

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 3619/2013

In the matter between:-

ABSA BANK LIMITED

Applicant

(REGISTRATION NUMBER: 1986/004794/06

and

RENE HAYNES N.O.

1st Respondent

RONALD PATRICK HAYNES N.O.

2nd Respondent

ANTHONY DE VILLIERS N.O.

3rd Respondent

(In their capacities as Trustees for
THE SONSKYN TRUST IT[...]

RONALD PATRICK HAYNES

4th Respondent

(IDENTITY NUMBER: 6[...]

RENE HAYNES

5th Respondent

(IDENTITY NUMBER: 6[...]

HEARD ON:

5 DECEMBER 2013

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

12 DECEMBER 2013

INTRODUCTION

[1] Absa Bank Ltd, the applicant in these proceedings, seeks summary judgment against the first three respondents in their representative capacities as trustees of Die Sonskyn Trust IT[...], jointly and severally for:

- “1. Payment of the amount of R302 079.19;
2. Interest on the aforesaid amount of R302 079.19 at the rate of 8.50% per annum, calculated and capitalized monthly from 23 July 2013 to date of payment, both dates inclusive;
3. An order declaring the following property specially executable:
CERTAIN: ERF [...], D[...], DISTRICT D[...], FREE STATE PROVINCE
HELD BY DEED OF TRANSFER NO. T[...]
4. An order in terms of which the Registrar is authorised and directed to issue a writ of execution against the immovable property;
5. Costs on an attorney and client scale to be taxed;
6. Further and/or alternative relief.”

[2] The application is opposed by the three respondents. It was argued before me on 5 December 2013 whereupon judgment was reserved. Adv Rautenbach appeared for applicant and Adv Le Roux for respondents.

THE ISSUES

[3] In a founding affidavit filed in support of the application for summary judgment, Mr Vilakazi of the applicant alleged as follows in paragraph 3 thereof:

“I confirm that the Respondents are indebted to the Applicant on date of application for default judgment in the amount of R302 079.19 (THREE HUNDRED AND TWO THOUSAND AND SEVENTY NINE RAND AND NINETEEN CENTS) together with interest @ 8.50% per annum calculated and capitalized monthly from 23 July 2013 on grounds as defined in the particulars of claim.” (emphasis added.)

- [4] Applicant elected to make use of a combined summons (form 10) and particulars of claim annexed thereto. In paragraph 8 of the particulars of claim reference is made to respondents’ liability for payment “*in respect of a mortgage loan with account number 8[...]*”. There is no indication whether this loan agreement was in writing or concluded orally. No loan agreement is attached to the particulars of claim, but applicant elected to rely on a registered mortgage bond registered in its favour for R300 000.00 which it attached to the particulars of claim.
- [5] Two points *in limine* were raised in the answering affidavit filed on behalf of respondents, the first that the underlying loan agreement secured by the mortgage bond was not attached to the particulars of claim and furthermore that the requirements of Rule 32(2) and Rule 18(6) of the Uniform Rules of Court were not complied with in that the applicant’s deponent could not under the circumstances verify the cause of action, including every element of the cause of action. Therefore the application for summary judgment was

defective and should be dismissed. The second point *in limine* relates to the reference to default judgment instead of summary judgment in paragraph 3 of the founding affidavit. I am of the view that this is clearly a typographical error and am not prepared to dismiss an application upon such a formalistic defect. When I indicated my view to Ms Le Roux she conceded that she could not make any meaningful submissions to persuade me otherwise. For purposes of this judgment I shall not consider this any further.

- [6] Respondents made averments pertaining to the merits of their defence as well. This *inter alia* relates to the fact that the trust has been placed under debt review in terms of the National Credit Act, 34/2005 (“NCA”) by the local magistrate’s court and that in terms of the magistrate’s court order, payments in accordance with the distribution scheme, less certain administrative costs, have been made to applicant regularly over a period of approximately four years prior to the institution of the present action against them. Just prior to the institution of the action in the High Court applicant caused a notice in terms of section 86(10) of the NCA to be dispatched to respondents in terms whereof the debt review was terminated based on respondents’ alleged non-compliance. Thereupon respondents again applied to the magistrate’s court for an amendment of the debt review order and for it to resume. It is alleged by respondents that they have been complying with the magistrate’s orders and performed their obligations towards applicant in terms thereof. An issue that will be considered briefly is whether a

trust can apply for debt review and if not, what the effect thereof is on these proceedings.

- [7] Applicant has failed to file the required affidavit in accordance with the practice of this division in support of its request that the immovable property be declared specially executable. In such affidavit aspects such as the respondents' payment history, the amount in arrears, whether the property is the respondents' primary residence and any other information considered relevant must be set out.

THE POINT IN LIMINE

- [8] The failure to attach the underlying loan agreement to the particulars of claim and the alleged defect in the applicant's founding affidavit will be considered now.
- [9] Mr Rautenbach submitted during oral agreement that it was not a requirement in this division for a written loan agreement to be attached to the particulars of claim if a plaintiff's claim is based on money lent and advanced. He mentioned that he was aware of many instances in this division where judgments by default or summary judgment have been granted in matters where plaintiffs attached to their pleadings and relied on registered mortgage bonds only. This is a matter of great concern to me. An argument might have been accepted in the past that it was not required to attach written loan agreements to simple summonses (where Form

9 is used) in accordance with Rule 17, unlike the situation where combined summonses are used in which cases the provisions of Rule 18 clearly apply. There was a stage in our history that it was accepted by some to be the correct legal position, the reason being that a simple summons was not regarded as a pleading and Rule 18 applies to pleadings only.

- [10] A plaintiff's cause of action in a claim based on money-lending is not the registered mortgage bond, which is nothing more but proof that the applicant's claim has been secured by way of a mortgage bond over the immovable property of the debtor. **Klerck NO v Van Zyl and Maritz** 1989 (4) SA 263 (A) at p 275G – 276G is relatively recent authority for a well-known principle that the loan agreement and not the mortgage bond is the basis for a money-lending claim and the following *dictum* at 276A is apposite:

“If there is no valid principal obligation for the mortgage bond to secure, there can be no valid mortgage bond and no real right of security in the hands of the mortgagee.”

The court relied on the judgment of **Kilburn v Estate Kilburn** 1931 AD 501 where the following was said at 505 – 506:

“It is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim.

Such mortgage bond should be attached to the papers if the plaintiff requires an order in terms whereof the immovable property is to be declared specially executable.

[10] Rule 18(6) reads as follows:

“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 pleadings shall be annexed to the pleading.”

[11] As mentioned at a stage in our history there was a school of thought advocating that a simple summons was not a pleading and therefore it was not required of the plaintiff to attach the document(s) relied upon for his cause of action. The plaintiff was merely required to set out his cause of action in concise terms without attaching documents in support of the claim. However the most recent authority is to the effect that also in the case of a simple summons, the document(s) relied upon for the cause of action must be attached thereto, otherwise the summons would not disclose a cause of action.

See: **Absa Bank Limited v Studdard and Another** (2011/24206) [2012] ZAGPJHC 26 (13 March 2012); 2012 JOL 28604;
Standard Bank of South Africa Ltd v Dawood 2012 (6) SA 151 (WCC) paras [6] – [7] and the Full Bench

decision in **Absa Bank v Janse van Rensburg and Another** 2013 (5) SA 173 (WCC) at paras [11] – [15].

[12] *In casu* applicant elected to make use of a combined summons and in such cases the legal position has always been clear. If the written underlying agreement is not attached to the particulars of claim, such pleading shall in terms of Rule 18(12) be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with Rule 30. Furthermore it is not necessary for a party to apply Rule 30, but he may sit back and when confronted with an application for summary judgment object to the validity of such application. An applicant who verifies a cause of action in his particulars of claim where to the written underlying loan agreement is not attached cannot be heard to say that the verifying affidavit complies with Rule 32(2). There is no basis on which such a deponent can attest to the correctness of the allegations set out in the particulars of claim if the necessary document that ought to be relied upon, is not attached to the particulars of claim. It is inconceivable that a deponent who, *ex facie* the documents before me, is not even aware of the existence of the written loan agreement, can “*swear positively to the facts*” within the meaning of Rule 32(2).

[13] In **Gulf Steel (Pty) Ltd v Rack-Rite Bob (Pty) Ltd and Another** 1998 (1) 679 (O) at 683I – 684B the court, in view of the fact that summary judgment procedure is an

extraordinary and drastic remedy closing the doors of the court for a defendant finally, stated the following:

“In view of the nature of the remedy of summary judgment, the Court must be satisfied that a plaintiff who seeks summary judgment has established its claim clearly on the papers and that the defendants have failed to set up a bona fide defence as required in terms of the Uniform Rules of Court. There are accordingly two basic requirements that the plaintiff must meet, namely a clear claim and pleadings which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment. In fact, before even considering whether the defendant has established a bona fide defence, it is necessary for the Court to be satisfied that the plaintiff's claim has been clearly established and its pleadings are technically in order. Even if a defendant fails to put up any defence or puts up a defence which does not meet the standard required of a defendant to resist summary judgment, summary judgment should nevertheless be refused if the plaintiff's claim is not clearly established on its papers and its pleadings are not technically in order and in compliance with the Rules of Court.”

See also **Absa Bank Limited v Coventry** 1998 (4) SA 351 (N) at 353 and 354 and the authorities referred to.

- [14] Although I am of the view that the court in **Gulf Steel** has put the bar a bit too high for a plaintiff, and although I reject reliance on unnecessary formalism, the underlying principles set out by the court should be applied *in casu*.

- [15] I am in respectful agreement with the following views of Wallis J (as he then was) in **Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another** 2010 (5) SA 112 (KZP) at para [25], criticising the approach of Blieden J in **Standard Bank of South Africa Ltd v Roestof** 2004 (2) SA 492 (W):

“Insofar as the learned judge (Blieden J) suggested that a defective application can be cured because the defendant or defendants have dealt in detail with their defence to the claim set out in the summons, that is not in my view correct. That amounts to saying that defects will be overlooked if the defendant deals with the merits of the defence... The fact that they set out that defence does not cure the defects in the application, and to permit an absence of prejudice to the defendants to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective, then *cadit quaestio*.”

- [16] Mr Rautenbach submitted that the court is entitled to grant summary judgment based on the mortgage bond attached to the applicant's papers and thereby ignoring the absence of the loan agreement. He was apparently unaware of the authorities quoted herein, several of which have been relied upon by Ms Le Roux in her helpful heads of argument and oral argument which is much appreciated.
- [17] As indicated, *supra*, when a mortgagor causes a mortgage bond to be registered in favour of the mortgagee he does so to give effect to an antecedent agreement between them

which may be either in writing or verbal in terms of which the mortgagor bound himself to grant to the mortgagee as security for a debt, a real right in the hypothecated immovable property. In **Absa Bank v Janse van Rensburg**, *supra*, at paragraph [12] the full bench accepted the statement in Erasmus, **Superior Court Practice**, at B1-124 that if a copy of the written agreement on which the cause of action is based is not attached to the simple summons, even it is not a pleading, the summons would not disclose a cause of action. The learned authors relied on the judgment of Wepener J in **Studdard**, *supra* as authority, which judgment was referred to with approval in **Absa Bank v Janse van Rensburg**. In **Moosa and Others NNO v Hassam and Others NNO** 2010 (2) SA 410 (KZP) Swain J correctly stated the law in para [18] concerning a party's failure to annex a copy of the written agreement relied upon to the particulars of claim as required by Rule 18(6):

“The written agreement is a vital link in the chain of the respondents' cause of action against the applicants... In the absence of the written agreement the basis of the respondents' cause of action does not appear *ex facie* the pleadings.”

- [18] I agree with the view of Davis AJ in **Absa Bank v Nicholas and Another** 19942/2011, 18243/2011 [2013] ZAWCHC 58 (20 February 2013) where it was found in paragraph [10] that although the courts in **Absa Bank v Janse van Rensburg** and **Absa bank v Studdard** were seized with applications for default judgment and not summary judgment, these

judgments were authority for the general proposition that where a plaintiff's cause of action is based on a written document, a copy thereof is required to be attached to the simple summons in order for the summons to disclose a cause of action. Even more so in my view, a copy of the written document should also be attached to the particulars of claim when combined summons is issued. The court is duty bound to refuse judgment in the event of non-compliance. Without having had the opportunity to consider the relevant underlying agreement, it would be impossible for a court to satisfy itself whether or not judgment should be granted.

- [19] *In casu* the attached mortgage bond refers in several paragraphs to the written agreement(s) entered into between the parties indicating *inter alia* that aspects such as repayment of the loan, interest and breach of contract are set out in these documents. I am not prepared to grant relief without having had sight to these underlying agreement(s). Mr Rautenbach has requested me not to be too formalistic but to consider whether the defence raised was *bona fide* or not. He submitted that the applicant was entitled to terminate the debt review insofar as respondents paid about R28.00 per month less to applicant than was ordered by the magistrate's court and therefore there was substantial non-compliance with the order which entitled applicant to take steps in terms of section 86(10) of the NCA. His request

should not be acceded to as it would fly in the face of cogent authority.

- [20] Consequently the point *in limine*, to wit that there is no compliance with Rule 32(2) due to the underlying loan agreement not being attached to the particulars of claim and the consequent defectiveness of the affidavit intended to verify the cause of action which was improperly pleaded, should be upheld. Therefore the application for summary judgment should be dismissed.

THE MERITS OF THE OPPOSITION

- [21] For the reasons set out herein it is not even necessary to consider the defence on the merits. Mr Rautenbach argued that Die Sonskyn Trust could not apply for debt review in terms of section 86 of the NCA because of its status as a juristic person for purposes of the Act. He did not rely on any authority for this submission and the argument was also not dealt with in his heads of argument. Ms Le Roux argued that even if that was the position, the magistrate's court did in fact issue an order and also the revised order referred to above and as long as a court order stands, it should be accepted as correct. In fact, applicant accepted instalments in terms of the magistrate's court's order for a period of nearly four years without complaining and/or objecting to the validity of the order.

[22] It is unnecessary to deal any further with the merits of the opposition, save to say that even if the point *in limine* was not good, I would probably have exercised my discretion in accordance with Rule 32(5) under the circumstances in favour of respondents and refused summary judgment based on the regular payments received by applicant over the years without objection and lack of proof as to what amount is in arrears at this stage.

COSTS

[23] If summary judgment applications are dismissed, courts generally order the costs to be costs in the main action. However *in casu* it is apparent that nothing that may happen during the trial between the parties can have an effect on the pleadings with which I am confronted. The applicant's application for summary judgment is totally defective and I would not grant summary judgment even if the application was unopposed. Consequently there is no reason why respondents should not be awarded costs.

ORDER:

[24] Therefore the following orders are made:

1. The applicant's application for summary judgment is refused with costs.
2. Respondents are given leave to defend the main action.

J.P. DAFFUE, J

On behalf of applicant: Adv J.S. Rautenbach
Instructed by:
E G Cooper Majiedt Inc
BLOEMFONTEIN

On behalf of first, second
and third respondents: Adv L le Roux
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