REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.12256/08

IMRAAN CASSIM RASHID MOOSA N O
TRUSTEE OF THE DASSIM RASHID MOOSA
FAMILY TRUST & 33 others FIRST APPLICANT

and

NADIM HASSAM N O
TRUSTEE OF THE MOHAMED ZUKEIRIA
HASSAM FAMILY TRUST & 8 others FIRST RESPONDENT

JUDGMENT Delivered on 20 November 2009

SWAIN J

[1] What is before me is an application brought in terms of Rule 30 of the Uniform Rules of Court, by the first to the thirty-first applicants, who are cited as defendants (bearing the same numbering) in an action, instituted by the first to the ninth

respondents as plaintiffs (likewise bearing the same numbering), in the said action.

[2] In the action the first to ninth respondents (hereafter referred to as the respondents) alleged in their particulars of claim that a written agreement was concluded between the respondents, representing certain named trusts, and the first to the thirty-first applicants (hereafter referred to as the applicants) representing certain named trusts, in terms of which certain shares in Epic Foods were sold "on certain terms and conditions". It was alleged that the agreement would be referred to as the "Epic Agreement".

[3] The following allegation was then made in paragraph 48 of the particulars of claim:

"The plaintiffs are not in possession of a signed copy of the Epic Agreement, which to the best of the plaintiffs' knowledge, is in the possession of the thirty -fourth defendant"

[4] No relief is sought against the thirty-fourth defendant, it being alleged that he is "joined herein as he has an interest in the relief sought by the plaintiffs against the first to the thirty-first defendants".

[5] The particulars of claim contain a number of detailed allegations of what the respondents allege are terms of the written agreement.

[6] As a consequence of the respondents' failure to comply with the provisions of Rule 18 (6) and annex a copy of the written agreement relied upon, the applicants served notice upon respondents, in terms of Rule 30 (2) (b), complaining of this failure. Certain other complaints were addressed in the notice, but the only issue argued before me, was the failure of the respondent to annex the written agreement relied upon.

[7] The response of the respondents' attorney to the notice was to state that "….there is no basis in law for the contentions contained in your notice in terms of Rule 30 (2) (a). The plaintiffs accordingly do not intend amending the particulars of claim."

[8] In the result, the present application is before me, in which the applicants seek an order setting aside the respondents' particulars of claim, as an irregular proceeding in terms of Rule 30. In the alternative, an order is sought directing the respondents to remedy the irregularity in their particulars of claim, by annexing the written contract within fifteen days of the service of any order upon the respondents' attorney of record.

[9] In resisting the application on behalf of the respondents, Mr. Coetsee, S.C., submitted that the issue for decision by this Court, is whether a party who relies upon a written contract in its pleading, and pleads that it is not in possession of a true copy of the signed contract, and is therefore unable to comply with Rule 18 (6), is

obliged in terms of the Rule to allege that it has taken steps to obtain such a copy, but was unable to do so; or to annex an incomplete, or an unsigned draft thereof, to its particulars of claim.

[10] In support of his assertion that it is sufficient for a party to simply allege that it is not in possession of a true copy of the signed contract at the time when action is instituted, he relied upon the following decisions:

Vorster v Herselman
1982 (4) SA 857 (O)

and

Sasol Industries v Electrical Repair Engineering
1992 (4) SA 466 (W)

[11] Both of these cases are distinguishable however, as they both concerned oral agreements and a failure to plead the particularity demanded in that regard, by the provisions of Rule 18 (6).

[12] Mr. Coetsee, S.C. nevertheless submitted that in Vorster's case it was decided that the pleader is obliged "if possible" to state the exact date upon which, and place where, the oral contract was concluded. In such a case, the plaintiff could formerly be compelled, by way of a request for further particulars, in terms of the

former Rule 21 (1) to compel the plaintiff, either to furnish the particulars, or to declare unequivocally that he is unable to furnish such.

[13] In the Sasol Industries' case, it was held that if a pleading does not comply with the sub-rules of Rule 18, requiring specified particulars to be set out therein, the prejudice required for the setting aside of the pleading in terms of Rule 30 has *prima facie* been established. It was held that cases may arise, where a defendant would not be prejudiced by the plaintiff's failure to comply with the sub-rule, or where the plaintiff would be excused from providing the prescribed particularity, because he is unable to do so.

[14] As I understood the argument of Mr. Coetsee, S.C., it was that these cases are authority for the proposition, that if a party who relies upon a written agreement is unable to attach a copy therof to its pleadings, because it is not in possession of a true copy of the signed agreement, it is sufficient to allege such lack of possession, to excuse non–compliance with the provisions of Rule 18 (6).

[15] The cases quoted are no authority for this proposition. That an inability to furnish the particulars required in terms of Rule 18 (6), may in a particular case be excused, does not mean that an inability to annex a written agreement relied upon, may similarly be excused, without more.

[16] The need to annex a true copy of the written agreement relied upon is obvious. In this manner the defendant is afforded full particulars of the written agreement, which the plaintiff relies upon for its cause of action. If, however the plaintiff relies on only a portion of the written agreement in the pleading, only that portion need be annexed to the pleading, in terms of Rule (18) (6). As stated by Centlivres C J in the case of

Stern N O v Standard Trading Company (Pty) Ltd.
1955 (3) SA 423 (A) at 429 H

"When a plaintiff bases his cause of action on a document and annexes to his declaration only part of the document, the defendant is entitled to assume that the plaintiff will rely only on that portion. The defendant is under no obligation to call for a copy of the whole document."

[17] This I consider to be the crux of the present enquiry. Rule 18 (6) speaks of a party who in his pleading "relies" on a contract or "part" thereof. A party clearly "relies upon a contract" when he uses it as a "link in the chain of his cause of action".

S A Railways & Harbours v Deal Enterprises (Pty) Ltd.
1975 (3) SA 944 (W) at 953 A

and

Van Tonder v Western Credit Ltd.
1966 (1) SA 189 (T) at 193 H

Although both of these cases were decided at a time when Rule 18 (6) made no provision for a true copy of the written agreements to be annexed to the pleading, the views of the learned Judges as to the meaning to be attached to the phrase in question, are still relevant and instructive.

[18] In the present case, the respondents base their cause of action against the applicants, upon the written agreement. The written agreement is a vital link in the chain of the respondents' cause of action against the applicants. In order for the respondents' cause of action to be properly pleaded, it is necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absence of the written agreement, the basis of the respondents' cause of action does not appear *ex facie* the pleadings.

[19] An allegation that a party is not in possession of the written agreement relied upon, constitutes an acknowledgment that the basis for the cause of action advanced is lacking, or that a link in the chain of the cause of action advanced is missing. Consequently, such an allegation as made in the present case, does not constitute compliance with the requirements of Rule 18 (6), nor excuse their non-compliance. In addition an allegation that the party has taken steps to obtain a copy, without success, or to annex an incomplete, or unsigned draft thereof, would not for the same reason, constitute compliance with the demands of Rule 18 (6), nor excuse their non-compliance.

[20] It is therefore clear that a party who bases its cause of action upon a written agreement, should obtain a true copy of the agreement before advancing its claim. However, this is not to say that a failure to annex a written agreement relied upon, may never be condoned in terms of Rule 27 (3).

[21] Good cause would have to be shown why the party concerned is unable, at that stage, to annex a copy of the written agreement relied upon. Relevant considerations would be the steps taken to obtain a copy of the written agreement and the prospects of the written agreement being obtained in the future. That a true copy will be available before the issues arising therefrom have to be determined, will be of particular importance in this regard. In addition, any prejudice to the opposing party, caused by the failure to annex the agreement to the pleading, would have to be considered. Of significance in this regard, would be whether the pleading concisely and clearly sets out the terms relied upon in the written agreement upon which the cause of action is based, and is not excipiable. The above factors are not exhaustive and each case will have to be decided upon its individual merits.

[22] In the present case the respondents allege in the particulars of claim "The Epic Agreement which to the best of the plaintiffs' knowledge, is in possession of the thirty-fourth defendant". No allegation is made by the respondents in their answering affidavit in the application, that they have requested a copy of the agreement from the thirty-fourth defendant. All that is alleged is that the respondents are not in

possession of a true copy of the written agreement, or any part thereof. In the applicants' replying affidavit it is alleged that on or about 13 May 2009, the third plaintiff (third respondent) was provided with a copy of the agreement by the thirty-fourth defendant. In support of this assertion, a copy of a fax from the thirty-fourth defendant to the third plaintiff is annexed. The respondents were invited to file a supplementary affidavit if they denied receiving the agreement in the circumstances. No supplementary affidavit has been filed by the respondents.

[23] The respondents did not seek condonation for their failure to annex a true copy of the written agreement and were content to rely on the argument dealt with above. In addition, no facts were set out by the respondents to explain their inability to annex a true copy of the written agreement.

[24] I am accordingly satisfied that the respondent should be directed to comply with the requirements of Rule 18 (6), by annexing a true copy of the written agreement.

[25] The order I make is the following:

1. The first to ninth respondents are directed to remedy the irregularity in their particulars of claim, being the failure to annex the written contract on which they rely, or a true copy

thereof, within fifteen days of service of this order on their attorney of record.

2. The first to ninth respondents are ordered to pay the costs of this application, jointly and severally, the one paying the others to be absolved.

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SWAIN J.

Appearances: /

Appearances:

For the Applicant	:	Mr. P. T. Rood
Instructed by	:	Dasoo Attorneys C/o Tatham Wilkes Inc Pietermaritzburg
For the Respondent	:	Mr. P. Coetsee, S.C.
Instructed by	:	Christo Jacobs Inc. C/o Brown Brodie & Fourie Pietermaritzburg
Date of Hearing	:	16 November 2009
Date of Filing of Judgment	:	20 November 2009