DELETE WHICHEVER IS NOT APPLICABLE

'-(1) REPORTABLE: ***NO.***

(2) OF INTEREST TO OTHER JUDGES: ***NO.***

(3) REVISED.

IN THE HIGH COURT OF SOUTH AFRICA

[TRANSVAAL PROVINCIAL DIVISION]

CASE NUMBER: 33474/2003
DATE: 28/2/2006

In the matter between:

MR WALSH t/a WONDALAND INSTANT LAW **Plaintiff**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **Defendant**

JUDGMENT

1.

This is a case that should never have been. In essence the Plaintiff is claiming damages from the Defendant for breach of contract, constituting general as well uS consequential (special) damages where the Defendant has pleaded only denials without a single shred of expert testimony. What is more, either in the pleadings or during the trial certain admissions of breach were made but despite that Defendant has persisted in its denial that:

(a) Any breaches were committed by the Defendant; and

(b) That the Plaintiff has suffered any damages whatsoever, albeit general or consequential.

2.

Even before the case started, senior counsel for Defendant was asked to set out in broad terms what the defence of Defendant was whereupon the answer simply came that the defence would appear from cross-examination. The only ground of defence that was then mentioned was that the Plaintiff was still on the rented property although the term of the agreement has already expired through the affluxion of time.

3.

Furthermore, the Plaintiff has not set up any kind of counterclaim for other defence like the *exceptio non adempleti contractus* or any other kind of special defence.

4.

It may be said that I was partly to blame for the fact that this trial proceeded in any event, however, there being two counsel on both sides, one is loath to interfere in the proceedings unless really necessary. The sad fact is that at the end of the trial no defence was raised and almost not a single shred of the evidence on behalf of the Plaintiff, was or could be contested by the defence.

5.

THE CONTRACT:

The Plaintiff was granted a tender by the Respondent (in the normal course of tender procedures) for the *"rental of land for the establishing, maintaining and harvesting of instant lawn at Zeekoegat, Water Care Works"* for a period of 5 years on property and water works controlled by the Defendant. The terms of the contract are not in dispute. Defendant's benefit would be that Plaintiff would get rid of Defendant's sludge.

6.

The following further features of the contract were admitted on the pleadings:

6.1 The site, property and area of land to be irrigated by sewerage by the Plaintiff received from the Defendant was illustrated on Plan No. 11471 as was pointed out to Plaintiff at the site meeting prior to the tender being granted.

6.2 *"The area of land is available for <u>immediate preparation for instant lawn and is approximately</u>* 24.5 *<u>hectares".</u>*

6.3 The Defendant would make available to the contractor (Plaintiff) certain equipment and accessories necessary for the irrigation of the sludge onto the land.

6.4 Defendant would make available to the Defendant the dams at the sludge drying beds as well as effluent water storage.

6.5 The sludge would be *"aerobically stabilized sludge"* supplied to the Plaintiff and would usually have the following properties:

6.5.1 Total solids content between 2% and 8%;

6.5.2 pH value of between 6.5 and 7.2;

6.5.3 Ammonium nitrogen between 300 and 600 mg per liter.

6.6 The rental payable by Plaintiff to Defendant was to be calculated on a certain basis as set out in the contract based on the available land area of 24.5 hectares.

6.7 At all relevant times it was within the contemplation of the parties that the Plaintiff would conduct a business for profit for the establishing, maintaining and harvesting of instant lawn.

7.

THE PLEADINGS:

As already stated all these allegations were admitted in the plea (paragraphs 1 to 9 of the plea).

8.

In paragraph 12 of the plea the Defendant pleads as follows:

"12.1 *The Defendant denies that it was agreed that the pH content of the sludge will be between* 6.5 *and* 7.2 *and puts Plaintiff to the proof thereof*

12.2 *Defendant further avers that:*

12.2.1 *No guarantee of the pH content of the sludge was given to the Plaintiff in tender specifications;*

12.2.2 *Towards the end of 2002 Defendant stopped the aeration process at the request of the Plaintiff.* "

9.

On the allegation by the Plaintiff (paragraph 11.4 of the particulars of claim) that the Defendant withdrew the use of the sludge dams *"as agreed"*, Defendant pleaded in paragraph 14.2 of the plea that only the sequence in which the sludge dams were used, was changed *"per agreement between the parties"*.

10

Plaintiff made the following allegations regarding breaches by the Defendant:

10.1 An area of approximately 24.5 hectare was not available for the production of instant lawn as only approximately 15 hectares were eventually made available;

10.2 The pH content of the sludge varied and was substantially lower than 6.5 to 7.2 value as set out in the agreement;

10.3 The sludge did not have the ammonium nitrogen content of between 300 and 600 mg per liter;

10.4 The Defendant adapted the aeration and pump system to make the effective use of the irrigation system impossible;

10.5 Defendant did not remove chemicals from the effluent water that made it unsuitable for the irrigation of non-edible crop;

10.6 The Defendant adapted the aeration system which resulted in the lowering of the quality of sludge for a period. (This was admitted by the Defendant);

10.7 The Defendant practically removed all solids from the sludge provided after the installation of the *"dewatering plant".* (This was admitted by the Defendant with the proviso that the increased volume was not in excess of what may and can be used by the Plaintiff);

10.8 The Defendant has added waste water from the dewatering plants to the volume of sludge to be processed by the Plaintiff. The increased volume is in excess of what may and can be processed by the Plaintiff (This was not pleaded to by the Defendant).

11.

Plaintiff then pleads as follows (para 12 and 13):

12.

12.1 *The combination of the abovementioned breaches has materially impacted on the viability of establishing and maintaining and harvesting instant lawns.*

12.2 *The breach of the agreement, alternatively Defendant's conduct has infringed on 80% of the Plaintiff's 'commodus usus' of the rental property and/or the Plaintiff's beneficial occupation.*

12.3 *In the further premises the Plaintiff is entitled to a pro-rata decrease of the tender rental in the amount equal to 80% of the rental paid or payable of such amount as the Court may find.*

13.

As a result of the abovementioned breaches, the Plaintiff has suffered damages in the amount of R4 576 *755.50 being the loss of profit for the duration of the agreement.* "

Then the Plaintiff prays for the following relief:

1. That a declarator be issued that the Plaintiff is entitled to a remission of 80% of rental paid or payable in terms of the parties' rental agreement on the rental of land at Zeekoegat Water Works;

2. That the Defendant is ordered to repay any rental paid in excess of the amount of rental the court finds as being payable after the remission has been taken into account;

3. That the Defendant pay an amount of R4 576 755.50 as damages;

4. That the Defendant pay interest on the abovementioned amounts at the rate of 15.5% per annum a tempore morae;

5. Costs. "

12.

At the close of the trial, Plaintiff, as per previous notice to the Defendant also asked for punitive costs on the attorney and client basis against the Defendant for the whole trial for two counsel; as well as a declarator that the amount of rental still owing and payable in terms of the contract, is not due and owing to the Deferldant. (Therefore the admitted amount of R455 460.00 still outstanding on the rental since November 2003, should be written off as part of Plaintiff's damages) .

13.

Apart from the admissions already referred to above, the Defendant has as stated earlier, simply denied the balance of the allegations by Plaintiff, i.e. more specifically denying any breach on behalf of the Defendant and denied every allegation in paragraphs 12 and 13 quoted above.

14.

During the trial it was admitted that the ammonium nitrogen content of the sludge was for all practical reasons never within the limits specified in the tender and were in fact always much lower. It was further admitted that except for a 31-month period from about March 2001 until October 2003 the pH content of the sludge was never within the specified limits and were constantly below that. It was conceded that the solids from the waste were removed up to a quantity of approximately 80% and much effluent water was added to the sludge provided to Plaintiff, which means that the properties of the sludge specified by Defendant and tendered for by Plaintiff, were never reached, except for that 31-month period.

15.

THE EVIDENCE:

The one big issue in the trial was the area of land provided to Plaintiff. It is

common cause that when the land was pointed out, there was a house and a small encamped area in the middle of the land which was not turned over to Plaintiff (except for the small piece of land which was provided to him at a later stage). Plaintiff's evidence was that at the site meeting, a Mr Snyman, on behalf of the Defendant stated categorically to all the tenderers present that the house would be demolished as well as the encampment of the other piece of land and that the whole area of 24.5 hectares would be available to the successful tenderer upon acceptance of the tender. This evidence was corroborated by Plaintiff's witness, Mr Ebersohn, who accompanied the Plaintiff to the site meeting as his agricultural advisor (Ebersohn was called as a witness).

16.

The evidence on behalf of the Defendant by Mr Snyman, was first of all the denial that he would have said that the house would be demolished and said that he could not have said it at the time, because he knew one of the Defendant's employees was staying in it and there was no alternative accommodation available to him. It is interesting to note that he never categorically denied having said as much. He simply said that he could or would not have said it because of the circumstances referred to. Furthermore, the Defendant's case was that the area allotted to the tenderers was *"approximately"* 24.5 hectares. It is common cause that the area taken up by the house and the piece of land was approximately 2.5 hectares.

17.

The Plaintiff's evidence was also (and this was uncontested) that the Plaintiff was obliged by Defendant (not specified in the tender) to maintain certain buffer areas around the perimeter of the land as well as around the Defendant's employee's house and to prevent spillage of any sewerage on the road leading to the employee's house (the road was also said by Mr Snyman to be taken away). These areas were measured by Plaintiff's surveyors and eventually the sizes were not disputed by the Defendant.

18.

Further areas which Plaintiff claims not to have been made available to him was first of all a piece of 1.5 hectare which was contaminated by cyanide which prevented any growth of grass on that piece of land. What was planted, simply died after the first planting thereof.

19.

Furthermore other pieces of land that should have been available were unusable by the Plaintiff because of pre-existing conditions created by the Defendant by pouring sludge onto that area for the 9 year period prior to the tender, which caused gradual fermentation of the soil and then gradual sinking in. In certain areas it

created puddles which prevented proper growth of grass on the land. All these areas put together, plus a certain other area which could not be irrigated because there were no irrigation equipment nearby, amounted to approximately 10 hectares which basically for the duration of the contract was not" *available"* for the *"establishing, maintaining and harvesting of instant lawn"* .

20.

These were the main breaches complained of by Plaintiff. On behalf of Plaintiff Mr Walsh himself gave evidence as well as his agricultural advisor, Mr Ebersohn and his accountant, Mr Cornelius. All three persons gave evidence as experts and had given the necessary notices and summaries of expertise. The Defendant denied the expertise of the Plaintiff, but admitted the expertise of the other two witnesses; as also the expertise of another expert witness, Mrs Gregory, who was not called. (In fact, her evidence regarding prices of instant lawn were admitted by the Defendant).

21.

At this stage it might be convenient to mention that shortly after the start of the proceedings, and after a consultation with counsel in my chambers, it was agreed that the question of merits of the case will be dealt with first whereafter the question of quantum would be dealt with. The matter then proceeded on that

basis and Mr Walsh and Mr Ebersohn gave evidence on the merits and Mr Walsh then also gave evidence during the quantum cession as well as Mr Cornelius. On the merits issues only Mr Snyman on behalf of Defendant gave evidence and no witnesses were called on the quantum issue.

22.

The evidence of Mr Walsh revolved around the problems he had in establishing, maintaining and harvesting his instant lawns due to the breaches caused by the Defendant. He confirmed all the breaches referred to as contained in the pleadings. More specifically, and also as an expert, he testified as to the effect of the lower Clualities of pH and ammonium nitrogen in the sludge as well as the consistency and the aeration of the sludge which made it impossible for him to establish and maintain and harvest instant lawn as he tendered for. Mr Ebersohn was then called and basically confirmed the evidence of Mr Walsh and confirmed the evidence that the samples of the land taken on his advice was sent to a laboratory for testing and he then confirmed the results which showed that the qualities of the sludge were not as specified in the tender documents.

23.

The evidence of Mr Kobus Snyman, on behalf of Defendant did actually no more than strengthen the Plaintiff's case. Although the presence of cyanide in the sludge

at the beginning of the contract period was denied on the pleadings and throughout the evidence on behalf of Plaintiff, Mr Kobus Snyman admitted that there was cyanide present during the start of the contract period and the evidence of Mr Walsh that it remained there for the whole period.

24.

One of the big issues put to Plaintiff in cross-examination was that he failed to manage the irrigation on a proper basis, Le. that he appointed an employee to take care of it for him and that he was not present at all times. This was categorically denied by him and he in fact stated that until he appointed this employee half-way through the contract, he was there on a day to day basis. No evidence by Snyman could contradict what Walsh had said. Snyman's further evidence was that so called *"puddles"* were created on the land by over-irrigation by Plaintiff. The sizes of the so-called puddles, the periods and exact effect thereof, etc. was never put to Plaintiff or dealt with by Defendant since all this evidence came on second-hand basis to Mr Snyman. He admitted that he only drove past the property a couple of times a year and that he at times did see puddles and smelt the sludge in the air. The fact is however that on behalf of the Defendant no substance to these allegations on behalf of Defendant could be given by Snyman (or anybody else for that matter). The final effect of all this is that as much as Mr Sithole SC, on behalf of the Defendant tried, he could not establish any so-called breach by the Plaintiff as regards his running of the irrigation works.

25.

The Defendant's other big attack on the Plaintiff revolved around the issue of odour and smell. This issue emanated from paragraph 5.17 of the tender document which reads as follows:

> *"The contractor may undertake no activities that may in any way be construed as offensive or annoying to the council or neighbouring communities."*

The Defendant's big point on this issue was that all actions taken by Defendant which were labelled by Plaintiff as being breaches, were taken to minimise the so called stench and bad odour which emanated from Plaintiff's operations. Mr Snyman said that the aeration of the sludge (which killed the pH and ammonium nitrogen values of the sludge) was re-starting in October 2003 because unaerated sludge which was allowed to stand on the land, caused the smell. Contrary to this there is also evidence on the papers and the documents from Defendant's side that there was a neighbouring chicken farm which also caused a stench. Nowhere was Defendant able to pinpoint either the real origin, duration, extent, etc. of the so called odours nor was it able to deny the existence of the chicken farm which also caused an odour.

26.

In essence Mr Kobus Snyman conceded and admitted that he as the responsible person on behalf of the Defendant, decided that it was better to breach the contract than face interdicts and other cases from the neighbouring communities relating to stench. He also admitted that the one sewerage dam (No. 4) was taken away from Plaintiff, causing him to be able to use only Dam No. 1, plus the effluent watering dams 2 and 3. He also admitted that this caused the PH levels and the ammonium nitrogen levels to drop. He also conceded as was pointed out in the minutes and monthly reports of the Plaintiff that the Defendant's employee's piece of land and his homestead was supposed to be part of the 24.5 hectares of land which was supposed to be made available to Plaintiff for his operations.

27.

In the final result it is quite clear that the Plaintiff has proved far more than on the balance of probabilities that the Defendant breached the contract as pleaded and that this caused him not to be able to operate the land on a profitable basis which caused him severe damage.

28.

QUANTUM:

Here again the Defendant was at a total loss and could not in any manner whatsoever, contest the basis of the calculations and the manner thereof as presented by Plaintiff to Court of his damages. Because of that I do not intend to deal with the question of quantum in very great detail. Suffice it to say the following:

28.1 It is uncontested that all damages calculated by or on behalf of Plaintiff was done on a very conservative basis;

28.2 The measurements of the land actually used by the Plaintiff was also done on a conservative basis in that the measurements were not taken from the actual boundaries but from the telephone poles inside the boundary which made measurements easier;

28.3 Mr Snyman also admitted that Plaintiff was obliged to keep buffer zones around his irrigated areas which varied between 10 and 20 metres and these measurements were also taken to the advantage of the Defendant;

28.4 As far as actual expenditures are concerned, all the exact expenditures were taken into account and in calculating projected profitability due to breaches, the expenses were in fact doubled to the benefit of the Defendant (this obviously could not be denied by the Defendant) ;

28.5 As far as actual sale prices of harvested instant lawn was concerned, Mr Walsh's evidence was that as an expert he can say that the prices were reasonable. Furthermore, he confirmed the estimates and prices given by Mrs Gregory also as being reasonable and then furthermore, the prices taken by Mr Cornelius for calculating his damages was taken on a basis lower than the average. (Again this could not be denied) ;

28.6 As far as the actual loss of harvests is concerned, it was stated that the tender provided for 2 - 3 *"lifts"* per annum, whereas in actual fact the losses were calculated on a basis of 1 % lifts per annum of kikuyu and 1.2 lifts of LM grass per annum. This was well below the estimates provided for in the tender and also less than the projected lifts foreshadowed in the contract itself where a lift every six months was foreshadowed.

29.

As indicated Plaintiff claims actual damages and special and consequential of approximately R4.5 million, plus the approximately R450 000.00 outstanding rent.

30.

The evidence by Plaintiff and Mr Cornelius was that, had the contract run as per tender specifications, Plaintiff would have made an estimated profit of R8 million. However, making provision for all kinds of contingencies such as bad weather, rain and the like and allowing or only 1.5 lifts per annum of kikuyu and 1.2 lifts per annum of LM grass his estimated loss of profit was in the region of R5.1 million. (All these estimates and calculations and figures were properly set out in documentation by Plaintiff and could not be disputed by Defendant in any way. For those reasons I do not intend dealing with them in any detail.)

31.

In quantifying the damages, Mr Naude, on behalf of Plaintiff suggested and submitted that because Mr Walsh calculated his damages on such a conservative scale, a robust approach should be taken in actually quantifying his damages for purposes of a final order. In this regard he submitted that it is impossible to calculate the exact effect of each ground or breach of the contract such as the

poor quality of sludge or the smaller area granted to him, etc. The fact is that on a conservative basis he proved damages of at least R5.1 million. If one then considers all the breaches, as admitted and also testified to by the Plaintiff (including Mr Snyman's admission that 80% of the solid content of the sludge was taken away), and whichever way one looks at it, the damages as presently claimed by the Plaintiff are well within the proven amounts, i.e. if one adds the remission of rent (i.e. the outstanding amount) to the amount of R4.5 million claimed the total amounts to R5 032 215.00, which is still less than the calculations by Cornelius.

32.

I have no doubt that this approach by Mr Naude makes sense and should be followed.

33.

It remains to briefly deal with the arguments raised by the Defendant on the merits as well as quantum, simply to try and further elucidate my reasoning:

33.1 Area.

On this issue it was again argued that *"approximately"* 24.5 hectare

was given in spite of the almost 2 hectare taken up by the employee's house. Had it only been for this approximately 2 hectare taken up by the employee's house, I still do not think it comes within the bounds of *"approximate"* as envisaged in the tender documents;

33.2 PH level and sludge conditions.

Mr Sithole relied in this context on the *"voetstoots"* clause contained in the contract in the argument relating to the land. He however failed to consider that the *"voetstoots"* clause only pertains to the land and not to the sludge provided by the Defendant. His argument further was that the PH levels were not far off the stated amounts as attested to by Mr Ebersohn's and therefore did not constitute a breach and was irrelevant. He further submitted that the quality of the sludge was changed by the Defendant to prevent bad odours, but again the quality and the specifications of *"odour"* was never dealt with in evidence or by any experts. He then submits that *"it respectfully submitted that such actions by the Plaintiff (to contain the odours) amount to positive mal-performance on his (Plaintiff's) part as he has breached the express terms of the contract."* This was of course never pleaded and was never put to Mr Walsh in so many terms in cross examination.

33.3 Use of sludge dams.

In view of the admissions by Mr Snyman that one sludge dam was taken away from Defendant, these arguments cannot be maintained.

34.

On the issues of quantum Mr Sithole argued that for the Court to take into consideration remission of rent and consequential damages would amount to double jeopardy. As already indicated, he suffered or would have suffered actual loss in expending money on rental and made a great loss on profit. This is not a valid argument. Next he contended that the period during which good sludge was provided to the Plaintiff, should be taken into account in minimising the damages. But as also pointed out, this was in fact done by Mr Cornelius and the improved quality of grass and sales was reflected in the calculations provided to Court. He next argued that contingency allowance should be made for rain and black frost and the like. This was also done in the conservative approach adopted by Mr Walsh. As for mal-performance on behalf of the Plaintiff, this was of course never pleaded and most of it was not even put to Mr Walsh in cross-examination, so nothing turns on that. He submits that the new prayer for a declaratory order regarding the outstanding rent was not pleaded and that the Defendant was ambushed in this way. This cannot be so because all along the Plaintiff has pleaded for a remission of rent and whether it is done by way of additional

damages or simply reducing the outstanding, it amounts to the same thing. This could never be an ambush on the Defendant.

35.

A totally new issue arose during argument in that there was still unharvested grass on the land although the contract period has expired. On a question by the Court, whether this was being offered to Mr Walsh to minimise his damages, it was positively and unambiguously denied on behalf of Defendant. In any event it is totally irrelevant as far as damages are concerned.

36.

In view of the abovementioned, I am more than satisfied that the approach suggested by Mr Naude, is the proper one to adopt in these proceedings and I will eventually make my allocation on that basis.

37.

COSTS:

A week before the end of the trial, the Defendant was given notice by Plaintiff that Plaintiff would seek punitive costs at the end of the trial. The basis thereof was not

spelt out in the notice, but it was elucidated by Mr Naude during the trial and during argument. The basis of this prayer was as follows: First of all the Defendant never fully set out its grounds of defence in spite of many, many, many requests thereto and not only by the Plaintiff and his counsel, but also by the Court itself. Secondly, all kinds of efforts were made to elicit information from the Defendant regarding what is admitted and what is not admitted. Plaintiff went sofar as to offer to have consultations with Defendant, together with Plaintiff's experts in order to find out what was in issue and what could be admitted and what could not be admitted, and to find ways and means to curtail the proceedings. Furthermore, Defendant never requested the Plaintiff to provide it with copies of its discovered documents. There was also a bundle of 10 files containing all the invoices, accounts, etc. relating to the Plaintiff's expenses, which was never requested to be seen by Defendant until a very late stage and which was then only cursorily paged through. In argument, Mr Sithole then complains that they had to spend days and nights going through these documents, some of which were illegible, but in spite of that there was never one single request for elucidation or clarification by Plaintiff of any of these matters.

38.

The next issue was the expertise of Mr Walsh. To the very last, Defendant denied his expertise, but in cross-examination nothing was put to him to contradict any opinion or finding of Mr Walsh. In fact, it was just a fishing expedition at best for

Defendant. Almost a whole day was used to prove his expertise and a lot of time wasted in cross-examination to try and disprove it without any substantive fact or allegation being made except for one simple allegation i.e. that because Mr Walsh has not published any paper of any kind in the field of his expertise he cannot be considered an expert. Not only was this denied by Mr Ebersohn, who also considers him to be a specialist in his field, but the whole foundation of such an allegation is nonsensical. There is no basis for saying that experience by itself cannot qualify a person as an expert. The other big ground of contention by the Plaintiff was the fact that in spite of all the admissions made by or on behalf of Defendant relating to breaches of the contract, it was maintained and submitted and argued by the Defendant to the very last that no breach was proved and that the Plaintiff was the cause of his own demise. That whole approach made the conduct of this case by the Defendant a bit of a farce.

39.

In defence to this claim Mr Sithole submitted that the Plaintiff did in fact make many admissions and did everything he could to curtail the proceedings. In this respect he referred to the admissions made in the pleadings as such as well as the concession that Messrs Ebersohn and Cornelius were experts and the final concession at the end of the trial that Mrs Gregory's evidence would also be admitted. To my mind his submissions mean absolutely nothing. All the admissions contained in the pleadings as such were of the contents of the contract

which was not in issue and certain other aspects which were trite or trifling. As for the real issues of the trial itself, the Defendant was very, very backward in coming forward with efforts to curtail the proceedings. In this respect I was referred by Mr Naude to an unreported judgment of the Honourable Mr Justice Kriegler J as he then was in the case of J T Mulder v Stadsraad van Pretoria and Minister van Nasionale Opvoeding, Case Number 17043 in the Transvaal Provincial Division and judgment handed down on 25 May 1985. In this judgment Kriegler J makes *inter alia* the following statements:

> *"Die Verweerder se verweer op die eiser se vordering soos gepleit deurstaan geen intelligente ondersoek nie."*

This equally applies to the plea in this case.

> *"Die Verweerder is 'n element van ons landsbestuur, weliswaar op die sogenaamde derde vlak maar dit is en bly 'n regeringsinstansie met omvanryke middele tot sy beskikking en kundighede binne die geledere van sy werknemers wat vir die privaat individu nie beskikbaar is nie."*

> *"Gevolglik is dit die gedingvoerders se plig om voor die verhoor sinvol met mekaar te kommunikeer, werklik die geskilpunte te identifiseer en die onnodige bogrond weg te skraap."*

I have no doubt that the same considerations apply in this case. The Defendant

40.

Mr Sithole submitted that in the case of the Defendant, it has many departments and it is not always easy to correlate what each hand of the body is doing. In this regard Kriegler J said the following:

> *"Die Verweerder is egter nie 'n bosveldse winkeltjie nie. Die VelWeerder is die administrasie van die administratiewe hoofstad van die voorste moondheid op die vasteland van Afrika. Dit is nie vir hom beskore om die soort van onbeholpenheid ten aansien van wat in sy eie kring gebeur het, aan te voer as 'n velWeer nie. As sy administrasie dan so swak is, dan is dit steeds laakbaar. Les bes is dit vir 'n regsverteenwoordiger wat met so 'n verleentheid gekonfronteer word, geroepe om na sy kW!nt terug te gaan en te se "gee my vaste opdragte". By onstentenis van sulke opdragte moet daar dan deur die regsverteenwoordiger ondubbelsinnig geantwoord word en nie op die wyse wat hier geantwoord is nie.* "

At the end thereof he granted costs against the Defendant on an attorney and client basis.

41.

I have no doubt that the same considerations apply in this case. The Defendant

has steadfastly refused to come to the table, put its cards on the table and find out what the real issues are and how to resolve them. In the result I am quite satisfied that an attorney and client costs order in this case against the Defendant is more than justified.

42.

The issue of two counsel was not debated and it was conceded on both sides that it should be granted.

43.

I therefore make the following order:

1. The Defendant is to pay to Plaintiff the amount of R4 576 755.00;

2. Interest on the said amount from date of mora, being 27 November 2003 at 15.5% per annum until date of payment;

3. The Plaintiff is not liable to Defendant for any unpaid rental that may have accrued during the period of the contract;

4. The Defendant is to pay the costs of the Plaintiff on an attorney and client

scale including the costs of two counsel;

5. The Defendant is to pay the qualifying fees of Messrs Ebersohn, Walsh, Cornelius and one land surveyor.

c--

R D CLAASSEN
Judge of the High Court of South Africa

P.S. This judgment was prepared and dictated directly after the trial. Although a lot of additional thought probably should have gone into this judgment, pressure of work in this division is such that one is not given the luxury to ruminate for any length of time on decisions like this. In the interest of the parties therefore it is essential to come to a conclusion and a decision as soon as possible and to make it known in spite of any deficiencies in the formulation thereof.