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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE NO: 5086/2016

In the matter between:

**MMAMOLEBOGE INVESTMENT CC
REGISTRATION NUMBER: CK2[...]**

**RESPONDENT/
PLAINTIFF**

-and-

**THE MINISTER OF THE
DEPARTMENT OF PUBLIC WORKS
REPUBLIC OF SOUTH AFRICA**

**FIRST APPLICANT/
DEFENDANT**

**THE DIRECTOR - GENERAL, DEPARTMENT
OF PUBLIC WORKS OF THE REPUBLIC
OF SOUTH AFRICA**

**SECOND APPLICANT /
DEFENDANT**

JUDGMENT

BRESLER AJ:

Introduction

[1] The First and Second Applicant (First and Second Defendants in the main case) applies for an order against the Respondent (Plaintiff in the main case) *inter alia* in the following terms:

1.1 Striking out the Respondent's claim as set forth in its Particulars and Claim, alternatively dismissing the Respondent's claim.

1.2 Directing that the Respondent's replies to further particulars delivered to the Applicants on 25 August 2021 and 6 June 2022 are struck out in terms of Rule 21(4) of the Uniform Rules of the High Court, on the ground that the Respondent who was requested to furnish particulars failed to deliver them sufficiently and adequately.

[2] On or about the 11th of August 2021, the Applicants requested from the Respondent further particulars that are alleged to be necessary to enable them to prepare for trial.

[3] In reply to the request for further particulars, the Respondent submitted a response to the Applicants which response was deemed by the Applicants to be insufficient and unsatisfactory.

[4] The Applicants thereupon applied for an order compelling the Respondent to reply sufficiently and adequately to the request for further particulars.

[5] On or about the 23rd of May 2022, the Honourable Muller J granted an order pursuant to the application to compel in terms whereof the Respondent was compelled to answer and / or reply to questions 5 and 7 of the Applicants' request for further particulars.

[6] For the sake of elucidation, these questions are the following:

6.1 Question 5: Can the Plaintiff give the date, time and place where the Parties signed the General Conditions of Contract?

6.2 Question 7: If the answer is yes (referring to question 6) then on

what basis would the parties have a¹⁵ contract based on an unsigned document?

[7] Question 6 relates to the validity and enforceability of the contract if same is unsigned. The Respondents were not directed to answer hereto.

[8] On or about the 6th of June 2022, the Respondent delivered a reply in response to the order to compel.

[9] In reply to question 5 the Respondent stated:

1. *The General Conditions of Contract was signed by the Plaintiff, duly represented by one of it's members, Sam Thema on or about 30 April 2022 at 75 Hans van Rensburg Street, Polokwane, Limpopo Province, the Defendants were represented by one of their Project Managers unknown to me, who provide me with an unsigned contract which I affixed my signature to, on behalf of the Plaintiff and then handed back the signed original to the Project Manager.*

2. *The Plaintiff does not remember the time at which it went to the Defendants premises, but it was during the Defendants normal working hours, presumably during midday.*

[10] In reply to question 7 the Respondent stated:

3. *The Plaintiff signed a standard General Conditions of Contract (similar to the unsigned copy annexed to the Plaintiff's Particulars of Claim) and handed back the signed original contract to the Defendants Project Manager, for the Director - General to sign on behalf of the Defendants.*

4. *Therefore, the signed original contract or copy thereof was never provided to the plaintiff and if the Defendants are unable to produce the signed original contract, the Plaintiff will during the trial of this matter lead*

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evidence to show that the parties conducted themselves in accordance with the terms of the unsigned General Conditions of Contract annexed to the particulars of claim and accordingly bound by such terms thereof

[11] This court must therefore establish if the aforesaid responses constitute a sufficiently adequate response, alternatively if the Applicants are entitled to relief as set out in the Notice of Motion.

[12] The Applicants raised the issue of the procedure adopted by the Respondent in opposing the current application in their answer to the Rule 6(5)(d)(iii) notice. In as far as may be necessitated, I find that the procedure adopted by the Respondent cannot be criticized as the predominant issue before court is indeed a determination of the law rather than fact. The Applicants did not pursue this line of argument at length in court and no further consideration thereof is thus required. It is also evident that a consideration of the merits would benefit both parties as opposed to a potential blunt dismissal on a mere technicality.

[13] From the onset it is apposite to note that the Honourable Judge Muller ordered the Respondents to reply adequately to questions 5 and 7. This order does not presuppose that the Respondent was obliged to deliver a signed copy of the General Conditions of Contract.

[14] Uniform Rule 21(4) provides that a party may apply to court for an order for the delivery of further particulars or for the dismissal of the action or striking out of the defence (as the case may be), whereupon the court may make such order as it may deem meet.

[15] **Erasmus**¹ states the following:

'The purpose of permitting a party to call for further particulars for trial is (a) to prevent surprise; (b) that the parties should be told with greater precision what the other party is going to prove in order to enable his

¹ Van Logerenberg, **Erasmus, Superior Court Practice**, Second Edition on page 01 - 252

opponent to prepare his case to combat counter allegations; and (c) having regard to the foregoing nevertheless not to tie the other party down and limit his case unfairly at the trial. Even if the particulars requested may at times involve the disclosure of evidence, the fact does not disentitle the other party from obtaining the particulars if on the grounds of embarrassment or prejudice in the preparation of his case he would otherwise be entitled to know that case he has to meet. In general, however, the purpose of particulars for trial is not to elicit evidence or information which will emerge on cross-examination.'

[16] The *crux* of the Applicants' argument is contained in paragraph 27 of their Heads of Argument. Essentially, the Applicants submit that the Respondent cannot present a copy of a signed agreement and, in the absence thereof, there is no contractual relationship between the parties.

[17] This argument is extenuated by the failure of the Respondent to produce a copy of the official purchase order which the Applicants deem a critical component of the Respondent's cause of action. The Applicants therefore state that the claim is fatally flawed, and on this premise, it should be struck out.

[18] What the Applicants however fail to appreciate is that strict adherence to Rule 18(6), which was repeatedly referred to by counsel in her argument in court, is not a prerequisite for the Plaintiffs claim succeeding. A party can, after all, not be compelled to 'comply with the impossible'.

[19] Rogers J in ***Absa Bank v Zalvest Twenty (Pty) Ltd and another***² clarified the position as such:

'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

² 2014 (2) SA 119 (WCC)

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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 not required to annex a copy of the contract ...)'

[20] In the case of **Nedbank Limited v Yacoob**³ the full bench stated the following:

'[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. A rule of procedure such as Magistrate's 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 his right to adduce secondary evidence on the contract.'

[21] Reference was made during argument in court to the matter of **Transnet Limited v Newlyn Investments (Pty) Ltd**⁴ where the following was stated:

'[19] Furthermore, there was only one original addendum. The evidence (to which I shall refer presently) was that it was never in possession of the respondent after it had been signed on behalf of the appellant. If it had ever existed, the original remained in possession of the appellant. That being so, two rules of evidence come into play:

³ [2021] JOL 51073 (GJ)

⁴ 2011 (5) SA 543 (SCA)

(a) *It is well established that a party may adduce secondary evidence of a document in the possession of the opposite party if the latter has failed to produce it after having been given notice to do so. But notice is not required where the nature of the proceedings is such as to inform the opposite party, by necessary implication, that production of the document will be required: S v Miles.⁵ If ever there was such a case, this is it. If it be accepted that the original had been lost by the appellant then the second rule of evidence, which I shall now deal with, becomes applicable anyway.*

(b) *One secondary evidence is admissible, there are no degrees of secondary evidence ie the common law no longer requires that the best secondary evidence has to be produced. Phipson⁶ states the position as follows:*

The general rule is that there are no degrees in secondary evidence; and that a party is at liberty (subject to comment if more satisfactory proof is withheld) to adduce any admissible description he may choose. The reason assigned is the inconvenience of requiring evidence to be strictly marshalled according to weight; and of compelling a party, before tendering inferior evidence, to account for the absence of all which is of superior value, but the very existence of which he may have no means of ascertaining.'

[22] The principle has therefore been clearly enunciated: the absence of a signed agreement does not extinguish the Plaintiff's cause of action. Secondary evidence can be presented in this regard.

⁵ With reference to **S v Miles** 1978 (3) SA 407 (N) at 410 - 411

⁶ With reference to Hodge M Malek QC (ed) **Phipson on Evidence** 16 ed (2005) para 41 - 26

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[23] Can it therefore be said that the reply delivered by the Respondent to questions 5 and 7 are inadequate to the extent that it warrants a dismissal of the Respondent's claim?

[24] The Applicants made extensive reference to the matter of ***Regent Insurance Company Ltd v Flinkdink Transport and Another***⁷ in their Heads of Argument. In my view reliance on this matter is misplaced. First and foremost, this matter dealt with a situation where a respondent deliberately and contemptuously disobeyed the order to provide the further particulars. The Honourable Moosa AJ specifically noted that the defendants are 'wilfully refusing to answer' and have 'literally resorted to all and any measures available to it, to prevent the striking out application from proceedings as well as to avoid answering the plaintiffs request for further particulars.'

[25] This can be distinguished from the facts *in casu* in as far as the Respondent has provided an answer to the Applicants. The Respondent clearly submitted in reply that it is not, and never was, in possession of a signed copy of the agreement. The Respondent furthermore pleaded, by means of the reply to the request for further particulars, that oral evidence will be led as to the consensus between the parties having regard to their conduct.

[26] In my view, these particulars are sufficient to enable the Applicants to prepare for trial. It is not the duty of this court to determine if the evidence that will be led in due course, will be sufficient to succeed with the claim. This court must merely determine if the particulars requested is necessitated to enable the Applicants to prepare for trial.

[27] Even if I am incorrect in my submission that the answer is adequate for purposes of preparation for trial, the court in the matter of ***Regent Insurance Company Ltd supra*** enunciated that the striking out of an action is a drastic remedy. The power to grant such remedy is discretionary and the discretion must be exercised judicially.

⁷ 2015 JDR 2065 (GP)

[28] It is evident that the Applicants wishes to rely predominantly on the fact that the Respondent is unable to produce a signed document. It was presented to counsel during the hearing that the signature of the agreement is not a prerequisite for the legal enforceability thereof.

[29] Having regard to the agreement itself on which the Respondent's case is premised, it does not contain a suspensive condition that only upon signature thereof, a valid and binding agreement comes into operation.

[30] This court is also not aware of any legislation, similar to Section 2(1) of the **Alienation of Land Act**, Act 68 of 1981, which regulates the enforceability of the agreements with government institutions in the absence of same being signed by both parties. The legislation and policies pertaining to supply chain management after all only provides that the agreement must be in writing. This issue will however be canvassed by the trial court in due course.

[31] In *Khunou and Others v M Fihrer & Son (Pty) Ltd and Others*⁸ Slomowitz AJ said the following about civil procedure in general and the Rules of Court in particular:

'The proper function of a Court is to try disputes between litigants who have real grievances and so 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 inexpensive⁹ly 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 are clarified and tried in a just manner.'

⁸ 1982 (3) SA 353 (W) at 355 - 6

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[32] In my view the true issues between the parties will not be determined if the Respondent's case is dismissed purely on the premise of its inability to produce a signed copy of the conditions of contract. It is in the interest of justice to have the matter properly adjudicated before a trial court.

[33] The Applicants have therefore failed to make out a case for the relief prayed for in the Notice of motion.

[34] I see no reason why the cost order should not follow the outcome of the proceedings. The Respondent has prayed for the dismissal of the application with costs on a punitive scale. I am of the view that the conduct of the Applicants was not of such a reprehensible nature to warrant the granting of a cost order on a punitive basis.

Order

[35] In the result, the following order is made:

35.1. The application is dismissed with costs.

M BRESLER
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on : 7 December 2023

Judgment delivered on : 17 January 2024

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