

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case no: 31890/2019**

In the matter between:

**FIRST NATIONAL BANK, A DIVISION  
OF FIRST RAND BANK LIMITED**  
(Registration: 1929 / 001225/06)

**Plaintiff**

And

**ANTLEY LIGHTING (PTY) LTD**  
(Registration : 2013/ 118962/ 07)

**First Defendant**

**AIDEN ANTHONY HAWLEY**  
[...]

**Second Defendant**

**LESLEY NELLIAN HAWLEY**  
[...]

**Third Defendant**

**JUDGEMENT**

**NE NKOSI AJ**

[1] This is an application in terms of Rule 23(1) of the Uniform Rules of Court brought by the second and third defendants. The application is opposed by the plaintiff.

[2] The defendants raised an exception to the plaintiff's simple summons citing two grounds. The second ground, as it appears in the

notice of exception, was abandoned by both defendants during the hearing of this application. The only remaining ground of the defendants exception is stated in the notice of exception as follows:

*"1. The basis of the first ground of exception is that the cause of action pleaded in the plaintiff's simple summons dated 10 May 2019, is discrepant from the one pleaded in the declaration.*

*2. The simple summons -*

*2.1 Is defective for want of compliance with Rule 17(2)(b) as it failed to disclose a cause of action;*

*2.2 Failed to disclose a cause of action as it was of vital importance for the plaintiff to have attached the written deed of suretyship to the simple summons, taking into account that its cause of action is based on the aforementioned deed of suretyship<sup>1</sup>."*

[3] The defendants' basic complaint is that the deed of suretyship was not attached to the simple summons and for that reason it was contended, by Mr. Coetzee appearing for the defendants that, the simple summons does not disclose a cause of action and does not comply with Rule 17(2)(b) of the Uniform Rules of Court.

[4] This application stems from the plaintiff's action against, *inter alia*, second and third defendants which was commenced by way of a simple summons.

[5] The deed of suretyship was not annexed to the simple summons. The plaintiff applied for summary judgement which was granted against the first defendant but the second and third defendants were granted leave to defend the action. Thereafter, the plaintiff delivered a

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<sup>1</sup> Caselines B – 3 at B73 – 77.

declaration with copies of the deed of suretyship ("annexures SJ2 and SJ3") annexed to it.

[6] The cause of action in respect of the second and third defendants is stated in the simple summons as follows:

*"As against the second and the third defendants respectively, in terms of a written suretyship agreement contained in the paragraph 3.3 of the facility agreement annexed hereto as Annexure "B" signed at PRETORIA on 25 June 2018, wherein the second and the third defendant bound themselves jointly and severally as surety and co-principal debtor for the payment when due of all present and future debts of any kind of the first defendant to the plaintiff to an unlimited amount<sup>2</sup>."*

[7] In the declaration the cause of action in respect of the second defendant is that:

*"On or about 4 January 2017 and at or near Pretoria the second defendant in writing bound himself jointly and severally as surety and co-principal debtor for the payment when due of all present and future debts of any kind of the first defendant; to the plaintiff A copy of the deed of suretyship is annexed hereto marked as Annexure "SJ2"<sup>3</sup>."*

[8] In respect of the third defendant the declaration says:

*"On or about 01 October 2015 and 4 January 2017 respectively and at or near Pretoria the third defendant, in writing, bound herself jointly and severally as surety and co-principal debtor for the payment when due of all present and future debts of any kind of the first defendant to the plaintiff A copy of the deed of suretyship is annexed to the plaintiff's summons as Annexure "SJ3 and SJ2*

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<sup>2</sup> Caselines B3, at para 1.2.

<sup>3</sup> Caselines BSS, at para 13

respectively<sup>4</sup>."

[9] A simple analysis of the declaration and the simple summons indicates that the plaintiff's cause of action against the second and third defendants is based on a suretyship agreement in terms of which both defendants, respectively bound themselves to be liable jointly and severally to the plaintiff for the debts of the first defendant. It is further clear that the cause of action is the same in both, the simple summons and the declaration.

[10] I agree with Mr. Jacobs, the plaintiffs Counsel, that a simple summons is not a pleading<sup>5</sup> and accordingly cannot be attacked by way of an exception. In *Jee Breakers 83 (Pty) LTD v Medicross Healthcare Group (Pty) LTD*<sup>6</sup>, Wallis J held that:

*"As that is all that is required of a plaintiff issuing a simple summons to recover a debt or liquidated demand, it would be incongruous were a defendant able to take exception to the summons. In terms of Rule 23(1) the only grounds for an exception are that the pleading is vague and embarrassing or that it lacks averments necessary to sustain an action. Yet in accordance with our authorities a simple summons may be perfectly valid even though the cause of action is stated vaguely or is defective. The contention that an exception can be taken to a simple summons is therefore inconsistent with the nature of such a summons and the requirements of the rules in regard to its content."*

[11] When a plaintiff seeks to proceed to another level on the basis of a simple summons, for instance, if he applies for default judgment or summary judgment, he cannot succeed if the document upon which the cause of action is based is not annexed to the simple summons.

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<sup>4</sup> Caselines B57, para 17.

<sup>5</sup> *Jee Breakers 83 (Pty) LTD v Medicross Healthcare Group (Pty) LTD* 2011 (5) SA 130 (KZD) at 131 F - H and 134 E -5.

*" Where the cause of action is found ed on some document, reference thereto should be made in the simple 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. If a copy of the required document is not attached to the simple summons, the summons would not disclose a cause of action<sup>7</sup>."*

[12] In casu, plaintiffs claim is for a liquidated debt. In terms of Rule 20 (Uniform Rules) plaintiff delivered its declaration shortly after receiving a notice of intention to defend from both defendants. In terms of Uniform Rule 22, the defendants are required to deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out. This rule envisages a plea or exception to a declaration and not a simple summons.

[13] The defendants referred to Section 6 of the General Amendment Act 56 of 1996 and Rule 17(2)(b) of the Uniform Rules in support of their exception.

[14] Section 6 of General Law amendment act provides:

*"6. Formalities in respect of contracts of suretyship:*

*No contract of suretyship entered into after the commencement of this Act, shall be valid unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer or an aval under the laws relating to negotiable instruments."*

This section does not support the defendants' contention that the summons does not disclose the cause of action and therefore cannot be relied upon. It merely refers to the prescribed formalities to be

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<sup>6</sup> Ice Breakers 83 {Pty}LTD v Medicross Healthcare Group (Pty) LTD *supra* at para 6.

<sup>7</sup>DE Van Loggerenberg & PBJ Farlam, Erasmus Superior Court Practice BI – 124 at nn 5 and 6 (Service 39, 2021).

adhered to when relying on a suretyship agreement.

[15] Rule 17(2)(b) states:

*"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"*

Form 9 of the first schedule deals with the form which simple summons must follow. The rule does not explicitly go further and prescribe a requirement that copies of relevant agreements must be annexed to a simple summons.

[ 16] In *ABSA Bank Limited v Janse Van Rensburg & Others*<sup>8</sup> the full bench of the Western Cape Division held that, on proper interpretation of Rule 17(2)(b) read with Form 9, it is necessary to attach a copy of the written agreement to the summons where the plaintiffs cause of action is based on such agreement.

[17] In *ABSA Bank Limited v Studdard and Another*<sup>9</sup>, Wepener J referred to the following remarks of Swain J in *Moosa v Hassam*<sup>10</sup> which deal with non-compliance with the requirements of Uniform Rule 6:

*"In the present case the respondents base their cause of action against the applicants upon a written agreement. The written agreement is a vital link in the chain of respondents' cause of action against the applicants. In order for the respondents' cause of action to be properly plead ed, it is necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absences of the written agreement, the basis of the respondents' cause of*

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<sup>8</sup> As yet unreported decision of the Western Cape High Court in Case number 16071/12, handed down on 24 December 2012, referred to in *ABSA Bank Limited v Nicolas and Another*, *Absa Bank Ltd v Nicholas and Another* (19942/2011, 18243/2011)[2013]ZAWCHC 58 (20 February 2013) at para 9.

<sup>9</sup> *ABSA Bank Limited v Studdard and Another*, [2012] ZAGPJHC 26 (13 March 2012).

<sup>10</sup> *Moosa v Hassam*, 2010 (2) SA 410 (KZP) at para 18.

*action does not appear ex facie the pleadings*<sup>11</sup>."

Wepener J held that:

*"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*<sup>12</sup>."

[18] I am in agreement with the views expressed by Wepener J, Swain J and the passage in Erasmus to the extent that the views relate to applications for summary judgement, default judgement, compliance with Rule 18(6) the list may not be exhaustive. However, in my view, where a simple summons has been met with a notice of intention to defend, the simple summons cannot be attacked for failing to have a copy of an agreement attached to it. The attack should be directed at the declaration which constitutes a pleading.

[19] In the present case, the cause of action relied upon is contained in the declaration which is materially similar to the one contained in the simple summons. A copy of the deed of suretyship agreement in respect of each defendant is attached to the declaration .

[20] Once a declaration is delivered, the defendants are expected to plead or file an exception to the declaration and not to the simple summons<sup>13</sup>.

[21] I am satisfied that the declaration contains annexures pertaining

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<sup>11</sup> See footnote number 7 at para 17.

<sup>12</sup> Studdard *supra* n 7 at para (15), also see Absa Bank Limited v Nicolas and Another *supra* at 6 at para 9.

<sup>13</sup> Uniform Rule 22 (1).

to the deed of suretyship and that the cause of action is consistent with the one raised in the simple summons. A declaration constitutes a pleading. The defendants should therefore be able to file a plea or an exception to the declaration if they so wish.

[22] I am therefore of the view that the exception raised by the defendants should be dismissed with costs.

[23] Mr. Jacobs submitted that costs should be on an attorney and client scale, largely because of the manner in which the defendants conducted themselves in this application. They withdrew their second ground of exception during the hearing of the application when they could have done so earlier. Mr. Jacobs argued further that the issues raised in the exception were not necessary having regard to the available authorities which Mr. Coetzee should have consulted.

[24] Mr. Coetzee submitted that the appropriate scale of cost should be on a party and party .

[25] It is trite that the costs should follow the results. The Court has a discretion in awarding costs. In *Ferreira v Levin NO and Others*<sup>14</sup> the Constitutional Court stated that:

*"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for*

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<sup>14</sup> Ferreira v Levin NO and Others, (1996) ZACC 27;1996 (2) SA 621at para 3.

*example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings. "*

[26] An award of attorney - and - client costs will not be granted lightly as the courts look upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complainant such party may have<sup>15</sup>.

[27] *The* list of grounds upon which a court may grant a punitive cost order on an attorney and client scale is not exhaustive. They include dishonesty, fraud, reckless and malicious or frivolous motives.

[28] I am not persuaded that the scale of costs sought by the plaintiff is justifiable in this case. *The* defendants did not commit any of the grounds listed above (para 27). *The* defendants' heads of argument are premised on case law researched by Mr. Coetzee. *The* only issue is the interpretation of the views of the authorities *referred* to by either party.

[29] In the circumstances I make the following order:

1. *The* exception is dismissed;
2. *The* Second and Third defendants are to pay plaintiff's costs of application jointly and severally, the one paying the other to be absolved

NE NKOSI, AJ  
Acting Judge of the  
High Court

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<sup>15</sup> Herbstein & Van Winsen – The Civil Practice of the High Courts of South Africa Vol2 at page 971. Also see *De Villiers v Murrayburg School Board* 1910 CPD 535 at 538 *Jewish ColonialTrust Ltd v Estate Nathan* 1940 AD 163 at 183 -184.

Date of hearing: 31 May 2021  
Date of Judgement: 11 June 2021

For the Plaintiff: Adv Jacobs  
Instructed by: Vezi & De Beer Incorporated  
For the Second  
and Third Defendants: Mr. M Coetzee  
Instructed by: Morne Coetzee Attorneys