

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
REPUBLIC OF SOUTH AFRICA**

CASE NO: 49343/2013

5/2/2016

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

AMALGAMATED METAL RECYCLING:

PLAINTIFF

And

**LIMPOPO SCRAP METAL CC:
(Reg. No. 20041093929/23)**

DEFENDANT

JUDGEMENT

SEMENYA AJ:

1. Plaintiff issued summons against defendant for payment of an amount of R1618336.46 for cash/loan advances paid by plaintiff to defendant as a result of a partly oral and partly written agreement entered into by the parties. The instant judgement is on an exception raised by defendant to plaintiff's particulars of claim. Defendant has abandoned its claim in as far as interest is concerned. I will therefore give no ruling on this aspect.
2. Defendant argued that plaintiff is obliged, in terms of Rule 18 (6), to annex to his

particulars of claim, a written contract upon which its claim is based. That by so doing, defendant would be in a position to determine the terms relied upon by plaintiff. It was further argued that failure to annex the said written agreement to the particular of claim renders same to fail to disclose the cause of action, alternatively vague and embarrassing.

3. In paragraph 5A of its amended particulars of claim, plaintiff alleges that portion of the written agreement included, inter alia, a detailed ledger which was to be compiled by it, various purchase/credit notes referred to in such ledger, defendant's corresponding invoices, various bridge slips together with corresponding inventory of goods supplied and the *ad hoc* confirmation of defendant's indebtedness. It is necessary to mention that, that portion of the written contract was not annexed to the particulars of claim.
4. Notwithstanding the initial averment that the necessary documents required to support its claim are voluminous and cannot be annexed to particulars of claim, plaintiff discovered same before respondent raised the instant exception. It is on this basis, among others, that plaintiff argues that the exception is without merits. It was contended on behalf of plaintiff that the material portion on which it relies have been sufficiently stated in paragraph 5 of the particulars of claim so as to enable defendant to plea.
5. Defendant contended that the documents annexed/discovered by plaintiff, *to wit*, the ledger comprises of what happened after the contract on which the claim is based was concluded. It was further argued that the Rules as they provide, make it compulsory for plaintiff to annex a true copy of the written contract.
6. Rule 18(6) of The Uniform Rules of Court provides as follows:

"A party who in his pleading relies upon a contract shall state whether the contract is written or oral and, 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."
7. In support of its contention, plaintiff referred the court to the decision in **South African Railways and Harbours v Deal Enterprises (PTY) LTD 1975 (3) SA 944 (W)** as authority for the submission that the furnishing of a written contract would not always be regarded as strictly necessary for the purposes of enabling the defendant to plead or to tender.
8. The argument that the documents annexed by the plaintiff cannot be regarded as

a true copy of the written contract entered into by the parties or a portion relied upon by plaintiff is valid. They can at the least, amount to evidence of whatever happened pursuant to the contract, if any, entered into by the parties. What defendant is entitled to is a true copy of a written contract on which the plaintiff's claim is based as provided in Rule 18(6).

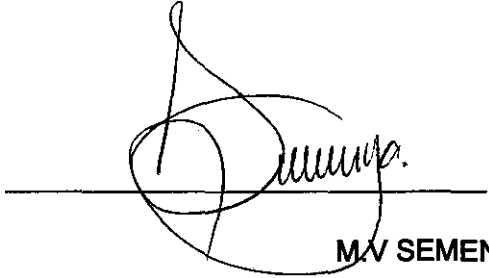
9. I am in agreement with the reasoning of **Traverso DJP in Absa Bank Ltd v Zalvest Twenty (Pty) Ltd 2014 (2) SA 119 (WCC)** that Rule 18(6) is formulated on the assumption that a party is able to annex a true copy of a contract and that it was not intended to preclude a party to a written contract from enforcing his rights in terms thereof if he is, for valid reasons, unable to annex it.
10. However, the other documents referred to in paragraph 5A of the plaintiff's particulars of claim were, in the same way as the ledger, created after the alleged contract was concluded. They therefore could not, as argued by defendant, be part of the written contract. Plaintiff does not furnish any reasons why it is unable to annex a true copy of the written contract. It does not appear from the particulars of claim that it is not in possession of the said contract or that it is impossible for it to annex it. It appears that it is not the contract itself that is too voluminous to be annexed. It is the ledger, purchase/credit notes, defendant's corresponding invoices of goods supplied (paragraph 5A.1-5) that are. The defendant is entitled to see if what is alleged in paragraph 5A is indeed part of the written contract.
11. Plaintiff argued, based on the decision in **Nxumalo v First Link Insurance Brokers (PTY) LTD 2003 (2) SA (620)**, that defendant bears the *onus* of proving both vagueness amounting to embarrassment and embarrassment amounting to prejudice. He further argued that in the instant matter defendant does not allege that he will suffer prejudice if he were to plea on the particulars of plaintiff's claim as they now stand. I agree that what defendant did was to make a bold submission to the effect that plaintiff is obliged to annex the contract without showing that its failure to do so causes embarrassment amounting to prejudice. It is on this basis that I am unable to find any prejudice on the part of defendant.
12. Moseneke J, as he then was, in **Nxumalo (supra)**, stated that in such cases, defendant can make use of a number of other provisions at its disposal for example Rule 35 to require the written contract on which the claim is based. In my view the same sentiment finds application in this instant case. The defendant

may make use of the provisions referred to in Nxumalo to compel the plaintiff to annex a true copy of the written contract to its particulars of claim.

13. I conclude that defendant failed to prove that plaintiff particulars of claim are vague and embarrassing and that he suffered prejudice as a result.

14. In the circumstances the following order is made:

1. The exception is dismissed with costs.



M.V SEMENYA

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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