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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: 4620/13

In the matter between: Reportable

ABSA BANK LTD **PLAINTIFF**

And

ZALVEST TWENTY (PTY) LTD **FIRST DEFENDANT**

MARK WILLIAM ATKINSON **SECOND DEFENDANT**

Coram: TRAVERSO DJP & ROGERS J

Heard: **4 NOVEMBER 2013**

Delivered: **6 NOVEMBER 2013**

JUDGMENT

ROGERS J:

[1] This is an exception by the defendants against the plaintiff's particulars of claim. The plaintiff's claim is based on a mortgage loan agreement pursuant to which a mortgage bond was registered in its favour over a sectional title unit in Gordons Bay near Cape Town. The plaintiff alleges that the first defendant, the principal debtor, is in default and thus seeks judgment against the first defendant in an amount of R1 550 329,33 (plus interest as from 12 February 2013) together with an order declaring the property specially executable. The plaintiff seeks to hold the second defendant liable, jointly and severally with the first defendant, on the basis of a suretyship signed by the former.

[2] The essential complaint in the exception is that the plaintiff has failed to annex to its particulars of claim the mortgage loan agreement.

[3] The relevant allegations made in this regard by the plaintiff in its particulars of claim are the following:

[a] During 2005 and in Cape Town the plaintiff and the first defendant concluded a written mortgage loan agreement in terms whereof the plaintiff lent to the first defendant a capital amount of R1,4 million repayable in monthly instalments that are currently R14 116,97.

[b] The mortgage loan agreement was destroyed in a fire at the plaintiff's Midrand premises on or about 28 August 2009. Despite a diligent search the plaintiff cannot find a copy of the mortgage loan agreement.

[c] The best available evidence of the terms and conditions contained in the mortgage loan agreement are provided by the standard mortgage loan agreement regularly used by the plaintiff at the time it concluded its agreement with the first defendant, those terms and conditions being the same as the ones contained in the agreement concluded with the first defendant. The plaintiff annexes to its particulars of claim as 'A' a copy of the standard mortgage loan agreement, and seeks condonation as far as needs be of its failure to annex a true copy of the agreement.

[d] In terms of the mortgage loan agreement, the loan was secured by mortgage bond SB17497/2005 passed at Cape Town on 30 September 2005. Further particulars of the mortgage bond are provided and a copy thereof is annexed to the particulars of claim as 'B'.

[e] Various material terms of the mortgage loan agreement were incorporated in the mortgage bond. The plaintiff sets out the particular terms on which it relies.

[4] The summons was issued on 27 March 2013. On 10 July 2013 the defendants delivered an exception in the following terms:

'1. The Plaintiff's cause of action against the Defendants is said to arise from the breach by the First Defendant, as principal debtor, of the terms of an alleged written mortgage loan agreement.

2. No true copy, or any part thereof, is annexed to the particulars of claim as the Plaintiff is required to do in terms of Rule 18(6) of the High Court Rules.

3. The allegation in paragraph 4.3 of its particulars of claim, that a copy of the mortgage loan agreement cannot be found despite a diligent search, is an acknowledgement by the Plaintiff that the basis for the cause of action is missing.

4. Accordingly, the particulars of claim lack the necessary averments to sustain an action inasmuch as the Plaintiff's cause of action does not appear *ex facie* therefrom.

5. The Plaintiff's claim against the First and Second Defendants therefore falls to be dismissed with costs.'

[5] I draw attention to the fact that the exception does not complain that the terms of the agreement have been insufficiently pleaded. Possibly the defendants could have contended that the particulars of claim were vague and embarrassing for failing to allege what terms the mortgage loan agreement contained in regard to the rate of interest or the initial instalment. However, no notice to that effect was served in terms of rule 23(1). The exception is squarely based on a contention that because the plaintiff is unable to annex a copy of the written loan agreement it has no cause of action.

[6] The defendants referred in argument to a notice of amendment which the plaintiff delivered on the 30 July 2013 and later abandoned. The amended

particulars of claim would have inserted an allegation that details pertaining to the specific transaction with the first defendant were captured on the plaintiff's electronic systems, and that these captured details enabled the plaintiff to plead the specific terms contained in the particulars of claim. While this shows that the plaintiff might have been able to allege the evidential source of its allegations, the exception is not concerned with that question. It is unnecessary to decide whether this further allegation in the proposed amendment should have been contained in the original particulars of claim.

[7] Confining myself to the original particulars of claim and the complaint in the exception, I have no doubt whatsoever that the exception is misconceived. Rule 18(6) states that a party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded; and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading. In the present case the plaintiff has alleged that the mortgage loan agreement was a written contract and has made allegations as to when, where and by whom it was concluded. What the plaintiff has not done is to annex a copy of the agreement. The plaintiff has explained in its particulars of claim that it is unable to annex a copy because the document was destroyed in a fire and no other copy can be found.

[8] We were referred to various cases in which the purpose and importance of rule 18(6) have been discussed. We were also referred to cases which hold that, even in the case of a simple summons, rule 17(2)(b) read with form 9 requires a plaintiff who relies on a written contract to annex a copy to the summons (most recently in this division, see the full bench judgment in *Absa Bank Ltd v Van Rensburg* 2013 (5) SA 173 (WCC)). Save for *Moosa & Others NNO v Hassam & Others NNO* 2010 (2) SA 410 (KZP), with which I shall deal presently, none of the cases cited to us in argument dealt with the situation where the plaintiff was unable to annex a copy of the written contract because it had been destroyed or lost. In particular, *Absa Bank Ltd v Studdard & Another* [2012] ZAGPJHC 26 and *Absa Bank Ltd v Nicholas & Another* [2013] ZAWCHC 58 were cases where the plaintiff had issued a simple summons containing no allegations regarding the loss or destruction of the relevant loan agreement.

[9] The rules of court exist in order to ensure fair play and good order in the conduct of litigation. The rules do not lay down the substantive legal requirements for a cause of action nor in general are they concerned with the substantive law of evidence. The substantive law is to be found elsewhere, mainly in legislation and the common law. There is no rule of substantive law to the effect that a party to a written contract is precluded from enforcing it merely because the contract has been destroyed or lost. Even where a contract is required by law to be in writing (eg a contract for the sale of land or a suretyship), what the substantive law requires is that a written contract in accordance with the prescribed formalities should have been executed; the law does not say that the contract ceases to be of effect if it is destroyed or lost.

[10] In regard to the substantive law of evidence, the original signed contract is the best evidence that a valid contract was concluded and the general rule is thus that the original must be adduced. But there are exceptions to this rule, one of which is where the original has been destroyed or cannot be found despite a diligent search. In such a case the litigant who relies on the contract can adduce secondary evidence of its conclusion and terms (see *Singh v Govender Brothers Construction* 1986 (3) SA 613 (N) at 616J-617D). There are in modern law no degrees of secondary evidence (ie one does not have to adduce the 'best' secondary evidence). While a photocopy of the lost original might be better evidence than oral evidence regarding the conclusion and terms of the contract, both forms of evidence are admissible once the litigant is excused from producing the original. In *Transnet Ltd v Newlyn Investments (Pty) Ltd* 2011 (5) SA 543 (SCA) a defendant, in opposing its eviction from certain premises, relied *inter alia* on a written addendum to the lease agreement. The defendant did not annex the addendum to its plea, alleging that a copy of the addendum was not in its possession and was last in the possession of the plaintiff. The original addendum was not adduced in evidence. The question whether an addendum had ever been concluded was hotly disputed. The Supreme Court of Appeal held that in the circumstances of the case the defendant was excused from producing the original and found that the execution and terms of the addendum had been sufficiently proved by oral testimony (see particularly at paras 4-5 and 17-19). Even in the case of wills, the loss or destruction of a deceased's will does not preclude an interested party from proving that a valid

will was executed and what its terms were, and upon such proof the court will under its common law powers direct that the estate be administered in accordance with such terms (see, for example, *Nell v Talbot NO* 1972 (1) SA 207 (D) at 209H-210E; *Ex parte Porter* 2010 (5) SA 546 (WCC) para 12).

[11] That then is the substantive law. The rules of court exist to facilitate the ventilation of disputes arising from substantive law. The rules of court may only regulate matters of procedure; they cannot make or alter substantive law (*United Reflective Converters Pty Ltd v Levine* 1988 (4) SA 460 (W) at 463B-E and authority their cited). The court is, moreover, not a slave to the rules of court. As has often been said, the rules exist for the courts, not the courts for the rules (see *Standard bank of South Africa Ltd v Dawood* 2012 (6) SA 151 (WCC) para 12). The following passage from *Khunou & Others v M Fihrer & Sons (Pty) Ltd & Others* 1982 (3) SA 353 (W) at 355F-356A bears repetition:

'The proper function of a Court is to try disputes between litigants who have real grievances and so to see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned clarified and tried in a just manner.

Of course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover sometimes not appropriate to specific cases. Accordingly the Superior Courts retain an inherent power exercise double within certain limits to regulate their own procedure and adapted, and, if needs be, the Rules of the Court according to the circumstances. This power is enshrined in s 43 of the Supreme Court Act 59 of 1959.'[1]

[12] A rule which purported to say that a party to a written contract was deprived of a cause of action if the written document was destroyed or lost would be *ultra vires*. But the rules say no such thing. Rule 18(6) is formulated on the assumption that the pleader is able to attach a copy of the written contract. In those

[1]The inherent power of superior courts to protect and regulate their own process is now located in s 173 of the Constitution.

circumstances the copy (or relevant part thereof) must be annexed. Rule 18(6) is not intended to compel compliance with the impossible. (I may add that it was only in 1987 that rule 18(6) was amended to require a pleader to annex a written copy of the contract on which he relied. Prior to that time the general position was that a pleader was not required to annex a copy of the contract – see, for example, *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C) at 194B-H; *South African Railways & Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W) at 950D-H.)

[13] Rule 27(3) provides that the court may on good cause shown condone any non-compliance with the rules. I am by no means certain that a party in the position of the plaintiff in the present case needs to rely on rule 27(3). On a proper interpretation of rule 18(6) itself, there is arguably a necessary implication that a copy need not be attached if it is impossible for the pleader to do so, though to avoid an objection to the particulars of claim the pleader should explain the inability. To say that the court could in its discretion under rule 27(3) condone the non-annexing of a copy (in circumstances where the plaintiff is unable to attach a copy) implies that the court could notionally in such circumstances refuse to condone the non-annexing. I rather doubt whether a rule conferring such a power would be valid.

[14] However, I need not finally decide that point because, if it is unsound, rule 27(3) confers the necessary power of condonation. The defendants' exception is not that a power of condonation exists but should not be exercised in the present case or that the plaintiff should as a matter of procedure have launched a substantive application on affidavit for condonation rather than making explanatory averments in the particulars of claim. The defendants' assertion is that the plaintiff's inability to annex a copy deprives it of a cause of action. That assertion is wrong.

[15] The defendants' counsel placed strong reliance on the judgment of Swain J in *Moosa supra*. In that case the plaintiff's sued 31 defendants on the strength of a written agreement relating to the sale of shares. The plaintiffs alleged in their particulars of claim that were not in possession of a signed copy of the agreement but that to the best of their knowledge the agreement was in the possession of the 34th defendant (against whom no relief was sought but who was cited by virtue of any interest he might have). The plaintiff's made a number of detailed allegations as

to what the written agreement contained. The 31 defendants brought an application in terms of rule 30(2)(b), contending that the plaintiffs' failure to comply with rule 18(6) by annexing a copy of the agreement was an irregular step. Swain J said that the written agreement was a 'vital link in the chain of' the plaintiffs' cause of action against the 31 defendants and that in order for the plaintiffs' cause of action to be properly pleaded it was necessary for the written agreement to be annexed to the particulars of claim: 'In the absence of the written agreement the basis of the [plaintiffs'] cause of action does not appear *ex facie* the pleadings' (para 18).

[16] The learned judge proceeded to say that an allegation that a party is not in possession of the written agreement constitutes 'an acknowledgement that the basis for the cause of action advanced is lacking' or 'that a link in the chain of the cause of action advanced is missing'. Such an allegation thus did not constitute compliance with rule 18(6) nor did it excuse the non-compliance. It would not even constitute compliance, or excuse non-compliance, if the party alleged that it had taken steps without success to obtain a copy or if the party annexed an incomplete or unsigned draft (para 19). Swain J said that it was thus clear that a party who bases its cause of action upon a written agreement must obtain a true copy thereof before advancing its claim (para 20).

[17] He immediately added, however, that 'this is not to say that a failure to annex a written agreement relied upon may never be condoned in terms of rule 27(3)' but that good cause would have to be shown (para 21):

'Relevant considerations would be the steps taken to obtain a copy of the written agreement and the prospects of the written agreement being pertained in the future. That a true copy will be available before the issues arising therefrom have to be determined will be of particular importance in this regard. In addition any prejudice to the opposing party caused by the failure to annex the agreement to the pleading would have to be considered. Of significance in this regard would be whether the pleading concisely and clearly sets out the terms relied upon in the written agreement upon which the cause of action is based, and is not excipiable. The above factors are not exhaustive and each case will have to be decided upon its individual merits.'

[18] In considering the particular circumstances in *Moosa*, Swain J observed that the plaintiffs, in their answering papers in the rule 30 application, had not averred that they had requested a copy of the agreement from the 34th defendant; the plaintiffs merely alleged that they were not in possession of a true copy. It appeared from the defendants' replying affidavit in the rule 30 application that on 13 May 2009 (which must have been shortly before summons was issued, because the rule 30 application was heard in November 2009) the 34th defendant had supplied a copy of the agreement to the 3rd plaintiff and a fax in proof of this assertion was annexed. The plaintiffs were invited to file a supplementary affidavit dealing with this averment, which invitation the plaintiffs declined. The plaintiffs had not sought condonation for their failure to annex a written copy of the agreement. In those particular circumstances, the learned judge concluded that the defendants were entitled to relief in terms of rule 30 and he directed the plaintiffs to remedy the irregularity within 15 days of service of the order. (This relief must have been granted on the supposition that the plaintiffs were indeed in possession of a copy of the agreement and could thus remedy the non-compliance.)

[19] The *Moosa* case is for several reasons distinguishable from the present one. Firstly, the defendants in *Moosa* did not contend by way of exception (as the defendants do in the present case) that the plaintiffs lacked a cause of action because they were unable to annex a copy of the written agreement; they contended that the failure to annex the agreement was an irregular step, and they launched an application on affidavit to make good that contention. The court was placed in possession of information on affidavit which indicated that the plaintiffs were indeed in possession of a copy of the agreement. Second, the plaintiffs in *Moosa* did not, as the plaintiffs have done in the present case, seek condonation for their failure to annex a copy of the agreement. Third, the explanation offered by the plaintiffs in *Moosa* was a bald allegation that they were not in possession of a copy of the agreement, whereas in the present case the plaintiff has alleged that the mortgage loan agreement was destroyed in a fire on a specified date and that despite a diligent search the plaintiff has been unable to find a copy of the agreement. Given the nature of exception proceedings, the plaintiff's allegation as to the destruction of the mortgage loan agreement and the inability to locate a copy must be accepted as true.

[20] The present case can thus be distinguished from *Moosa*. The latter case is not authority for the proposition that a plaintiff is deprived of its cause of action merely because it is unable to annex a copy of the agreement to its pleading. I have no difficulty in accepting the correctness of Swain J's ultimate conclusion in the rule 30 application which served before him, having regard to the particular facts disclosed in the affidavits. However, there are passages in his judgment which suggest that rule 18(6) applies even where it is impossible for the plaintiff to annex a copy of the written agreement on which he relies; that even in such a case the plaintiff requires condonation in terms of rule 27(3); and that the court might refuse condonation if it appeared, for example, that a true copy of the agreement would not be available by the time of the trial. I respectfully consider that this is going too far. If it is impossible for the plaintiff to produce the written contract or a copy thereof, the law allows him to prove the execution and terms of the written contract by other evidence. A rule of procedure cannot deprive the plaintiff of his cause of action or of his right to adduce secondary evidence of the contract, though the rules would still require the plaintiff to plead with appropriate particularity the conclusion of the contract and its terms.

[21] I also, with respect, disagree with the learned judge's proposition that '[i]n the absence of the written agreement the basis of the [plaintiffs'] cause of action does not appear *ex facie* the pleadings' (para 18). If a plaintiff pleads the conclusion of a written contract and the terms relevant to his cause of action, the cause of action will appear *ex facie* the particulars of claim. That, after all, is how causes of action based on written contracts were legitimately pleaded prior to the amendment of rule 18(6) in 1987, at a time when there was no procedural requirements to annex the written contract. What is true is that since 1987 a plaintiff who fails to annex the written contract will (at least in the absence of a properly pleaded explanation) be in breach of rule 18(6).

[22] To the extent that the plaintiff requires the condonation sought in para 4.5 of the particulars of claim, that request is not before us. If the defendants consider that condonation is necessary and if they wish to oppose condonation, a court could give procedural directions for the filing of affidavits. Alternatively the request for condonation in the particulars of claim could be tried as a separated issue in terms

of rule 33(4). However, and unless the plaintiff's allegations concerning the loss of the document by way of fire are untrue, the only other persons who are likely to be in possession of a copy of the mortgage loan agreement are the defendants themselves. At this stage we do not know that the defendants do not have a copy of the agreement. If they do have a copy of the agreement, they would obviously receive short shrift in opposing condonation. If they, like the plaintiff, do not have a copy, I have already explained why in my view the plaintiff would not be non-suited. This would either be because rule 18(6) does not apply to such a case or because condonation in terms of rule 27(3) could not properly be refused. (In *Absa Bank Ltd v Dumisani Hans Inc & Another* [2013] ZAWCHC 70 Cloete J granted condonation in similar circumstances (see para 19), though there the bank was able to annex an unsigned copy of the alleged written agreement. In *Absa Bank Ltd Wagner & Another* Case 4085/2013, where the plaintiff's allegations regarding the mortgage loan agreement appear to have been identical to its allegations in the present case, Blignault J in summary judgment proceedings rejected the defendant's complaint that the agreement had not been annexed to the particulars of claim.)

[23] Mr Mundell SC, who appeared for the defendants together with Ms Buikman, retreated in oral argument from the extreme position that a plaintiff who is unable to annex a copy of the written contract can never have a cause of action. His submission in oral argument was that a litigant in the plaintiff's position should first apply for condonation by way of application and then plead in its particulars of claim that its failure to annex a copy of the contract has already been condoned by the court. However, that procedural objection was not contained in the exception. Furthermore, the objection (if sound) would, I think, have to be taken in terms of rule 30 or rule 30A (unless the conclusion and terms of the written contract were too vaguely pleaded, in which case it might also be appropriate to serve a notice in terms of rule 23(1)). What cannot appropriately be done is to serve an exception contending that the particulars of claim disclose no cause of action; the non-compliance with rule 18(6) is unrelated to the question whether there is or is not a cause of action. The elements of the cause of action are determined by substantive law. Mr Mundell SC was compelled, in response to a question from the court, to acknowledge that on his argument the granting by the court of condonation for the failure to annex a copy of the written contract would be an element of, and complete,

the plaintiff's cause of action. For reasons I have already explained, I reject that argument.

[24] The judges of this division (and no doubt of other divisions) will be very familiar with the allegations made by the plaintiff in the present case regarding the destruction of documents in the fire which took place on 28 August 2009. Hundreds if not thousands of default and summary judgments have been granted in favour of this particular plaintiff where it has made similar allegations. While this does not affect the principle, it does highlight the absurdity of the defendants' contention, implying as it does that a very large part of the plaintiff's debtors book (running no doubt to billions of rands) was, overnight, rendered irrecoverable merely because the plaintiff's documents were destroyed in a fire. It is gratifying to be able to conclude that the law is not such an ass.

[25] I would dismiss the exception with costs. Although the legal point raised by the exception has not occasioned this court any difficulty, it is of sufficient importance to the plaintiff that the engaging of two counsel was justified. The defendants themselves engaged two counsel.

TRAVERSO DJP:

[26] I concur. The exception is dismissed with costs including the costs of two counsel, the defendants to be jointly and severally liable for such costs.

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TRAVERSO DJP

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ROGERS J

APPEARANCES

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