IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: 14889/2008

DATE: 24 NOVEMBER 2008

In the matter between:

1. SOUNDPROPS (236) (PTY) LIMITED 1st APPLICANT

2. PETER COOPER N.O. 2nd APPLICANT

3. GESINA CHRISTINA COOPER N.O. 3RD APPLICANT

and

1. JUSTIN RORY McKENZIE LEWIS

(And all that hold title under him) 1st RESPONDENT

2. THEEWATERSKLOOF

LOCAL MUNICIPALITY 2nd RESPONDENT

JUDGMENT

FOURIE, J:

This is the judgment in two applications which I heard on 13 November 2008. Firstly there is an application for a declaratory order and ancillary relief, brought as a matter of urgency under case number 11292/2008 by Justin Rory McKenzie Lewis ("Lewis") in his capacity as trustee of the Draaiberg Trust and in his personal capacity. The third

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applicant is Lewis' co-trustee of the Draaiberg Trust, while his wife is the fourth applicant.

The respondents are Peter Cooper ("Cooper") and his co-trustees of the Helderfontein Farming Trust ("Helderfontein Trust"). I will refer to this application as the main application. Secondly, there is an application under case number 14889/2008, brought by Soundprops 236 (Pty) Limited and Cooper and his co-trustees of the Helderfontein Trust, against Lewis and all that hold title under him, for their eviction from the farm Draaiberg. I will refer to this application as the eviction application.

At the hearing of the applications, Mr Lewis appeared in person and Advocate De Waal on behalf of the respondents in the main application and applicants in the eviction application. At the commencement of the hearing, I ordered that due to their inter-relationship, it would not only be convenient, but also in the interests of justice, to hear the two applications together. I also refused an application by Lewis for a postponement of both applications. I stated that reasons for this decision would be furnished in this judgment.

Briefly the reasons are as follows: The postponement was sought pending the finalisation of a corruption investigation

relating to a liquidated close corporation of which Lewis had been a member. The events giving rise to this investigation took place some eight years before the events relevant to the issues in the present applications. The issues to be decided in the present applications, do not appear to be relevant or linked to the issues in the corruption investigation, as the latter pertains to the close corporation's affairs. In addition, the main application was launched as one of urgency by applicants, well knowing that the corruption investigation has not yet been finalised. In view thereof, applicants in the main application, who are *dominus litis*, can surely not be heard to say that the main application should now be postponed, merely on the basis of the possibility that there may be a link between the issues in the present applications and those covered by the corruption proceedings.

In any event, according to Lewis, the corruption investigation will only be completed by the end of this year and Cooper, according to Lewis, will then be given an opportunity to settle with Lewis, failing which he will be added to what was termed "the list of suspects". In my view, all of this can be done in due course once the investigation is complete and there is no cogent reason why the present applications should not proceed. I accordingly refused the request for a postponement

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of the two applications.

The papers in these two applications are voluminous, together with the heads of argument they exceed 700 pages. Due to a heavy case schedule with resultant time constraints, I do not intend referring in detail to the allegations of the respective parties. I assume that any person interested in this judgment, is fully conversant with the contents of the parties' affidavits and annexures filed in both applications. I, therefore, proceed to summarise my reasons for the orders which I intend to make.

Dealing firstly with the main application, the crucial issue to be decided is the validity of a written agreement, styled "Heads of Agreement". The main relief sought by applicants in the main application, is an order declaring the heads of agreement to be null and void and of no force or effect. The heads of agreement is the product of a settlement reached by the parties during the course of mediation proceedings, which were instituted with a view to resolve disputes between them. The heads of agreement were entered into between Cooper and Lewis in their representative capacities and they agreed, *inter alia*, as follows:

"1. Both parties are acting in their capacities as

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trustees for the time being of the Helderfontein Trust. Cooper representing the Class A beneficiaries and Lewis the Class B beneficiaries.

2. The trustees agreed to create a new trust for the B Class beneficiaries.

3. The new trust will have the following assets and liabilities:

3.1 A claim of R791 000 against the Jolly Good Trust and/or J M Lewis in his personal capacity.

3.2 An obligation to pay an amount of R791 000 to the Helderfontein Trust on or before 17 June 2008.

4. Upon payment of the amount of R791 000, the new trust will be entitled to acquire 100% of the shareholding in the company Soundprops 236 (Pty) limited for R100,00.

5. Should the new trust not make payment of the amount aforesaid, the Helderfontein Trust shall be entitled to immediately place the shares of Soundprops 236 (Pty) Limited or the property owned by Soundprops 236 (Pty) Limited on the market. The proceeds of the sale will be dealt with as follows.

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5.1 An amount of R791 000 will be a first charge against the proceeds of the sale.

5.2 The trust (Helderfontein) will be entitled to subtract as a second charge, the value of any capital gains obligation that it may incur.

5.3 The balance of the proceeds of the sale, after the deduction of the amounts in 5.1 and 5.2 above, will be split in equal shares by the Helderfontein Trust and the newly created trust.

8. Lewis shall, upon the creation of the new trust, resign as trustee of the Helderfontein Trust and as manager of same on 17 June 2007. (I should add that the parties are *ad idem* that the date should read 17 June 2008).

9. The parties agree that their heads of agreement afore-mentioned, will be encompassed in a comprehensive agreement to be finalised amongst the parties, but until such time as a comprehensive agreement is signed by both parties, these heads of agreement will remain in force an effect.

11. The parties agree that on 17 June 2008 a reconciliation will be made of the fruit receipts outstanding in respect of Draaiberg, which

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amounts will be paid over by the pack house to the new trust."

In their founding papers, applicants attack the heads of agreement on two main grounds. Firstly, that Lewis was induced to enter into the heads of agreement on the strength of a misrepresentation or a non-disclosure by Cooper. It is alleged that Cooper failed to disclose to Lewis that Soundprops was not unencumbered at the time of the conclusion of the heads of agreement, but that it was indebted to the Helderfontein Trust in an amount of R807 444. It does appear from applicants' founding affidavit that Lewis was aware of the existence of approximately R670 000 of this indebtedness, but he says that he was not informed of the balance owing by Soundprops. I should add that Lewis alleges that he only discovered the existence of this liability on 17 June 2008 when draft financial statements of Soundprops were supplied to him by respondents' attorneys.

Secondly, applicants contend that at the conclusion of the heads of agreement, Lewis and Cooper, acted *ultra vires* the Helderfontein trust deed, by failing to consider the interests of minor beneficiaries of the trust, particularly as required by Clause 21.5 of the relevant deed of trust.

The allegation by Lewis that applicants, represented by Lewis, were induced to conclude the heads of agreement on the strength of a misrepresentation or a non-disclosure of this nature has, in my view, not been established. In addition, I agree with the submission of Mr De Waal that even if applicants were induced to enter into the heads of agreement as alleged, such misrepresentation of non-disclosure was not material and accordingly legally irrelevant.

A non-disclosure of the nature upon which applicants rely, can only be regarded as such if Lewis was unaware of the extent of Soundprops' liability as at 17 June 2008. However, in paragraphs 14 to 17 of the written submissions dated 6 March 2008, prepared by Cooper for the mediation, a copy of which was served on Lewis, a full disclosure of the loan obligations of Soundprops to the Helderfontein Trust is made. It is not disputed that Lewis received his copy on 7 March 2008, i.e. more than three months before 17 June 2008. It further appears from the papers that the loans were initially granted by one of Cooper's trusts for the purpose of providing working capital for the parties' farming venture, details of which loans were known to Lewis.

The misrepresentation, if there was one, would in any event have been legally irrelevant. This is so, as it could not have

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caused applicants any prejudice. Clause 4 of the heads of agreement provides that upon payment of the amount of R791 000 by the new trust, i.e. the Draaiberg Trust, it would be entitled to acquire 100% of the shareholding in Soundprops for a nominal sum of R100,00. It appears from the papers that the intention of the parties was that upon payment of this amount, the Draaiberg Trust would have acquired the shares and loan accounts in Soundprops for R100,00. This is borne out by the terms of a draft comprehensive agreement accepted and signed by Lewis, which provides, in Clause 6.2.3, for the delivery of a deed of cession in respect of the loan account, together with delivery of the shares in Soundprops.

In a letter of respondents' attorneys dated 17 June 2008, Lewis was expressly advised that the shares and loan accounts in Soundprops would be transferred to the Draaiberg Trust. It follows that if the Draaiberg Trust had performed its obligation by paying the amount of R791 000, it would have been entitled to exercise its option in terms of Clause 4 of the heads of agreement, thereby acquiring the shares in Soundprops, as well as the loan account obligation due to Helderfontein Trust by Soundprops. This means that the Draaiberg Trust would have become the creditor of the debt.

The conclusion is that any misrepresentation in this regard

could not have caused applicants, and in particular the Draaiberg Trust, any prejudice. Put differently, the misrepresentation would not have been material and, therefore, would not have justified the rescission of the heads of agreement by applicants. Materiality in this context relates to the importance of a misrepresentation or non-disclosure. Here it would not have been material as Draaiberg Trust would have become the creditor of the debt owing by Soundprops.

It follows from the aforesaid that there is, in my view, no merit in the first ground relied upon by applicants in substantiation of their alleged entitlement to have cancelled the heads of agreement. To this I should add that during the course of argument, Lewis expanded on the grounds upon which applicants rely in their papers for avoiding the heads of agreements. Although the additional grounds are not fully covered in the papers of applicants in the main application, I will deal with same.

Firstly, Lewis questioned the allegation in respondents' papers, namely that Cooper holds all the issued shares in Soundprops in his capacity as trustee and nominee of the Helderfontein Trust. He argued that applicants in fact owned 52% of the shareholding in Soundprops. For this argument, Lewis relied on allegations made by him in applicants' replying

affidavit to the effect that by virtue of financial contributions made into Soundprops to match Cooper's investments, the Lewis family has a legal right to 52% of the shareholding in Soundprops. It is, however, clear from these allegations that even if same are correct, the Lewis family will have no more than a personal right to claim delivery of the shares from Cooper or the Helderfontein Trust on whose behalf Cooper holds all the issued shares in Soundprops.

The extended argument of Lewis was that in these circumstances, the respondents, represented by Cooper, had no right to conclude the heads of agreement on the basis that upon payment of the amount of R791 000 by the Draaiberg Trust, the full shareholding in Soundprops would be transferred to the Draaiberg Trust. In my opinion, this submission is factually and legally unsound. The fact of the matter is that Cooper is the registered owner of the shares which he holds as nominee for the Helderfontein Trust. This would entitle him or the Helderfontein Trust to dispose thereof. On the other hand, Lewis, or the applicants, are not the owners of the shares in Soundprops, but, as already indicated, may only have a personal right to acquire same.

Finally in this regard, even if Cooper and/or the Helderfontein Trust were not the owners of the shares in Soundprops, they

would still be legally entitled to conclude an agreement in terms of which they undertook to deliver the shares in Soundprops to the Draaiberg Trust. An analogy is to be found in the law of sale, where a non-owner may sell the property of another, as long as he or she is able to deliver the property to the purchaser when the obligation to deliver arises.

Secondly, Lewis argued that respondents are precluded from enforcing the heads of agreement, by virtue of their breach of contract in regard to the fruit income dealt with in Clause 11 thereof. Put differently, applicants contend that they are entitled to rely on this alleged breach of contract to avoid the consequences of the heads of agreement. In this regard, Mr De Waal pointed out that this allegation of a breach of contract is inconsistent with the basis upon which applicants maintain that they cancelled the heads of agreement, i.e. by virtue of a misrepresentation or non-disclosure on the part of Cooper.

Be that as it may, it is in any event clear to me that upon a proper construction of the heads of agreement, it cannot be argued, as Lewis did, that payment of the fruit income had to be made to the Draaiberg Trust, prior to the Draaiberg Trust being obliged to pay the sum of R791 000 to the Helderfontein Trust. It is, in my view, clear from a reading of the document, that no such condition was included and that Clause 11 only provides that on 17 June 2008, a reconciliation would have to

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be made in this regard, whereafter payment to the Draaiberg Trust would take place. It follows, as explained by Cooper in his answering affidavit, that the fruit proceeds would have been payable after payment of the amount of R791 000 by the Draaiberg Trust to the Helderfontein Trust.

This brings me to applicants' contention that at the conclusion of the heads of agreement, Lewis and Cooper acted *ultra vires* the Helderfontein Trust Deed, by failing to consider the interests of minor beneficiaries. As mentioned previously in this regard, applicants rely on the provisions of Clause 21.5 of the Helderfontein Trust Deed. This clause requires that the trust should continue to administer the capital to which minor beneficiaries are entitled until they turn 25. What the clause requires, is that if, at the termination of the trust, the beneficiaries are under the age of 25 years, the capital shall continue to be held in trust on their behalf on the terms and conditions of the trust deed. It follows that Clause 21.5 only finds application upon termination of the Helderfontein Trust.

It is common cause that this trust had not been terminated nor is its termination envisaged in the heads of agreement. All that happened, is that the Class B beneficiaries, i.e. the Lewis beneficiaries, were transferred from the Helderfontein Trust to the Draaiberg Trust. A comparison of the two trust deeds

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shows that they are virtually identical and that the Draaiberg Trust Deed deals with the capital payable to the beneficiaries on the same terms and conditions as the Helderfontein Trust Deed. As explained in the affidavits in the main application, the setting up of a separate trust for Lewis and his family, was the whole purpose of the exercise. It is clear that in the process the rights of minor beneficiaries were considered, as they were especially provided for in the Draaiberg Trust Deed. It follows, in my opinion, that there is no merit in the second basis upon which applicants rely for avoiding the provisions of the heads of agreement.

I now turn to the eviction application. In his answering affidavit, Lewis made it clear that his defence to the eviction application is that the heads of agreement are unenforceable. From this it would follow that in the event of the main application failing, the eviction application should succeed. In argument, however, Lewis extended the basis of the defence to the eviction application by, firstly, if I understood him correctly, claiming an entitlement to occupy the Draaiberg Farm by virtue of his, or his family's, entitlement to 52% of the shareholding in Soundprops.

For the sake of clarity, I should mention that the Draaiberg Farm is registered in the name of Soundprops. I have already

dealt with the contention of Lewis regarding the ownership of the Soundprops shares. As I have already found, at best for Lewis, he and/or his family, may have a personal right to claim transfer of a certain percentage of Soundprops' shares (this being an issue on which I express no firm view), but that does not provide him with a right of ownership of the shares.

Even if the Lewis family owned 52% of the shares in Soundprops, I still fail to see how that would entitle them to occupy Draaiberg. I, therefore, fail to appreciate how the alleged entitlement of the Lewis family to shares in Soundprops, may constitute a defence to the eviction application brought by, *inter alia*, Soundprops as the registered owner of Draaiberg.

Secondly, Lewis submitted that he is entitled to occupy Draaiberg by virtue of the fact that he has lived on the farm for a number of years, in terms of a right to lifelong residence granted to him under his employment contract. He says that this lifelong residence has all along been one of his conditions of employment, which were only reduced to writing on 16 August 2007. It appears from the written employment contract, that on 16 August 2007, Lewis, acting in a dual capacity, namely on behalf of the Helderfontein Trust as employer, and in his personal capacity as employee, concluded a written

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agreement in terms of which he was appointed as the general manager for the farms, Helderfontein and Draaiberg.

Clause 5.2.1 of the employment contract deals with "huisvesting" and provides as follows:

> "Free housing in Draaiberg homestead - lifelong."

In paragraph 9.8 of his founding affidavit in the main application, Lewis explained as to how the employment contract came about:

> "I point out that this contract is merely a confirmation of the oral terms of the contract which were required by the auditors of the Export Accreditation Agencies to be set out in writing during the 2007 financial year. Although I signed the contract, both on behalf of the trust and as employee, at that stage I had been working in the terms set out in the employment contract since 1995. The contract sets out the terms of my agreement with the Helderfontein Trust and my understanding with Cooper in this regard."

To this Cooper responded as follows in his answering affidavit in the main application:

"88. Each and every allegation herein contained is denied. In particular I deny that:

88.1 The employment contract that Lewis has attached is, according to Lewis, merely a confirmation of the oral terms of his employment. I have never before seen this agreement and note that the agreement is signed by Lewis in his capacity as trustee and employee. The signature of Lewis alone in his capacity as trustee cannot bind the trust and he is not authorised by the trust deed. The effect is that the contract is void or voidable.

88.2 I attach as PC14 my letter of 2 August 2007 to Lewis. This letter was sent to Lewis two weeks before he purported to conclude an employment agreement with himself. I submit that the content of paragraph 5 of my letter is significant in that at the very least I recorded the material terms of Lewis' terms of employment as I understood it.

88.3 It is quite apparent from the content of JL5 to the founding affidavit, that Lewis acted in utter disregard of the position, as I understood it, when he purported to record the terms of his employment. It is clear from the attachment that the purported terms of Lewis' employment is not as set out in the

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contract.

88.4 In any event I have made enquiries with the auditors of the Export Accreditation Agencies, in order to see whether a copy of Lewis' written employment contract was ever provided to them. According to their records, they do not have a copy of any such contract. In the circumstances the agreement seems to be a recent and convenient fabrication. As a result of time constraints, my attorneys have been unable to arrange for an affidavit confirming the above. I do, however, believe the information to be true and correct."

From the aforesaid, it appears that there is a dispute of fact regarding the terms of the employment of Lewis and his alledged right to occupy the Draaiberg residence pursuant thereto. On reflection, I do no believe that this dispute of fact precludes the final determination of the eviction application. The reason for this is to be found in clause 8 of the heads of agreement, which provides as follows:

"Lewis shall upon the creation of the new trust, resign as trustee of the Helderfontein Trust and as manager of same on 17 June 2007." (As I mentioned previously, this date should read 17 June 2008).

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It is clear from this clause, that the intention of the parties, as at 17 June 2008, was that Lewis would no longer be employed by the Helderfontein Trust as manager, with the result that he would not have been entitled to occupy Draaiberg under any employment contract with this trust. As from 17 June 2008, Lewis ceased to be a beneficiary of the Helderfontein Trust and could also not claim any right of occupation of Draaiberg in that capacity. What was envisaged in the heads of agreement, is that the new trust, the Draaiberg Trust, would acquire the entire equity in Soundprops and, in so doing, it would take control of Draaiberg, provided that the Draaiberg Trust settled the indebtedness of R791 000 to the Helderfontein Trust on or before 17 June 2008. In such event, it was envisaged that Lewis and his family would occupy Draaiberg until 17 June 2008, whereafter they, through the Draaiberg Trust, would become the owners of Draaiberg and have the right to occupy same.

The Draaiberg Trust, as I have mentioned, failed to pay the said sum to the Helderfontein Trust, with the result that it forfeited its option to acquire the

equity in Soundprops, as well as the right to become the owner of the Draaiberg farm. It follows, in my view, that after this date for payment had passed without payment of the said amount being made to the Helderfontein Trust, any right which Lewis had to occupy Draaiberg, had terminated.

It is clear to me that it was envisaged in Clause 5 of the heads of agreement, that Lewis and his family would not remain on Draaiberg after 17 June 2008, if the money was not paid to the Helderfontein Trust by then. This clause provides that if the new trust failed to pay this sum by 17 June 2008, the Helderfontein Trust would be allowed to sell Draaiberg. In view of the aforesaid, I conclude that after the date for payment had passed, without any payment being made to the Helderfontein Trust, Lewis and his family had no lawful right to continue their occupation of Draaiberg.

The respondents do not dispute that the procedural requirements for an eviction application, as laid down in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19/1988 ("PIE"), have been complied with. I am also satisfied that applicants have the necessary *locus standi* as owner, i.e. the 1st applicant, or as the person in charge of Draaiberg, i.e. the Helderfontein Trust, to bring this application. As submitted by Mr De Waal, Lewis, whose

occupation of Draaiberg had changed at midnight on 17 June 2008 from being lawful to unlawful, is entitled to rely on PIE in certain circumstances. Section 4(6) of PIE states that if an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so after considering all the relevant circumstances, including the right and needs of the elderly, children, disabled persons and households headed by women.

Lewis had been an unlawful occupier for less than six months at the time when the eviction application was launched. In regard to the evidential onus in an application of this nature, the following was said in Ndlovu v Ngcobo; Bekker & Another v Jika 2003(1) SA 113 (SCA) at paragraph 19:

> "Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction.

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> Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier, we need not now decide."

In the affidavits opposing the eviction application, Lewis does not disclose any circumstances relevant to the eviction order, other than to attack the validity of the heads of agreement. As mentioned previously, he did in argument, raise further defences regarding the merits of the eviction application, which defences I have already dealt with. In particular, no grounds have been put forward by Lewis regarding the factors mentioned in section 4(6) of PIE. Lewis did, in general, point to the fact that he has been residing on the farm for a number of years, but apart from still residing on the farm, he is no longer involved in the farming operations.

It follows, in my view, that no valid defence has been raised by Lewis as the unlawful occupier against the granting of the eviction application. I accordingly conclude that in terms of section 4(8) of PIE, applicants are entitled to an eviction order. I should add that it is sad to see that the business

relationship between Cooper and Lewis, which had covered a substantial number of years, should come to such an acrimonious end. However, having found the heads of agreement to be valid and enforceable, it seems to me to be just and equitable to enforce the agreement of the parties, including their intention, that failing payment of the sum of R791 000 on 17 June 2008, Lewis and those holding title under him, would not be entitled to reside on Draaiberg.

I am also required, in terms of section 4(8) of PIE, to determine a just and equitable date for the vacation of the property. In Part B of the notice of motion, an order is sought that the farm be vacated within 48 hours of the granting of an eviction order, or alternatively upon such date as the Court may deem just and equitable. In my view, a substantially longer period than 48 hours should be granted to Lewis and his family to vacate Draaiberg. In this regard it should be borne in mind that the farm has not yet been sold by the Helderfontein Trust, with the result that same is not immediately required for use or occupation by a prospective purchaser. The applicants have also not advanced any reasons why a reasonable period of time should not be allowed.

In the circumstances I believe that it would be just and

equitable to order that the farm be vacated by not later than 31 January 2009. This ought to provide sufficient time for Lewis and those who hold title under him, to make the necessary alternative arrangements.

Finally, with regard to costs, the respondents in the main application and the applicants in the eviction application are the successful parties. As such they are entitled to their costs of suit. In the result the following orders are made:

Case number 11292/2008:

The application is dismissed with costs.

Case number 14889/2008:

1(a) The first respondent and all those who hold title under him, is/are ordered to vacate the property known as Portion 1 of the farm Draaiberg, number 459 in the Division of Caledon, Western Cape, 19 hectares in extent, on or before 31 January 2009.

(b) The sheriff of this court is directed and authorised to evict first respondent and all those who hold title under him on 1 February 2009, if first respondent and all those who hold title under him, has/have not vacated the said farm by this date.

2. The first respondent is ordered to pay applicants' costs suit.

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FOURIE, J