



Reportable:	<u>YES</u> / NO
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **1143/2016**
DATE HEARD: **18/11/2016**
DATE DELIVERED: **25/11/2016**

In the matter between:

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED

Applicant

and

JACOB C R HENDERSON

Respondent

Coram: Olivier J

JUDGMENT

Olivier J:

[1.] This is an application by the plaintiff, Wesbank (a division of Firststrand Bank Limited) for summary judgment. The defendant is Mr JCR Henderson. The

application was initially opposed, but the defendant never filed an opposing affidavit. At the hearing of this matter there was no appearance and a notice to abide, filed by the defendant's attorneys on the day of the hearing, was handed up by plaintiff's counsel, Ms Tyuthuza.

- [2.] In view of what follows the chronology of the service and filing of certain pleadings and affidavits is relevant. Summons was issued on 2 June 2016, and it was served on the respondent on 21 June 2016. On 28 June 2016 the defendant gave notice of his intention to defend the action.
- [3.] On 15 July 2016 the defendant filed a plea to the plaintiff's particulars of claim. According to the stamp of the plaintiff's attorneys the plea was filed around 13:30 on that day.
- [4.] On the same day, but it is not clear at what time, the affidavit supporting the application for summary judgment was deposed to.
- [5.] On 19 July 2016 this application for summary judgment was lodged and filed. That was on the 15th day after notice of intention to defend had been given, and therefore in time.
- [6.] Although it is not clear whether the deponent for the plaintiff had been aware of the existence of the plea at the time of deposing to the supporting affidavit, it is clear that the application for summary judgment was lodged with full knowledge of the fact that a plea had been filed, and presumably also of the contents of that plea.

- [7.] In theory nothing would prevent a plaintiff from applying for summary judgment after a plea has been filed, but the contents of such plea will then be taken into account in considering such an application¹.
- [8.] The cause of action set out in the particulars of claim is an alleged breach of a so-called “*online*” instalment sale agreement and, according to an allegation in paragraph 4 thereof, annexure ‘C’ to the particulars of claim is supposed to be “*a copy of the Agreement*”.
- [9.] Annexure ‘C’ to the particulars of claim is comprised of a number of different documents, each bearing what appears to be a watermark reading “*Agreement entered into by JACOB HENDERSON Account Number [8...] 2013/10/31 23:49:27*”. The defendant’s personal particulars indeed also appear on some of the documents.
- [10.] What does not, however, appear on any of the particular documents is the defendant’s signature, or any visible sign of him having approved and accepted the terms set out in the different documents. On a page titled “*contract COVER SHEET*”² reference is made to a list of so-called “*DIGITALLY SIGNED DOCUMENTS*”, but none of the documents referred to in the list bear any sign of a signature, digital or otherwise. Ms Tyuthuza could also not point out any signature of the defendant.
- [11.] She submitted that the watermark is the plaintiff’s standard method of proof of signature, and of the fact that the person whose particulars appear in the watermark had consented to the terms of the agreement. She was constrained to concede that the particulars of claim contain no allegations to this effect.

¹ Compare **Vesta Estate Agency v Schlom** 1991 (1) SA 593 (C) at 594H – 595H; **Steeledale Reinforcing (Cape) v HO HUP Corporation SA (Pty) (Ltd)** 2010 (2) SA 580 (ECP) para [8]; **Ramsamy v Nonxuba** 2008 JDR 1055 (O) para [22]; **African Bank Ltd v Mjali** [2005] JOL 13366 (Tk) at p4

² Papers: page 36

- [12.] This in itself, and even without having regard to the contents of the plea, is problematic. The absence of a copy of a written agreement relied upon in particulars of claim would render such a pleading non-compliant with the provisions of Uniform Rule 18(6). Insofar as annexure 'C' may, at least on the face of it, in fact not be a copy of an agreement entered into by the defendant, as alleged by the plaintiff, this would render the annexure inconsistent with the allegation in paragraph 4 of the particulars of claim, and could arguably result in the pleading being excipiable.
- [13.] This is not, however, the end of the matter. In the plea the defendant explicitly denied having entered into an agreement as alleged with the plaintiff, and went on to make allegations to the effect that the plaintiff had, despite being requested to do so, failed to provide the defendant with a "*signed Agreement*".
- [14.] It is apposite at this point to deal with an affidavit which was filed on behalf of the plaintiff on 7 June 2016, and therefore after the issue of summons. It therefore also did not form part of the summons which had been served on the defendant. The affidavit is titled "*AFFIDAVIT IN RESPECT OF SCANNED DOCUMENTS*". In it the deponent explained that, due to a lack of storing space, the plaintiff had begun "*storing its documents on a computer as scanned images*" and that, once original documents had been scanned and stored in this way, they were destroyed. With reference to annexure 'C' to the particulars of claim, the deponent stated that it had been "*retrieved*" from the computer system and that it is a "*true copy of what is stored on the ... computer system*". The particular deponent went on to submit that the document annexed to the particulars of claim as annexure 'C' is admissible evidence because it constitutes the best evidence of the existence of the agreement and because it in any event constitutes a data message as envisaged in section 15(4) of the **Electronic Communications and Transactions Act**³ ("*the Act*").

³ 25 of 2002

- [15.] As already explained, the affidavit does not form part of the particulars of claim and it accordingly also is not part of what was verified and confirmed in the founding affidavit to the application for summary judgment. As could be expected⁴ no mention was made, in that affidavit, of the existence of the affidavit of 7 June 2016. Ms Tyuthuza did not attempt to argue that the contents of the June affidavit would be admissible in the application for summary judgment. In any event, and as will be explained in due course, the contents of the affidavit do not really take the issue of the copy any further.
- [16.] As regards the submission that annexure 'C' to the particulars of claim is the best available evidence of a so-called online agreement having been concluded between the parties, it was not pleaded in the particulars of claim what an "*online*" agreement entailed. There are, of course, also no allegations in the particulars of claim to the effect that annexure 'C' is actually a copy of a so-called scanned image of the original agreement, neither was it pleaded what exactly the scanning process would have entailed. The particulars of claim also contain no explanation for the fact that no signatures are visible in annexure 'C', not even in the documents listed as those with so-called "*digital*" signatures. What exactly a "*digital*" signature is, was also not pleaded, and Ms Tyuthuza could not point out any such signature. I have already dealt with the argument regarding the so-called watermark.
- [17.] Even if the contents of the June affidavit were to be admissible, these aspects were also not explained in that document.
- [18.] In the present context the word "*scan*" could possibly mean to "*convert (a document or picture) into digital form for storage or processing on a computer*"⁵, but neither in the particulars of claim nor in the June affidavit is there any

⁴ Compare **Man Truck & Bus (SA) (Pty) Ltd v Singh and Another (1)** 1976 (4) SA 264 (N)

⁵ **The Concise Oxford English Dictionary**, 10th Edition (Revised), page 1276

explanation of such a process of “*conversion*”, or of the role and effect of such a conversion on “*digital*” signatures.

- [19.] Coming back to the submission, in the alternative, that annexure ‘C’ is admissible evidence because it is a data message as envisaged in the Act, the first question that would arise is whether the alleged digital signatures referred to would indeed constitute “*electronic signatures*” as envisaged in sections 1 and 13 of the Act. No attempt was made in the particulars of claim, or even in the June affidavit, to make out such a case.
- [20.] If it is, however, for the moment assumed that the intention was to refer to “*electronic signatures*”, the question would be what method of “*signature*” was used (and which appears *ex facie* the so-called message) to indicate the defendant’s approval and acceptance, and why that method was the best in the particular circumstances⁶. Even if it is to be assumed that the watermark could constitute an acceptable method for the purposes of section 13 of the Act, I have already pointed out that the particulars of claim contain no allegations in this regard.
- [21.] The position would be even worse in a case where the signature of a person is required by law, because in such a case only an “*advanced electronic signature*” would suffice, which would mean that the particulars of claim would have to contain an allegation that the particular electronic signature resulted from a process accredited by the Authority, as provided for in section 37 of the Act⁷.
- [22.] It is so that provision is made in section 15(1)(b) of the Act for the admissibility of a data message into evidence even though it is not in its original form, but that would only be the case if the particular message is “*the best evidence that the*

⁶ See the provisions of section 13(3) of the Act.

⁷ See section 1 of the Act.

person adducing it could reasonably be expected to obtain". No allegation to this effect was made in the particulars of claim, or even in the June affidavit.

[23.] In any event, and as regards the evidential weight of annexure 'C' as a data message, the particulars of claim contain no allegations regarding the factors set out in sub-paragraphs (a) to (c) of section 15(3) of the Act, neither does the June affidavit.

[24.] The fact that the defendant has not filed an opposing affidavit, and that he has indeed chosen to abide the Court's decision, but that does not mean that cognisance cannot and should not be taken of the defence/s raised by him in his plea. As already said, however, the plaintiff has in my view in any event on its own papers not made out a case for summary judgment⁸.

[25.] There is no reason why costs should not in this case follow the result, and none was suggested in argument. In the premises the following orders are made:

1. THE APPLICATION FOR SUMMARY JUDGMENT IS DISMISSED WITH COSTS.
2. THE DEFENDANT IS GRANTED LEAVE TO DEFEND THE ACTION.
3. FURTHER PLEADINGS AND PAPERS ARE TO BE FILED AND SERVED AS IF NOTICE OF INTENTION TO DEFEND HAD BEEN GIVEN ON THE DATE OF THIS ORDER.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

⁸ Compare **Gulf Steele (Pty) Ltd v Rack-Rite Bop (Pty) Ltd** 1998 (1) SA 679 (O)

