821, 51 plus further interest on the outstanding amount at the rate of 2% per annum calculated from the 25th December 2023 to date of payment. The applicant further sought that the respondent be ordered to pay the costs of this application as between attorney and client. The respondent has opposed the matter and his grounds for defence are set out in his answering affidavit.

#### The founding affidavit

- [2] The deponent to the applicant's affidavit is Amanda Letitia Harriette Baxter who states that she is an adult female Financial Manager in the employ of the applicant and is authorised to depose to the affidavit. She has in her possession and under her control all the documents relating to the respondent's indebtedness to the applicant, including the relevant

agreements concluded, as well as the invoices issued. In addition, she has considered, in conjunction with the applicant's attorney, written communications exchanged between the respondent and the applicant and its attorney of record, from which it is evident that the respondent never disputed the debt which the applicant seeks to recover through this application.

- [3] The applicant is a public company with limited liability registered in terms of the laws of the Republic of South Africa with its principal place of business at AECI Chem Park, Block No 2 – 2nd Floor, 2[...] B[...] Drive, Chloorkop, Kempton Park, Gauteng Province. The Respondent is an adult male businessman trading as Kleinbegin Boerdery at the farm Witkranz, Ventersdorp, North West Province. The applicant states that the respondent has not disputed the debt and therefore there is no need for a dilatory and expensive procedure of action to be embarked upon.
- [4] On the 5th September 2022 the respondent signed a written application for an account at the applicant. A copy of the said document is attached as “FA2” to the application. The applicant accepted the application for the account, and consequently an agreement came to be established between the parties in accordance with the terms and conditions of “FA2”, which provided for delivery of products to be made to the respondent. The relevant express, alternatively tacit, further alternatively implied terms of the agreement included the following:

4.1 The applicant will sell, and the respondent will purchase from the applicant products.

4.2 The respondent acknowledged that the standard terms and conditions of sale, which are part of annexure “FA2” and which are recorded on page 1 of annexure “FA2” shall apply to the sale by the applicant of all products and materials (the goods) and the rendering by the applicant of all services (the services) to the respondent, to the exclusion of all other terms and conditions (clause 1.1).

4.3 Any delivery note or weigh bill signed by the respondent shall constitute prima facie proof of delivery to the respondent of the products and/or completion of the services reflected therein (clause 3.1).

4.4 The issuing of each delivery note shall constitute a separate contract between the applicant and the respondent and be governed by these terms (clause 3.2).

4.5 In the event that the applicant has, in writing, extended credit to the Respondent, the credit limit granted by the applicant may from time to time be revised, or revoked, by the applicant in its discretion (clause 4.2).

4.6 Payment for products and/or services on credit shall be due and payable within 30 days from the date of statement (clause 4.4).

4.7 All overdue payments will attract interest of 2% per month from the date on which payment was due to date of actual payment (clause 4.4).

4.8 If the applicant institutes legal proceedings against the respondent and such proceedings succeed the respondent would be liable to pay the costs incurred by the applicant on an attorney and client scale

(clause 12.3).

4.9 The respondent ceded in favour of the applicant, in respect of any amount owing to the applicant, the proceeds of its crops and production of livestock including insurance claims in respect of such crops and livestock (clause 13).

4.10 The respondent acknowledged that if there is any conflict between the terms of this agreement and any offer or other circumstances or communication received from the respondent, these standard terms shall prevail (clause 19).

[5] Pursuant to the conclusion of the sale agreement, the respondent ordered various agricultural

products from the applicant and the products were sold to the respondent in terms of the said annexure "FA2". The applicant sent statements to the respondent. In addition, the applicant also issued and delivered to the respondent invoices reflecting the individual sales, and the products were delivered to the respondent and received, and in fact also utilised by the respondent. "FA3" is a schedule of invoices and transactions. Annexures "FA4.1 to FA4.19" are the invoices which were regularly sent by the applicant.

[6] The respondent breached his obligations to pay the amount due to the applicant within 30 days from date of statement and intimated to the applicant that he requires time to make payment and will commence payments at the end of May 2023 and the balance due at the end of August 2023. However, the respondent failed to make payment as undertaken. The applicant then engaged the services of its attorney C Thom who has also provided a confirmatory affidavit marked "FA5". The attorney contacted the respondent who asked for an opportunity to pay the undisputed debt by no later than the 15th November 2023.

[7] On the 15th October 2023 a settlement agreement was signed which is attached as "FA7" to the founding affidavit, the terms whereof are as follows:

7.1 On the 24th August 2023 the indebtedness was the amount of R 775 634, 21.

7.2 The amount shall bear interest at a rate of 2% per month on the outstanding capital amount (clause 1).

7.3 The outstanding balance to be paid in full on the 15th November 2023.

7.4 Clause 6 recorded that should there be a failure by the respondent to make any payment due, the unpaid balance of the principal debt and interest would immediately be owing and payable.

7.5 Legal costs on an attorney and client scale (clause 7).

7.6 The agreement expressly recorded the possible commission by the respondent of acts of insolvency (clause 8).

7.7 The applicant can utilise a certificate to prove the amount owed.

[8] During the period 15th September 2023 to 24th November 2023 the applicant's attorney sent letters to the respondent, providing him with the balance due and reminded him to make payment on/or before the 15th November 2023. The respondent failed to honour his payment undertaking and failed to pay the balance due. The applicant has demonstrated that the debt is not in dispute and has been acknowledged over and over again on a number of occasions. The respondent has breached the undertaking to pay the balance due as well as the sale agreement. A certificate of balance is attached as annexure "FA 14" and shows the balance as at 25th December 2023 in the amount of R 843 821, 51. The applicant has complied with the National Credit Act and seeks judgment as prayed

for in the notice of motion.

#### Answering affidavit

[9] The deponent to the answering affidavit is the respondent himself. He has done business with the applicant by ordering weed killer. He challenged the authority of the deponent to the applicant's affidavit. The fact that the applicant refers to relevant agreements means that there is more than one agreement concluded. He had problems with deliveries and supplying of correct items. He confirms that regular payments were not done due to problems which he has set out. He sets out the procedure involved between the applicant and the respondent. There is a duplication of at least one invoice and this has caused numerous problems as when delivery takes place it is unsure what was ordered and for what purpose as orders are placed on the advice of the representor of the applicant.

[10] The farmer is expected to sign a delivery note in the absence of an order document that is not always available from the farmer's side or by another person in the absence of the farmer. If a person's bookkeeping system is not of a high standard it becomes impossible or very difficult to establish what is ordered and what is received. An order is made on the advice of the representor of the applicant. It is denied that annexure "FA7" was signed voluntarily and with knowledge or acceptance that the content of it was correct. The attempt to commission the affidavit does not comply with the prescribed descriptions.

#### Replying affidavit

[11] The applicant filed a replying affidavit addressing and dealing with the issues raised in the answering

affidavit. That the respondent does not state that he has made more payments and the applicant had erroneously not recorded such

payments. The respondent has not complained that he had ordered a product that he had not received. When the respondent failed to pay, he acknowledged the debt and gave an undertaking to pay. The respondent signed the delivery notes himself and collected the products soon after he had ordered them telephonically. He was able to observe with his own eyes that he received what he ordered.

#### The authorities and reasons for judgment

[12] It is clear that there are points in limine raised by the respondent and I will first deal with that before dealing with the claim itself.

#### First point in limine by respondent – authority of deponent to applicant's affidavit

[13] The law when it comes to authorisation to depose to an affidavit has long been settled. The applicant is a public company and the deponent has indicated that she has familiarised herself with the facts of the matter. In fact, at paragraphs 2 to 4 of her affidavit, the deponent states reasons why she is authorised to depose to the affidavit as follows: She states that she has in her possession and under her control all documents relating to the respondent's indebtedness to the applicant, including the relevant agreements concluded, as well as the invoices issued. In addition she has considered, in conjunction with the applicant's attorneys, written communications exchanged between the respondent and the applicant and its attorney of record, from which it is evident that the respondent never disputed the debt. The applicant's attorney of record's confirmatory affidavit is attached to the papers

[14] The case of *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) is very relevant and actually similar to our case:

In that case the defendant had an overdraft facility which was entered into by him and one D. Rees on behalf of the plaintiff. The defendant defaulted, and the plaintiff issued summons. The defendant filed a notice to defend. The plaintiff then applied for summary judgment. The defendant raised the following point in limine: "Rule 32 sub-rule 2 of the Uniform Rules of Court requires that the affidavit in summary judgment proceedings has to be made by a person who can swear positively to the facts, verifying the cause of action and the amount claimed. The affidavit of the said Mason does not comply with these requirements. Ex-facie the summons, plaintiff's cause of action is alleged to be based on an oral agreement concluded between myself and the plaintiff who was represented by its duly authorised manager, one D.A Rees. The said Mason does not and cannot claim to swear positively to the facts and in the circumstances he cannot verify plaintiff's cause of action."

[15] At paragraphs 11 and 12 of the *Maharaj* case supra, it is stated as follows:

*"...In regard to certain of these facts, it would be difficult, if not impossible, for any one person to have first-hand knowledge of every fact that goes to make up the Plaintiff's cause of action. In this connection I am in full agreement with the following remarks of Miller J, in Barclays National Bank Ltd v Love (supra, at pp 516 – 7), made with reference to an affidavit made by the manager of a branch of the Plaintiff bank (oddly enough also at the Stanger branch), 'we are concerned here with an affidavit made*

*by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the Defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of account, indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment. It goes without saying that a manager of a bank who claims to have personal knowledge of the extent to which a client has overdrawn his account must needs rely upon the bank records which show the amounts paid into the account and the amounts withdrawn by client"*

[16] At paragraph 13 of the Maharaj case *supra*, it is stated as follows:

*"In this case the deponent, Mr Mason, does not specifically state that he has personal knowledge of the overdraft arrangements made by the defendant with the manager of the Stanger branch of the bank and the state of defendant's current account at the relative time. On the other hand, he does say, in paragraph 1 of his affidavit, that he is the assistant to the branch manager of the Stanger branch. It is not clear what the duties or status of the assistant are but, if one reads this averment together with the statement in paragraph 2 that the deponent swears positively that the defendant is liable on the claim and for the amount as detailed in the summons and upon the cause of action as set out therein there is perhaps enough to justify the conclusions that in the course of his duties Mr Mason would have acquired a personal knowledge of the defendant's financial standing with the bank and the state of his current account. This is to some extent reinforced by the fact that in paragraph 4 of his opposing affidavit (quoted above) the defendant merely puts in issue the deponent's ability to depose to the oral agreement of overdraft entered into with the manager, Mr Rees. He does not deny the deponent's ability to speak of the current state of his (the defendant's) account. Moreover, the affidavit does not specifically allege that Mr Mason was not present when the arrangements were made or that he could not have acquired first-hand knowledge of the arrangements in the course of his duties, e.g- from discussions with the defendant himself. Finally, it appears from the rest of defendant's affidavit that the real dispute relates not to the fact that overdraft facilities were granted to him but to the amount, if any, actually owed by him on overdraft. Viewing the matter, "at the end of the day", I consider that, although this is a borderline case, there is just sufficient to enable the affidavit to pass muster. At any rate, I am not prepared to hold that the trial judge erred in overruling the point in limine."*

[17] Erasmus, the Superior Court Practice, Second Edition, Van Loggerenberg, Volume 2, Juta, Uniform Rules of Court at page D1 – 393 states that: "If the plaintiff is a company and the deponent is authorised by the company to swear the affidavit, and the deponent does not state in his affidavit the grounds, indicating only that the facts deposed to by him are within his personal knowledge, the court will none the less not hold the affidavit to be defective for that reason, as long as the deponent is someone who would ordinarily be presumed to have personal knowledge of the matter."

[18] This point in limine can therefore not succeed and is hereby dismissed.

## Second point in limine – Non-compliance of affidavit

[19] The second point in limine by the respondent is that the affidavit by the applicant does not comply with Regulations.

[20] I agree with paragraph 11 of Khumalo J in the case of Standard Bank of South Africa Limited v Redmond (80438/2015)

[2016] ZAGPPHC 396 (2 June 2016) that:

*“With regard to Regulation 1 – 4, the court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with the regulations has been proved or not”*

[21] Erasmus, Superior Court Practice at page D – 392 state that: “In FirstRand Bank Limited t/a FNB Home Loans v Freddie (unreported, FB Case no 4075/2016 dated 16 November 2016) it was held at paragraph [5] – [14] that the plaintiff was entitled to file supplementary affidavits of the deponent to plaintiff’s affidavit in support of its application for summary judgment and the commissioner of oaths before whom the deponent appeared, explaining that the deponent in fact appeared before the commissioner at Johannesburg (as stated in the commissioner’s certificate) despite the latter’s stamp having reflected her business address as being at Boksburg.”

[22] Although this issue was raised by the respondent in its papers, nothing further was stated on what are the reasons or grounds for the point in limine. The respondent indicated that the court was to be addressed but no address in this aspect was received from the respondent. Perusal of the founding affidavit by the applicant does not show any shortcomings when it comes to compliance with the Regulations as contained in Government Notice R1258 of 21 July 1972 as amended by Government Notice R1648 of 19 August 1977.

[23] The point in limine is therefore dismissed.

## Contract and breach

[24] The basic principles of contract are that the parties must have the capacity to enter into the contract, freely and voluntarily, and be able to identify the terms of their contract. The next issue is whether there was a contract between the parties and whether there was breach which gave rise to the applicant’s claim. Although the respondent states that there was no contract in place and he denies that “FA7” was signed voluntarily, I find that there is no merit in this argument. With regard to the alleged involuntary signature of “FA7”, the respondent was supposed to go further and show why such conclusion is made. The respondent could have set out sufficient reasons showing why he says he was forced to sign and why it was not voluntary.

[25] In the case of Mohamed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176; 2018 (2) SA 314 (SCA) (1 December 2017) at paragraph 23 it is stated that: “The privity and sanctity of contract entails that contractual obligations must be

honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract. Taking into consideration the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract.”

- [26] With regard to the allegation that there was no contract between the parties, the answer to this lies in the case of *Pillay and Another v Shaik and Others* 2009 (4) SA 74 (SCA) at paragraph 50 and reads as follows: “I do not agree with the court a quo’s conclusion that there could be no binding contracts between the parties unless each was signed by or on behalf of the buyers and the sellers. In my opinion it is clear from *Godblatt v Freeman*, supra and the authorities cited therein that, in the absence of a statute which prescribes writing signed by parties or their authorised representatives as an essential requisite for the creation of a contractual obligation (something that does not apply here), an agreement between the parties which satisfies all the other requirements for contractual validity will be held not to have given rise to contractual obligations only if there this is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract comes into existence.”
- [27] The *Pillay* case at paragraph 53 goes further to state as follows: “This raises the question as to whether the doctrine of quasi-mutual assent can be applied in circumstances where acceptance does not take place in accordance with a prescribed mode but the conduct of the offeree is such as to induce a reasonable belief on the part of the offeror that the offer has been duly accepted according to the prescribed mode. Viewed in the light of basic principle, the question must surely be answered in the affirmative because the considerations underlying the application of the reliance theory apply as strongly in a case such as the present as they do in cases where no mode of acceptance is prescribed and the misrepresentation by the offeree relates solely to the fact that there is consensus.”
- [28] In casu, the respondent ordered items from the applicant over a stipulated period. The respondent took possession of the said products and utilised same whilst making payments. The respondent himself, at paragraph 21.3 of his answering affidavit, has admitted that he defaulted on the payments, however, this he blames on his own bookkeeping system. These give credence to the principle of quasi-mutual assent. There is no statutory requirements or formalities known to me for such contracts to come into force. I therefore find that there was a contract between the parties and that the respondent has breached the said contract.

## Conclusion

- [29] With regard to whether the applicant has succeeded in proving that its claim is liquidated, annexures “FA7”

and “FA14” clearly clarifies that issue. The respondent signed an acknowledgement of debt as contained in “FA7”

and he has also consented to a certificate of balance being prima facie proof of the debt, and the applicant has complied with same.

Order

[30] I therefore make an order as follows:

J. T. MAODI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

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FOR THE APPLICANT:

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FOR THE RESPONDENT:

IN PERSON

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