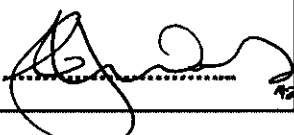


IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO.: 80584/16

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
27/10/2016	
	

27/10/2016

In the matter between:

THEUNS JORDAAN PRODUCTIONS (PTY) LTD

First Applicant

THEUNS JORDAAN

Second Applicant

and

AFRIKAANS IS GROOT (PTY) LTD

Respondent

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JUDGMENT

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VAN DER WESTHUIZEN, A J

1. The applicants launched an urgent application in terms of the provisions of Rule 6(12) of the Uniform Rules of Court seeking *inter alia* an order dispensing with the provisions relating to time periods and service and that the matter be heard as one of urgency.
2. The second applicant is a professional artist and conducts his profession through the vehicle of the first applicant.
3. This application relates to a show known as *Afrikaans Is Groot* and in particular to concerts to be held during November 2016.

4. The relief that is sought by way of urgency is:
- (a) That the decision by the respondent to remove the applicant from the Afrikaans Is Groot 2016 concerts to be held on 10 to 12, 17 to 19 and 24 to 26 November 2016, as informed on 3 October 2016, be set aside;
  - (b) That the applicant be authorised forthwith to appear as an artist at the Afrikaans Is Groot concerts to be held on 10 to 12, 17 to 19, and 24 to 26 November 2016;
  - (c) That the respondent be ordered to forthwith ensure that the applicant be given the same rights and privileges with regard to his appearance at Afrikaans Is Groot 2016 concerts to be held on 10 to 12, 17 to 19 and 24 to 26 November 2016, had the decision to remove the applicant on 3 October 2016 not been done;
  - (d) That the respondent be ordered to pay the costs of this application.
5. It may be prudent to state some background to the application.
6. Prior to 2012, the second applicant participated in a show known as the *Huisgenoot Skouspel*. In 2012, a number of artists got together and a new show, *Afrikaans Is Groot* (AIG), was staged. The latter show appeared to be successful and evolved into an annual show since 2012. The AIG is a live show.
7. The second applicant claims to be one of the founding artists of AIG. There appears to be a dispute on the papers as to the origin of the AIG. For purposes of this judgment it is not necessary to consider and/or decide that dispute.

8. On 11 March 2016, the respondent handed a contract to the second applicant relating to his participation in the AIG 2016 concerts. In response thereto, the second applicant gave an undertaking to sign the contract forthwith and return it the following day. It is clear from that undertaking, that the second applicant was in agreement, and assented to, that participation in the AIG 2016 concerts was to be regulated contractually.
9. However, the second applicant did not sign the agreement as per his undertaking and did not return same the following day. Despite various requests to the second applicant to sign the agreement, he did not heed to the requests, nor did he respond thereto.
10. The second applicant concedes that on 27 September 2016, for the third time, he was placed on terms to sign the aforementioned agreement. He was advised in no uncertain terms that should he not sign the agreement immediately, i.e. on 27 September 2016, he would not be participating in the AIG 2016 concerts.
11. Only on 29 September 2016 did the second applicant append his signature to the agreement and in doing so subjected it to conditions precedent. By appending his signature to the said agreement, the second applicant clearly confirmed that participation at AIG 2016 concerts was to be on a contractual basis.
12. The second applicant signed the agreement subject to two conditions precedent. The first related to full disclosure by the respondent of CD and DVD sales in respect of previous AIG concerts and how the profit on the CD and DVD sales was calculated. The second condition precedent was directed at a meeting to be held between the first applicant, the vehicle through which the second applicant conducted his act as artist, and Coleske Artists (Pty) Ltd. The second applicant requested either of the two new directors (Messrs Mark Rosin and Antonio Lee) of the respondent to be present at the meeting. The

second applicant suggested dates for the proposed meeting and requested that it be held at the latest on 19 October 2016. It is common cause that the conditions precedent did not relate to any issue in respect of the AIG 2016 concerts.

13. It was made clear to the respondent that the signing of the agreement was subject to the said conditions precedent being met. The respondent acceded to the first condition precedent, however the second applicant did not make use of the offer. There was non-compliance with the second condition precedent, as neither of the two new directors was prepared to attend such meeting.
14. On 3 October 2016, and in view of the second applicant's stance in respect of the two conditions precedent, the second applicant was notified that he would not be participating in the AIG 2016 concerts. This prompted the second applicant to act and eventually resulted in the launching of this urgent application.
15. It is common cause between the parties that no agreement came into place in respect of participation in the AIG 2016 concerts.
16. The second applicant seeks to rely on the assumption that as a founding artist of the AIG concerts, he is automatically entitled to participate in such annual concerts. In this regard the second applicant contends that, in respect of founding artists, no contractual arrangement is required for participation in AIG concerts. No support for this contention is provided, either by other founding artists or in respect of the minutes of a meeting held on 27 July 2016. It appears from those minutes that the issue of participation of founding artists in AIG concerts is uncertain and that such is to be considered and negotiated. At that meeting no principle was established that founding artists' participation in AIG concerts was guaranteed.

17. The aforementioned contention by the second applicant begs the question. If no contractual arrangement is required, it is not explained why the second applicant undertook to sign a contractual agreement, and in fact signed the agreement on 29 September 2016, albeit subject to conditions precedent.
18. Counsel for the applicants disavowed any reliance on the part of the second applicant on any contractual arrangement. He also disavowed any reliance on the minutes of the aforesaid meeting of 27 July 2016.
19. The "right" to participate in AIG 2016 concerts appears to be a reliance on the assumption that founding artists are entitled to automatically participate in an AIG concert, and, particularly in the present instance (AIG 2016), on the apparent "use" of the second applicant in media exposure for promotional purposes of the AIG 2016 concerts. The second applicant further relies on him being "in the show" up until 3 October 2016. This proposition by second applicant's counsel is without merit.
20. The second applicant signed agreements relating to the AIG concerts during 2012, 2013 and 2014. Only in respect of the AIG concert for 2015 did the second applicant not sign an agreement. It is apparent that the second applicant's contention that no contractual agreement is required in respect of participation in an AIG concert is without merit. For the years 2012, 2013, 2014 and 2016 the second applicant signed such agreements and such signed agreements militate against the second applicant's contention in that regard. Since 2012 the second applicant was aware, and it is clear, that participation in AIG concerts are secured by contract.
21. The second applicant has not shown an automatic right of participation in AIG concerts.

22. At no stage during 2016, or for that matter during 2012 to 2014, had the second applicant indicated that he as founding artist was not required to sign an agreement for participation in the AIG concerts, and hence was not obliged to sign such when presented therewith during March 2016. Contrary thereto, the second applicant undertook to sign the agreement and in fact signed such, albeit subject to conditions precedent.
23. The reliance on the non-signing of the 2015 agreement and the second applicant being "in the show" until 3 October 2016 is akin to premising the alleged right to participate on some form of *estoppel*. It is trite that *estoppel* cannot form a *causa* for a claim.
24. Whether the second applicant has a protectable right is a matter of substantive law.<sup>1</sup>
25. When the second applicant was informed on 3 October 2016 that he would not participate in the AIG 2016 concerts, it confirmed what the second applicant was advised would happen if he did not sign the agreement on 27 September 2016. Subjecting his signature to the agreement on 29 September 2016 to conditions precedent and in the absence of compliance with the conditions precedent, it is tantamount to not signing the agreement. It is common cause that second applicant has no contractual right.
26. Furthermore, the second applicant has not proven on a balance of probabilities that as a founding artist, his participation in AIG concerts is guaranteed.
27. The second applicant has not proven that he has a clear right, or a right clearly established. Accordingly, the second applicant has not complied with the first and foremost requirement for a final interdict.

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<sup>1</sup> *Welkom Bottling Co (Pty) Ltd v Belfast Mineral Waters (OFS) (Pty) Ltd* 1967(3) SA 45 (O) at 56D-E

28. It follows that the application cannot succeed.

I grant the following order.

- (a) The application is dismissed;
- (b) The applicants are to pay the costs, such costs to include the cost of two counsel where applicable.

  
C J VAN DER WESTHUIZEN  
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:

K W Lüderitz SC  
J Vorster

Instructed by:

J I van Niekerk Inc.

On behalf of Respondent:

C Zietsman

Instructed by:

Morne Mostert Attorneys