

SOUTH AFRICA / JUDGMENT

Van Baalen and Another v ABSA Bank (22652/2022) [2024] ZAGPPHC 26 (3 January 2024) [2024] ZAGPPHC 26

COURT

North Gauteng High Court, Pretoria

BEFORE

E M Kubushi

CASE / FILE NUMBER

22652/2022

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FLYNOTES:

CIVIL PROCEDURE – Pleadings – Copy
of contract –
Bank
relying on credit agreements for its cause of action –
Exception – Whether particulars of claim are excipiable
because Absa failed to annex true copies of written agreements –
Bank arguing that it pleads the best evidence available
to it in
its particulars – Terms of agreement as alleged in
particulars of claim are sufficient to enable defendants
to plead
thereto – Party to written agreement not precluded from
enforcing it merely because the agreement has been
destroyed or
lost – Exception dismissed – Uniform Rule 18(6).
REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA GAUTENG DIVISION, PRETORIA
Case Number: 22652/2022
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER
JUDGES: NO
(3) REVISED: NO
DATE: 03/01/2024

SIGNATURE:

In

the matter between:

PIETER
WILLEM ADRIAAN VAN
BAALEN
First Excipient
JUANETTE
VAN
BAALEN
Second Excipient
and
ABSA
BANK
Respondent
In

re:

ABSA
BANK
Plaintiff
PIETER
WILLEM ADRIAAN VAN
BAALEN
First Defendant
JUANETTE
VAN
BAALEN
Second Defendant

Delivered:

This judgment was prepared and
authored by the Judge whose name is reflected and is handed down
electronically by circulation to
the parties/their legal
representatives by e- mail and by uploading it to the electronic file
of this matter on Caselines The date
and for hand- down is deemed to
be 03 January 2024

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] The exception, which is opposed, turns on the issue of whether the Particulars of Claim are
excepiable based on the failure by the

Respondent to annex true copies of the written agreements upon which it (the Respondent) relies
for its cause of action, as required in terms of Rule 18(6) of the Uniform Rules of Court.[1]

- [2] Rule 18(6) requires, amongst others, that a party who relies upon a written agreement in her/his pleading, annex a true copy thereof or of the part relied on in the pleading to that pleading. The written agreement serves as a vital link in the chain of a party's

cause of action,[2] and failure to attach it may result in the pleading being excepted to on the ground that the pleading does not sustain a cause of action or does not disclose a cause of action.

- [3] The First and Second Excipients ("the Excipients") who are the Defendants in the main action, relying on Rule 18(6), have taken an exception to the Particulars of Claim of the Respondent, who is the Plaintiff in the main action, on the ground that the Particulars of Claim do not disclose a cause of action in that the Respondent did not attach the written agreements which it rely upon for its claim.

BACKGROUND

- [4] The exception is premised on a Summons issued by the Respondent against the Excipients, in which the Respondent claims payment of monies lent and advanced to the Excipients in the amount of R1 077 867. 07, plus interest thereon. In addition, the Respondent claims an order declaring the immovable property of the Excipients hypothecating the said loan, specially, executable together with

costs on an attorney and client scale. In its claim, the Respondent is relying on three separate Credit Agreements allegedly entered into with the Excipients, for its cause of action.

- [5] The Respondent is unable to attach true copies of the three Credit Agreements to its Particulars of Claim, as required in terms of Rule 18(6), but instead, has attached copies of the Standard Terms and Conditions applicable to Credit Agreements the Respondent enters into with all its debtors, alleging that the original Credit Agreements were misplaced and, after diligent search, could not, as at the time of issuing of the Summons, be procured. Together with the Standard Terms and Conditions, the Respondent has

attached copies of the Mortgage Bonds registered in its favour as security for the monies it lent and advanced to the Excipients in respect of the three Credit Agreements. The contention being that the respective Mortgage Bonds confirm both the conclusion of the respective Credit Agreements between the parties and the Excipients' indebtedness to the Respondent. It is due to the Respondent's failure to attach the said Credit Agreements that the Excipients have excepted to the Respondent's Particulars of Claim.

- [6] The Respondent has in its Particulars of Claim alleged some of the material and tacit provisions of the respective Credit Agreements which, amongst others, are that the loan amount would be paid in monthly instalments on or before the 1st day of each month until all the amounts owing or claimable have been paid in full; that the Excipients agreed to pay interest to the Respondent at a rate of 5.5%; the agreement constituted the whole agreement between the parties and no amendment, alteration, addition, variation or

cancellation would have any effect unless reduced to writing and signed by the parties.

GROUND OF EXCEPTION

[7] The Excipients' grounds of exception are that –

“1. The Respondent (Plaintiff in the main action) is relying on three written loan [credit] agreements for its claim for payment of the outstanding part(s) thereof plus interest;

2. The actual written loan [credit] agreements form an integral part of the Respondent's claim and should in law have been attached to the particulars of claim;
3. The Respondent failed to attach true copies of the written agreements as required in law and prescribed in Uniform Rule 18(6) of the Uniform Rules of Court;
4. Instead, the Respondent attached copies of the standard terms and conditions for loan agreements and of the bond agreements upon which it relies for its claim against the Defendants.”

[8] The angle the Excipients take to attack the Particulars of Claim is that a true copy of each Credit Agreement is not attached as required by Rule 18(6) and assert on that basis that the respective claims, automatically, do not sustain a cause of action.

EXCIPIENTS' ARGUMENT

[9] It is submitted on behalf of the Excipients that the Respondent's claim against the Excipients should, on the grounds raised, be dismissed with cost.

[10] The argument is that in terms of the copies of the Standard Terms and Conditions applicable to Credit Agreements attached to the Summons, the principal debt, which is ostensibly the loan amount, together with interest thereon calculated in terms of the Mortgage Loan Agreement, shall be repaid in instalments, the amount and number of which and the dates on which they are to be paid is specified in the Mortgage Loan Agreement or, in respect of the third Loan Agreement, a pre- agreement statement/quotation.

[11] Additionally, it is argued that in terms of the Mortgage Bonds, which are in favour of the Respondent, and which confirms the conclusion of the first and second Loan Agreements and the Excipients' indebtedness to the Respondent, and in respect of the third Loan Agreement, that the repayment of all amounts owed to the Respondent must be paid in accordance with the written agreement(s) as may be entered into between the Respondent and the Excipients. According to the Excipients, the Mortgage Bonds are the only documents which the Respondent, was able to attach copies thereof to its Particulars of Claim. No other agreements and/or quotations between the parties, as referred to in the Mortgage Bonds, is alleged nor attached to the Particulars of Claim. All the documents on which the Respondent relies for its cause of action, therefore, refer back to an agreement or agreements which the Respondent failed to attach to the Particulars of Claim, and the Respondent expects the Excipients to be in a position to plead to its claim, so it is argued.

- [12] The contention being that if the allegations in the Respondent's Particulars of Claim are taken to be true, one has to accept that the actual terms on which the Respondent relies for its cause of action is to be found in agreements and quotations which should have been entered into with the Excipients but which the Respondent did not attach to its Particulars of Claim. The copies of the documents which are attached only refer to these agreements and/or quotations which should have been entered into. The very document which is alleged to be a copy of the Loan Agreement and which the Respondent relies upon for its cause of action, refers back to the document which the Respondent alleges the first document to be.
- [13] In as far as the Respondents rely on the Mortgage Bond for its cause of action, the Excipients refers to the decision of the Court in Mnguni,[3] where it was said that a Mortgage Bond can stand on its own only if it contains all the essentialia of the underlying agreement. The Excipients' suggestion is that the terms of the Mortgage Bond regarding repayment in Mnguni, refers to agreement(s) that has been or is to be concluded between the parties which was not attached to the Summons. The Court in that judgment, as a result, found that non-compliance with Rule 18(6), that is failure to attach the underlying agreement,

renders the Respondent's cause of action not to have been properly pleaded and therefore incomplete.[4] The Excipients' view is that even in this matter, where the Credit Agreements (the underlying agreements to the Mortgage Bonds) are not annexed to the Particulars of Claim, there is non-compliance with the provisions of Rule 18(6).

RESPONDENT'S ARGUMENT

- [14] The Respondent's argument is that the point in this matter is that it (the Respondent) pleads the best evidence available to it in its Particulars of Claim. The issue in regard to the Credit Agreements and the terms thereof is, according to the Respondent, a matter of evidence which should be dealt with by a Trial Court, particularly as the Excipients do not positively assert any contradictory terms as that which has been pleaded by the Respondent. The ultimate question of whether the best evidence in this regard should be allowed and whether a Court may reasonably find that the three Credit Agreements were concluded, the money advanced to the Excipients, as confirmed prima facie by the respective Mortgage Bonds, is a question of evidence for a Trial Court to decide, so the argument goes. In support of this argument, the Respondent refers to the judgment in Zalvest Twenty,[5] a case wherein an exception was raised to the particulars of claim on the basis that Rule 18(6) has not been complied with in that the written agreement relied on was not attached to the particulars of claim. The exception, in that judgment, was dismissed on the ground that there is no rule of substantive law to the effect that the party to a written contract is precluded from enforcing it merely because the contract has been destroyed or lost.

DISCUSSION

[15] It is trite that in order to succeed an Excipient should persuade the Court that upon every interpretation which the pleading in question may have, and in particular the document upon which it is based, no cause of action is disclosed. Failing this, the exception ought not to be upheld.[6]

[16] As argued, correctly so by the Respondent, the issue in regard to a plaintiff not being in possession of the original credit agreement has been conclusively, so, decided in the judgment in Zalvest Twenty. The Court in dismissing the exception stated the following:

“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 litigation and the common law. There is no rule of substantive law to the effect that the 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 (e.g. a contract for the sale of land or a suretyship), what the substantive law requires is that the 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.

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 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 – 617I). There are in modern law no degrees of secondary evidence (i.e. one does not have to adduce the “best” secondary evidence). While a copy 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. . .

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 436B – E and authority there 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.

. .

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 circumstances the copy (or relevant part thereof) must be annexed. Rule 18(6) is not intended to compel compliance with the impossible. . .

. . . 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 must explain the inability. . .

I also, with respect, disagree with the learned Judge's proposition that "(i)n the absence of the written agreement the basis of the [plaintiff's] cause of action does not appear ex facie the pleading". (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 requirement to annex the written contract. . ." [7]

[17] Zalvest Twenty is distinguishable from the present matter in that in Zalvest Twenty, the Credit Agreement had been destroyed by fire whereas in the present matter, the Credit Agreements at issue, have simply been misplaced and despite diligent search, as at the time the Summons was issued, they could not be procured. Nevertheless, the substantive law cited in Zalvest Twenty, finds application in the circumstances of the present matter.

[18] In amplifying the substantive law as it applies regarding written agreements, the Court in Zalvest Twenty held that there is no rule of substantive law to the effect that the party to a written agreement is precluded from enforcing it merely because the agreement has been destroyed or lost. Even where an agreement is required by law to be in writing (e.g. an agreement for the sale of land or a suretyship), what the substantive law requires is that the written agreement, in accordance with the prescribed formalities, should have been executed; the law does not say that the agreement ceases to be of effect if it is destroyed or lost. The law, therefore, is that if the original agreement or true copy thereof, cannot be produced and attached to the Summons, then the terms of the said agreement, as alleged in the Particulars of Claim, becomes a matter of evidence. It becomes a question of proving same before the Trial Court. Similarly, in the present matter, the fact that the written agreement or a true copy thereof, cannot be produced and/or attached to the Particulars of Claim, at this point of the proceedings, does not mean that there is no cause of action and that the claim must just be summarily dismissed.

[19] In Zalvest Twenty, the Court dismissed the exception even when the agreement had been destroyed by fire and would never have been made available. In the present matter, the allegation is that the Credit Agreements have been misplaced, and as at the time of the issue of Summons, they had not been procured. The documents are not lost or destroyed, they have simply been misplaced and they may be found. At this juncture, it is not known whether by the time the matter gets to trial the agreements would have been procured and made available to the Court. The Respondent has, furthermore, set out the alleged terms of the Credit Agreements in the Particulars of Claim. It has, also, proffered an explanation why the Credit Agreements have not been attached to the Particulars of Claim. Thus, on any construction of the pleading excepted to, the exception cannot be upheld.

[20] The reliance by the Excipients on the judgment in Mnguni, is misguided. On a proper reading of the Particulars of Claim, it is patently clear that the Respondent relies for its claim, on the misplaced Credit Agreements and not the Standard Terms and Conditions and/or the Mortgage Bonds that are attached to the Particulars of Claim. The Respondent alleges in the Particulars of Claim that the Standard Terms and Conditions it attached to the Summons applies to loan agreements entered into between it and all its debtors. It, also, alleges that the Mortgage Bonds confirms both the conclusion of the respective Credit Agreements between the parties as well as the indebtedness of the Excipients to it. There is nowhere in the Particulars of Claim where it is stated that the Respondent relies on the Standard Terms and Conditions and/or the Mortgage Bonds for its claim, nor was it ever so suggested by the Respondent in argument.

[21] The Excipients' other submission, which is also based in Mnguni, that in the absence of the written Loan Agreements the basis of the Respondent's cause of action does not appear *ex facie* the pleadings and is, therefore, excipiable, is not sustainable. This issue was, correctly so, conclusively dealt with in Zelvra Twenty, as follows:

"I also, with respect, disagree with the learned Judge's proposition that "(i)n the absence of the written agreement the basis of the [plaintiff's] cause of action does not appear ex facie the pleading". (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 requirement to annex the written contract. . ."

[22] As it has been said, pleadings are the written statements of the parties, served by each party in turn upon the other, which must set out in summary form the material facts on which each party relies in support of her/his claim or defence, as the case may be. The object of pleading is to define the issues so as to enable the other party (and the Court) to know what case has to be met. It is indeed a basic principle that a pleading should be so phrased that the other party may reasonably and fairly be required to plead thereto.[8] Equally so, the terms of the agreement as alleged in the Particulars of Claim are sufficient to enable the Excipients to plead thereto.

[23] It is worthy to note that the cases upon which the Excipients rely, were decided before 2014, they have, as a result, all been overruled by Zalvest Twenty which was decided in 2014. As was decided in Zalvest Twenty, wherein the exception taken is in this exact type of scenario, the exception, in the present matter, is not well taken, it is not good law and cannot be sustained.

COSTS

[24] The Respondent, as the successful party, argues for the exception to be dismissed with costs on an attorney and client scale as provided for in the underlying agreements. The underlying agreements are not available at this point in time, and the terms thereof having not been proved at this stage of the proceedings, costs ought to be reserved for determination at the hearing of the main action.

ORDER

[25] In the premises, the application is dismissed and costs are reserved.

E M KUBUSHI JUDGE OF THE HIGH COURT

PRETORIA

APPEARANCES:

For the Excipients: Adv T L Jacobs Instructed by Legal Aid South Africa For the Respondent: Adv W J Roos Instructed by Velile Tinto & Associates

- [1] Rule 18(6), 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.
- [2] South African Railways and Harbours v Deal Enterprises (Pty) Ltd 1975 (3) SA 944 (W) at 953A.
- [3] Mnguni & Another v ABSA (8294/2012)[2013] ZAGPPHC 81 (14 March 2013) para 36.
- [4] Para 37.
- [5] Absa Bank Ltd v Zalvest Twenty (Pty) Ltd 2014 (2) SA 119 (WCC).
- [6] See Sanan v ESKOM Holdings Ltd 2010 (6) SA 638 (GSJ) at 645D.
- [7] See, also, Erasmus: Superior Court Practice Volume 2 at pD1-236 – D1-239.
- [8] See Erasmus: Superior Court Practice Volume 2 at pD1-228 and the cases quoted therein.

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Prepared on 13 October 2026 · Esheria