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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 3332/13

DATE: 13 February 2015

NOT REPORTABLE

ABSA BANK LIMITED Plaintiff

V

IVAN NEWELL BJORKMAN First Defendant

HER MAJESTY'S GUEST HOUSE CC Second Defendant

JUDGMENT

MABUSE J:

[1] This is an exception raised on five grounds, to which I will refer in the course of the judgment, by the defendant against the plaintiff's summons.

[2] The plaintiff is a public company with limited liability duly registered as such in accordance with the company statutes of this country. In terms of the provisions of the Banks Act 94 of 1990 and of the National Credit Act 34 of 2005 the plaintiff is a registered commercial bank and a registered credit provider respectively. It operates from its registered offices located at 15 Troye Street and conducts business through its Corporate and Business Bank at 208 Jeppe Street, both in Johannesburg.

[3] The first defendant is an unmarried major businessman who has chosen his *domiciHum citandi et executandi* at plot 259 Bridle Park, Midrand. He is the sole member of the second defendant. The second

defendant is a close corporation duly registered as such in accordance with the provisions of the Close Corporation Act 69 of 1984. Its chosen *domicilium citandi et executandi* is Plot 259 Bridle Park, Midrand and its registered office is located at Suite 11 Fish Eagle Office Park, Kingfisher Crescent, Meyersdal.

[4] By summons issued by the Registrar of this Court on 29 May 2013, the plaintiff claims against the first and second defendants, the one paying and the other to be absolved, payment of a sum of R2,824,618.84 or as set out in the certificate of balance attached to the plaintiff's declaration as 'ABL2', plus interest and costs. In addition the plaintiff claims against the first defendant only an order in terms of which two immovable properties belonging to the first respondent are declared especially executable. After the defendants had delivered their notice to defend, the plaintiff, seemingly, approached the Court with an application for summary judgment which the Court refused to grant. Instead the court granted the defendants leave to defend the plaintiff's action. That necessitated the plaintiff having to deliver its declaration which the plaintiff it did.

[5] In the aforementioned declaration, the plaintiff alleged that it entered into a written loan agreement ("the agreement") with the first defendant. As proof of such written loan agreement the plaintiff had attached to it declaration, a document marked Annexure 'ABL1', a money loan agreement property development. In terms of the said loan agreement they had agreed, among others, that:

> 5.1 the plaintiff had agreed to loan the first defendant who had agreed to borrow from the plaintiff the sum of R720.000.00 *{"the principal debt'),* on certain terms and conditions;
>
> 5.2 it was a term of the said agreement that the first defendant would repay the principal debt, and in addition certain named and interest charged over a term of 120 months in equal monthly instalments each of R10,890.23;
>
> 5.3 the plaintiff was entitled to add to the outstanding balance of the principle debt any unpaid interest;
>
> 5.4 the first defendant would be in default of the said loan agreement if he failed to pay on the due date any amount payable by him to the plaintiff. In addition the first defendant would be in default of the loan agreement if he breached any provision of the said agreement including any provision of a security document;
>
> 5.5 in the event of default by the first defendant the plaintiff would give him, the first defendant, a written notice of such default and may propose that the first defendant refer the agreement to a debt counsellor, alternatively a dispute resolution agent, consumer court or ombud with jurisdiction, with intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payment up to date;

5.6 in the event of default the plaintiff would be entitled to commence legal proceedings to enforce the agreement, including exercising its rights in terms of any of the securities and recover collection costs and default administration charges (if the Plaintiff has given the first defendant notice referred to in paragraph 5.5 *supra* and the first defendant was and has been in default under the agreement for at least 20 business days and at least 10 business days have elapsed since the plaintiff delivered the notice contemplated in paragraph 5.5 and in the case of a notice sent as provided for in paragraph 5.5 that the first defendant has failed to respond to the notice or has responded to the notice but rejected the plaintiff's proposal.

[6] The parties had agreed that a certificate signed by a manager of the plaintiff in which he specified the amount owed by the first defendant to the plaintiff and in which he further stated that such amount was due, owing and payable by the first defendant to the plaintiff would be *prima facie* proof of the amount thereof and of the fact that such amount was due, owing and payable for the purpose of obtaining provisional sentence or other judgment in any competent court. It was a term of the aforementioned loan agreement that it would not be necessary for the plaintiff to prove the appointment of the person signing the certificate.

[7] The plaintiff duly complied with all its obligations in terms of Annexure 'ABL1' in that it advanced the cash amount of R720,000.00 to the defendant and the first defendant withdrew the same amount. According to the plaintiff the loan to the first defendant was administered in the plaintiff books and accords under account number [...].

[8] The first defendant breached the aforementioned agreement in that he failed to pay the monthly instalments duly and/or timeously or at all as a consequence whereof he failed to pay any amount payable by him to the plaintiff on the due dates thereof in breach of the provisions of the agreement and of breach of his payment obligations under the loan agreement. As a consequence of the first defendant's failure to pay the monthly instalments timeously or at all the principal debt, the plaintiff became entitled to commence legal proceedings to enforce the agreements, including its rights in terms of the mortgage bonds and the full outstanding amount of the first defendant's indebtedness to the plaintiff became due and payable.

[9] The plaintiff alleged that it had complied with the provisions of clause 14.2 of Annexure 'B' in that it gave written notice to the first defendant of such default and proposed in the same written notice that the first defendant should refer the loan agreement to a debt counsellor, alternatively a dispute resolution agent, consumer court or ombudsman with jurisdiction with the intent that the parties resolve their dispute under the credit agreement or develop and agree on a plan to bring the payments up to date. Notwithstanding the delivery by the plaintiff of the said notice, the first defendant has neither responded to the said notice nor made payment of the loan agreement after the effluxion of a period of 20 days after delivery of such notice.

[10] In terms of Annexure ‘ABL2’, which is a signed certificate by one of the plaintiff’s managers, the total amount due and payable by the first defendant to the plaintiff in respect of the first defendant’s entire indebtedness to the plaintiff was as at 10 April 2013, R2,824,618.87 plus interest at 11.5% and became due from 11 April 2013.

[11] The first defendant’s caused to be registered four mortgage bonds in favour of the plaintiff:

> 11.1 Mortgage Bond Number B62326/98, a copy of which was attached to the declaration as Annexure ‘ABL3’ was to secure the debt of R100,000.00;
>
> 11.2 Mortgage Bond Number B110668/06 dated 18 July 2006 and a copy which was attached to the declaration as Annexure ‘ABL4’ was to secure payment of the sum of R1,300,000.00;
>
> 11.3 Mortgage Bond Number B49566/07 dated 26 March 2007 and a copy of which was attached to the declaration as Annexure ‘ABL5’ was security for payment of the sum of R945,000.00;
>
> 11.4 Mortgage Bond Number B38113/08 dated 15 April 2008 as contained in Annexure marked ‘ABL6’ was to secure payment of the sum of R1,215,000.00 and Mortgage Bond Number B15661/08 registered on 19 February 2008, a copy of which was attached to the declaration as Annexure ‘ABL7’ was to secure payment of the sum of R720,000.00;
>
> 11.5 Mortgage Bonds ‘ABL2’ to ‘ABL6’ were all registered over the first defendant’s immovable property known as portion 258 (a portion of portion 63) of the Farm Knopjeslaagte Number 365, Registration Division JR in the province of Gauteng, measuring 2830 hectares and held by Deed of Transfer Number T7241/98 and Mortgage Bonds ‘ABL6’, and;
>
> 11.6 ‘ABL7’ was registered over the immovable property known as portion 259 (a portion of portion 63) of the Farm Knopjeslaagte Number 385, Registration Division JR in the province of Gauteng, measuring 4,2829 hectares and held by virtue of Deed of Transfer Number T12625/98.

[12] The defendants have now raised five distinct exceptions against the plaintiff's summons.

They are as follows:

> 12.1 That the plaintiff has not attached the loan agreements in respect of the mortgage bonds annexed to the declaration as Annexures ‘ABL3 to ABL6’.
>
> 12.2 The summons was, with regard to clauses 14.1 and 14.2 of Annexure ‘B’ to the loan agreement, premature.

<u>THE PLAINTIFF HAS NOT ANNEXED THE LOAN AGREEMENTS RELATING TO THE MORGAGED BONDS ANNEXED TO THE DECLARATION AS ANNEXURES 'ABL3 TO ABL7</u>'

[13] The defendants' first ground of exception is based on the provisions of Rule 18(6) of the Uniform Rules of Court. This Rule provides that:

> "*A party who in his pleading relies on 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 the pleading shall be annexed to the pleading."*

In paragraph 4 of its declaration the plaintiff stated that:

> "*On 16 October 2007 the Plaintiff and the First Defendant entered into a written loan agreement, a copy of which is attached hereto marked Annexure ABL1' and which consist of the following..."* then followed a list of documents all of which constituted Annexure 'ABL1'. The plaintiff then continued with further allegations in which it set out the conditions and terms on which the parties to the said agreement agreed upon, how the first defendant flouted certain material terms of the loan agreement and how the first defendant's failure to comply with the terms of the loan agreement fundamentally affected certain primary obligations of the defendant which were interwoven with, and linked to, the Plaintiff's existing rights in terms of certain securities in the form of mortgage bonds. Firstly it is as clear as crystal that the further allegations in the plaintiff's declaration are predicated on the loan agreement referred to as 'ABL1'. Secondly it is also clear that nowhere in the declaration does the plaintiff plead that the defendants failed to comply with the terms of the loan agreement or agreements relating to the mortgage bonds marked Annexures 'ABL3 to ABL6'. Thirdly nowhere in its declaration does the plaintiff plead that the defendants failed to comply with the terms of any of the four mortgage bonds referred to as 'ABL3 to ABL6'. The second defendant though was not party to the agreement constituting the plaintiff's cause of action.

[14] The matter that ignited the claim for payment of the amount of R2,824,618.84 is the plaintiff's claim for the sum of R700,000.00. It is not in dispute that in respect of the amount of R700,000.00 the plaintiff has attached the loan agreement to the combined summons as enjoined by Rule 18(6) of the Uniform Rules of Court. The loan agreement constitutes the source of the claim against the defendants for payment of the sum of R700,000.00 or, to put it in other words, the loan agreement, Annexure 'ABL1', constitutes the plaintiff's sole cause of action. The plaintiff's claims in respect of the other security the plaintiff had only become operative by reason of the defendant's failure to comply with the terms of the loan agreement 'ABL1'. The defendant's objection to the plaintiff's summons is that the plaintiff has not attached the relevant loan agreement in respect of the mortgage bonds attached to the summons as Annexures 'ABL3 to ABL6'. It was

argued on behalf of the defendants that it was trite that a mortgage bond is not cause for a debt but merely security document securing a debt as set out in a loan agreement.

[15] It is as clear as crystal from the pleadings that based on 'ABL1' the plaintiff claimed from the defendants' payment of the sum of R720,000.00. It is also clear from the summons that a apart from their liabilities arising from 'ABL1' the First Defendant was also liable to the plaintiff for other amounts fully set out in the Annexures 'ABL3 to ABL7'. It is the First Defendant's default in complying with the terms of the loan agreement that triggered the demand for the payment of the amount referred to in the mortgage bonds. This is quite clear from paragraph 10 of the summons in which the plaintiff pleaded that:

> "*In consequence of the first defendant's default, the plaintiff became entitled to commence legal proceedings to enforce the agreement, including its rights in terms of the mortgage bonds infra and the full outstanding amount of the first defendant's indebtedness to the Plaintiff became due and payable.* "

Accordingly the plaintiff's cause of action is not based on any document but the loan agreement attached to the summons as Annexure 'ABL1'. This ground of the Defendants' exception therefore lacks merit.

<u>THE PLAINTIFF'S CLAIM IS PREMATURE</u>

[16] Referring to clauses 14.1 and 14.2 of Annexure 'ABL1', the defendants contend that the summons was premature in as much as the plaintiff did not draw the first defendant's default to his notice or allow the first defendant to remedy his default. In this regard the first defendant relies on Standard Bank of South Africa Ltd v Hand 2012(3) SA 319 (GSJ) and Other Authorities. Secondly, it is contended that the plaintiff's summons did not set the amounts that constituted the arrears in the declaration but instead stated that the full outstanding amount of the first defendant's indebtedness to the plaintiff became due and payable under circumstances when it did not so become due and payable. It was argued that the loan agreement contained no stipulation that the full amount in terms of the loan agreement would become due and payable upon an event of default.

[17] It is only apposite at this stage to set out clauses 14.1 and 14.2 of Annexure 'A' of 'ABL1'. Clause 14.1 thereof provides as follows:

> "*Should the consumer*
>
> > *14.1.1 fail to pay any amount payable by him to the Bank on the due date thereof; or*
> >
> > *14.1.2 breach any provision of this Agreement including any provision in a Security*

Document; or

14.1.3 being a natural person surrender his estate, be sequestrated or die; or

14.1.4 not being a natural person be wound-up, liquidated, deregistered or placed under judicial management or pass a resolution providing for any such event; or

14.1.5 have any application or other proceedings brought against or in respect of him in terms of which is sought to be sequestrated or placed under curatorship if a natural person or, if not a natural person, deregistered, wound-up, liquidated or placed under judicial management, in any such event whether provisional or finally;

then, the consumer will be default of this Agreement. "

Clause 14.2 of the same agreement provides as follows:

"*14.2 In the event of the Consumer committing or allowing an event of default as referred to in clause 14.1 or in clause 9 of Annexure C;*

14.2.1 give the Consumer written notice of such default and may propose that the Consumer refer this Agreement to a debt councillor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under this Credit Agreement or develop and agree on a plan to bring repayments up to date; and

14.2.2 commence legal proceedings to enforce this Agreement including exercising its rights in terms of any of the securities and recover collection costs and default administration charges (if the default is in respect of a payment obligation); if

14.2.2.1 it has given the Consumer notice as referred to in paragraph 14.2.1 above or it has given notice to terminate any debt review processunder section 86 of the National Credit Act which may then be under way in respect of this Agreement; and

14.2.2.2 the Consumer has been in default under the Agreement for at least twenty (20) Business Days; and

14.2.2.3 at least ten (10) Business Days have elapsed since the Bank delivered the notice contemplated in paragraph 14.2.2.1; and

14.2.2.4 in the case of notice in terms of paragraph 14.2.1 the Consumer;

14.2.2.4.1 has not responded to the notice or

14.2.2.4.2 responded to the notice by rejecting the Bank's proposal. "

[18] In the first place clause 14.2.1 only provides that if the consumer, meaning the first defendant, is in default, the credit provider, meaning the plaintiff, must give him notice of such default. This clause does not prescribe what such notice must contain. One cannot read into a clause of agreement what is not contained in it.

[19] Secondly, s. 129 of the NCA which deals with the procedures before the enforcements of debts. It prescribes that if a consumer, in the instant matter the first defendant, is in default under a credit agreement, the credit provider may, and not must, draw the default to the notice of the consumer in writing. If the credit provider should choose to give the consumer such notice the section does not provide what must be contained in such a notice. The plaintiff has pleaded compliance not only with the terms of clause 14.2.1 supra but also with the provisions of s. 129 of the NCA. This it did in paragraphs 25 and 27 of its declaration. Over and above the plaintiff has attached copies of the relevant notices which were sent to the consumer, the first defendant, by prepaid registered post. These notices which are all dated 8 May 2013, are marked 'ABL12'. In his heads of argument Mr. Reineke had referred the Court on this aspect to the case of Standard Bank of South Africa Limited v Hand 2012(3) SA 319 (GSJ). The case dealt with the terms of the agreement in terms of which the credit provider was obliged to give "*the due demand'* before it could cancel the agreement. In paragraph 23 it had this to say:

> "*(23) The parties clearly intended that due demand and dear, unequivocal and unambiguous notice of cancellation should occur prior to the institution of judicial proceedings; or, at the very least, that ''due demand'' ought to have occurred prior to the institution of judicial proceedings and, if the applicant thereafter intended this application to have institutions, dear, unequivocal and unambiguous notice of cancellation "it ought to have alleged that''."*
>
> The problem of the applicant in that matter was that, although in a demand it had stated that: "*The applicant in terms of the agreement has elected to cancel the agreement, take repossession of the vehicle and claim damages. The applicant seeks confirmation of the cancellation of the agreement and the return on the vehicle in the present application, the applicant had neither as a fact alleged that it had cancelled the agreement nor had it alleged how it had cancelled the agreement. "*

[20] It is quite clear that clause 4.2.1 was crafted along the terms of s. 129 of the NCA. The first defendant had agreed to such terms. I am satisfied that contrary to the first defendant's contention, the plaintiff gave notices in compliance with clauses 14.2.1 and the provisions of s. 129 of the fact. The fact that s. 129 was

mentioned in all the notices does not necessarily imply that notice that was given was also not in terms of the provisions of clause 14.2.1. Accordingly the contention that the plaintiff did not draw the first defendant's default to his notice is without merit. I already have pointed out that neither clause 14.2.1 nor s. 129 of the NCA has set out what the relevant notice must contain or to read in particular as no expressly or otherwise prescribe that the first defendant should be granted an opportunity to remedy his default. It is also not the defendant's case that he tried to remedy his default. In simple terms the notice that was given by the plaintiff to the first defendant served dual purpose. It served the purposes of clause 14.2.1 of the loan agreement and s.129 of the NCA. In view of the identical similarities in the wording of both clause 14.2.1 and s.129 of the NCA, it was not necessary for the plaintiff to issue two separate notices. The first defendant had been duly warned.

[21] At any rate it is not correct that the first defendant was not given an opportunity to remedy his default. In my view that opportunity to remedy his default was given to him in the manner expressly set out in the following paragraph:

> *"In terms of section 129(1) of the National Credit Act, 2005 we proposed(sic) that you refer the Credit Agreement to a Debt Counsellor, alternative Dispute Resolution Agent, Consumer Council or the Ombudsman for the financial services so that resolve the dispute arising pursuant to the default / agree on a plan to bring payments under the agreement to date. "*

[22] The fact that the plaintiff did not specify on the notice that it was not given in terms of clause 14.2.1 of the agreement or to put it in another manner, the fact that the notice indicated that it was given under s. 129 of the NCA does not mean that it was not a notice in compliance with clause 14.2.1. I have already pointed out that clause 14.2.1 was framed along the lines of s.129 of the NCA. In the result this point has no merit.

<u>THE AMOUNT OF R2,824,618.84 WAS NOT EVIDENCED BY THE LOAN AGREEMENT WAS NOT SUPPORTED:T HE AMOUNT CLAIMED IS MORE THAN DOUBLE THE TOTAL AMOUNT REPAYABLE</u>

[23] In the third ground of exception, it is contended that the amount claimed was not supported by the loan agreement and furthermore that it was more than double the total amount repayable in terms of the loan agreement. This ground of exception, in my view, cannot be sustained. Firstly it must be recalled that, in terms of Rule 23(1) of the Uniform Rules of Court only two grounds of exception can be lawfully raised against a summons. Those grounds are that a summons is vague and embarrassing or secondly that a summons lacks averments which are necessary to sustain an action or a defence.

[24] The purpose of an exception is to weed out cases which lack merit. This ultimate goal is to set aside the

pleading objected to in its entirety or in part.

"*An exception goes to the root of the entire claim or defence, as the case may be. The excipient alleges that the pleading objected to, taken as it stands, is legally invalid for its purpose. "* Per Innes JA in Salzman vs Holmes 1914 AD 152 at 156. It is not the purpose of the first defendant's exception to set aside the plaintiff's summons by alleging that the amount claimed is more than double the amount due and payable. Evidence can be led which can disclose the plaintiff's cause of action. Where it is such a case, in other words, where evidence can be led to establish a cause of action the summons cannot be excepiable.

[25] In the instant matter, exception is based, among others, on the contention that the amount claimed is more than double the amount refundable in terms of the loan agreement and that there are no clauses or allegations pleaded to substantiate the abovementioned increase. It cannot be correct that where it is contended that the amount claimed is more than the amount due and payable a summons can be attacked by means of an exception because this objection relates only to part of the claim. In his heads of argument Mr. Meintjies referred the Court to Santos and Others vs Standard Gen Insurance Company Ltd and Another 1971(3) SA 434 (O) at 437 B-E in which De Villiers CJ had the following to say:

> "*It is trite law that an exception that a particular claim discloses no cause of action, cannot succeed unless it goes to the root thereof, that is to say unless the upholding of exception would have the effect of destroying it altogether. (See Dharumpai Transport (Pty) Ltd v. Dhurampai, 1956 (1) S.A. 700 (A.D.) at p. 706). in the present case the third plaintiff refers to two distinct claims against the second defendant, one on her own behalf and the other one on behalf of the minor daughters. Even if the construction plays upon s. 11 (1) (ii) (aa) by Mr. Lichtenburg is correct, that will not have the effect of destroying either of these claims. Both will still remain, but each for a lessor amount. The main function of the exception will not have been attained, namely the elimination of unnecessary evidence. The legal issue involved can just as effectively be argued and determined at the trial and the second defendant will in no way be prejudiced: it is at liberty to tender the amount it considered legally due. (Cf. Thornton v. Royal Insurance Co. Ltd and Another, 1958 (4) S.A. 171 (C) at p. 174). Moreover, second defendant's real complaint is that the third plaintiff's claims contained a plus petetio and a complaint of this nature can never be a good ground for an exception that the pleading does not disclose the cause of action. ''*

This ground of objection presupposes the existence of a good cause. It can be viewed as an admission that the plaintiff has established a cause of action. In my view the exception cannot be sustained on this ground of objection.

<u>THE STANDARD MORTGAGE CONDITIONS AS REGISTERED UNDER REFERENCE BC2/2006</u>

AND REFERREDD TO IN CLAUSE 14 OF ANNEXURES “ABL3”-“ABL7" ARE NOT SUPPORTED OR EVIDENCED BY THE ANNEXURES

[26] The gist of the first defendant’s forth ground of exception is that:

> “*The relevant Standard Mortgage Conditions are thus not annexed to the declaration as required by inter alia Rule 18(6). It is trite that when a party relies on an agreement the agreement must be annexed to the particulars of claim. ”* This ground of exception was sparked by what appears in clause 14.1 of Annexures ‘ABL3 to ABL7’. Save for the differences in the reference numbers of the boards, the wording of the clauses are the same in all material respects. This clause provides that:
>
> > “*The Standard Mortgage Conditions of the Bank which have been filed in the Deeds Registry in which this bond is registered with reference number.... are applicable to and form part of this bond except in so far as any written agreement between the mortgage bond and the Bank may provide otherwise. ”*

[27] In paragraph 18 of the declaration, the plaintiff pleaded that:

> “*The plaintiff attaches hereto marked Annexure ABL8’, a copy of the Standard Mortgage Conditions as registered with reference number BC2/2006 and referred to in clause 14 of annexures ABL3 to ABL7’ and which is applicable by virtue of clause 5 of Annexure ‘C’ to Annexure ABL1’. In paragraphs 19 of its declaration the plaintiff set out the relevant terms and condition of Annexure ABL8’*."

[28] This contention by the first defendant that the plaintiff has not complied with the provisions of Rule 86 is, in my view, misguided and unsustainable. The plaintiff has annexed the relevant Standard Mortgage Bond Conditions and has furthermore explained their relevance to the essential parts of its declaration. There can be no confusion, in my view, about these conditions.

THE PLAINTIFF HAS FAILED TO SET OUT FACTORS THAT A COURT SHOULD TAKE INTO ACCOUNT IN DECIDING WHETHER OR NOT TO AUTHORISE THE ISSUING OF A WRIT OF EXECUTION

[29] This ground constitutes the first defendant’s fifth ground of exception. In the summons the plaintiff seeks, among others, an order in terms of which certain immovable properties belonging to the first defendant are declared specially executable. The first defendant contends that, although it has claimed that the first defendant’s immovable properties be declared executable, the plaintiff has failed to allege the factors that the court may need to take into account in determining whether or not it should authorise the issuing of a

writ of execution. In support of his argument or this ground the counsel for the first defendant has referred this court to First Bank Ltd v. Folscher and Another and similar matters in which the Full Court of this Division stated at paragraph [56] that:

> "*The creditor instituting action may include a paragraph for a writ of execution in the summons provided that the relevant circumstances identified above are recorded therein. This information is to be verified by an affidavit where application is made for judgment by default, which must be made to the High Court if the granting of the writ is sought at the same time.* "

Counsel for the first defendant has taken the pains to set out some of the most important factors in his heads of argument. I did not deem it necessary to repeat them in this judgment as they are irrelevant, in my view, for the purposes of this judgment.

[30] The weakness in the first defendant's contention and his counsel's argument lies in the following. In its summons the plaintiff has not asked for any authority to issue a writ of execution. Therefore it was not necessary for the plaintiff to set out any factors that the Court would need to take into consideration. An application for an order to declare certain immovable property especially executable, does not, by any stretch of imagination amount to, nor is it equal to, an application to authorise the issuing of a writ of execution. Nowhere in its summons does the plaintiff seek an order for the Court to authorise the issue of a writ of execution. Both the contention and accompanying argument that where a party claims against the other that certain properties be declared especially executable such party must set forth certain factors that a Court need to take into consideration before authorising the issue of a writ of execution are, in my view, invalid. A party need only do so at the stage when it applies for the issue of a writ of execution, the exception fails on this ground too. It is the amended Rule 46 of the Uniform Rules of Court which provides that where property sought to be attached as the primary residence of the judgment debtor, no writ of execution shall be issued unless the Court, having considered all the relevant circumstances, orders execution against such property. The judgment debtor must apply to the Court for an order in terms of which a writ of execution must be issued. In the absence of such an application, which may sometimes be embodied in the instrument by which payment is claimed, no Court may authorise the issuing of a writ of execution. In this particular case there is no such application and therefore not necessary to set out any such factors.

[31] In the result I make the following order:

(1) The defendant's exception to the plaintiff's summons is hereby dismissed with costs.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiff: Adv. Meintjies

Instructed by: Rorich, Wolmarans & Luderitz Inc

Counsel for the defendants: Adv. Rein eke

Instructed by: Deon Rens A ttorneys

Date Heard: 19 A ugust 2014

Date of Judgment: 13 February 2015