REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE:
CASE NO: 17092/2015

29/1/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED ✓

29.1.2016 .....

DATE SIGNATURE

In the matter between:
THE STANDARD BANK OF SOUTH AFRICA LIMITED — APPLICANT

And

ANDRE VAN DER MERWE — 1ST RESPONDENT

ANAMARIE VAN DER MERWE — 2ND RESPONDENT

JUDGMENT

MSIMEKI, J

[1] This is an application for summary judgment against the respondents for payment of an amount of R381 581.98; interest thereon; monthly

insurance premiums of R324.76; an order declaring the hypothecated property especially executable; authorising the issuing of a writ of execution and costs.

[2] On 16 March 2015 respondents delivered their notice of intention to defend which was followed by an application for summary judgment.

[3] Advocates JH Mollentze and Francois Greef, respectively, represented applicant and respondents when the matter was argued.

[4] First respondent deposed to an opposing affidavit stating that the respondents have a *bona fide* defence against the applicant's claim and not that appearance to defend had been entered for purposes of delaying the speedy resolution of applicant's claim.

[5] Respondents' contention is that plaintiff's particulars of claim are lacking in that Part A being quotation/cost of credit section was not attached to the particulars of claim. This contention is based on the fact that point 5 of annexure "A2" to plaintiff's particulars of claim describes the agreement between the parties as an agreement which means:

> "... the quotation/cost of credit section – Part A read together with the terms and conditions (Part B) and all repayment instructions, letters and notices".

Respondents contend that Part A forms an integral part of the credit agreement. This is the reason, respondents argue, applicants cause of action is lacking. This, according to them, as advised, becomes an absolute bar against the granting of summary judgment.

[6] The nub of their defence is that applicant failed to comply with the provisions of Rule 18(6) which provides that:

> "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 part relied on in the pleading, shall be annexed to the pleading."(my emphasis)

[6] In deciding the issue it is important to have regard to what is said to be a "pleading".

[7] It is also noteworthy to know what a simple summons is. A simple summons, in terms of Rule 17(2)(b) is a legal document which shall be as near as may be in accordance with form 9 of the first schedule. The document is used where the claim is for a debt or liquidated demand.

The form only requires, regarding the setting out of the cause of action, that that be done in concise terms. In doing so one has to give a general indication of the claim amounting merely to a label. (*Icebreakers No 83 v*

Medicross Health Care Group No 83 v Medicross Health Care Group 2011 (5) SA 130).

[8] It has been held that a simple summons is not a pleading (*Icebreakers No 83 v Medicross Health Care Group* (*supra*) at paragraphs [9] and [10]E and *Absa Bank v Janse van Rensburg* and *Another 2013* (5) SA 173 at paragraph [5]F. In the *Icebreakers No 83 v Medicross* case, WALLIS J dealt with Rule 18 (1), 18(3) and 18(4).

[9] Rule 18(1) clearly shows that a simple summons does not have to be signed by anyone other than an attorney. A combined summons needs the signatures of an advocate and an attorney. In a simple summons a party has to wait for a declaration to which he/she must respond. An exception is directed at the pleading and not the summons. A simple summons not being a pleading cannot be attacked by way of an exception. *Icebreakers No 83 v Medicross Health Care Group* (*supra*) at paragraph [12].

[10] In terms of rule 18(3) every pleading has to be divided into paragraphs which are consecutively numbered and as near as possible and each having a distinct averment. This is not in line with the contents of a simple summons set out in Form 9.

[11] Rule 18(4) provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for the claim, with sufficient particularly to enable the opposite party to reply thereto. In a combined summons this will be covered by the particulars

of claim while in a simple summons, as shown above, one has to wait for the declaration to which he/she responds by way of a plea.

[12] It will be recalled that respondents based their defence on non-compliance with the provisions of Rule 18(6).

Rule 18(6) provides:

> "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 pleading shall be annexed to the pleading." (My emphasis)

A simple summons being different from a combined summons GRIESEL J in *Absa Bank v Janse van Rensburg and Another* (*supra*) at page 180 paragraph [16]G said:

> "it would be incongruous to have a more onerous requirement in respect of a simple summons – in other words, it should be open to a plaintiff who relies on a portion only of a voluminous written agreement, only to attach such portion to the summons and not the whole document."

[13] Two issues need consideration and these are whether applicant was supposed to have annexed Part A of the agreement and whether the

simple summons read with annexures A1 and A2 is adequate for applicant to be entitled to the summary judgment prayed for by it.

[14] Clearly, according to the simple summons, applicant, for its cause of action, relies on annexures A1, A2 and the debt restructuring or re-arrangement order dated 8 June 2011 in terms of which respondents were to pay applicant an amount of R3 124.29.

[15] Mr Mollentze, for the applicant, submitted that:

1. respondents admitted the breach of the re-arrangement order in that they conceded that they had not properly complied with the provisions of the order.

2. the credit agreement was enforceable without further notice once a debt-rearrangement order was breached. This submission is in line with the decision of *Ferris and Another v Firstrand Bank* 2014 (3) SA 39 at paragraph [18] B page 46 MOSENEKE ACJ said:

> "While *Firstrand* is not entitled to rely on this section (ie section 86(1)) for enforcement of the loan because notice was not properly given, it was independently entitled to enforce the loan on the basis of the breach of the debt-restructuring order and the provisions of the debt-restructuring order itself." (my emphasis)

It is noteworthy that applicant attached the re-arrangement order. This, in my view, is adequate compliance with the Rules.

[16] Paragraph 6 on page 9 of the paginated papers reveals that respondents in the months referred to therein failed to honour the re-arrangement agreement to the extent shown therein.

[17] It is clear from paragraph 9 on page 10 of the papers that as at 6 March 2015 the respondents were in arrears with their payments in an amount of R94 541.30. This has not been denied. All the deponent to the opposing affidavit says in paragraph 3.2 on page 62 of the papers is as follows:

> "Although I did not make payments for certain months, this due to industrial action in the mining industry which resulted in me not receiving any salary, I did make additional payments in subsequent months to catch up (*sic*) the payments which had been skipped due to circumstances beyond my control. In confirmation of the aforesaid I attach here with (*sic*), as Annexure AM2, a creditor statement from my debt counsellor which clearly indicates the additional payments.

[18] Paragraph 3.2 reveals the concession of non-payment made by the deponent to the opposing affidavit. The paragraph fails to indicate the total additional payments that he made. The paragraph fails to reveal if all the arrears have been paid and in fact does not deny that there are still

arrears amounting to a substantial amount. Annexure AM2 is more in line with the payment history of the deponent as revealed by applicant.

[19] It is noteworthy that respondents:

1. do not dispute that they applied for debt review;

2. the debt re-arrangement was granted by the court;

3. they are in arrears with their payments in terms of the debt re-arrangement order; and

4. that they do not dispute the terms and conditions.

[20] A proper cause of action, in my view, has been demonstrated by applicant which, in my view, is entitled to the order sought.

[21] Respondents' only defence as demonstrated in the papers is that the summons fails to comply with Rule 18(6) of the Uniform Rules of Court. This defence, as shown above, is without merit. Mr Greef, for respondents, in any event, when arguing the matter conceded that it was common cause that there had been no compliance with the debt re-arrangement order.

[22] Mr Greef submitted that there was a factual dispute pertaining to the payments that first respondent made. The submission, in light of what I have said above, is not convincing and lacks merit.

[23] I find nothing wrong with the simple summons as it stands. Nothing has been advanced to show why the property should not be declared executable and why a writ of execution should not be authorised.

[24] Applicant, in my view, has made out a case for the order that it seeks. The application should succeed. I, as a result, make the following order:

1. An order is granted in terms of prayers 1, 2, 3, 4, 5 and 6 of application for summary judgment dated 7 April 2015.

MW MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	19/06/2015
For the Applicant:	Adv J H MOLLENTZE
Instructed by:	RAMSAY WEBBER
For the Respondents:	Adv F GREEF
Instructed by:	GREEF & VAN WYK ATOTORNEYS
Date of Judgment:	