

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 20867/07

In the matter between

JAY COLLEN MCQUILLEN

Plaintiff

and

JAN VISAGIE NO

First Defendant

EUGENE SCHEFFERS NO

Second Defendant

CHRISTOPHER NAIDOO NO

Third Defendant

PATRICIA DURRELL NO

Fourth Defendant

ROY STANFORD OLIVIER NO

Fifth Defendant

LEROY DURRELL NO

Sixth Defendant

PHILEMON SITOLE NO

Seventh Defendant

GLORIA NAIDOO NO

Eighth Defendant

JUDGMENT DELIVERED ON 16 MARCH 2009

ZONDI, J

Introduction

[1] The plaintiff has applied for summary judgment against the defendants. In its simple summons the plaintiff claimed from the defendants in their capacities

as trustees of Hope of Africa Foundation "payment of the amount of R800 000-00 in respect of monies lent and advanced" by it to the Hope of Africa Foundation (the Trust) and interest on the amount claimed "at the rate of 15,5% from 21 December 2006 until date of payment" plus costs.

[2] The application is opposed by the defendants and the seventh defendant has disposed to the affidavit in which he alleges that the defendants have good defences to the plaintiff's claim. In their opposing affidavit the defendants aver that the plaintiff's summons lacks particularity. In this regard it is contended by *Mr Abrahams* on behalf of the defendants that between 2002 and 2006, a number of transactions took place between the plaintiff and the Trust, as well as between the Trust and a company represented by the plaintiff and that in the absence of further particularity regarding the monies claimed by the plaintiff, they are unable to respond in a meaningful manner.

[3] *Mr Muller*, who appeared for the plaintiff, submitted that the defendants' defence is not a *bona fide* defence in that no facts are stated by the defendants which would enable the Court to ascertain whether they have deposed to a defence which, if proven at trial, would constitute a good defence to the action. In support of this contention he relied upon the case of **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 419(A).

[4] It is correct when a Court is asked to grant a summary judgment it should not do so unless it is satisfied that the necessary elements which go to make up the cause of action have been verified under oath as being present. What is

required is that the plaintiff has to verify the cause of action upon oath. Thus where a simple summons has been used (just like in the present case) the averments made in it may be sparse. They may be adequate to convey, in a general sense, what the cause of action is, but they may not include all the essential averments which are strictly necessary to complete the cause of action. As pointed out by Marais AJ at 426 H in **Dowson and Dobson Industrial Ltd v Van Der Werf and Others** 1981 (4) SA 417(C) "*the allegations may amount to no more than a label which identifies the kind of cause of action upon which plaintiff sues*"

[5] It is clear from the defendants' opposing affidavit that between the period 2002 and 2006 the parties concluded a number of transactions in which the plaintiff appeared in either personal capacity or representative capacity. In such a case then plaintiff would be required to allege the capacity in which he appeared in lending and advancing monies to the Trust in order to establish his *locus standi*. Failure to make this allegation in the summons will be fatal to its simple summons. In this case there appears to be uncertainty as to the plaintiff's rights and in the circumstances I would refuse summary judgment.

[6] Relief by way of summary judgment like that by way of provisional sentence is of an unusual kind, intended to give a plaintiff with an apparently clear right a speedy means of relief against a delaying or recalcitrant debtor. But then the right must be demonstrably clear. If it is not, then he must follow the normal procedure of placing the issues before the Court for trial.

[7] Similarly the plaintiff has claimed interest from 21 December 2006 until date of payment. It is not indicated whether the loan agreement between the parties provided for interest and if so the date on which and the circumstances in which it would become payable.

[8] In my view the defendants' defence is a kind of a defence, which, if proved at trial, would constitute a good defence to the action and in the circumstances I would refuse summary judgment.

[9] In the result it is ordered that:

1. Summary judgment is refused;
2. the defendant is granted leave to defend; and
3. the plaintiff to pay the defendants' taxed costs.

A handwritten signature in black ink, appearing to be 'H. Zondi', written over a horizontal line.

ZONDI, J