

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO:6408/2008

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Plaintiff

and

HUNKYDORY INVESTMENTS 194 (PTY) LIMITED

First Defendant

RUPERT HENRY INGRAM

Second Defendant

JUDGEMENT DELIVERED ON 10 OCTOBER 2008

ELIZE STEYN AJ

THE APPLICATION

1. Plaintiff is applying for Summary Judgment to be entered against First and Second Defendants jointly and severally for payment of a capital sum together with interest thereon and costs of suit on the scale as between attorney and client. Plaintiff further asks for an order against First Defendant declaring its mortgaged immovable property executable for the claimed sums.

THE OPPOSITION

2. Defendants filed a Notice of Opposition of Application for Summary Judgment wherein notice was given that they would apply for the striking out of paragraph 3 of the '*Applicant's replying affidavit*', presumably referring to the Applicant's supporting affidavit. This striking out application was not raised in the Defendants' Heads of Argument, but it was dealt with in their opposing Affidavit in support of their contentions that Summary Judgment be refused.
3. In Paragraph 3 of the Applicant's affidavit in support of the application for Summary Judgment, an employer of Plaintiff sets out the circumstances that form the basis of her knowledge of the facts pertaining to the matter. I was referred to the judgment of *Fischereigesellschaft v African Frozen products*, 1967(4)Sa 105 (CPD) at 109H – 110F, in support of the contention that Defendants' application for the striking out was unfounded and I agree that it has no merit.
4. Another point not raised in the Defendants' Heads of Argument, but raised by the Defendants in their affidavit opposing Summary Judgment was that the Defendants denied that the deponent to Plaintiff's affidavit had the requisite authority to sign the affidavit. I was persuaded by Mr. Sievers,

with reference to reported decisions that this purported defence, is without merit.

5. Defendants are opposing the Application, as set out in Heads of Argument, on the grounds that:

- 5.1 Plaintiff's summons is vague and embarrassing and therefore excipiable in terms of Rule 23 and/or irregular in terms of Rule 30, in essence, because Plaintiff made spelling errors when referring to Defendants on 5 separate occasions in the summons;

- 5.2 Sections 4(1)(a), 4(1)(b) and 4(2)(c) of the National Credit Act, no. 34 of 2005 ('The Act') are unconstitutional in so far as it states that the Act is not applicable to a juristic person.

THE SUMMONS

6. Plaintiff instituted action against Defendants by way of a simple summons as provided for in Uniform Rule of Court 17(1).
7. A simple Summons (Form 9) is used for claims for debts or a liquidated demand. Form 9 requires the Plaintiff to set out his cause of action '*in concise terms*'. Full particularity is not required as long as a general

Indication of the cause of action is provided. The statement of the cause of action in a simple summons is in fact no more than a '*label*', an indication of the Plaintiff's claim '*in the most general terms*'.

See Erasmus, Superior Court Practise, B 124 and further and the comments and cases quoted.

See also BW Kuttle & Association Inc v O'Connell Manthe and Partners Inc 1984 (2) SA 665 (CPD) at 668 B-D and

Volkscas Bank Ltd v Wilkinson and Three similar Cases 1992 (2) SA 388 (CPD) at 394 J.

EXCEPTIONS and IRREGULAR PROCEDURE

8. That a summary judgment simple summons is capable of being set aside on exception, or as an improper or irregular step, may be a good reason why summary judgment should be refused. It would constitute a *bona fide* defence. However, it could not have been intended that the initiating simple summons should contain the degree of particularity which is appropriate in a declaration. A court will only grant summary judgment if satisfied that the necessary elements which go to make up a cause of action have been verified under oath.

See Dowson v Dobson Industrial v Van Der Werf 1981 (4) SA 417 CPD

9. It is trite law that an overly-technical approach by the Court with regard to exceptions and irregular procedure should be avoided. The Court does not look too critically at a pleading.
10. Whether a pleading is vague and embarrassing on the ground of lack of particularity depends on whether it complies with the provisions of the relevant Rules of the Uniform Rules of Court. Prejudice to a litigant faced with an embarrassing pleading lies ultimately in an inability to prepare properly to meet an opponent's case.
11. As stated hereinabove the simple summons (Form 9) intended for use in claims for a debt or liquidated demand should contain only an indication of the Plaintiff's claim in the most general terms. All that is required is that the claim be set out with sufficient particularity for the court to decide whether judgment should be granted and for the Defendant to be made aware of what is being claimed from him.
12. I agree with the detailed argument of Mr. Sievers, on behalf of the Plaintiff, that the Plaintiff has complied with the requirements of Rule 17 read with Form 9. There are four spelling errors relating to the word Defendants. The 5th objection raised, is incorrect. The existence of a few spelling errors does not render the summons defective or the statement of the cause of

action inadequate. I am satisfied that the necessary elements constituting a cause of action have been properly verified under oath, as being present. I am not persuaded that summary judgment should be dismissed on this ground.

THE CONSTITUTIONALITY OF SECTIONS 4(1)(a), 4(1)(b) and 4(2)(c), OF THE NATIONAL CREDIT ACT No 34 of 2005. ('The Act')

13. The National Credit Act No 34 of 2005, ('the Act') is limited in its application regarding incidental credit agreements on the one hand and all credit agreements in terms whereof the consumer is a juristic person on the other hand. A juristic person has an extended meaning for purposes of the Act. It includes partnerships, any association or body of persons, corporate or unincorporated and trusts with three or more trustees. Companies and close corporations fall within the concept of a juristic person. Juristic persons do not enjoy the protection contained in certain parts or sections of the Act. The exceptions are numerous and include that juristic persons do not have the protection of the parts of the Act dealing with reckless credit, debt review, rescheduling of debt etc.
14. The Defendants correctly argue that the agreements entered into between the Plaintiff and the First Defendant are not governed by the provisions of the Act. Defendants are excluded from the protection of the Act because

First Defendant is a juristic person. (Sections 4(1)(a), 4(1)(b) and 4(1)(c) of the Act.)

15. The Defendants claim that sections 4(1)(a), 4(1)(b) and 4(2)(c), of the Act are unconstitutional in so far as it states that the Act is not applicable to a juristic person and that the Act only applies to a surety contract if the Act applies to the contract in respect of which the surety was granted. Second Defendant submits that section 4(2)(c) should be so interpreted as to afford him, as the '*alleged surety*', the same protection as any other natural person who signed surety for the debt of another natural person. He argues that the Plaintiff should have complied with the provisions of the Act before issuing summons in the matter. It has failed to do so and the matter '*should therefore not be before this Honourable Court*'. It is submitted that if the Court should find that the Act cannot be interpreted so as to afford Second Defendant the protection of the Act, he submits that sections 4(1)(a) and (b) of the Act are unconstitutional.
16. Second Defendant furthermore states that the First Defendant is a property holding company which does not trade. Second Defendant transferred the property in question to the First Defendant '*as an estate planning measure*.' He submits that it is unfair that First and Second Defendants are not afforded the same protection under the Act as any other natural person, just because the credit agreement was concluded

with a juristic person. He maintains that there is no reason why a juristic person should not be afforded the same protection under the Act as a natural person. Defendants accordingly requested, in Second Defendant's affidavit, that the Court should declare sections 4(1)(a) and (b) of the Act unconstitutional.

17. The Defendants have failed to comply with the relevant provisions of Uniform Rules of Court 10 and 16 regarding the raising of constitutional issues in an action. I will deal with their submissions regardless.
18. Quoting Section 9(1) of the Constitution of South Africa, Act 108 of 1996, ('the Constitution') Defendants submitted in the heads of Argument, that everyone is equal before the law and have the right to equal protection and benefit of the law. (The right to equality) It is furthermore submitted that the provisions of Section 36 of the Constitution, dealing with the limitation of rights, do not '*save the violation of the Defendants' rights to equality*'. It is accordingly submitted by the Defendants that the said sections in the Act should be declared unconstitutional and for that reason the application for summary judgment should be dismissed and Defendants given leave to defend the action.
19. The purpose of the Act is described *inter alia* in the preamble and in par 3 of the Act. Par 3 reads as follows:

3. Purpose of Act

The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by-

- (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;*
- (b) ensuring consistent treatment of different credit products and different credit providers;*
- (c) promoting responsibility in the credit market by-*
 - (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and*
 - (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;*
- (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;*

20. In essence the Act attempts to prevent the reckless provision of credit by institutions to people who cannot afford credit.

21. It has been stated that attacks on the legislation founded on the provisions relating to equality in the Constitution raise difficult questions of constitutional interpretation and require careful analysis of the facts of each case and an equally careful application of those facts to the law. In **Prinsloo v Van Der Linde, and Another, 1997 (3) SA 1012 (CC)**, it was stated that this court -
'should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and hopefully surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises.'

22. In **Harksen v Lane NO and Others, 1998(1) SA 300, CC, p 320** Goldstone J found, regarding arguments relating to lack of equality, that an enquiry should be directed by the Court to the question as to whether the impugned provisions do differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of equality provisions in the Constitution (at the time section 8(1) of the then Interim Constitution), there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is

designed to further or achieve. If it is justified in that way, then it does not amount to a breach of the relevant section.

23. It was further stated by Goldstone J, *supra*, p 321 D, that *'if the differentiation complained of bears no rational connection to a legitimate governmental purpose which is proffered to validate it, then the provision in question violates the provisions of s 8(1) of the Interim Constitution. If there is such a rational connection, then it becomes necessary to proceed to the provisions of s 8(2) to determine whether, despite such rationality, the differentiation none the less amounts to unfair discrimination.'*
24. There may be instances of discrimination which do not amount to unfair discrimination. In the final analysis it has been held that it is the impact of discrimination on a complainant that is the determining factor regarding the unfairness of the discrimination. To establish unfairness in this context various factors must be considered, including the position of the complainants in the society and whether they have suffered in the past from patterns of disadvantage, the nature of the provision and the purpose sought to be achieved by it. If the purpose is aimed at achieving a worthy societal goal, this purpose may have a significant bearing on the question whether complainants have in fact suffered the impairment in question.

25. There can be no doubt that there is a rational connection between the differentiation created by the relevant provisions of section 4 of the National Credit Act and the legitimate governmental purpose behind its enactment. I have not been persuaded, on a balance of probabilities, by the Defendants, who bear the *onus* in this regard, that any differentiation or discrimination, even if it exists, is unfair. I have not been persuaded that the First Defendant's exclusion from the protection of the relevant sections of the Act, have any negative effect on it.
26. The Defendants have failed to set out in their Heads of Argument, or in argument in Court, any constitutional right that would be infringed upon, should judgment be granted as prayed. As correctly submitted by Mr Sievers, the onus is on the Defendants to set out how and why their rights will be prejudiced unless the provisions of the Act are declared unconstitutional. In his affidavit the Second Defendant admits that the property which Plaintiff is claiming should be declared executable, was transferred to First Defendant as '*an estate planning measure*'. He decided to avail himself of the use of a separate entity in order to avoid certain tax implications. This is the reason why First Defendant does not have the protection of a natural person and why it is fair that he should not be bestowed with the same protection.

27. I do not intend to deal with the remaining defences raised on behalf of the Defendants in their opposing Affidavit. I have considered these defences and took note of the arguments relating thereto. The defences were not proceeded with by Defendants in Court and have no merit.

CONCLUSION

28. The defences raised in this matter are without merit. Defendants do not have a *bona fide* defence and their opposition to the application for summary judgment is aimed merely at a delay of the action.

ORDER

Judgment is claimed and is granted as follows:

1. Against First Defendant for:

1.1. Payment of the sum of R 982 115,42;

1.2. Interest:

1.2.1 on R 828 000,00 at 13.25% per annum from 9 April 2008;

1.2.2 on R 156 115,42 at 14.75% per annum from 9 April 2008 to 28 May 2008 and thereafter on R 154 115,42 at 14.75% per annum to date of payment in full.

1.3. An order declaring Erf 3186 Somerset West, in the City of Cape Town, Stellenbosch Division, Western Cape Province, specially executable.

1.4. Costs of suit.

2. Against Second Defendant, (jointly and severally with First Defendant) for payment of the amounts referred to in 1.1, 1.2 and 1.4 hereof.



Elize Steyn AJ