REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 13434/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO THE JUDGES: NO
(3) REVISED: NO

[redacted]

DATE 15 November 2024 SIGNATURE

In the matter between:

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SA **APPLICANT**

and

MARDI BOERDERY (PTY) LTD **RESPONDENT**

JUDGMENT

MORGAN AJ

INTRODUCTION

[1] This matter comes before me as an opposed motion. The Land and Agricultural Development Bank of South Africa ("the applicant") seeks judgment in the amount of R16 139 663.42 together with interest, and an order declaring Portion 1 of the Farm Langebaan 89 specially executable by virtue of two mortgage bonds registered in its favour.

[2] The respondent, Mardi Boerdery (Pty) Ltd ("the respondent"), opposes the application. At the heart of the dispute lies the applicant's claim to have acquired the rights and obligations in question through cession agreements allegedly concluded with Obaro Financial Services (Pty) Ltd and Statusfin Financial Services (Pty) Ltd. However, despite repeated reliance on these cessions, the applicant has failed to annex the operative cession agreement(s) to its founding affidavit. That omission goes to the very root of the applicant's standing and its cause of action.

[3] The respondent further disputes the indebtedness itself, contending that the applicant has not proved the existence, enforceability, or quantum of the obligations it seeks to enforce. The papers reveal material disputes of fact which, applying the *Plascon-Evans* principle, cannot be resolved on affidavit.

[4] The application is accordingly beset by two fatal deficiencies: procedurally, the founding papers are inchoate and excipiable for want of compliance with Rule 18(6); substantively, the disputes of fact raised by the respondent preclude final relief. The cumulative effect of these defects is that the application cannot succeed.

THE PARTIES

[5] The applicant is the Land and Agricultural Development Bank of South Africa, a statutory institution established in terms of the Land and Agricultural Development Bank Act 15 of 2002. Its primary function is to promote and finance agriculture, and in the present matter it asserts standing as the creditor of the respondent by reason of alleged cessions of rights from third-party financial institutions.

[6] The respondent is Mardi Boerdery (Pty) Ltd, a private company duly incorporated in accordance with the laws of the Republic of South Africa. It is engaged in farming operations. The respondent is the registered owner of Portion 1 of the Farm Langebaan 89, which stands hypothecated under two mortgage bonds registered in favour of the applicant.

[7] The relationship between the parties is not a direct one in the sense of privity of contract. Rather, the applicant's standing is premised on the assertion that

it acquired rights through cessions executed by Obaro Financial Services (Pty) Ltd and Statusfin Financial Services (Pty) Ltd. It is this alleged chain of title that forms the fulcrum of the dispute.

THE MATERIAL FACTS

[8] The applicant's claim is founded on an alleged indebtedness said to have arisen from loan facilities originally advanced to the respondent by Obaro Financial Services (Pty) Ltd and Statusfin Financial Services (Pty) Ltd. According to the applicant, those entities ceded their rights, title and interest under the facilities to the applicant, thereby rendering it the lawful creditor of the respondent.

[9] As security for the alleged indebtedness, the respondent had registered two mortgage bonds in favour of the applicant over Portion 1 of the Farm Langebaan 89. It is on the strength of those bonds, read with the alleged cessions, that the applicant seeks judgment for the sum of R16 139 663.42 and an order declaring the immovable property specially executable.

[10] The respondent disputes the claim. It denies that the applicant has established locus standi, noting that the founding affidavit contains repeated references to cession agreements but fails to annex the agreements themselves. The

respondent argues that without those documents, the applicant cannot demonstrate that the rights sued upon were validly transferred to it.

[11] Beyond locus standi, the respondent also contests the alleged indebtedness. It questions whether the amounts claimed remain due, disputes the quantum advanced, and challenges the evidential sufficiency of the applicant's papers. It further points to the fact that the disputes raised are not peripheral but material, and thus incapable of resolution on affidavit.

[12] The respondent filed a Rule 41A notice proposing mediation. That avenue was not pursued, and the matter was argued on the opposed motion roll. The applicant pressed its claim but remained without the operative cession instruments.

ISSUES

[13] The application presents three principal issues for determination:

a. The first issue is whether the applicant has established that it is the lawful creditor of the respondent. This turns on whether the alleged cession agreements were properly placed before the Court. The omission to annex those agreements raises the question whether the applicant's founding papers are fatally defective under Rule 18(6) of the Uniform Rules of Court.

b. The second issue is whether the applicant's founding papers are inchoate and excipiable. The complaint is that the application lacks the very operative instruments on which the claim is premised and that the evidential foundation is inadequate. The Court must decide whether, notwithstanding the absence of a formal exception, the defects are such as to justify dismissal.

c. The third issue is whether the disputes raised by the respondent, as to the existence, enforceability, and quantum of the alleged indebtedness, are material disputes of fact incapable of resolution on affidavit. If such disputes exist, the *Plascon-Evans* principle dictates that the matter cannot be resolved by way of motion proceedings.

[14] These issues go both to the form and the substance of the applicant's case. The resolution of any one of them adversely to the applicant is sufficient to defeat the application; cumulatively, they demonstrate that the relief sought cannot be granted.

THE PARTIES' SUBMISSIONS

[15] The applicant submits that it has established its entitlement to the relief sought. It contends that the loan indebtedness arose under the facilities concluded with the respondent and that those obligations were ceded to it by Obaro

Financial Services (Pty) Ltd and Statusfin Financial Services (Pty) Ltd. It relies on the mortgage bonds registered in its favour as incontrovertible proof of its security and argues that the respondent has defaulted in repayment. In the applicant's view, the absence of a formally annexed cession agreement is not fatal because the mortgage bonds and the filing notices serve as sufficient evidence of its rights. It further submits that the respondent has raised no *bona fide* dispute of fact that would warrant the dismissal of the application.

[16] The respondent counters that the application is fatally defective. It stresses that the applicant's standing depends entirely on the cession agreement(s), yet none are attached to the founding affidavit. Without those instruments, the applicant cannot prove that the personal rights it seeks to enforce were ever validly transferred to it. The respondent further argues that the applicant's reliance on mortgage bonds and filing notices cannot cure the omission, because those documents are collateral to, and not a substitute for, the operative cession. It also disputes the alleged indebtedness, both as to existence and quantum, and argues that the hearsay evidence in the applicant's founding papers is insufficient to sustain judgment. Finally, the respondent submits that given the volume of disputes, including whether the applicant lawfully holds the rights it asserts, the application falls to be dismissed with costs

ANALYSIS

[17] The starting point is that a litigant must establish locus standi by placing before the Court the instruments that confer the right it seeks to enforce. The applicant's case rests on alleged cessions of rights by Obaro Financial Services (Pty) Ltd and Statusfin Financial Services (Pty) Ltd. Yet, despite repeated references to such cessions, the applicant has not annexed a copy of any operative cession agreement to its founding affidavit.

[18] That omission is not a mere technicality. The very foundation of the applicant's claim (that it acquired the respondent's indebtedness) is left unproven. The Court cannot assume the existence or terms of a cession; they must be established by the documents themselves. A mortgage bond, while evidencing security over immovable property, does not in itself prove the transfer of the underlying personal right to claim repayment. Similarly, filing notices and ancillary paperwork do not demonstrate that the debt was effectively ceded.

[19] The applicant argued that these collateral documents suffice. That submission cannot be accepted. Our courts have consistently held that where a cause of action depends on a written instrument, it must be annexed to the founding affidavit. The failure to do so is fatal unless cogent reasons are advanced for its absence, which is not the case here. Without the cession agreement(s), the applicant has not demonstrated that it is the lawful creditor of the respondent.

[20] Even if one were to look beyond the standing point, the disputes of fact raised by the respondent (as to the existence, enforceability, and quantum of the alleged indebtedness) are material and incapable of resolution on affidavit. The applicant's case therefore suffers from two compounding defects: the absence of the essential cession agreement(s) and the presence of genuine disputes of fact.

Rule 18(6) of the Uniform Rules – No Cession Agreement

[21] Rule 18(6) of the Uniform Rules of Court provides:

> "A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, 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.

[22] In the present case, the applicant's standing rests entirely upon alleged cessions of rights from Obaro Financial Services (Pty) Ltd and Statusfin Financial Services (Pty) Ltd. Yet, despite this being the fulcrum of its cause of action, the applicant failed to annex the cession agreements to its founding affidavit. Instead, it pleaded that such agreements were "too voluminous" to attach and elected to rely only on endorsements of mortgage bonds filed at the Deeds Office. These endorsements, while capable of recording the substitution of a bondholder, do not disclose the underlying contractual terms nor establish the transfer of personal rights said to be enforceable.

[23] Without the cession agreements, the Court cannot be satisfied that a valid transfer of rights occurred, on what terms, and whether the applicant truly acquired the locus standi it asserts. To attempt to cure this omission in reply, after the respondent squarely raised the issue in limine, is impermissible. It is trite that an applicant must stand or fall by the case made out in its founding affidavit, and that fatal defects cannot be remedied in reply.

[24] The failure to annex and plead the written cession agreements thus renders the applicant's founding papers excipiable and inchoate. On this ground alone, the application is fatally defective and falls to be dismissed.

[25] Courts have repeatedly stressed that failure to annex a written agreement when reliance is placed upon it is a material omission. In *Moosa and others NNO v Hassam and others NNO*[1], the Court confirmed that the requirement to annex the contract is peremptory, and a failure to comply renders the pleading (or affidavit) excipiable.[2]

[26] Applied here, the applicant's reliance on cessions without annexing the cession agreements contravenes the requirements of Rule 18(6). The defect is not cured by pointing to mortgage bonds or filing notices, which are separate

[1] 2010 (2) SA 410 (KZP) at para 18.
[2] See also, *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and another* 2014 (2) SA 119 (WCC).

instruments. The cession agreement is the operative document conferring the right of action. Its absence is therefore fatal.

[27] This conclusion is fortified by the principle that an applicant must stand or fall by its founding papers. The applicant cannot reply or in oral argument supply what is absent from its founding case.

Hearsay evidence

[28] The respondent's second preliminary objection concerns the evidentiary basis of the applicant's case. The founding affidavit was deposed to by the applicant's legal adviser, who was neither a party to the loan agreement nor involved in the alleged cession transactions. The deponent candidly relies on documents said to be in the applicant's possession, without establishing personal knowledge of the facts underlying them.

[29] It is a fundamental principle of motion proceedings that the affidavit constitutes both the pleading and the evidence. See the recent decision of *Millu v City of Johannesburg Metropolitan Municipality and Another*.[3] The deponent is required to swear positively to the facts. Where the deponent has no personal knowledge, and merely transmits information gleaned from records or third parties, the evidence is hearsay unless an exception applies. Section 3 of the

[3] [2024] ZAGPJHC 419 at para 28.

Law of Evidence Amendment Act[4] makes it clear that hearsay evidence is inadmissible unless, *inter alia*, the Court, in the interests of justice, admits it.

[30] In this matter, the deponent does not establish that she is the custodian of the records, nor that she verified their accuracy. She does not attest to any involvement in the negotiation or conclusion of the loan agreement or cessions. In the absence of such foundation, the entire affidavit, together with its annexures, is reduced to hearsay.

[31] The applicant's attempt to argue that a corporate entity may rely on any authorised officer is misplaced. While the authorities do permit a corporate official to rely on company records, the essential requirement remains that the deponent must be able to swear positively to the truth of the facts alleged. A blanket reliance on annexed documents, without evidentiary grounding, does not meet this threshold.

[32] The defect is not trivial. The very existence of the debt, the validity of the cession, and the calculation of the quantum are all matters introduced by a deponent without personal knowledge. This strikes at the heart of the applicant's case, leaving it built upon inadmissible hearsay evidence.

[33] It would not be in the interests of justice to admit this hearsay evidence.

[4] No 45 of 1988, as amended.

Material disputes of fact

[34] The respondent's third point in limine is that this matter bristles with disputes of fact which cannot be resolved on the papers. It is trite that application proceedings are appropriate only where the facts are common cause or not seriously disputed, and that where genuine, material conflicts exist, the matter should proceed by way of trial. The leading authority remains *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[5], which holds that a final order may be granted only if the facts averred by the applicant, which are admitted by the respondent, together with the respondent's version of the disputed facts, justify such an order.

[35] In the present case, the disputes are not peripheral. They strike at the heart of the applicant's cause of action:

a. The cession agreements: The respondent denies the validity and enforceability of the alleged cessions. In the absence of the actual agreements, their terms, scope, and effect remain in contest. Whether the applicant has standing is a substantive dispute that cannot be resolved by reference to bond endorsements alone.

[5] 1984 (3) SA 623 (A).

b. The quantum of indebtedness: The applicant claims R16 139 663.42, supported by a certificate of balance. The respondent disputes this figure, alleging that the computation includes irregular charges, applies incorrect interest rates, and ignores payments actually made. These allegations raise factual issues requiring proper ventilation by evidence and cross-examination.

c. Compliance with Rule 46A: The applicant maintains that the Rule is inapplicable as the property is agricultural land. The respondent contends that compliance remains necessary. The factual use and characterisation of the property, as well as the procedural safeguards for execution, are contested issues.

[36] These disputes were reasonably foreseeable at the time of launching the application. They cannot be dismissed as contrived or insubstantial. Instead, they demonstrate that motion proceedings were ill-suited, and that the matter should have been pursued by way of action.

[37] The result is that the applicant has failed to discharge its onus within the confines of affidavit evidence. The disputes of fact compel the dismissal of the application.

COSTS

[38] The general principle is that costs follow the result, unless there are special circumstances warranting a departure. The applicant sought relief in the amount of over sixteen million rand, together with an order of special executability against the respondent's farm, a drastic remedy. Yet, its founding papers were fundamentally defective: it failed to annex the very cession agreements upon which its standing depends; it relied extensively on hearsay evidence; and it elected to proceed by way of application despite the existence of manifest disputes of fact.

[39] These shortcomings placed the respondent to unnecessary expense in opposing proceedings that were ill-conceived from the outset. In such circumstances, an adverse costs order against the applicant is both just and equitable.

[40] There is no basis to award costs on the punitive scale sought by the applicant. Rather, fairness dictates that the applicant, having failed in its application, should bear the costs of opposition on Scale B.

CONCLUSION

[41] The applicant has failed to make out a proper case for the relief it seeks. Its founding affidavit is inchoate and excipiable for want of compliance with Rule

18(6); it is permeated with hearsay evidence tendered by a deponent without personal knowledge; and it seeks to resolve substantial disputes of fact on affidavit when such disputes were both foreseeable and material.

[42] I cannot, on the defective papers, grant judgment for more than R16 million or declare the respondent's immovable property executable. The applicant must stand or fall by its founding papers, and here it has fallen short.

[43] Thus, I make the following order:

1. The application is dismissed with costs on party and party scale B.

[redacted]

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M MORGAN

Acting Judge of the High Court of South Africa,

Limpopo Division, Polokwane

Date of Hearing: 24 August 2024

Delivered: 15 November 2024