REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No 47848/2017

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

29.1.19

Date:

WHG VAN DER LINDE

In the ex parte application of:

Insimbi Alloy Supplies (Pty) Ltd — Plaintiff

and

Melcast Foundry CC
Registration number 2002/100810/23) — Defendant

Judgment

Van der Linde, J:

introduction

[1] This is an application for summary judgment in the amount of R194 167 41, interest at 10.5% per annum and costs. The amount falls within the jurisdiction of the Magistrates' Court, and the action could therefore have been instituted there. In fact, the plaintiff initially issued summons there, but withdrew its action. The reason why the action was withdrawn is not evident, nor is it evident why the action was instituted in the High Court, the forum generally designed for matters of more weighty complexity and quantum. As it happens, as will be seen below, the way in which the case has evolved thus far in this court underscores the inappropriateness of the action having been instituted here.

[2] The plaintiff commenced its action here by means of what it contends is a simple summons. The summons does not comply with the rules, and there is no application to condone the non-compliances. These will be elaborated upon later in the judgment. However, what followed after the defendant entered appearance to defend was a paper exchange which heaped irregularity upon irregularity, underscoring why the matter should not have been brought in this court.

The irregularities

[3] The problem starts with the summons. The rules envisage two options: a summons for a debt and liquidated demand, and one which is not. The former follows form 9, the latter form 10. In this case the draughtsman offered an amalgam of the two.

[4] First, the second line of the first page of the summons bears a heading, *"(Claim in respect of debt or liquidated demand)"*. That suggests form 9. The mandamus to the sheriff or his deputy starts off by following form 9; after the words, *"... in which action the plaintiff claims ..."* which are envisaged in both forms 9 and 10, there follows the semi-colon (a colon is actually prescribed, but the summons need only be *"... as near as may be in accordance with ..."* the form), which introduces the provision for the cause of action in concise terms. That part still sugegsts form 9.

[5] But second, what follows immediately is not in accordance with form 9. There is no *"concise"* setting out of the plaintiff's cause of action, a mere label of the case the defendant is called on to meet. To the contrary, what follows is a setting out of the relief that is claimed, followed by the following: *"SEE PARTICULARS OF CLAIM ATTACHED – ANENXURE 'A'"*. That is inconsistent with form 9, and is quintessentially form 10, which prescribes, after the words, *"... in which action the plaintiff claims ..."*, the words, *"... the relief and on the grounds set out in the particulars annexed hereto."*

[6] Third, further inconsistent with form 9 and consistent with form 10, there follow 57 pages of detailed particulars of claim comprising 6 pages of typed assertions, the rest being annexures attached as evidence of the assertions. Importantly, appreciation is displayed for the difference between *facta probanda* and *facta probantia*. One of many examples is paragraph 9.2.1 which, not content with the assertion that the defendant is a juristic person (*factum probandum*), then annexes as annexure B a company search (*factum probantium*).

[7] Fourth, lest there be any doubt that form 10 was envisaged here, the summons is signed not only by the plaintiff's attorneys, but also by a person who describes him/herself as *"Authorised hereto in terms of Section 4(2) of the Right of Appearance in Court Act No. 62 of 1995."* Considering rule 17(2)(a), read with rule 18(1), this is an unequivocal indication that form 10 was intended.

[8] Fifth, the section that follows the words, *"Inform the defendant further ..."* is verbatim form 10, until it reaches the last paragraph, which is then again verbatim form 9.

[9] This intertwining of forms 9 and 10 is not the subject of an application for condonation. In fact, the plaintiff asserts that the summons is a form 9 summons, and thus not a pleading to which an exception can be taken – and so it excepts to the defendant's exception.

[10] It is necessary to say something about the reason why there is a difference between a simple summons and one with particulars of claim annexed. The former, as already indicated, need only label the claim. So few words are necessary, and the rules relating to pleading are not

required to be followed. That is why an exception cannot be taken against it: it is not a pleading.

[11]It is very different the moment a statement of the material facts is annexed. Then that statement must comply with rule 18, and it must be drawn (signed) by a practitioner who has the skill and experience to drawn a pleading, and who appreciates the difference between *facta probanda* and *facta probantia*. This is essential, because this document (like the declaration that follows a simple summons) lays the very foundation of the litigation that will follow.

[12]In this regard Reyneke, AJ said the following in Inzinger v Hofmeyr and Others:[1]

> "15.The need to distinguish between *facta probanda* and *facta probantia* is a further aspect of the requirement that material facts only be pleaded. [See Makgae v Sentraboer [Kooperatief] Bpk *supra* at 244C-H] *Facta probanda* should be distinguished from "pieces of evidences" [*facta probantia*] required to prove the true *facta probanda*. [King's Transport
> v Viljoen 1954 (1) SA 133 (K) at 138 – 139] As was remarked in Dusheiko v Milburn 1964 (4) SA 648 (A) at 658A:
> *"I venture to think that most difficulties will in practice be resolved if, in applying the definition stated in McKenzie v Farmers' Co-operative Meat Industries Ltd (supra) to any given case, it is borne in mind that the definition relates only to 'material facts', and if at the same time due regard be paid to the distinction between the facta probanda and the facta probantia."*
> 16.*Facta probantia* has no place in a pleading and the contents of any pleading should be restricted to those facts only which serve to establish the cause of action, excluding any evidence required to prove them."

[13]Thus a plaintiff cannot under the guise of purporting to put up a simple summons offer a statement of material facts which does not comply with the rules: when the description of the cause of action exceeds a label, and takes the form of an annexure which contains the material facts of the cause of action, then that is a pleading which must comply with rule 18.

[14] The defendant's exception is that the plaintiff's claim is vague and embarrassing. The complaints go mainly to the issue raised earlier in this judgments, being pleader's inability to appreciate the difference between *facta probanda* and *facta probantia.* An example of a

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[1] (7575/2010) [2010] ZAGPJHC 104 (4 November 2010) at [15], [16].

complaint raised in this regard is in paragraph 3 of the defendant's notice dated 16 February 2018.

[15] Next the defendant applied to strike out the plaintiff's particulars of claim on the basis that the plaintiff was persisting with the summary judgment application in the face of the exception notice. That application is in itself defective, because the defendant's exception can and should be argued when the plaintiff moves the application for summary judgment, as a defence to that application. The summary judgment application must, after all, be decided first, to see if the defendant has any further *locus standi* in the proceedings. But, as I have pointed out, the exception is a function of the plaintiff's problematic pleading. As it happened, when the matter was heard, Ms Cordier for the defendant abandoned the application.

[16] Next, the plaintiff filed an exception and an irregular step notice, asserting that its summons is a simple summons, not a pleading, and thus that an exception – such as that taken by the defendant - could not have been taken against it. It also contended that the exception itself is not clearly and concisely stated, and also not properly signed. But what the defendant delivered on 12 March 2018 was not an exception but an application, which was doomed to fail as I have indicated, but not for any of the reasons raised by the plaintiff.

[17] Then, on 9 July 2018, the plaintiff filed a document which it called. *"Plaintiff's Exception and Application in terms of Rule 30(1)."* But that document is itself fatally defective. To begin with, an exception is a pleading, not a notice. And so a pleading is required, which – as for example, a plea – has a name, here an *"Exception"*, and then sets out the various exceptions relied on, with the grounds, just like a pleading; and ending, just like a pleading, with the relief claimed, and duly signed, just like a pleading, with provision for service. The exception here fails, if only for the reason that in form it is not a pleading, although it was in fact signed, as Mr du Plessis was able to point out from his laptop. It is also bad in substance, because it supposes that the summons is a simple summons when, as pointed out, it is not.

[18] That part of this document that purports to be an application in terms of rule 30 is also fatally defective for lack of a supporting affidavit. Such an application cannot succeed unless it show prejudice, and this is usually if not invariably proved by an affidavit which sets out the prejudice relied on.

[19]Two separate processes should have been launched and set down for argument at the same time, as was done in Nasionale Aartappel Koöperasie Bpk v PriceWaterhouseoCopers Ing en Andere.[2] There the headnote reflects:

"Held, that the plaintiff's objection to the Rule 30 application could not be sustained. That the exception and the Rule 30 application were contained in two different documents and that relief was not claimed in the alternative was irrelevant. In a case such as the instant one, where the grounds for the exception and the Rule 30 application were the same, it could not be said that the filing of the exception either (1) advanced the proceedings one step nearer completion or (2) manifested an intention to pursue the cause despite the irregularity. (At 796F - 797A/B, paraphrased.)
The dictum in Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 904F - H applied."

[20] The reference to Jowell's case is to the judgment of Heher, J (as he then was) who said *loc cit*:

"Seen in that light, the filing of a notice of exception, which contains as an alternative an application to set pleadings aside under the provisions of Rule 18(2) read with Rule 30, does not constitute the taking of a further step within the meaning of Rule 30(2). Such an excipient is concerned merely to make full use of the remedies which the Rules provide for an attack on a defective pleading. The inclusion of the alternative is quite opposed to an inference that the excipient intends to pursue the cause despite the irregularity. In my opinion, therefore, the procedure adopted by the fourth defendant did not preclude reliance upon Rule 30(1)."

[21]And finally, the defendant has now applied for leave to file a supplementary affidavit opposing summary judgment. The basis disclosed is that the defendant's attorney and counsel advised the defendant, long after the plaintiff had filed its heads of argument in the application, that the affidavit opposing summary judgment does not disclose a defence. That explanation should bring the application straight into the realm of applications for the leading for further evidence to relieve the pinch of the shoe; they are usually refused.

[22]Ultimately, when all is said and done, this matter ought not to have come before the High Court. In the unreported judgment in this division of Tsuang v Minister of Police, case number

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[2] 2001 (2) SA 790 (T).

2441/2015, my colleague Keightley J stressed the need for cases that belong in the magistrates' court to be brought there. The learned judge also pointed out that the mere fact that an amount that exceeds the jurisdiction of that court is initially claimed, is no justification to institute action in the high court, or to persist in it in this jurisdiction.

[23]Mr du Plessis fairly drew my attention to the Full Court judgment in Nedbank Limited v Thobejane and other banks.[3] There the court said that the High Court is not obliged to her matter that ought to have been brought in the Magistrates' Court, and it has the power to transfer such matters to that court. I was not fully addressed on whether I should do so here, and so I prefer to follow the route below.

[24]In this matter, not only is the amount involved relatively small, but the pleadings and notices are of an inadequate standard. For this reason the clients ought not to be suffering the cost of these short-comings that have resulted in the failure of the processes in this court. The summary judgment will be refused on the basis that the plaintiff's summons is materially defective.

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

(a) The application for summary judgment is dismissed, and the defendant is granted leave to defend.

(b) The defendant's application to file a supplementary affidavit opposing summary judgment is refused.

(c) The plaintiff's exception and application in terms of rule 30(1) dated 9 July 2018 are refused.

(d) Neither the plaintiff's attorneys nor the defendant's attorneys are permitted to recover any fees from their respective clients in respect of the processes that were disposed of in terms of this order, or those that were abandoned.

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[3] (84041/15; 93088/15; 99562/15; 36/16; 736/16; 1114/16; 1429/16; 3429/16; 6996/16; 16228/16; 29736/1; 30302/16) [2018] ZAGPPHC 692; [2018] 4 All SA 694 (GP) (26 September 2018).

WHG van der Linde

Judge, High Court

Johannesburg

Date hearing: 29 January 2019

Date judgment: 29 January 2019.

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