

REPUBLIC OF SOUTH AFRICA



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

Case Number: A3074/2020

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
30 August 2021	
DATE	SIGNATURE

In the matter between:

NEDBANK LIMITED

Appellant

And

MOOLA IMRAN YACOOB

Respondent

JUDGMENT

Summary: *If it is impossible for the plaintiff to produce the written contract relied on for his claim, substantive law allows him to plead and prove the conclusion of the contract and its terms by way of secondary evidence.*

A rule of procedure, such as Magistrate Court rule 6(6) or the equivalent High Court rule 18(6), which requires that contract be attached to a pleading, cannot be construed to deprive the plaintiff of his cause of action or of his right to prove the contract by means of secondary evidence of the contract.

An application for condonation is not required in order to plead and prove a contract in the absence of the agreement.

THE COURT (FISHER J AND MATTHYSEN AJ)

Introduction

[1] This is an appeal against the refusal of a judgment by default handed down in the Magistrate's Court Boksburg.

[2] The matter was defended in that a plea (a bare denial) was filed but there was no appearance for the defendant at the trial.

[3] The Magistrate, however, dismissed the application for default judgment and made no order as to costs. The basis for dismissal was that a copy of the agreement relied on by the plaintiff was not attached to the particulars of claim, it being pleaded by the plaintiff that the contract could not be found.

[4] Whilst the refusal of a judgment by default without a dismissal of the claim itself may not always be appealable in that it is not necessarily a final order, the determination in this matter has final effect.¹ The Magistrate has determined that the plaintiff is not able to make out any case absent an application for condonation. The appellant argues that an application for condonation would not be appropriate in the circumstances of the case and that this determination puts it out of court.

[5] This appeal is thus against the dismissal of the application for default judgment on this ground.

[6] There are differing views in different divisions of the High Court as to the effect of the inability to attach a copy of a contract relied on to the pleadings. These are dealt with in this appeal.

Procedural history

¹ See the discussion in relation to appealability of determinations in judgments by default in *FirstRand Bank Limited v Malakeng* [2016] ZASCA 169 24 November 2016 at paras [11] to [13].

[7] During 2016 the appellant issued the summons against the respondent for payment of R28 954.22 and ancillary relief. The claim is for monies lent and advanced in terms of a credit agreement relating to the use of a credit card issued by the respondent. The action was defended and, after pleadings were closed, the matter was set down for trial on 12 August 2020.

[8] The respondent had been represented by an attorney throughout but the attorney withdrew on the day before trial. This caused the matter to be postponed in order for a new trial date to be arranged. Notice of set down of the new date of 05 October 2020 was served by sheriff at the respondent's residence on the respondent's brother in the respondent's temporary absence. The Respondent failed to appear at the second trial hearing set down and, as a result, the appellant brought the application for judgment by default at the trial.

[9] The Magistrate found that the appellant had failed at the hearing to prove the credit agreement relied on. Her finding was based on the fact that the appellant did not attach to the particulars of claim a copy of the actual credit agreement between the parties but a standard pro forma document. The appellant pleads that the reason for this is that it cannot locate the actual application form concluded. It thus relied on its pro forma standard terms and conditions. The salient terms relied on were also specifically pleaded in the particulars of claim.

[10] There were also summary judgment proceedings brought in the matter. The respondent, in his affidavit resisting summary judgment, did not deny having received and used the credit card pursuant to a credit card agreement between him and the appellant. His only 'defence' was that he placed the outstanding amount in issue. He did not do this with any particularity.

[11] As we have said, the Magistrate held that the only way in which the case could proceed would be if a condonation application dealing with the failure to attach the contract was successfully brought. The Magistrate erroneously relied on the provisions of Magistrates Court rule 12 in coming to this conclusion. Rule 12 deals with a Plaintiff's rights to direct a written request to the Court or the Registrar to request

default judgment in circumstances where either the Defendant had not delivered a notice of intention to defend an action or the Defendant is barred from delivering his plea. Rule 12 is therefore not applicable in the current matter as the pleadings were closed and the case allocated a trial date.

[12] Notwithstanding the erroneous reference to rule 12, the question of whether an application for condonation is appropriate at all still arises as an issue in this appeal.

[13] The Magistrate also put some store by the contention of the respondent in the pleadings to the effect that it had not had notice as required by section 129 of the National Credit Act.² That the point was pleaded, is indicative of a defendant scrambling about for technical defences which have no foundation. This point need not be dealt with in any detail. It suffices to say that it is settled law that the lack of proper notice is not a defence to the appellant's claim and that at best it can lead to a postponement for the purpose of allowing for compliance with the section.³

Issues for determination

[14] The questions which arise in this appeal are (i) whether a plaintiff in the predicament of the appellant may still proceed to claim under the missing contract and (ii) if so, what processes and principles apply to the making of such a claim.

We shall deal with each question in turn.

Can a plaintiff who is not in possession of the contract relied on claim thereunder?

² 34 of 2005.

³ *SA Taxi Development Finance (Pty) Limited v Phalafala* 2013 ZA GP GHC55.

[15] The Magistrate obviously sought to place reliance on the requirements of Magistrate's Court rule 6(6) which provides a copy of a contract or part thereof relied on to be attached to the pleadings concerned.

[16] The Magistrate relied on the decision in *Moosa & Others NNO v Hassam & Others NNO*⁴ for her finding that, without condonation, the claim would not be capable of proper pleading or proof.

[17] *Moosa* dealt with the contention that the failure to attach the contract was an irregular step whereas this case deals with a trial hearing albeit in default of appearance. Thus the inquiry in *Moosa* was somewhat different. Furthermore, in *Moosa* the court was provided with facts on affidavit which indicated that the plaintiffs were indeed in possession of a copy of the agreement.

[18] We agree with Rogers J in *ABSA Bank Ltd v Zalvest Twenty (Pty) Ltd and Another*⁵ that *Moosa* is not authority for the proposition that a plaintiff is deprived of its cause of action merely because it is unable to attach a copy of the agreement to its pleading.

[19] Rogers J in *Zalvest* succinctly put the position thus⁶

'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)[the equivalent of Magistrate's Court rule 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 might 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 not required to annex a copy of the contract'.

⁴ 2010 (2) SA 410 (KZP).

⁵ [2013] ZAWCHC 169; 2014 (2) SA 119 (WCC) (6 November 2013).

⁶ At para 12.

[20] The substantive law of evidence prescribes that 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 produced. But, if it is impossible for the plaintiff to produce the written contract or a copy thereof, substantive law allows him to plead and prove the conclusion of the contract and its terms by way of secondary evidence.⁷ A rule of procedure such as Magistrate Court rule 6(6) or the equivalent High Court rule 18(6) cannot, in our determination, be construed to deprive the plaintiff of his cause of action or of his right to adduce secondary evidence of the contract.

[21] We, like Rogers J, also respectfully disagree with proposition in *Moosa* that 'in the absence of the written agreement the basis of the [plaintiffs'] cause of action does not appear *ex facie* the pleadings'.⁸

[22] Provided a plaintiff pleads the conclusion of the contract and the material terms, the particulars of claim will disclose a cause of action. The failure to attach a contract will, in the absence of a properly pleaded explanation for such failure, be in breach of the procedural rules pertaining to pleadings – but this does not deprive the pleader of a cause of action. This was the position taken by a full bench of this court in the unreported judgment in *Silver v Nedbank* and we agree with it.⁹

[23] The appellant has therefore pleaded a cause of action.

[24] We now move to deal with the manner of pleading and process which needs to be followed in bringing proceedings where the contract is missing or destroyed.

Pleadings and process where it is not possible to attach the contract.

[25] The process to be adopted where the pleader is unable to attach the contract on which the claim is founded is obviously fact specific. At very least, the reason for this inability should be fully pleaded. The date, place, parties and circumstances of

⁷ See *Transnet Ltd v Newlyn Investments (Pty) Ltd* 2011 (5) SA 543 (SCA) at paras 4-5 and 17-19; *Singh v Govender Brothers Construction* 1986 (3) SA 613 (N) at 616J-617D);

⁸ *Moosa* at para 18.

⁹ *Case no A3013/2013* [22 January 2014]

the conclusion of the contract should also be properly set out to the extent possible as these are procedural requirements. It is important also that the salient terms relied on be properly pleaded. The manner in which the plaintiff will seek to establish the terms also requires to be fully pleaded. If this is not properly done, the pleadings may be attacked as excipiable for being vague or irregular. As we have said, they are not, however, excipiable for disclosing no cause of action merely because of the absent agreement.

[26] The cogency of the secondary evidence led on the pleadings will determine whether the contract is sufficiently proved. There is no 'best evidence rule' when it comes to secondary evidence. Once a litigant is, by force of the circumstances, relieved of the obligation to produce the original document any evidence which proves the contract is admissible.¹⁰

[27] This raises the question whether it is necessary for condonation as to the absence of the contract to be applied for and granted in order for the matter to proceed.

[28] The purpose of condonation is to seek that the lack of compliance (i.e. the failure to attach the contract) be forgiven for good cause. This presupposes fault which is excused by the court, thus allowing reliance on secondary evidence of the contract. If the document is missing or destroyed for reasons not attributable to the plaintiff, is he still called on to make out this case in order to get condonation as a precondition of the making of a claim? What if the loss of the document is entirely and unforgivably attributable to the plaintiff - does this preclude condonation and thus reliance on the contract? Thus, is the blameworthiness or otherwise of the plaintiff in relation to the inability to produce the original contract dispositive of its ability to make out its cause of action? Clearly the answers to these questions must be in the negative.

[29] The responsibility or otherwise for the loss of the document is only relevant to the extent that it impacts ultimately on the proof the contract. Thus, an application for condonation is neither required nor would it be of any real assistance in these circumstances.

¹⁰ See *Transnet Ltd v Newlyn Investments (Pty) Ltd n. 5* at paras 4-5 and 16-19.

[30] We now move to deal with a discussion on the facts of this case in light of the above principles.

Discussion

[31] The appellant pleaded that it could not find the agreement. It pleaded and produced evidence of the conclusion of a credit agreement and pleaded and proved that the pro forma document attached were the usual terms which it contracted on if a client entered into a credit card agreement. It produced evidence of statements sent in relation to the use of the card which it alleged was in terms of the credit agreement. The respondent, as we have said, does not dispute that a credit agreement was concluded and that he used the credit card which was issued pursuant thereto for the purposes of concluding credit transactions in accordance with the contract.

[32] The appellant relied on a certificate of balance which it was agreed in terms of the contract proved would constitute *prima facie* proof of the contents thereof.

Conclusion

[33] We are therefore of the view that the appeal should be upheld. It would serve no purpose to send the matter back to the Magistrate's Court for determination. This Court has all the evidence that is needed to itself determine the case.

Costs of the appeal

[34] The refusal of the order by default was not as result of a point raised by the respondent. The appeal was not opposed. In the circumstances we do not deem it fair to impose a cost order against the respondent.

Order

[35] Thus we order as follows:

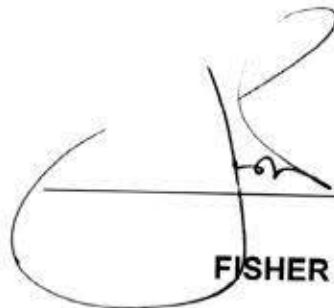
1. The appeal is upheld.

2. The order of the Court a quo is set aside and replaced with the following order:

'(a) The Defendant is ordered to pay to the Plaintiff the sum of R28 954.22;

(b) Interest is to be paid on the aforesaid amount at the rate of 18.65% per annum from 13 June 2016 to date of final payment.

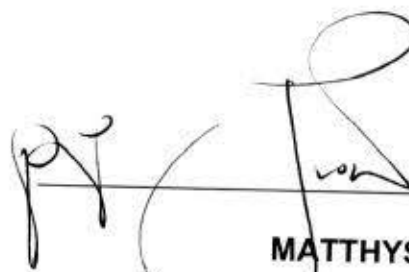
(c) The Defendant shall pay the costs of suit.'



FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG



MATTHYSEN AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 19 July 2021.

Judgment Delivered: 30 August 2021.

APPEARANCES:

For the Appellant : Adv K Meyer.

Instructed by : Smit Jones and Pratt Attorneys,
Johannesburg.

For the Respondent : No appearance.