

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

In the matter between:

Case No. 371/2010

ABSA BANK LIMITED

Applicant

and

JOHAN FRANCOIS CARSTENS N.O. First Respondent

ARIE VOS MULLER N.O. Second Respondent

JOHAN FRANCOIS CARSTENS Third Respondent

JUDGMENT DELIVERED ON 23 MARCH 2010

BINNS-WARD J:

[1] The plaintiff in this matter instituted action against the defendants to recover the amount allegedly due and payable to it in respect of a credit agreement. The summons, which is something of a hybrid between a conventional simple summons

and a combined summons, sets out the following salient allegations:

1. That the plaintiff at the special instance and request of the Norstadt Trust (the first and second defendants are cited in their capacity as the trustees) undertook to advance 'certain amounts' to the Trust, subject to the registration of a mortgage bond over immovable property as security.
 2. That pursuant to the aforementioned agreement a mortgage bond (B.38936/2005) was registered.
 3. That 'in terms of the provisions of the mortgage bond the Norstadt Trust agreed that
 - i. the amounts advanced and due in terms thereof would be repaid in the manner stipulated, together with interest;
 - ii. on default to make payment of any one instalment the entire balance would be owing, due and payable;
 - iii. a certificate signed on behalf of the Plaintiff by a manager would constitute prima facie proof of all the facts set out therein;
 - iv. on default, plaintiff would be entitled to an order declaring the mortgaged properties executable.'
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4. That 'the Norstadt Trust failed to make payment and the outstanding balance as at 27 November 2009, amounted to R3,446,983,75 plus 8,5% interest p.a from 28th November 2009 to date of payment as set out on the annexed certificate'.

[2] The 'annexed certificate' referred to in the body of the summons was, according to its tenor, executed by Petrus Jacobus Bosman in his capacity as 'Manager, 3RD Party Management' of the plaintiff bank. Bosman certified that Norstadt Trust was indebted to the plaintiff as follows:

'The total amount due and payable as at **27-11-2009** is the amount of **R3 446 983,75** together with interest calculated at **8,50%** per annum, capitalised monthly from **28-11-2009** to date of payment, both days inclusive, and which is due in respect of Mortgage loan **B38936/2005** account number **8060840597**.'

[3] In terms of the summons the plaintiff prayed for judgment against the defendants jointly and severally for:

1. Payment of the amount of R53,446,983.75;
 2. Interest on the aforesaid amount at the rate of 8,5% interest p.a. from 28th November 2009 to date of payment, calculated and capitalised monthly in arrears;
 3. Costs of suit as between Attorney and Client;
 4. Alternative Relief.
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An order was also sought declaring the mortgaged property directly executable.

[4] The defendants gave notice of their intention to defend the action and the plaintiff thereupon applied for summary judgment. The application for summary judgment prayed for judgment in the terms set out in the prayers in the summons; namely for 'payment of the amount of R53,446,983.75.

[5] The summary judgment application was supported by an affidavit by Petrus Jacobus Bosman. It will be noted that the deponent bears the same name as the manager who executed the certificate of balance quoted above. In the affidavit, however, Bosman describes himself as being a manager of the plaintiff employed in the latter's Legal Recoveries division. It is probable that notwithstanding the discrepancy in the description of his job title in the two documents, Bosman, the certifying manager, and Bosman, the deponent to the supporting affidavit, are one and the same person.

[6] The summary judgment procedure is governed by rule 32 of the Uniform Rules of Court. The affidavit by Bosman was

submitted in purported compliance with the provisions of rule 32(2), which requires, amongst other matters, that an application for summary judgment be supported by an affidavit by a 'person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay'.

[7] Annexed to the supporting affidavit made by Bosman was a copy of mortgage bond B38936/2005. It is apparent from the content of the bond that it is a covering bond and is intended to provide continuing security for any amount up to R3 000 000 in respect of any indebtedness by the trustees for the time being of the Norstadt Trust howsoever arising. It therefore does not define or limit the sum of the Trust's actual indebtedness to the Plaintiff.

[8] It is clear from what has been described above that the summons was inherently defective. There was an inconsistency between the amount of the defendants' alleged indebtedness as pleaded in the body of the summons and the amount claimed in the prayers. In the summary judgment application payment of the greater amount was sought. This amount was consistent with the

amount in respect of which judgment was prayed in the summons, but inconsistent with the amount set out in the certificate of balance.

[9] The result is that it is by no means clear which amount Bosman purported to verify in his affidavit in support of the application for summary judgment. He averred that he had 'read the Summons and annexed Particulars of Claim and verify the cause of action and the indebtedness of the respondents to the applicant in the amounts and on the grounds stated in the Summons'. There are indeed two amounts stated in the summons, but judgment is sought in respect of only one of them. Furthermore one looks in vain for the 'annexed Particulars of Claim' to which the deponent refers. It begs the question did the deponent really read the court documents as he claimed? Comparing the summons with the content of the affidavit certainly does not give me a sense of assurance that he did. And if the deponent did read the summons how could he make the averments deposed to? What reliance can be put on his dependability?

[10] The defendants took a point *in limine* against the application based on the inconsistencies that I have mentioned.

[11] The plaintiff's counsel submitted that there had been a typographical error in the summons. She moved for an amendment of the summons to reflect a prayer for judgment in the amount of R3 446 983,75. I was readily inclined to accept counsel's explanation for the discrepancy and, in any event, was not persuaded by the defendants' counsel's argument in opposition to the application that there was any good reason to refuse it. The summons was amended accordingly.

[12] The amendment of the summons did not, however, address the problems with the supporting affidavit. If anything, it compounded them. The supporting affidavit most certainly could not be accepted as relating to the summons as amended. The plaintiff's counsel then sought a postponement in order to introduce a further affidavit correcting, and presumably seeking to explain, the errors in the originally submitted affidavit. The defendants' counsel opposed the affording of any such opportunity to the plaintiff.

[13] The procedural remedy of summary judgment affords a plaintiff the special advantage of obtaining judgment without the defendant being permitted to plead to the claim and entering into an ensuing trial. The remedy is also intended to avoid the courts being unnecessarily burdened with the task of trying matters in which the defendant has no *bona fide* defence. Cf *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at para. [31]. The rules of court impose certain stringencies on the availment by plaintiffs of the remedy. An application for summary judgment must be instituted promptly. If the application is not instituted within 15 days of the delivery by the defendant of a notice of intention to defend, the opportunity to make use of the remedy is forfeited. Furthermore, the plaintiff does not have the opportunity to reply to any affidavit that the defendant may deliver in opposition to the application, nor does the plaintiff have the right to cross-examine a defendant who chooses to give oral evidence in opposition to the application. The procedure is therefore somewhat rigidly structured. The notion that a plaintiff who supports its application with an affidavit that fundamentally fails to comply with the requirements of rule 32(2) should be permitted a second bite at the cherry is essentially

inconsistent with the summary nature of the remedy. Summary judgment is in essence an all or nothing procedure; not only for the defendant, but also for the plaintiff - the adjective 'summary' aptly connotes as much.

[14] The course which the plaintiff seeks to achieve in the current matter would entail the filing of a further affidavit by the plaintiff, which natural rules of justice would require consequently also affording to the defendant the opportunity to file another affidavit. Allowing that course would be to depart from the summary nature of the remedy. The summary remedy is appropriate in a case in which the plaintiff's case is clearly set out and validly confirmed by an affidavit by a person whose evidence on the face of it may be accepted as convincingly confirmatory of nature and amount of the plaintiff's claim. For the reasons discussed earlier, the situation in the current matter is, far removed from such a case. To allow the plaintiff to lodge a further affidavit would be to depart from the requirements of the remedy in an evidently unwholesome way.

[15] In arriving at this conclusion I should not be misunderstood to suggest that common sense should not apply in permitting the condonation of slight and obvious errors in the wording of

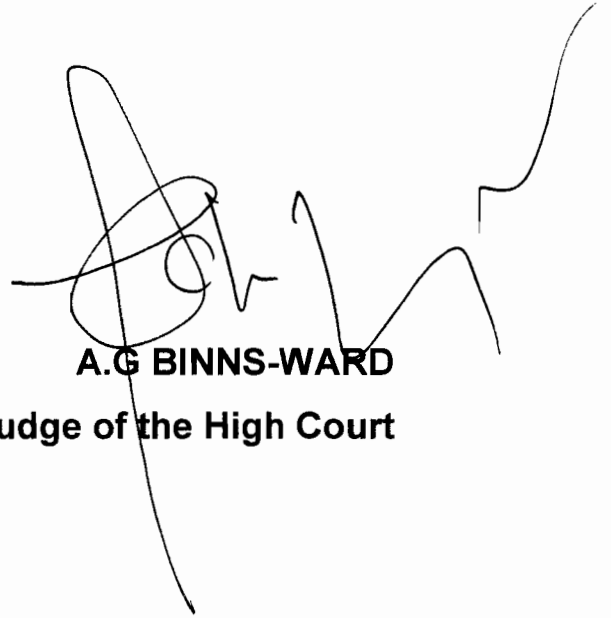
supporting affidavits in summary judgment applications, or of overlooking minor and immaterial deviations from the letter of the requirements of rule 32. Those errors will be of the nature which are patently mistaken and which can be accommodated without the need for the delivery of further sets of affidavits. Cf. *Standard Bank of SA Ltd v Naude and Another* 2009 (4) SA 669 (ECP); *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W) and *Van den Bergh v Weiner* 1976 (2) SA 297 (W). They are unlikely to be errors which require the material amendment of the summons or particulars of claim.

[16] The application by the plaintiff for leave to file a further affidavit correcting and explaining the fundamental errors in the supporting affidavit made in support of the application for summary judgment is therefore refused.

[17] In the result the following orders are made:

1. The application for summary judgment is refused.
 2. The defendants are given leave to defend the action.
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3. The costs of the application are to stand over for determination by the trial court.

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by 'G' and 'BINNS-WARD' in a cursive script.

A.G BINNS-WARD
Judge of the High Court