Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No 1143/2017

ABSA BANK LIMITED Plaintiff

and

METROPOLIS CONSTRUCTION &
SITE MANAGING CONSULTANTS CC First Defendant
(Registration Number 1990/057944/23)

JUNAID SLAMANG Second Defendant
(Identify Number […])

JUDGMENT DELIVERED ON 23 MAY 2017

KUSEVITSKY AJ:

[1] This is an opposed application for summary judgment. Plaintiff instituted action against Defendants by way of simple summons for payment of the amount of R609 180.69 together with interest thereon at the rate of 13.75% per annum, calculated and capitalized monthly to date of payment, being in respect of money lent and advanced by Plaintiff to the principal debtor at the latter's special instance and request.

[2] It is common cause that the parties concluded a banking facility agreement ("the facility"), which agreement was annexed to the summons as annexure "A" and that monies were advanced to the First Defendant in terms of the facility. The amount claimed as well as the applicable rate has been established by means of a certificate of balance reflecting these details and annexed to the summons as annexure "B". On the 18 August 2015, the Second Defendant signed a Deed of suretyship guaranteeing the First Defendant's obligations to the Plaintiff bank. The Suretyship agreement was similarly annexed to the summons as annexure "C".

[3] On the 23 February 2017, the Defendants entered an appearance to defend and upon the expiry of the dies, the Plaintiff applied for summary judgement for hearing on the 28 March 2017. On that day, the application for summary judgment was postponed to 20 April 2017 in order for the Defendants to deliver their opposing affidavit by no later than 17 April 2017. This they failed to do. On the 20 April 2017, and in the absence of the Defendants' opposing affidavit, Plaintiff afforded the Defendants another opportunity to file its opposing affidavit and condonation application. The matter was thereafter postponed to 9 May 2017 and Defendants were ordered to pay the wasted costs occasioned by that postponement on an attorney and client scale.

[4] The Defendants eventually filed its opposing affidavit and in it's defence, raised only technical defences. They did not disclose any defence to the merits. According to Plaintiff, the Defendants did not dispute the conclusion of the facility, nor that monies were lent and advanced in terms of the facility or that First Defendant had defaulted in its obligations. Neither the suretyship agreement binding the Second Defendant was disputed. In its opposing affidavit, the Defendants state that in terms

of the Banking Facility schedule, it obliges the Plaintiff to send a written notice to the Defendants to remedy an event of default within 2 business days and give further written demand of the default before exercising its rights pursuant thereto.

[5] As support for this, they rely upon Clause 10 of the agreement. Clause 10.1.1 of the facility provides that an event of default will occur if the borrower fails to make any payment to the bank on the due date thereof. In terms of clause 10.2 thereof, if the Borrower fails to remedy such an event of default (where capable of remedy) within 2 (two) business days of having been given notice by the Bank calling upon the Borrower to do so, or if the event is not capable of remedy and the Bank gives notice that such event has occurred and the Bank is exercising its rights pursuant thereto, then:

> "10.2.1 all the Borrowers indebtedness to the Bank (actual or contingent) will be due and payable immediately irrespective of any terms or conditions otherwise applicable to such indebtedness…" and
>
> 10.2.2 the Bank will be entitled to demand that the Borrower immediately pay…"

[6] According to the Defendants, Plaintiff's claim, more specifically paragraphs 1.2 and 3.1 thereof, lack averments which are necessary to sustain a cause of action and are thus excipiable, alternatively that there are insufficient material facts that would enable it to plead thereto, thus rendering the summons and particulars vague and embarrassing. Defendants relied on the decision of **Jagger & Co. Ltd v Mohamed** 1956 (2) SA 736 (C) for their contention that they need only base their opposition on the excipiability of the Plaintiff's claim as formulated and that in any event, as in the defence put forward there, that no cause of action was disclosed. In

that matter the Plaintiff had applied for summary judgment and the defendant's defence was that he had timeously taken an exception to a declaration filed and it appeared that there was substance in the exception that went to the root of the action when the plaintiff, in claiming payment of the price of the goods which he had sold to defendant, failed to allege that he had delivered them.

[7] Defendants also allege that the failure by Plaintiff to attach any written notice advising it to remedy an event of default, as well as its failure to attach any letter of demand for payment to its pleadings, is a contractual breach thus rendering the summons and particulars of claim vague and embarrassing.

[8] The first point to consider is whether paragraphs 1.2 and 3.1 of the summons lacks averments which are necessary to sustain a cause of action. The relevant clauses of the summons which is the subject of the attack are as follows: Paragraphs 1.2 and 3.1 states the following:

> "1.2 The principal debtor is in default of its obligations to the plaintiff and has failed to remedy the event of default after having been notified by the plaintiff calling upon the principal debtor to do so. The plaintiff is now exercising its rights pursuant thereto and the principal debtor's indebtedness to the plaintiff (actual or contingent) is now owing, due and payable, irrespective of any other terms and conditions otherwise applicable to the indebtedness."

> "3.1 The default is substantial and the debt is not negligible and long outstanding and was despite demand, not paid."

[9] As to the aforementioned allegations, the Plaintiff contends that in paragraph 1.2 of the summons, it makes the following allegations:

> "The principal debtor is in default of its obligations to the plaintiff and has failed to remedy the event of default after having been notified by the plaintiff calling upon the principal debtor to do so"

[10] This, they contend, complies with clause 10.2 of the agreement in that they firstly allege that a default event had occurred, secondly that Defendants have been notified of the default event, and as a consequence, the acceleration clause as triggered by the default as contained in 10.2.1 and 10.2.2 entitles the Plaintiff to demand repayment of all the borrower's indebtedness immediately irrespective of any terms or conditions otherwise applicable to such indebtedness.

[11] It is trite that in summary judgment proceedings, a plaintiff must prove a clear claim upon pleadings which are correct. **Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd and Another** 1998 (1) SA 679 (O).

[12] Whether a pleading is vague and embarrassing on the ground of lack of particularity depends on whether it complies with the provisions of the relevant rules of the Uniform Rules of Court. Prejudice to a litigant faced with an embarrassing pleading lies ultimately in an inability to prepare properly to meet an opponent's case. In *casu*, the Defendants have not claimed any prejudice.

[13] As a point of departure, one first need to ascertain whether the summons complained of is a simple summons within the meaning of Rule 17, or not, and if it is, whether it contains sufficient information to alert a defendant of its cause of action.

Mr *Jonker* for Plaintiff submitted that the summons was a simple summons, or to be precise, a ‘hybrid’ form of a summons, common in this Division. This type of summons contains more details that a simple summons might, but it is not signed jointly by an attorney and advocate, nor does it have particulars of claim annexed to it or any of the other elements that would render it a combined summons for purposes of Rule 18.

[14] This question was dealt with in **Standard Bank of South Africa v Hunkydory Investments 194 (Pty) Ltd and Others** (No.1) 2010 (1) SA 627 (C) at 630, where a Plaintiff had instituted action against defendants by way of a simple summons as provided for in Uniform Rule of Court 17(1). There the court held that a simple summons (Form 9) is used for claims for debts or a liquidated demand and that Form 9 requires the plaintiff to set out his cause of action 'in concise terms'. Full particularity is not required, as long as a general indication of the cause of action is provided. The statement of the cause of action in a simple summons is in fact no more than a 'label', an indication of the plaintiff's claim 'in the most general terms. With regards to exceptions and irregular procedure, the court stated the following:

> “[8] That a summary judgment simple summons is capable of being set aside on exception, or as an improper or irregular step, may be a good reason why summary judgment should be refused. It would constitute a bona fide defence. However, it could not have been intended that the initiating simple summons should contain the degree of particularity which is appropriate in a declaration. A court will only grant summary judgment if satisfied that the necessary elements which go to make up a cause of action have been verified under oath. See also **Dowson & Dobson Industrial Ltd v Van der Werf and Others** 1981 (4) SA 417 (C). (my emphasis)

[15] It is trite law that an overly technical approach by the court with regard to exceptions and irregular procedure should be avoided. The court does not look too critically at a pleading.

[16] As stated hereinabove, the simple summons intended for use in claims for a debt or liquidated demand should contain only an indication of the plaintiff's claim in the most general terms. All that is required is that the claim be set out with sufficient particularity for the court to decide whether judgment should be granted, and for the defendant to be made aware of what is being claimed from him.

[17] It is evident that the Plaintiff's cause of action is based the agreement whereupon monies were lent and advanced in term of the banking facility. The allegation of this is made in the summons wherein it states that:

> "1.1 The first defendant ('the principal debtor") is indebted to the plaintiff in the amount of R 609 180.69 plus interest thereon at 13.75% per annum, calculated and capitalized monthly to date of payment, being in respect of money lent and advanced by plaintiff to the principal debtor at the latter's special instance and request on a cheque account with number 4087006122. Copies of the Facility letter and Banking Facility Schedule dated 18 August 2015 are annexed hereto marked A1-A2."

[18] There can be no doubt that summary judgment cannot be obtained in respect of a summons which fails utterly to disclose a cause of action. See **L S Enterprises (Pty) Ltd v Couck** 1971 (1) SA 438 (T) at 440F; **Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd** 1967 (1) SA 466 (D) at 469C. But, having said that, one must not lose sight of the fact that Rule 32 of the Uniform Rules of Court entitles a plaintiff who has issued and served a simple summons, of the kind set out in Form 9, to apply for summary judgment. Such a summons need only set out "in concise terms plaintiff's

cause of action" as was pointed out in **Dowson & Dobson Industrial Ltd v Van der Werf and Others** 1981 (4) SA 417.

[19] In *casu*, having regard to the Plaintiff's summons and in particular the clauses complained of, which should be read in conjunction with clause 1.1 of the summons, I can find no merit in the Defendants' assertion that clauses 1.2 and 3.1 are vague and embarrassing and therefore excipiable.

[20] The second issue to consider is whether Plaintiff is obliged to annex the written notices of breach and letter of demand to its summons and that in the absence of same, it renders the summons excipiable and a bar to obtaining summary judgment as submitted by the Defendants.

[21] The question of attaching supporting documents to a simple summons have been the topic of discussion in many decisions in this Division and elsewhere.

[22] As I have mentioned, the technical defence raised by the Defendants is the Plaintiff's failure to attach the aforesaid notices to its 'pleadings' which is thus deemed a contractual breach as well as rendering the summons and particulars of claim vague and embarrassing. The question as to whether a simple summons was a 'pleading' was dealt with in the full Bench decision **of Absa Bank Limited v Janse van Rensburg & Another** 2013 (5) SA 173 (WCC):

> "[4] The question whether or not a simple summons is a pleading was recently considered by Wallis J (as he then was) in *Icebreakers No 83 (Pty) Ltd v Medicross Health Care Group (Pty) Ltd.* The plaintiff, by way of such a summons, claimed payment of three amounts, namely R283 767 'arising out of arrear rental due in respect of leased premises'; R169 435,26 'being the reasonable and necessary costs of building alterations carried out' on those premises; and R49 587 'in

respect of the costs and repairs to dental equipment leased to the defendant'. The defendant delivered a notice of exception on the grounds that the claims as set out in the summons lacked averments to sustain a cause of action. In the course of a comprehensive judgment, the learned judge referred, inter alia, to the requirement in form 9 of the first schedule, that the plaintiff's cause of action be set out in 'concise terms', and pointed out that there is a 'plethora of authority' that all that is required in setting out the concise terms of a cause of action 'is to give a general indication of the claim amounting merely to a label'. For this, and a variety of further reasons, <u>Wallis J accordingly concluded that a simple summons is not a pleading</u>, <u>with the result that it cannot be attacked by way of an exception."</u> (my emphasis)

[23] Thus, based on the aforesaid decision, it is clear that a simple summons is not a pleading and that the claim by Defendants that the failure to attach written notices to its "pleadings" in the opposing affidavit is misplaced. However that is not the end of the enquiry.

[24] The next step is to consider is whether there is an obligation on the Plaintiff's to have annexed the said notices to its summons.

[25] Mr *Jonker* submitted that there is no obligation on the Plaintiff to have annexed the relevant notices to the summons because their cause of action is not based on the notices. The present case, he says, is distinguishable from the full Bench decision in **<u>Janse van Rensburg</u>** *supra* wherein it held that the plaintiff must annex a copy of the written agreement upon which it relies, to its simple summons. It held that, on a proper interpretation of Rule 17(2)(b), read with form 9, it is necessary to attach a copy of the written agreement to the summons where the plaintiff's cause of action is based on such agreement.

[26] In the **Van Rensburg** matter, various authorities were cited and I summarise it as follows:

> "[8] Turning to the need to annex copies of documents to a simple summons, this question was considered by Berman J and Selikowitz J in ***Volkskas Bank Ltd v Wilkinson*** *and Three Similar Cases*, where the requirements for a simple summons were succinctly summarised as follows:
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> > 'It appears to us accordingly that where a plaintiff sues for repayment of a loan (or an overdraft) all that a simple summons need contain is a statement setting out the relief claimed and a succinct outline of the cause of action, ie that an agreement of loan (or of overdraft) was concluded between the parties providing for interest on the balance outstanding from time to time at a specified (or ascertainable) rate and which loan (or overdraft) was repayable on demand (or on a fixed or ascertainable date) and which, despite demand (or the arrival of that date), has not been repaid. *Where the cause of action is founded on some document, reference thereto should be made in the summons and a copy should be attached to the summons and the original should be handed in at the time when application for default judgment is made.*' [Own emphasis.]
>
> "[11] More recently, in ***Absa Bank Ltd v Studdard and Another***, Wepener J in the South Gauteng High Court also considered the very issue confronting us herein, namely whether, having regard to the wording of rule 17(2)(b) read with form 9 or any other requirement, the written agreement of loan should be attached to the summons. He observed that —
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> > '(i)t has been a rule of practice in this Division that copies of both the written agreement of loan as well as the bond document must be attached to a summons, including a simple

summons, and to produce the original documents at the time when judgment is requested, whether the matter is brought by way of summons or application… After referring to various other authorities, he concluded as follows:

'I consequently conclude that the cases requiring the attachment of the written document, where it forms a link in the chain of the cause of action or is the foundation of the plaintiff's cause of action, are correct and should be followed. As is the case in this Division, the practice in the Western Cape High Court is a salutary one and I find no reason why I should not follow what the Full Bench said in Wilkinson regarding the attachment of the written contract where it forms a link in the chain of the cause of action or the cause of action is found thereon as well as the allegations, which are required to be contained in a simple summons.'

[13] Apart from the judicial authority referred to above, all the foremost authorities in this country on civil procedure in the high court appear to support this line of authority. In Erasmus reference is made to the ***Wilkinson*** **and** ***Studdard*** judgments, *supra*, in support of the following statement:

'Where the cause of action is founded on some document, reference thereto should be made in the simple summons and a copy should be attached to the summons and the original should be handed in at the time when application for default judgment is made. If a copy of the required document is not attached to the simple summons, the summons would not disclose a cause of action."

[27] Plaintiff alleges that in the present case, the Plaintiff's cause of action is not found upon a letter of demand, but on an agreement pursuant to which monies were lent in advance in terms of the banking facility. This document was annexed to the

simple summons. The Plaintiff's claim against Second Defendant is in terms of the Suretyship agreement. This too was annexed to the summons. I am therefore satisfied that the link in the chain of Plaintiff's cause of action has been followed. In any event, Plaintiff's cause of action is not based on the letter of demand, nor on the notice of breach, as these notices are mere procedural steps which flow from the agreement. In any event, there is no allegation by Defendants in their opposing affidavit that they did not <u>receive</u> the said notices, their complaint is that it was not annexed to the summons.

[28] The legal principles governing summary judgment proceedings are well-established. In **<u>Maharaj v Barclays National Bank Ltd</u>** 1976 (1) SA 418 (A) at 426 A-D, Corbett JA outlined the principles and what is required from a defendant in order to successfully oppose a claim for summary judgment as follows:

> "...[One] of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant had "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the

material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence."

[29] In this case the Defendants rely solely on their technical defence of excipiability. On the Defendants own version, they do not deny that they are indebted to the Plaintiff. If it is found that the annexing of the aforementioned documents is not a requirement for the completion of Plaintiff's cause of action, then their defence falls away.

[30] It is perhaps also apposite to have regard to the remedy provided by summary judgment proceedings as held by Navsa JA **in <u>Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture</u>** 2009 (5) SA 1 (SCA) :

> "[31]...The summary judgment procedure was not intended to "shut a defendant out from defending", unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. [32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful applications in our courts, summary judgment proceedings can hardly continue to be described as extraordinary."

[31] In light of the authorities discussed above, it is evident that this matter is distinguishable from those for the simple reason that the cause of action in those matters differ from that in the present instance. The principle, in my view remains the same and that is, that the document upon which the cause of action is based, has to be annexed to the summons and in the present case it was. I agree with Mr *Jonker*

that Plaintiff's cause of action is not found upon the letter of demand, nor the relevant notice to remedy the breach. In any event, upon a closer inspection of the Defendant's opposing affidavit, it is evident that it does not dispute that any monies are owing and in fact, does not dispute the allegations contained in paragraph 1.2 of the summons at all.

[32] I am therefore satisfied that the necessary elements constituting the cause of action is present and the relevant documents in support of the cause of action, has been annexed to the summons. As a consequence, the Defendants' reliance of the Plaintiff's failure to annexure the stated notices, which is not the genesis of the Plaintiff's cause of action, must fail.

[33] In this matter the Defendants relied solely on a technical defence and did not attempt to fulfil the requirements needed of them as required in Maharaj, *supra* to successfully oppose an application for summary judgment. Given that they would have been perfectly entitled to adopt this strategy in light of the Jagger decision, the risk of course attendant to this is that were they to fail in convincing a court that the defence of excipiability was good in law, then that would have been the end of the enquiry and the court would be left with nothing else to consider in defence of the merits. This is an election which they themselves made and one can but infer that there is in fact no other defence to the merits.

[34] In the circumstances, I am satisfied that the defences raised by the Defendants' must fail and that Plaintiff is entitled to summary judgment being granted against both First and Second Defendants.

[35] In the result the following Order is made:

1. The summary judgment application is granted against First and Second Defendant with costs.

D KUSEVITSKY AJ