REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/24206

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matte between:

ABSA BANK LIMITED Applicant/ Plaintiff

and

STUDDARD, THEO EUSTACIUS First Respondent/ Defendant

STUDDARD, MELISSA ANN Second Respondent / Defendant

J U D G M E N T

SUMMARY
Rule 17 (2) (b) – rule of practice in South Gauteng High Court similar to Western Cape High Court - Action instituted by way of simple summons where cause of action is based on written agreement – Requirement to attach both written agreement of loan and mortgage bond to summons. Original documents to be produced in all matters at the time when judgment is sought.

WEPENER, J:

[1] There are a number of applications before me for default judgment brought by the same applicant (plaintiff), against home-owners, for orders for the payment of sums of money and declaring the homes of the debtors (defendants / respondents) executable. Each claim is for a '*debt*' or '*liquidated demand*' as set out in Rule 17(2)(b) and can consequently be brought pursuant to that Rule. See *Nedbank v Mortinson* 2005 (6) SA 462 (W) para [19]; Standard *Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 (5) SA 610 (C) para [10].

[2] In each matter the plaintiff issued a simple summons, which contains the claim against the defendants. The plaintiff duly complied with the directives contained in *Saunderson*[1], *Mortinson*[2] and *Folscher*[3]. The only issue which I have to determine is, what is required of a party when issuing a simple summons against a defaulting debtor when claiming a money judgment and asking for immoveable property to be declared executable having regard to the wording of Rule 17(2)(b) read with Form 9 or any other requirement, with particular emphasis on whether the written agreement of loan should be attached to the summons?

[3] Having agreed to hear full argument at the instance of the applicant, I requested the Johannesburg Bar to appoint an *amicus curiae* to argue the matter before me and in keeping with this commendable tradition, Mr S

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1 *Standard Bank of SA Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA).
2 *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W).
3 *Firstrand Bank Ltd v Folscher and Another* [2011] ZAGPPHC 79 (24 May 2011); 2011 (4) SA 314 (GP).

Aucamp obliged to argue the matter as *amicus*. I am indebted to Mr Aucamp for his assistance on behalf of the Johannesburg Bar.

[4] The applicant was content to argue one matter only and to accept that the other matters are all to follow the outcome of this matter. The applicant issued a summons (often referred to as a '*simple summons'* as distinct from a combined summons) pursuant to Rule 17(2)(b) of the Rules of Court. Rule 17(2)(b) reads:

> *'In every case where the claim is for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 9 of the First Schedule.'*

In terms of Form 9, a plaintiff is required to set out '*… in concise terms plaintiff's cause of action'*. However, the applicant went further than setting out its cause of action in concise terms. After citing the parties the following is alleged:

> *'4. The plaintiff and the defendants entered into written agreements in terms of which monies were lent and advanced to the defendants as described in the agreements. A copy of the agreement securing the abovementioned money lending agreement being Mortgage Bond B2/09 is attached hereto as annexe "A" and should as all other annexes be read as part of the summons, the contents whereof the plaintiff prays be herein incorporated as if specifically recorded.*
>
> *5. In terms of the said Mortgage Bond the defendants hypothecated certain ERF 1633 DAWN PARK EXTENSION 25 TOWNSHIP, REGISTRATION DIVISION I.R., THE PROVINCE OF GAUTENG, IN EXTENT 1009 (ONE THOUSAND AND NINE) SQUARE METRES, Held by Deed of Transfer no. T02/09, in favour of the plaintiff.*
>
> *6. In terms of the written agreements the defendants agreed and consented:*

6.1 that if any of one instalment is not paid on due date the whole amount would immediately become due and payable;

6.2 that thereupon the plaintiff shall be entitled to institute proceedings for the recovery of all such amounts and for a court order declaring the hypothecated property executable;

6.3 *that a certificate signed by any manager of the plaintiff would constitute prima facie proof of the amount owed by the defendants to the plaintiff and a copy of such certificate is attached hereto as annexe "B";*

6.4 to pay costs on the attorney and client scale.

7. Notwithstanding demand the defendants have failed to repay the instalments on the due date as agreed upon and are presently in arrears.

7.1 The arrears on the Defendants' account currently amounts to R22 756,33, constituting 9 months in arrears;

7.2 The Defendants' current monthly instalment amounts to approximately R2 417,84.'

The summons continues to spell out a number of additional allegations, mostly in compliance with *Saunderson, Mortinson* and *Folscher*, but also allegations regarding default by the defendants.

[5] The written loan agreement is the basis of the claim and the cause of action rather than the bond, which is an instrument hypothecating landed property, which does not constitute the principal debt. *Klerck NO v Van Zyl and Maritz* 1989 (4) SA 263 at 275 and *Standard Bank of South Africa Ltd v Gordon and Others* [2011] ZAGPJHC 114 (2011/6477) (21 September 2011) at paras 9 and 10.

[6] It 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. In most of the matters coming before the court for default judgment, practitioners adhere partially to the practice by attaching copies of the documents, also where a simple summons is used, but the applicant argues that such attachment is not necessary despite it having attached a copy of the bond document to the simple summons. Since 1994 when Rule 31(5) was introduced, default judgments were largely dealt with by the Registrar and not by Judges in open court and it appears that the practice may not have been strictly adhered to, even to the extent, that it is now argued, that it is not necessary to attach the written agreement of loan at all. However, since the decision in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*, 2005 (2) SA 140 (CC), default judgments are often heard in court, together with a request to declare immovable property executable. There is no suggestion that the practice, to annex true copies of the documents and then to hand in the original documents when judgment is sought, has fallen into disuse, and it has not.

[7] Before I set out the correct position regarding what a simple summons should or must contain, it is important to note that Form 9 was cast in its present form by Government Notice 999 of 12 January 1965 with inception date 15 January 1965. Decisions prior to this date must consequently be read with due regard to the requirements of the applicable Form prior to its

amendment. The previous Rule (Rule 15) referred to Form 8, the latter which required of a plaintiff to indicate its case in the most general terms (*Singh v Vorkel* 1947 (3) SA 400 (C) at 403-405 where the requirements of the former rule are set out). The decisions, which refer to a Form requiring a plaintiff to set out its cause of action '*in concise terms generally*', may consequently not have application to matters since the Form was amended to require a plaintiff to set out the '*concise terms of plaintiff's cause of action'*. This distinction is not referred to in Erasmus *Superior Courts Practice* B124-B125 and the cases referred to by the author and in particular, those cases requiring the cause of action to be set out '*in the most general terms*' are based on a previous wording of the Rule and Form and cases based on the previous wording thereof, which stated that the cause of action should be set out in '*generally'*, albeit concisely. The fact that a distinction should be drawn between the old and new Forms was recognised in *Landman Implemente (Edms) Bpk v Leliehoek Motors (Edms) Bpk* 1975 (3) SA 347 (O) at 237H.

[8] Mr Swanepoel, appearing for the applicant, relied on decisions such as *Standard Bank of SA Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* 2010 (1) SA 627 (C) at 630C in support of the argument that a plaintiff only needs to set out its cause of action generally. Steyn AJ, however, in stating that the claim should be set out in the '*most general terms'* relied on *Erasmus* at B-124 and the cases there cited. I have indicated that the learned author does not take into account the change of wording since the amended Form came into operation since when no further reference was made to the cause of action to be described '*generally*'. In my view the correct statement

is to be found in *B W Kuttle v O'Connell Manthe* 1984 (2) SA 665 (C) where Tebbutt J said at 668B-D:

> *'It must be remembered that under Rule 17, which is the rule dealing with summonses, a plaintiff can issue a simple summons or a combined summons where the particulars of claim are annexed to the summons. It has on many occasions been laid down that the requirement that the cause of action must be set out in the summons in "concise terms" (the phrase used in Form 9 with which the simple summons must be in accordance, in terms of Rule 17), does not mean that it must be done with the particularity required of a declaration (or the particulars of claim annexed to a combined summons). The object of the summons is not merely to bring the defendant before court; it must also inform the defendant of the nature of the claim or demand he is required to meet. But it need do no more than that. It need not go into the minute particulars. It is for this reason that a Supreme Court summons has been described as "merely a label" (see Emdon and Another v Margau 1926 WLD 159 at 162) or a "general indication of the claim" (see Singh v Vorkel 1947 (2) SA 400 (C) and 405).'*

[9] Although Tebbutt J also referred to cases dealing with the wording of Form 8, I am of the view that a court is to determine what is meant by the words '*merely a label'* or '*a general indication of the claim'* by having regard to the requirements of Form 9, which requires the concise terms of the cause of action to be set out. The word '*concise'* is used in the Rule as an adjective to '*terms of plaintiff's cause of action'* and means '*giving a lot of information clearly in a few words'* (Concise Oxford Dictionary). I am of the view that the requirement for information to be given in a simple summons has broadened since the amendment of the wording of the relevant Form.

[10] In this regard I refer to *Volkskas Bank Limited v Wilkinson and Three Similar Cases* 1992 (2) SA 388 (C) where the Full Bench held at 397I-398C:

> *'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. It is unnecessary to set out the terms and conditions of the agreement relied on if such was not recorded in writing – indeed, an allegation that the interest claimed in terms of that agreement is calculated daily and capitalised monthly is strictly superfluous and need not be made.'*

How then is this requirement to attach the document upon which the cause of action is founded compatible with judgments referring to '*merely a label'* or '*general indication of the claim'*? I am of the view that upon a proper construction of the Rule as read with Form 9 as amended, and the requirement that a lot of information be given clearly, in a few words, the older cases which do not deal with the new words contained in Form 9 cannot be used as a precedent to determine what a simple summons should contain. What must the concise terms of plaintiff's cause of action be? What is required is that the claim must be set out with sufficient clarity for a court to decide whether judgment should be granted, and for the defendant to be made aware of what is being claimed from him. See *Wilkinson* at 395A. Or put differently, the defendant must be informed of '*the nature of the claim or demand he is required to meet'*. *B W Kuttle* at 668C-D. It is against this background that cases, which pre-date Form 9, must be read. Those cases

interpreted the Form and requirement of the Rule, which stated that a claim should be '*generally'* set out. Currently the requirement is that the cause of action must be set out in concise terms. I have shown what a concise setting out of a claim means. The former Form, which required the setting out a claim in '*general*' terms, require it to set out '*only the main features or elements and disregarding exceptions, overall'.* (Concise Oxford Dictionary).

[11] In *Trans-Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A), Schreiner JA said at 277C-D:

> *'How general the indication is appears from many of the examples given in the schedule, such as those in which a sum of money is claimed "for goods sold and delivered", "for money lent", "for board and lodging", "for arrears of rent" or "for damages for defamation". The defendant is given no information as to place or time or who were the persons directly concerned in the sale of goods, and the like. Where claims of his vague type are included in the summons the defendant can hardly gather any information which would help him to shape his conduct unless, as will commonly be the case, he already knows what the action is about. It is not surprising, accordingly that the claim in a supreme court summons has been described as "merely a label" or "a general indication of claim".'*

Also see *Vorkel* at p 403.

[12] The judgment's point of departure is from the former wording of the Form when the word '*general'* was used and not where the requirement has changed to '*concise terms'* without the word '*general*' in relation to the cause of action and where the schedule described the causes of action as '*for goods sold and delivered*', etc as set out in *Trans-Africa*. It would be inconceivable that a summons can today properly describe a cause of action as '*for*

damages for defamation' as was permitted under the former Form, which highlights the differences between the former Rule and Rule 17(2)(b).

[13] *Wilkinson* requires that the written agreement of loan should be attached. This requirement is a long standing rule of practice in the Western Cape High Court as can be seen from the judgment of Friedman AJ in *Bantry Head Investments v Murray & Stewart (CT)* 1974 (2) SA 386 (C) at 392-393. Although the learned judge dealt with further particulars and the requirements of Rule 18(6), the right to further particulars has been abolished and the discussion was regarding Rule 18(6) prior to its amendment compelling a party relying on a document, to attach same. The disclosure of the document was a requirement despite there being no provision in the Rule for its attachment. Thring J said in *Nedbank Ltd v Jacobs and Another* [2008] JOL 21940 (C) after a discussion of the requirement to attach a written document:

> *'The plaintiff has failed, in my judgment, to comply with the provisions of Rule 17(2)(b), inasmuch as it has not attached to its summons a copy of either the loan agreement (if it was in writing) or of the mortgage bond.*' (My emphasis).

[14] In *Moosa v Hassam* 2010 (2) SA 410 (KZP) Swain J, although considering Rule 18, held that it was necessary to attach the written document relied upon in order for a cause of action to be properly pleaded. The learned judge said in paras [16] to [18] as follows:

> *'[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 CJ in the case of Stern NO v Standard Trading Co (Pty) Ltd 1955 (3) SA 423 (A) at 429H:

> *"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". South African Railways and Harbours v Deal Enterprises (Pty) Ltd 1975 (3) SA 944 (W) at 953A; and Van Tonder v Western Credit Ltd 1966 (1) SA 189 (C) at 193H.

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.' (My emphasis)

I respectfully agree with these remarks.

[15] If it is correct that it is necessary for a plaintiff to attach the document to properly plead its cause of action, such would be correct not only for the purposes of Rule 18, but also for the purposes of Rule 17 as, the plaintiff would disclose no cause of action pursuant to the provisions of Rule 17 if it

fails to attach the written agreement. In *Strathmore Exploration Co v Pongola Developing Co* 1950 (4) SA 350 (T) at 352, it was held regarding Rule 17 that:

> *'In the circumstances, as a cause of action has been disclosed, there is no necessity to add any further particulars thereto and indeed, if one refers to the petition of the appellant himself, it is quite clear that his ignorance of the contract under which the claim is made is simulated because it is quite clear that there could be no possible embarrassment to him as to the contract under which the claim is made. But as I have already stated, my decision is based purely on the fact that a cause of action is set out and, there being a cause of action, it is clear that the learned judge in the court below was correct in his decision.*' (My emphasis).

That it is essential that the summons should set out a cause of action was also held in *Credit Corporation of SA Ltd v Swart* 1959 (1) SA 555 (O) at 557; *Landman Implemente (Edms) Bpk v Leliehoek Motors (Edms) Bpk* 1975 (3) SA 347 (O) at 348-349; *Dowson and Dobson Industrial Ltd v Van der Werf and Others* 1981 (4) SA 417 (C) at 425; *Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd* 1983 (2) SA 95 (C).

[16] As was the case in *Deal Enterprises* and *Van Tonder* at a time when Rule 18 did not require attachment of the agreement relied upon, Rule 17(2)(b) does not require the contract upon which the plaintiff relies to be attached in so many words, but, if it is not attached, I am of the view that the words of Swain J in para [18] of *Moosa*, are be applicable.

[17] In *Van Tonder*, Van Winsen J (as he then was) held that a written agreement, which is an essential link in the chain of the cause of action, should form a part of the pleadings. Although Van Winsen J dealt with the

provisions of Rule 18(6) it concerned the wording of the Rule prior to the requirement being introduced, that such a written agreement must be attached to the pleadings. Van Winsen J found that the agreement formed part of the case at the pleading stage. Van Winsen J dealt with the obligation to supply further particulars, but since that right has now been abolished, I am of the view that the agreement relied upon should form part of the initial document i.e. the simple summons.

[17] Also in this Division, Botha J (as he then was) held pre the Rule 18(6) amendment, which requires the attachment of a contract upon which a party relies, and before the right to obtain further particulars was abolished, in *Deal Enterprises* at 953A:

> *'As a second part of the argument the suggested narrow interpretation of the expression "relies upon" appears to me to be artificial and unwarranted. A plaintiff clearly "relies upon a contract" when he uses it as a "link in the chain of his cause of action" (Van Tonder's case, supra at p 193H.) He is accordingly obliged to furnish the particulars mentioned in Rule 18(6) whenever the contract forms part of the cause of action put forward by him, irrespective of whether the contract can aptly be described as the 'basis' of the claim or not.*
>
> *In my judgment, therefore, the principle to be applied may be formulated as follows:*
>
> *9. Where a plaintiff relies upon a contract as part of his cause of action put forward by him, the defendant is entitled to the particulars mentioned in Rule 18(6) as of right and independently of the application of the principles summarised in paras 1-7 above.*' (My emphasis).

[18] Mr Swanepoel also referred to *Trust Bank of Africa Limited v Hansa and Another* 1988 (4) SA 102 (W) where Flemming J (as he then was) said

that if a plaintiff alleges facts in addition to those that constitute his cause of action such facts are unnecessarily contained in a summons. The finding would seem to accord with the law. However the learned judge said at 105B-C:

> *'An attorney drafting a simple summons may sometimes justifiably incorporate allegations making up the "cause of action" by referring to a copy of the relevant contract which he attaches to the summons as an annexure thereto. That example accentuates the need to realise that the plaintiff's success in the action follows because of the presence of what is in law necessary for success; it does not become dependent also upon whatever he in fact alleged. The "cause of action" is not broadened because the annexure contains terms which go further'. (*My emphasis*).*

This, in my view, is a reference to a cause of action which is dependent upon a written document or as Botha J said in *Deal Enterprises,* that when a plaintiff relies on a contract which is a link in the chain of the cause of action, he is obliged to supply particulars thereof.

[19] It was argued before me that, in the absence of the attachment of the agreement to the summons, and only in the event of it being shown that there is some prejudice to the defendant, should I conclude that the attachment of the agreement may be required. However, in *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) it was held that if a pleading does not comply with the sub-rules of Rule 18, requiring specified particulars of 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. The failure to attach the written agreement to the

simple summons, in my view, similarly establishes *prima facie* prejudice for a defendant.

[20] The additional costs of attaching a few pages to a summons cannot outweigh the importance of attaching the documents. It will not have the consequence of introducing '*novel and onerous procedural impositions on mortgagees*' as suggested by Mr Swanepoel with reference to *Bekker and Another and Four Similar Cases* 2011 (1) SA (WCC) at para [20]. The learned judges could not have had the attachment of the written agreement of loan in mind when referring to '*onerous procedural impositions on mortgagees*' as the practice in that Division requires the attachment of the written agreement of loan.

[21] Plaintiff's counsel referred to a number of cases that condoned the non-compliance with the obligation to attach documents. However, those were matters in which, inter alia, the defendants opposed the proceedings and condonation was granted in each instance because the court concluded that there was no prejudice to the defendants. Those cases are distinguishable from the matters before me.

[22] Save for a reference in *Erasmus* at p B1-24 to *Absa Bank Ltd v C M Klem* (TPD 2 February 1993, unreported) where Joffe J refused to allow costs of annexures to a simple summons, I could find no authority which disallowed the attachment of an agreement which formed the basis of a claim, nor was I

referred to any. The judgment of Joffe J was also not available to me to consider the ratio therein. On the other hand, I have referred to judgments, which require the attachment of the written agreements and the circumstances under which it is required.

[23] Mr Swanepoel argued that Peter AJ was the first court to have the opportunity to deal with the issue of a simple summons to which a bond document only was attached in *Nedbank Ltd v Fraser* 2011 (4) SA 363 (GSJ). However, Peter AJ was not called upon to, and did not, consider the necessity of the attachment of the written agreement, which forms the basis of a cause of action.

[24] 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.

[25] The plaintiff's summons lacks compliance with the requirements set out in the cases referred to in this judgment and does not disclose a proper cause of action and in addition, lacks compliance with the requirements of Rule

17(2)(b) and the requirement of practice, that a party who relies on a written agreement, should attach it to a summons. The result is that the plaintiff cannot succeed on the papers as they stand. The rule of practice of this Division should be adhered to and the written agreements should be attached, also to a simple summons. This is also required when judgment is sought before the Registrar. The original documents must be handed in when judgment is sought.

[26] In the circumstances the matters before me are defective, at least to the extent indicated in this judgment.

[27] In order to allow the plaintiff to amend and/or correct the defects, I postpone all the matters *sine die* and disallow the costs incurred as a result of such defects.

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W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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