REPUBLIC OF SOUTH AFRICA

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

APPEAL CASE NO: A3050/14

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

....
DATE SIGNATURE

In the matter between:

CHRISTOFFEL GERHARDUS GROVE Appellant

And

NEDBANK LTD Respondent

J U D G M E N T

Headnote - Summary judgment – failure to attach written agreement upon which claim base – Rule 18(6) not satisfied - particulars of claim alleging document lost – an alleged generic template attached instead - Absence of attachment of agreement not per se fatal to summary judgment – depends on the allegations of defendant – where defendant denies concluding such an agreement as the template or any agreement at all, a irresolvable dispute of fact is alleged- summary judgment inappropriate and refused

DEWRANCE AJ

[1] This is an appeal from the Magistrate, Johannesburg ("the court *a quo*"). The court *a quo* granted summary judgment in favour of the respondent.[1]

[2] The appellant instituted action in the court *a quo* based on contract. The original contract was not attached to its particulars of claim. I will return to this aspect later.

[3] Before I deal with the merits of the appeal, it is necessary to dispose of a preliminary issue.

NOTICE OF APPEAL

[4] Mr Van Reenen, for the respondent, submitted, *in limine*, that the appellant's notice of appeal is fatally defective because the appellant *"merely contradicted aspects of the magistrate's judgment without indicating any substantial basis for doing so"*. Therefore, the notice of appeal does not meet the requirements of the relevant Rule.

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[1] In the amount of R68 583.18 plus interest at 21.4% per annum from 20 September 2010 to date of payment, with costs, on an attorney and client scale

[5] Rule 51(7) of the Rules regulating the Conduct of the Proceedings of the Magistrates' Court of South Africa ("the Magistrate Court Rules") dictates the form of a notice of appeal and provides as follows:

> "*(7) A notice of appeal or cross-appeal shall state -*
>
> *(a) whether the whole or part only of the judgment is appealed against, and if part only, then what part; and*
>
> *(b) the grounds of appeal, specifying the findings of fact or rulings of law appealed against.*"

[6] The relevant portions of the notice of appeal read as follows:

> "*…*
>
> ***BE PLEASED TO TAKE FURTHER NOTICE** that the Appellant's grounds of Appeal are set out hereunder, namely:-*
>
> *1. the learned Magistrate erred in finding that the Plaintiff's claim is calculated and a computed amount;*
>
> *2. the learned Magistrate erred in finding that the Plaintiff's claim is not excipiable;*
>
> *3. the learned Magistrate erred in finding that the Magistrate's Court has jurisdiction to hear the matter;*
>
> *4. the learned Magistrate erred in finding that the debt was paid;*
>
> *5. the learned Magistrate erred in not finding that there is a bona fide defence for Reckless Credit;*
>
> *6. the learned Magistrate erred in finding that a valid agreement existed between the Plaintiff and the Defendant.*
>
> ..."

[7] The objects of the notice of appeal are[2] to enable the magistrate to frame his reasons for judgment; to give the respondent an opportunity of abandoning the judgment; to inform the respondent of the test he has to meet; and to notify the Appeal Court of the points to be raised.'

[8] In *Van der Walt v Abreu*, *supra*, the Court stated how the objects must be achieved and held as follows:

> "*To achieve these objects, a notice of appeal must, in terms of Rule 51(7)(b), state exactly what is being appealed against (by 'specifying the findings of fact or rulings of law appealed against'); and it must also indicate broadly, and without the detail of an argument, why each finding of fact or ruling of law appealed against is said to be wrong (by stating 'the ground of appeal', being, as indicated in Riesberg v Kroll and subsequent cases that followed it, notice of ground(s) upon which each fact or finding is to be attacked)."* (**emphasis added**)

[9] The Court of Appeal will exact strict compliance with the requirements of Rule 51(7)(b) and will relax the prescribed practice only in cases where it is absolutely plain what issue of law is going to be raised under a notice of appeal (see *Jones and Buckle* Vol II RS 7, 2014, pages 51- 11**.**

[10] If it is not clear that there is only one point of law which could possibly be argued, and it is not clear that there is only one finding or fact by the magistrate which could possibly be challenged, the notice of appeal is fatally defective and the appeal must be struck off the roll

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[2] *See Van der Walt v Abreu* 1999 (4) SA 85 (W) at 104 C-F

(see *Wassenaar v Robertson* 1945 TPD 10 at 15; *Gaffoor v Mvelase* 1938 NPD 429, *Van Zyl v Burger* 1966 (1) SA 692 (O)).

[11] Whilst it is so that the notice of appeal does not strictly comply with Rule 51(2), in my view it discloses, on the face of it, several points of law which can be argued. The notice of appeal, for instance, states that the court *a quo* erred in finding that it had jurisdiction to hear the matter. This clearly indicates that there is an identifiable point of law which could possibly be argued. Accordingly, I am of the view that the rule should be relaxed and, therefore, I exercise my discretion to do so.

[12] This does not mean that I am satisfied with the manner in which the notice of appeal was crafted. In future, care should be taken to ensure exact compliance with the Rules. Failure to do so may have disastrous consequences for litigants, a situation which cannot be tolerated.

WHETHER SUMMARY JUDGMENT HAS BEEN GRANTED OR NOT

[13] Paragraph 3 of the respondent's particulars of claim provides as follows:

> "*3. During or about November 2008 the Defendant completed and caused to be submitted to the Plaintiff's credit card department, a written application for credit card account ("the application"), to be opened in his own. The Plaintiff cannot locate such application form at present,*

> *but a pro forma thereof, similar to that completed by the Defendant, is annexed hereto marked as 'A'*." (**emphasis added**)

[14] The particulars of claim allege that the application was sent to the respondent's credit card department at Braamfontein, Johannesburg. The application was received by the credit card department by a duly authorised employee. The credit card account was opened in the appellant's name upon approval of the application by the respondent. The respondent then despatched a letter to the appellant's postal address stated on the application form informing him that the application had been accepted.

[15] The respondent alleges that the material express terms of the application were that:

15.1 the postal address of the defendant was indicated as 68 Barnard Street, Oberholzer, Carletonville;

15.2 defendant agreed that the credit card would be issued subject to the relevant terms and conditions of use printed on the reverse of the application form, which defendant further confirmed having read and understood.

[16] For purposes of this judgment, it is not necessary to discuss the terms and conditions which are subject to the issue of the credit card.

[17] The law is quite settled on the attachment of original agreements where a plaintiff relies on such agreement (see Rule 18(6) of the Uniform Rules of Court and Rule 14(2) of the Magistrate Court Rules). In such a case, the original contract must be adduced. Where an original has been destroyed or cannot be found despite a diligent search, a litigant, relying on such a contract, can adduce secondary evidence of its conclusion and terms (see *Singh v Govender Bros Construction* 1986 (3) SA 613 (N) at 616 J - 617 D; *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 (WCC)).

[18] The appellant takes issue with the fact that the original agreement is not attached to the particulars of claim and, based on this, he alleges, *inter alia*, that the respondent's particulars of claim are vague and embarrassing. He further denies that he signed the *pro forma* agreement attached to the papers. He puts it as follows:

> "*10. I further confirm that the Applicant/Plaintiffs particular (sic) of claim is excipiable, vague and embarrassing. On this they haven't pleaded to any specific agreement whether it is an oral or in writing, they merely make allegations of a document which I would have signed, of which they could not trace the original. I deny that I signed such a document.*" (**emphasis added**)

and

> "*13. I further confirm that I am advised that for the Plaintiff to succeed with a Summary Judgment Application they will have to plead a written or oral agreement and the agreement will have to be attached to the Summons, they have failed to do so and this is definitely a trial-able (sic) issue as their only excuse is that they could not locate the application.*" (**emphasis added**)

[19] In his heads of argument, Mr Vermeulen, on behalf of the Appellant, submitted that "*by its very nature, Summary Judgment proceedings do not provide the appropriate forum for such secondary evidence to be adduced and therefore it would be grossly inappropriate for a court to draw any conclusions of the existence of an agreement and the terms thereof at Summary Judgment phase*". In making this submission, Mr Vermeulen relied on the unreported cases of *Absa Bank Ltd v Jenzen*; *Absa Bank v Grobbelaar.*[3]

[20] In *Absa Bank Ltd v Jenzen*; *Absa Bank v Grobbelaar*, Sutherland J made five important observations. Firstly, failure to attach the loan agreement and non-compliance with Rule 18(6) of the High Court Rules[4] cannot constitute the substance of an exception. Secondly, the terms of the agreement need to be proven by secondary evidence to fill the gap left by the missing document. Thirdly, it would be inappropriate to prejudice the merits of the defendant's allegations, and the plaintiff should extricate itself from its regrettable predicament on trial, not by way of summary judgment. Fourthly, the finding should not be construed to mean that merely because the foundational document is unattached to a claim that summary judgment is not feasible. Finally, the decision in each case "*will determine by the import of the allegations made by the defendant to question the version of the plaintiff about the terms of the alleged agreement 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.

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3 Case No 2014/877, Gauteng Local Division

4 Rule 14(2) in the Magistrates' Court

[21] The appellant denies that he entered into a written contract with the plaintiff; that an application was received by the plaintiff's credit card department and accepted by duly authorised employees; that the plaintiff despatched a letter to his postal address; that he agreed to a credit card being issued; and he never received the application form containing the terms and conditions on the reverse side.

[22] The appellant also denies signing the written contract. In fact, before the affidavit resisting summary judgment was delivered, the appellant delivered a notice in terms of Rule 23(15) of the Magistrates' Court Rules wherein he, *inter alia*, requested a copy of the duly signed agreement between the parties and documentary proof that the defendant agreed to any specific interest rate.

[23] Accordingly, as I understand the agreement, the court *a quo* erred in finding that a valid agreement exists. This argument also goes to the heart of the appellant's denial that the court *a quo* had jurisdiction.

[24] I do not agree with the appellant's contention that failure to attach the original loan agreement rendered the particulars of claim excipiable (see *Absa v Jenzen supra*). Therefore, the ground of appeal that it is excipiable is without merit.

[25] Mr Vermeulen also submitted that the particulars of claim are vague and embarrassing because, in paragraph 23 of the particulars of claim, it is alleged that the agreement was entered into "*during or*

about November 2008", whereas paragraph 12 of the particulars of claim alleges that "*section 92 of the National Credit Act was not complied with, as the aforementioned agreement had been concluded prior to 1 June 2007*".

[26] Mr Van Reenen submitted that the particulars of claim are not vague and embarrassing for this reason. He correctly pointed out that paragraph 12 is an indication that, whether rightly or wrongly, section 92 of the National Credit Act has not been complied with.

[27] Accordingly, I agree with Mr Van Reenen that, for this reason, the particulars of claim are not excipiable.

[28] I now turn to the question of whether summary judgment should have been granted by the court *a quo* or not.

[29] Summary judgment proceedings are not and never have been intended as a forum for the resolution of factual disputes (see *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) 367C; *Venetian Blind Enterprises (Pvt) Ltd v Venture Cruises Botel (Pvt) Ltd* 1973 (3) SA 575 (R) 578 A). A trial is the proper forum for that process, either because the nature of the relief presupposes a trial or because affidavits are not suitable for that purpose (see *Gulf Steel (Pty) Ltd v Rack-Rite (Pty) Ltd* 1998 (1) SA 679 (O); *Shackleton Credit*

Management (Pty) Ltd v Microzone 88 CC and Another 2010 (5) SA 112 (KZP) 122 F - I).

[30] Summary judgment must be refused if the defendant discloses facts which, accepting the truth thereof, or only if proved at a trial in due course, will constitute a defence (see *Raphael and Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C) 245 E - G; *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd supra*). While the defendant must fully present the facts upon which his defence is based, he need not deal in detail with either that defence or the evidence in support thereof (see *Millman NO v Klein* 1986 (1) SA 465 (C) 469 F; *Absa Bank Ltd v Coventry* 1998 (4) SA 351 (N) 353 C - H).

[31] Defects in the opposing affidavits are not necessarily fatal for the defendant as the court is entitled to adopt a lenient approach to the allegations contained therein and it is entitled to draw reasonable inferences from those allegations (see *Fashion Centre v Jasat* 1960 (3) SA 221 (N) 222 G; *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C) 678 E.

[32] The appellant clearly denies entering into a written contract with the plaintiff and accordingly denies that he signed a "*similar*" agreement attached to the particulars of claim. This raises doubt whether summary judgment should have been granted or not. That being so, summary judgment should have been refused.

[33] Accordingly, I am of the view that the "*terms of the agreement need to be proven by secondary evidence to fill the gap left by the missing document*".

[34] Accordingly, I make the following order:

34.1 the appeal is upheld;

34.2 costs of the appeal are costs in the cause;

34.3 the order of the court a *quo* is set aside and replaced with the following order:

"*Leave to defend is granted, costs to be costs in the cause.*"

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DEWRANCE, AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

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SUTHERLAND, J

JUDGE OF THE HIGH COURT,

GAUTENG LOCAL DIVISION JOHANNESBURG

Date of Hearing: 14 October 2014

Date of Judgment: 29 October 2014

Representation for the appellant

Counsel:	Mr M C Vermeulen (attorney)
Instructed by:	Smit & Grove Attorneys

Representation for the respondent

Counsel:	Mr W H J van Reenen
Instructed by:	Smit Jones and Pratt