REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

....

CASE NO 2014/877

IN THE MATTER BETWEEN:

ABSA BANK LTD **PLAINTIFF**

AND

JENZEN, KEVIN GLYNN **DEFENDANT**

CASE NO 20214/7728

IN THE MATTER BETWEEN:

ABSA BANK LTD **PLAINTIFF**

AND

GROBBELAAR, JAMES **DEFENDANT**

JUDGMENT

SUTHERLAND J:

1. In two matters in which summary judgment has been sought, the defendants have advanced, among other alleged defences, the proposition that summary judgment should be refused because the pleaded case of the plaintiff bank is based on a written document which is not attached to the particulars of claim. I allowed arguments to be heard on both matters and furnish this composite judgment.

2. Flesh is given to this notion by reference to Rule 18(6) which requires precisely that; a document relied upon to be attached. The two instances both relate to the absence of the loan agreement underlying a mortgage bond held by the plaintiff over fixed property owned by the defendants in respect of which execution is sought to recover the outstanding debt due, after the defendants had allegedly defaulted in terms of their obligations. There is no doubt that a failure to annex the loan agreement constitutes non-compliance with the rule. The plaintiff in both matters pleads the absence of the document and alleges that they have been lost or destroyed and are now and forever unavailable to be attached. Allusion is made to the documents being destroyed in a fire.

3. The real point of controversy is what significance that non-compliance with Rule 18(6) carries.

4. In one matter (*Absa v Jenzen*) it is argued that non-compliance is a foundation to except. Plainly, the merits of an exception must be outward and visible.

7. First, the issue at stake in the Moosa v Hassam case was not the viability of the cause of action pleaded; Swain J was addressing the merits of a Rule 30 application under which the defendant had *qua* applicant complained of the irregularity committed by the non-compliance with Rule 18(6). No explanation was volunteered for its absence. An order was made to comply. Moosa v Hasam is this not authority that supports the exception argument.

8. Secondly, non-compliance with a Rule of court, however sinful such a dastardly deed might be, cannot contaminate the merits or demerits of a party's cause of action.

9. Such a fallacy has been lucidly and fully exposed by the observations of Rogers J (Traverso DJP concuring) in Absa Bank Ltd v Zalvest Twenty (Pty) Ltd & another 2014 (2) SA 119 (WCC). In that matter the plaintiff, (being the same person as the plaintiff in the present two matters under consideration) pleaded that the failure to attach the foundational document evidencing the loan agreement was explained by its destruction in the uncelebrated fire of 28 August 2009 in the DocuFile documents warehouse. An exception was raised by the defendant.

10. The exception was dismissed and Rogers J went on to deal comprehensively with the contention and dispatched it once and for all by holding thus:

> "[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

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3. The real point of controversy is what significance that non-compliance with Rule 18(6) carries.

4. In one matter (*Absa v Jenzen*) it is argued that non-compliance is a foundation to except. Plainly, the merits of an exception must be outward and visible.

5. Reliance is placed on the decision by Swain J (as he then was) in Moosa & Others v Hassam & Others NNO 2010 (2) SA 410 (KZP). The critical findings in that case are at [17] – 19]:

> " [17] This I consider to be the crux of the present enquiry. Rule 18(6) speaks of a party who in his pleading 'relies' on a contract or 'part' thereof. A party clearly 'relies upon a contract' when he uses it as a 'link in the chain of his cause of action'. South African Railways and Harbours v Deal Enterprises (Pty) Ltd 1975 (3) SA 944 (W) at 953A; and Van Tonder v Western Credit Ltd 1966 (1) SA 189 (C) at 193H.
>
> Although both of these cases were decided at a time when rule 18(6) made no provision for a true copy of the written agreements to be annexed to the pleading, the views of the learned judges, as to the meaning to be attached to the phrase in question, are still relevant and instructive.
>
> [18] In the present case the respondents base their cause of action against the applicants upon the written agreement. The written agreement is a vital link in the chain of the respondents' cause of action against the applicants. In order for the respondents' cause of action to be properly pleaded, it is necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absence of the written agreement the basis of the respondents' cause of action does not appear ex facie the pleadings.
>
> [19] An allegation that a party is not in possession of the written agreement relied upon, constitutes an acknowledgment 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. Consequently, such an allegation as made in the present case does not constitute compliance with the requirements of rule 18(6), nor does it excuse their non-compliance. In addition an allegation that the party has taken steps to obtain a copy, without success, or to annex an incomplete, or unsigned, draft thereof, would not for the same reason constitute compliance with the demands of rule 18(6), nor would it excuse their non-compliance."

(There is an important qualification to these remarks concerning condonation of non-compliance, an aspect to which I later allude; however in sofar as the exception point goes, this is the high water mark within that judgment.)

6. There seems to me to be three reasons was the exception argument must fail.

7. First, the issue at stake in the Moosa v Hassam case was not the viability of the cause of action pleaded; Swain J was addressing the merits of a Rule 30 application under which the defendant had *qua* applicant complained of the irregularity committed by the non-compliance with Rule 18(6). No explanation was volunteered for its absence. An order was made to comply. Moosa v Hasam is this not authority that supports the exception argument.

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9. Such a fallacy has been lucidly and fully exposed by the observations of Rogers J (Traverso DJP concuring) in Absa Bank Ltd v Zalvest Twenty (Pty) Ltd & another 2014 (2) SA 119 (WCC). In that matter the plaintiff, (being the same person as the plaintiff in the present two matters under consideration) pleaded that the failure to attach the foundational document evidencing the loan agreement was explained by its destruction in the uncelebrated fire of 28 August 2009 in the DocuFile documents warehouse. An exception was raised by the defendant.

10. The exception was dismissed and Rogers J went on to deal comprehensively with the contention and dispatched it once and for all by holding thus:

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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.'

[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 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 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.)"

11. Thirdly, the present contention advanced to support the exception proposition readily acknowledges that the non- compliance may be condoned, and if so, the excipibility would be extinguished. The decisions in both Moosa v Hassam and Absa v Zalvest hold that condonation would resolve the plaintiff's non-compliance. In *Absa v Jenzen*, the contentions assumed that condonation within the contemplation of Rule 27(3) is appropriate, a submission derived from remarks made in Moosa v Hassam at [20] - [21]. There is a material difference of opinion between the judgment of Swain J and that of Rogers J about the process by which condonation might be procured from a court to

excuse the absence of a foundational document and whether Rule 27(3) applies in such a case and whether a genuinely lost document could ever not be condoned. It is unnecessary in this judgment to address that topic. It seems to me that, as a matter of logic, the very possibility that a barrier to the pursuit of a claim can be resolved by a discretionary excusing of a failure to comply with a procedural step, as distinct from the need to amend the averments by the addition of substantive allegations, demonstrates the inappropriateness of the perspective that the controversy could be about the cause of action. If that is correct, the true gravamen of the complaint cannot found an exception.

12. Accordingly, in my view the defendant's complaint in *Absa v Jenzen* about non-compliance with Rule 18(6) cannot consitute the substance of an exception. It follows that the articulation of that notion does not disclose a defence.

13. In *Absa v Grobbelaar* the same point was taken, albeit obliquely, being interlaced with several contentions of considerable obscurity and nit-picking intensity which need not be addressed in this judgment, save to dismiss the misconceived notion that the failure to attach the loan agreement meant that the pleadings had failed to 'identify' the document upon which reliance was placed; indeed precisely because of the fact of being lost, the document was described, perhaps, more fully in the pleadings than would have been strictly necessary had it been attached.

14. In my view, these arguments inspired by the missing loan agreements have in large measure touched upon an important consideration but have obscured the critical point. The starting place must be to recognise that what is critical in legal proceedings is dictated by the relief sought. In summary judgment proceedings, to defeat the plaintiff's

application a defendant must put up a basis why the plaintiff cannot get judgment without the merits of a defence being tested. Whilst a classical defence might contradict the facts upon which the plaintiff relies, it also remains open to a defendant to merely demonstrate that the plaintiff's averments, where the facts are peculiarly within the knowledge of the plaintiff, need to be proven and an opportunity to test the substance of those averments is appropriate.

15. In both these matters, the terms of the agreement need to be proven by secondary evidence to fill the gap left by the missing document.

16. In *Absa v Jenzen* the Defendant alleges that there are factual errors in describing the agreement that the parties had with each other, that the interest rate claimed is not what the agreement allowed for, and that the generic precedent agreement attached to support the averment that a like document was signed by the parties, in fact, differs from the actual agreement.

17. In *Absa v Grobbelaar*, the allegations include putting the plaintiff to the proof that the original foundational document really was lost in the fire, that the exemplar, attached to supposedly demonstrate what the contents of the lost document were, is indeed a true reflection of that agreement concluded in 2005 and not some other variant of a template that has evolved over time, and lastly, that several ostensible discrepancies appear to exist in the documents attached which supposedly reinforce the doubt shed on the exemplar being an accurate replica of the signed original.

18. Had the document been present to speak for itself, there could have been no room for such disputes of fact to arise. Even assuming that these allegations turn out to be spurious,

it is manifestly obvious that the only way that such an outcome is possible is after evidence has been tested and their meritlessness proven.

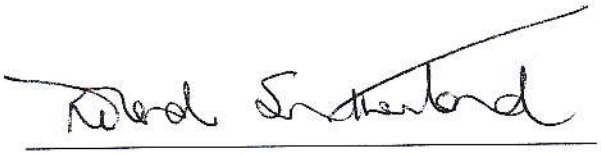
19. In my view, it would be inappropriate to pre-judge the merits of the defendants' allegations, and the plaintiff should extricate itself from its regrettable predicament on trial, not by way of summary judgment. This finding should not be construed to mean that I take the view that merely because the foundational document is unattached to a claim, whether by summons or by application, that summary judgment is not feasible. The decision in each case will be determined by the import of the allegations made by a defendant to question the version of the plaintiff about the terms of the agreement alleged by the plaintiff. Where such challenges are susceptible to rebuttal on the papers, or are demonstrated not to be bona fide, the remedy of summary judgment remains available.

20. There is self-evidently the very real prospect of professional debtors exploiting the processes of the law to unduly delay and obfuscate litigation. This occupational hazard ought not to incline a court to close a door which a fair adversarial litigation system ought to leave open. The essence of the present controversies lies in the realm of marshalling evidence, and the responsibility to construct cases in ways to meet such a challenge is what the legal profession is for.

21. Accordingly, Orders are made as follows:

21.1. In Case 2014/877: ABSA BANK LTD v JENZEN, KEVIN GLYNN, there shall be leave granted to defend, costs to be in the cause.

21.2. In Case 2014/7728: ABSA BANK LTD v GROBBELAAR, JAMES, there shall be leave granted to defend, costs to be in the cause.



ROLAND SUTHERLAND

Judge

Heard: 30 July 2014

Judgment: 2 August 2014

In Case 20214/877:

For Plaintiff: Adv J A Swanepoel

Instructed by Smit Sewgoolam

For Defendant: Adv CJL Harms

Instructed by De Vries attorneys

In Case 2014/ 7728:

For Plaintiff: Adv J A Swanepoel

Instructed by Smit Sewgoolam

For Defendant: Adv DJ Shaw