REPORTABLE

CASE NO: SA 27/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SAM NAMENE **Appellant**

and

KHOMAS REGIONAL COUNCIL **Respondent**

Coram: SMUTS JA, HOFF JA and CHOMBA AJA
Heard: **17 June 2016**
Delivered: **17 June 2016**

APPEAL JUDGMENT

SMUTS JA (HOFF JA and CHOMBA AJA concurring):

Introduction

[1] The appellant, as defendant in an eviction action, sought to rely upon a lease agreement in support of a defence in his plea and in support of a counterclaim for improvements. The plaintiff (respondent in this appeal) excepted to both the plea and counterclaim on the grounds that the lease agreement was not attached to those pleadings as required by the erstwhile Rule 18(6) of the High Court Rules. The High Court upheld the exception to the counterclaim and struck it

out with costs. The defendant appeals against that ruling. For the sake of clarity, the parties are referred to as plaintiff and defendant in this judgment.

The pleadings

[2] The particulars of claim allege that the plaintiff is owner of certain erven in Katutura, Windhoek (the property). It is also alleged that the defendant is in unlawful occupation of the property and had 'hijacked' the plaintiff's brick making project for women and had appropriated for himself building materials meant for that project. The particulars also allege that the defendant had illegally erected structures on the property and sought the defendant's eviction from the property and the removal of those structures.

[3] In his plea, the defendant denied being in unlawful occupation of the property. He pleaded that, as a member of the brick making project, he had entered into a lease agreement with the plaintiff, represented by a Ms Mberirua in May 2004. The defendant further pleaded that a copy of the agreement was kept by a certain Mr Kustaa as co-ordinator of the project. The rental amount under the lease is also pleaded.

[4] The defendant's plea further alleges that the original lease was kept by the plaintiff and a copy was provided to the City of Windhoek. It is also pleaded that the defendant unsuccessfully attempted to obtain a copy of the lease from Mr Kustaa in 2007. He refused to provide it. The defendant also pleads that in June 2007 he approached the plaintiff's offices and sought a copy of the agreement

from Ms Mberirua who informed him that the agreement was lost and could not be traced. The City of Windhoek, according to the plea, also could not locate the copy provided to it.

[5] The defendant also pleads that the plaintiff was aware that he was in occupation of the property as lessee and that the lease had not been terminated.

[6] The defendant denied the claim of ‘hijacking’ the project and of erecting illegal structures on the property.

[7] The defendant also filed a counterclaim. In it, he alleged that he had erected a building on the property with the consent of the plaintiff and that the reasonable cost of the improvements was N$570 000. He said that the cost to remove and relocate the machinery and equipment on the property amounts to N$200 000. He claimed these costs in the event of it being found that his occupation was unlawful.

[8] The plaintiff excepted to both the plea and counterclaim on the grounds that the plea and counterclaim fell foul of Rule 18(6) of the then rules of the High Court because the defendant had not attached a copy of the lease agreement.

[9] The exceptions contended that the plea and counterclaim as a consequence lacked the necessary averments to sustain a defence and counterclaim respectively.

Approach of the High Court

[10] Even though the defendant had excepted to the plea and counterclaim on the same basis, the High Court proceeded to uphold the exception to the counterclaim and did not deal with the exception to the plea. The court found that the wording in Rule 18(6) is peremptory. The High Court cited *Moosa and others NNO v Hassan and others NNO* 2010 (2) SA 410 (KZP) where it was held that a party basing its cause of action upon a written agreement should obtain a true copy of the agreement before advancing its claim so as to comply with Rule 18(6). The High Court concluded that the defendant's counterclaim, being based on a lease agreement he could not produce, meant that the counterclaim could not sustain a claim. The court upheld the exception with costs and struck the defendant's counterclaim. The court did not deal with the exception to the plea.

Principles governing the determination of exceptions

[11] The exceptions taken in this matter were solely on the grounds that no cause of action or defence was sustainable on the plea and counterclaim (and not on the grounds that those pleadings were vague and embarrassing as was incorrectly stated by the High Court).

[12] The principles governing the determination of an exception of this nature were recently restated by this court in *Van Straten NO and another v Namibia Financial Institutions Supervisory Authority and another* Case SA 19/2014, unreported, 8 June 2016 to this effect:

> '[18] Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct. In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.'[1]

The exceptions based on Rule 18(6)

[13] Rule 18(6) of the erstwhile rules of the High Court provides:

> 'A party who in his or her 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 that pleading shall be annexed to the pleading.'

[14] The effect of the approach of the High Court is that this rule is peremptory and that if a contract could not be located for whatever reason (or was for that matter destroyed) and a party does not comply with this rule, a claim or defence based upon that contract is unsustainable as a matter of law as a consequence.

[15] On the approach summarised above, a court at exception stage accepts the facts stated in the pleadings excepted to as correct (and capable of proof). These factual allegations include a reliance on the lease agreement for the admitted occupation of the property. The further facts contended for and relevant to the exception are that the lease agreement had been entered into with the plaintiff in

[1] *Van Straten* at para 18.

May 2004 at Windhoek. The person representing the plaintiff is stated as well as the fact that the original agreement had been retained by the plaintiff, a copy provided to the City of Windhoek and a copy kept by Mr Kustaa. It is also stated that neither the defendant nor the City of Windhoek could locate their copies whilst Mr Kustaa refused to provide his. The monthly rental sum was also stated.

[16] The defendant's defence is that his occupation of the property is by consent in the form of a lease agreement. The defendant's counterclaim for improvements is with reference to a structure being erected during the tenure of the lease with the lessor's consent.

[17] The counterclaim is however conditional upon his occupation being found to be unlawful. It is based upon enrichment and is not necessarily dependent upon a valid lease as a claim for a *bona fide* occupier may also arise. But the counterclaim did refer to the lease and contended that the structure was erected with the consent of the lessor.

[18] The approach of the High Court is however incorrect. The elements of a cause of action or defence are determined by the substantive law and not with reference to the rules which set out procedural requirements. Occupying property with consent in the form of a lease agreement is a defence to a claim for eviction as a matter of substantive law. Where it is impossible for a party relying upon an agreement to produce the original written agreement or copy, the rules of evidence permit that party to prove its execution and terms by other evidence.

[19] This matter was furthermore and in any event still at the stage of pleadings. Discovery could result in the agreement coming to light. So too, could a copy be forthcoming as a result of a subpoena *duces tecum* upon Mr Kustaa.

[20] Furthermore, the cause of action in the counterclaim would in any event not be dependent upon proving the existence of the lease agreement as it is founded upon enrichment which is not confined to a lessee but would also be available to a *bona fide* occupier.[2]

[21] An exception similar to that taken in this matter was roundly rejected by a full court in *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and another* 2014 (2) SA 119 (WCC). The court's well-reasoned approach is captured in these paragraphs:

> '[9] The rules of court exist in order to ensure fair play and good order in the conduct of litigation. The rules do not lay down the substantive legal requirements for a cause of action, nor in general are they concerned with the substantive law of evidence. The substantive law is to be found elsewhere, mainly in legislation and the common law. There is no rule of substantive law to the effect that a party to a written contract is precluded from enforcing it merely because the contract has been destroyed or lost. Even where a contract is required by law to be in writing (eg a contract for the sale of land or a suretyship), what the substantive law requires is that a written contract in accordance with the prescribed formalities should have been executed; the law does not say that the contract ceases to be of effect if it is destroyed or lost.

[2] Visser *Unjustified Enrichment* (2008) at p 610 – 613 and the authorities collected there.

[10] In regard to the substantive law of evidence, 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 adduced. But there are exceptions to this rule, one of which is where the original has been destroyed or cannot be found despite a diligent search.

[11] That then is the substantive law. The rules of court exist to facilitate the ventilation of disputes arising from substantive law. The rules of court may only regulate matters of procedure; they cannot make or alter substantive law (*United Reflective Converters (Pty) Ltd v Levine 1988* (4) SA 460 (W) at 463B – E and authority there cited). The court is, moreover, not a slave to the rules of court. As has often been said, the rules exist for the courts, not the courts for the rules (see *Standard Bank of South Africa Ltd v Dawood* 2012 (6) SA 151 (WCC) para 12) . . . .

[12] 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 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 — see, for example, *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C) at 194B–H; *South African Railways and Harbours v Deal Enterprises* (Pty) Ltd 1975 (3) SA 944 (W) at 950D–H.)'

[22] In that matter the court correctly found that a reliance upon *Moosa* was not apposite. In *Moosa* an application to set aside a pleading as an irregular step in conflict with the rules was brought. The approach of the court in *Moosa* should be seen within that confined and limited context of non-compliance with Rule 18(6) as

an irregular step. The observations of the court in *Moosa* find no application in an exception of this kind. The approach of the court in *Absa* is eminently sound and also reflects the position in Namibia, particularly after the introduction of judicial case management which was already applicable at the time the exception was taken under Rule 39 of the erstwhile rules. The overriding objective of judicial case management is after all to facilitate the resolution of the real issues in dispute justly and speedily and as cost efficiently as possible.[3]

[23] The plaintiff's exceptions were bad and should have been dismissed. Shortly before the hearing, the Government Attorney correctly conceded the appeal in a letter dated 30 May 2016 and tendered the defendant's costs of appeal and asked that the costs in the court *a quo* should be costs in the cause. As the exceptions were taken and argued, those costs should be awarded to the defendant as the exceptions were bad. The order of this court reflects that.

Order

[24] It follows that the appeal is upheld and the following order is made:

1. The appeal is upheld with costs.

2. The respondent is to pay the appellants' costs of appeal on an opposed basis until 30 May 2016 and thereafter on an unopposed basis.

[3] Although this is stated in rule 1(3) of the subsequently enacted Rules of the High Court which came into effect after the judgment of the court below, this fundamental purpose also applied to case management applicable at that time. See *Aussenkehr Farming (Pty) Ltd v Namibia Development Corporation Ltd* 2012 (2) NR 671 (SC) paras 86 – 89.

3. The order of the High Court is set aside and replaced with the following order:

   'The exceptions are dismissed with costs.'

4. The matter is referred back to the High Court for further case management.

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SMUTS JA

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HOFF JA

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CHOMBA AJA

APPEARANCES

APPELLANT:	N Marcus Instructed by Nixon Marcus Public Law Office
RESPONDENT:	M Ndlovu Instructed by the Government Attorney