

SOUTH AFRICA / JUDGMENT

ABSA Technologies Finance Solutions (Pty) Ltd v ICT Globe Management (Pty) Ltd (2513/2016) [2018] ZAGPPHC 416 (12 June 2018)

[2018] ZAGPPHC 416

COURT

North Gauteng High Court, Pretoria

BEFORE

B Neukircher

CASE / FILE NUMBER

2513/2016

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IN THE
HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)

(1)
REPORTABLE
(2)
OF INTEREST
TO OTHER JUDGES
(3)
REVISED.

Case
number: 2513/2016
Date: 12/6/2018
In

the matter between:

ABSA
TECHNOLOGIES FINANCE SOLUTIONS (PTY)
LTD
APPLICANT
And
ICT
GLOBE MANAGEMENT (PTY)
LTD
RESPONDENT

JUDGMENT

NEUKIRCHER, J:

- [1] Two applications serve effectively before me today: the Applicant has launched a substantive application in terms of Rule 30(1) and the Respondent has counter-claimed demanding compliance with its Rule 35(12) notice served on 22 February 2016. The Respondent demands inspection of the documents set out in this notice.
- [2] I will deal with each application ad seriatum. The Applicant is the Plaintiff in the main action and Respondent is the Defendant and are referred to herein as Applicant and Respondent.

THE

BACKGROUND

- [3] In a particulars of claim dated January 2016, the Applicant pleads that it purchased certain goods from the Respondent during December 2013. At that time, the Respondent then undertook to repurchase the goods from the Applicant in terms of a written undertaking.
- [4] The Applicant then called upon the Respondent to make good its undertaking in May 2015 but Respondent has failed to do so and

is therefore in breach of its obligations. The Applicant has thus sued Respondent for R2 449 704-14 being the repurchase value of the goods in question.

- [5] Copies of the documents upon which Applicant relies were attached to the particulars of claim.
- [6] On 22 February 2016 the Respondent served a Rule 35(12) notice on the Applicant which requires:

" ... the Plaintiff to make the following documents mentioned in the pleadings available for inspection, and to permit the Defendant to make copies thereof .. "

- [7] The documents sought are:
- (a) an addendum mentioned in the invoices attached as "POC1" to the particulars of claim; and
 - (b) a rental agreement and a cession agreement mentioned in the repurchase agreement attached as "POC 2" to the particulars of claim.
- [8] On 30 November 2016 the Applicant responded by way of a notice and attached the following:

- (a) the addendum to the rental agreement;
- (b) the rental agreement itself; and
- (c) the cession agreement.[1]

[9] On 17 October 2017 the Respondent then filed its plea and conditional counterclaim.

[10] The conditional counterclaim reads as follows:

"2. The main Sale and Cession agreement provides for rescission of the rental agreement in paragraph 7.1 thereof in tum for a purchase consideration of R500, plus VAT when the initial rental period ends.

2.1 The commencement date on the rental agreement is 1 January 2014 and for a period of 36 months.

2.2 The 36 period came to an end during or about 1 January 2007.

3. The Defendant on 28 August 2017 and in writing agreed to the recession of the rental agreement and tendered R500 + VAT (R570-00) against receipt of confirmation of recession.

3.1 The Plaintiff did not recede the rental agreement."

THE RULE 30 NOTICE

[11] On 25 October 2017 the Applicant served a Notice to Remove Cause of Complaint. The gist of the complaint is that the Respondent had failed to attach the Main Sale and Cession agreement referred to in paragraph 2 of its conditional counterclaim, which the Applicant alleges it is required to do in terms of Rule 18(6).

[12] The Respondent refused to cure this complaint which saw the launch of the present Rule 30(1) application.

[13] The Respondent's defence is threefold: Mr De Villiers firstly argued that the Respondent is not in possession of the document that the Applicant demands his client attaches. He argues that the document is in the possession of the Applicant and that it creates an absurdity if the Respondent is required to attach a document provided to it by the Applicant which is in any event the Applicant's own document and in the Applicant's possession.

[14] He also argues that the Respondent's counterclaim is conditional upon the Applicant proving its claim first and that because of this the Respondent is not required to attach any of these documents. He argues that were the Respondent to attach the documents this may attract an onus for the Respondent that it otherwise would not have.

[15] Mr De Villiers lastly argues that the Applicant is able to plead to the conditional counterclaim as the averments are clear: the Applicant never alleges that it doesn't know what case it must meet and there is therefore no prejudice to Applicant in. the Respondent's failure to attach the Main Sale and Cession Agreement.

[16] Rule 18(6) provides as follows:

"(6) A party who in his pleadings 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 the part relied on in the pleading shall be annexed to the pleading".

[17] It is clear from the aforementioned that Rule 18(6) assumes that a pleading premised on a contract will contain not only the necessary

averments to found that contract but will also contain as an annexure a copy of the contract itself or the relevant portions thereof. A party relies on a contract when he uses it as a link in the chain of his cause of action[2]

[18] In my view the allegation, that the pleader is not in possession of a copy of the agreement and that the other party has a copy thereof does not constitute compliance with Rule 18(6) and it also does not excuse non-compliance with Rule 18(6).[3]

[19] In Absa Bank Ltd v Zalvest Twenty (Pty) Ltd 2014(2) SA 119 (WCC) it was stated that failure to annex a copy of a contract may be condoned in terms of Rule 27(3) but that "goodcause" would have to be shown why the party concerned is unable to annex a copy of the written agreement relied on. It was stated that relevant

considerations would be for example the steps taken to obtain a copy of the written agreement and the prospects of the written agreement being obtained in future.

[20] In addition, any prejudice to the opposing party caused by the failure to annex the agreement to the pleadings 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 that the pleading is not expiable.

[21] The above factors are however, not exhaustive and each case must be decided on its own merits.

[22] Mr De Villiers also referred me to Dass & Others NNO v Lowewest Trading (Pty) Ltd 2011(1) SA 48 (KZD) where Tshabalala JP held that non-compliance with Rule 18(6) may be condoned in the absence of prejudice to the other party.

[23] The first argument that the agreement is in any event in the possession of the Applicant, it is the Applicant that provided the Respondent with a copy and that therefore Respondent does not need to attach it, must fail. Given the fact that the Respondent exercised remedies under Rule 35(12) and was given a copy of the agreement, it is not excused from attaching that which is in its possession.

[24] The argument that the Respondent's counterclaim is conditional and only arises once the Applicant proves its claim and that the Respondent is not required to attach documents as to do so will attract an onus must similarly be rejected. In my view, the argument is flawed for,

if the Applicant fails to prove its claim that will be the end of the matter. The counterclaim cannot stand on its own as it is premised upon a Court finding "... that there is a valid and lawful agreement between the parties." Thus absent such a finding, the Respondent attracts no onus and therefore there can be no prejudice in attaching the contract.

[25] As to the issue of prejudice. In the Dass[4]

judgment

Tshabalala JP states:

"[16] This Court is empowered to condone the non-compliance with Rule 18(6). The Defendant could have relied on the provisions of Rule 35(12) and Rule 35(14), both of which entitle a litigant to call for such documents, as may be referred to in pleading, before pleading ... The Defendant has not shown that it has suffered any prejudice by the non-compliance. Plaintiff's non-compliance with Rule 18(6) is therefore condoned."

[26] It would be absurd for Applicant to utilise the provisions of Rule 35(12) to obtain a copy of the very agreement it placed Respondent in possession of.

[27] Furthermore it is noteworthy that Respondent's defence is not that it is not in possession of the relevant agreement. The defence is that the Applicant is in possession of it in any event, that it is not required to attach a copy and that the Applicant is not prejudiced by the failure to attach a copy.

[28] The Applicant states that the prejudice may lie therein that it is precluded from raising an exception on the basis that the pleading

and the agreement differ. Unless the agreement is attached, it is impossible to give consideration to these issues. Furthermore, in my view, it is clear that the Respondent used the agreement as a "link in his cause of action" and thus Rule 18(6) must be complied with.

THE RULE 35(12) NOTICE

[29] The Respondent argues that providing the document in a notice responding to the Rule 35(12) notice is not good enough. That the Respondent is entitled to inspect the originals and make copies of those. Mr De Villiers pointed out that there has already been one error in the copying of documents provided to his client. The fact that the Applicant alleges that it remedied this defect is neither here nor there - the Respondent is entitled to inspect the documents themselves.

[30] Mr Scholtz argued that the Rule 35(12) application was no more than a smoke screen to divert the court's attention from the Rule 30 application and cloud the issues. He pointed out that the Rule 35(12) response was provided as far back as 30 November 2016 and the application to compel was only instituted in January 2017. He also pointed out that the replying affidavit contains a statement that the Respondent has never been denied an opportunity to inspect the documents sought at any time convenient to it. This affidavit is

dated 8 February 2018.

[31] Rule 35(12) reads as follows:

"Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleading or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice should not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording."

[32] It is quite clear that the rule requires that compliance with a Rule 35(12) notice takes the form of an inspection of (in this case) the documents sought. Whilst I agree with Mr Scholtz that it has become practice to provide documents sought via attachments to a responding notice, the purpose of the rule is that the party requiring compliance is entitled to inspect the original documents himself and decide for himself which of the documents sought are relevant to him and make copies of these. It is not for the party from whom compliance is sought to make that decision on behalf of his opponent.

[33] Given this, I find that there has not been proper compliance with the Respondent's Rule 35(12) notice.

COSTS

[34] I must state that the manner in which the present litigation has been conducted is lamentable. Both sides seek special costs orders against each attorney *de bonis propriis*. It is clear that tempers flared and sometimes derogatory comments were made.

[35] Practitioners should remember that they are officers of the Court first and foremost. They are required to conduct themselves with decorum and collegiality at all times.

[36] The Respondent has tendered the unopposed costs occasioned by a postponement on 7 February 2018 and this order will be made.

[37] As to the remainder of the costs - each party has been successful and these costs will follow the result.

THE ORDER

[38] The order I make is thus the following:

38.1 the Rule 30(1) application succeeds and the conditional counterclaim is set aside;

38.2 the Respondent/Defendant has 15 days from date of this order to amend its pleading;

38.3 the Applicant/Plaintiff is awarded the costs of the Rule 30 application which will include the unopposed costs of 7 February 2018; ;

38.4 Prayer 1 of Respondent's counter-application is granted; and

38.5 the Applicant is to pay the costs of the counter-application.

B NEUKIRCHER

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:

5 JUNE 2018

DATE OF JUDGMENT:

2 JUNE 2018

ATTORNEY FOR APPLICANT: LOWNDES DLAMINE ATTORNEYS

ADVOCATE FOR APPLIANT: ADV R SCHOLTZ

ATTORNEY FOR RESPONDENT: VANZYL INC

ADVOCATE FOR RESPONDENT: ADV R F DE VILLIERS

- [1] The Respondent states that several other documents were also attached but for reasons that will become apparent, this is simply a non-issue In the bigger scheme of things today.
- [2] SA Railways and Harbours v Deal Enterprises (Pty) Ltd 1975(3) SA 944 (W) at 953 A
- [3] See also the explanation in Erasmus: Superior Practice Vol 2 at D1-236
- [4] In circumstances where Plaintiff alleged that the agreement relied on in its particulars of claim was partly written and partly oral and that the terms had been fully pleaded.

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Prepared on 9 October 2026 · Esheria