



*'Not Reportable'*

**CASE NO.: I 1408/2010  
I 1539/2010**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**PAUL FARMER**

**First Applicant**

**MAGRIETA SUSANNA FARMER**

**Second Applicant**

and

**WERNER GUNA KRIESSBACH**

**First Respondent**

**TANIA NATASHA KRIESSBACH**

**Second Respondent**

**WERTAN FARMING**

**Third Respondent**

**AND**

**WERTAN FARMING**

**Respondent**

and

**PAUL FARMER**

**First Applicant**

**AGRICULTURAL BANK OF NAMIBIA**

**Second Applicant**

**CORAM: PARKER J**

Heard on: 2011 October 31; 2011 November 1 – 2

Delivered on: 2011 November 28

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## JUDGMENT

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**PARKER J:** [1] In this matter two actions, that is Case No. 1408/2010 and Case No. 1539/2010, have been consolidated; and in this judgment I shall refer to the parties as applicants and respondents as appear in the captioned citation.

[2] Pleadings in the matter closed in January 2011. In March 2011, the parties held a Rule 37 Conference and filed the minutes thereof on 5 May 2011. It is important to note the crucial point that the minutes were filed before the coming into operation of judicial case management on 13 May 2011 in terms of Amendment of Rules of High Court of Namibia (under GN No. 57 of 2011) ('the JCM Rules'). In that event rule 37(18) is applicable; and it provides:

'(18)Where a pre-trial conference in terms of rule 37 that is replaced by this rule was held and minutes therefor filed, subrule (4) may not apply, if in the opinion of the managing judge the minutes reasonably satisfy the requirements of the case management rules, and in that event the minutes are deemed to be a report at the initial case management conference in terms of subrule (5): Provided that the managing judge may direct that certain issues that are not sufficiently dealt with in the minutes must be addressed by the parties at a parties' conference and submit a report thereon to the managing judge.'

[3] Without unduly burdening this judgment with a long historical account of this matter, I will only set out the following factual findings following upon the matter being allocated to a managing judge in terms of the JCM Rules. On 12 July 2011 the managing judge made an order ('the 12 July 2011 order') in which the following paragraph, which is relevant to the present proceedings, is contained

in that order: '1. That the consolidated case comprising the two respective case numbers hereinbefore is hereby postponed to 31 October–11 November 2011, on which dates the hearing/trial shall take place, whether Mr and Mrs Farmer are represented or not'. In this regard it is important to note that when the aforementioned 12 July 2011 order was made by the Court, while the applicants were not legally represented, the respondents were represented by their legal representatives. The cruciality of this factual finding will become apparent shortly.

[4] At the commencement of the trial on the set-down date of 31 October 2011, Mr Conradie of Conradie & Damaseb who now represents the applicants in the present proceedings (that law firm had withdrawn on 9 June 2011 as legal representatives of record for the applicants) applied from the Bar for a postponement of the trial. Mr Oosthuizen, counsel for the respondents, opposed the application, not least because counsel argued – and I accept the argument – the application should be brought on a notice of motion, supported by a founding affidavit. The matter was stood down and a notice of motion was accordingly subsequently filed and served in the afternoon of 31 October 2011. There is an answering affidavit before the Court. In the notice of motion the applicants pray for an order in the following terms:

- '1. Removal of the matter from the Roll; alternatively;
2. Postponement of the matter;
3. Granting leave that this matter be conducted under the Rules governing Case Management;
4. Costs to be costs in the casue.'

[5] It is worth noting that in his oral submission it would seem Mr Conradie did not pursue the relief of 'removal of the matter from the Roll'. The defendant, as I intimated previously, have moved to reject the application for a postponement.

[6] The principal argument of Mr Conradie, as I understand him, is simply that the setting down of the matter for trial was premature on account of the fact that the course of the process thereanent has not been subjected to the JCM Rules; and counsel ties this argument up with the relief sought in prayer 3 of the notice of motion. The principal argument of Mr Oosthuizen on the other hand is, as I understand him, the following. The matter was allocated to a managing judge and the managing judge did manage the case; and in respect of this, counsel relies heavily on the fact that it was the managing judge who made the 12 July 2011 order.

[7] Granted; the managing judge did make the 12 July 2011 order. Apart from that order nothing remotely resembling the JCM Rules has been accomplished. The most important aspect of the JCM Rules is the initial case management conference under rule 37(3) of the Rules. In this regard the requirements of rule 37(4) are critical and absolutely peremptory. The parties have not submitted to the managing judge a jointly prepared case management report in accordance with rule 37(4). In my opinion, in terms of GN No. 57 of 2011, the rule 37(4) report is the alpha of the Judicial Case Management procedure after a file has been allocated to a managing judge; and all else must proceed from there. In this regard it must be noted that there is nothing filed of record establishing that the managing judge has expressed an opinion in terms of rule 37(18) that rule 37(4) does not apply in this matter in virtue of the minutes filed under the pre-13 May 2011 Rule 37.

[8] It need hardly saying that just because the managing judge has ordered a set-down date for trial and so therefore, without more, all the JCM Rules have been airbrushed into non-compliance. As I have said previously, there is no rule 37(4) report and there has not been held a pre-trial conference which, according to rule 37(11), is pre-emptory without any allowance, and there has not been a rule 37(12) parties' joint proposed pre-trial order, and, of course, no pre-trial conference has been held.

[9] Since the applicants were unrepresented, it was encumbered upon the legal representatives of the respondents – nay, they had a duty – to inform the managing judge that the JCM Rules have not been accomplished. The legal representatives did not so inform the managing judge – inadvertently, I suppose – and unbeknown to the managing judge the managing judge inadvertently made the aforementioned order in para 1 of 12 July 2011 order. Does it mean that by that fact alone the hands of the managing judge are tied to such an extent that the trial of the matter must willy-nilly proceed? I do not think so. In any case, the Rules do not say so; and what is more, this Court would be acting unjudicially if it ordered the trial to proceed in the face of such glaring and uncontroverted lack of compliance with the Rules and in view of the fact that the fact of non-compliance with the Rules has been brought to the attention of the managing judge in the nick of time by Mr Conradie before the trial commences. On the facts and in the circumstances of this case, it is with firm confidence, therefore, that I grant the postponement sought by the applicants. The authorities referred to me by counsel are not of any real assistance on the point under consideration: they are not directly to the point.

[10] As to the matter of costs; in the circumstances and on the facts of this case, I think it would be otiose to engage in a blame game; for instance, to say that the respondents' legal representatives had a duty to have informed the managing judge that JCM Rules have not been accomplished and so the trial could not proceed at set down date; or that Mr Conradie ought to have brought a formal application for a postponement earlier than he did. The irrefragable fact that remains is that the JCM Rules have not been accomplished; but they must be because they are statutory requirements. The only reasonable course open to the Court is, therefore, indubitably to order a postponement of the matter to enable the JCM Rules to be accomplished before going to trial. It follows that in the exercise of my discretion against the backcloth of what I have said previously that it serves no purpose to enter upon a blame game, I make no order as to costs as respects the present postponement application. The postponement is for a good legal cause which all of us must see; it is to enable the parties to proceed in accordance with the JCM Rules.

[11] In the result, I make the following order:

1. The trial of the matter is postponed to a date to be determined by the managing judge in due course.
2. The parties and/or their legal representatives must hold a parties' conference at the conclusion of which the parties by themselves or by their legal representatives must on or before 10 February 2012 jointly prepare a case management report and submit same to the managing judge in terms of subrule (4), read with subrule (5), of rule 37 of the Rules.

3. The parties and/or their legal representatives must attend in **open court** at **09h00** on **16 February 2012** a case management conference in terms of rule 37(4) of the Rules.
  
4. There is no order as to costs.

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**PARKER J**

**ON BEHALF OF THE APPLICANTS:**

Mr D Conradie

**Instructed by:**

Conradie & Damaseb

**COUNSEL ON BEHALF OF THE RESPONDENTS:**

Adv. H Oosthuizen, SC

**Instructed by:**

Kirsten & Co. Inc.