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

Case No.: **8850/2011**

In the matter between:

ABSA BANK LIMITED Plaintiff

and

ROBERT DOUGLAS MARSHALL First Defendant

GAVIN JOHN WHITEFORD N.O. Second Defendant

GLORIA DENISE WHITEFORD N.O. Third Defendant

GAVIN JOHN WHITEFORD Fourth Defendant

AND

Case No. **11921/2011**

In the matter between:

ABSA BANK LIMITED Plaintiff

and

PETRUS JACOBUS UYS First Defendant

IRIS UYS Second Defendant

JUDGMENT: 29 NOVEMBER 2011

GAMBLE J

INTRODUCTION

1. In these matters the Plaintiff ("*the Bank*") sought summary judgment against two sets of sureties whom it had sued after two principal debtors had each defaulted on their loans with the Bank.

2. When the matters came before me in the Motion Court I raised certain queries regarding the form of the summonses used by the Bank and invited counsel to address me thereon. By arrangement the matters were heard together with a number of others on the last day of term.

3. At that stage Mr Viviers appeared for the Bank in both matters. In the Marshall matter Mr P Tredoux appeared for the First Defendant while there were no appearances for the Second to Fourth Defendants (the trustees of a trust which I was informed had consented to judgment). In the Uys matter Mr Wessels appeared for both Defendants. Mr Tredoux informed the Court that in the event that the preliminary point regarding the form of the summons was not upheld, the parties had agreed that the First Defendant would be afforded time to file an affidavit opposing summary judgment. Mr Tredoux said that his client abided the decision of the Court on the summons point. The Court is indebted to Messrs Viviers and Wessels for their most helpful written and oral argument.

THE FORM OF THE SUMMONS

4. In both matters the Bank had purported to issue a simple summons. The document in question is made up of a citation of the parties followed by 10 individually numbered paragraphs in which the Bank's cause of action is set out. Various of those paragraphs make provision for a total of seven individual documents, which are attached as annexures to the summons. The document concludes with six prayers for relief introduced by the phrase "*Wherefore Plaintiff prays for judgment …*".

5. Rule 17 of the Uniform Rules governs the issue of a summons in this Court:

   5.1. Rule 17(2)(a) provides that in "*every case where the claim is **not** for a debt or liquidated demand the summons **shall** be as near as may be in accordance with Form 10 of the First Schedule, to which summons shall be annexed a statement of the material facts relied upon by the plaintiff in support of his claim, which statement shall inter alia comply with rule 18*". [emphasis added]

   5.2. Claims for debts and liquidated demands are dealt with in Rule 17(2)(b) which provides that in such a case "*the summons **shall** be as near as may be in accordance with Form 9 of the First Schedule*".

[emphasis added]

6. Rule 18 sets out the rules relating to pleadings generally and requires the annexing of, *inter alia*, a written contract where this is relied upon.

7. Form 9 (which is relevant in the instant case) requires a plaintiff to set out its cause of action in "*concise terms*". The phrase "*concise*" is defined in the Concise Oxford Dictionary as "*giving a lot of information clearly and in a few words*".

8. The simple summons used by the Bank herein is essentially a hybrid document. In its citation of the parties and in the directions to the parties regarding the filing of further pleadings and to the Sheriff regarding service, the document complies with Form 9. In setting out the cause of action, the document has all the hallmarks of a set of particulars of claim which would customarily accompany a combined summons.

9. In *Herbstein & Van Winsen*, **Civil Practice of the High Courts of South Africa (5th Ed) Vol. 1 p 479** the authors summarise the relevant case law and furnish the following general principles relevant to a simple summons:

> "*In setting out the cause of action, one need not go into detail and set out the particulars of the basis of the plaintiff's claim, that being a matter for the declaration. The summons merely puts a label to the claim, and need not state the claim with great particularity. Although the summons must contain an indication of what the defendant is to*

expect in the documentation, it need contain no more than that. It is not necessary to include in the summons a detailed statement of all the essential averments required for a statement so complete as not to be excipiable. It has therefore been held that it is sufficient if a cause of action is stated without the addition of any further particulars to it. In the declaration, should it be necessary to file one, the plaintiff must enter into details and give the defendant all the particulars he requires."
[Footnotes omitted]

10. In argument Mr Viviers readily conceded that each of the summonses before the Court was akin to a combined summons. But, he asked, is this a defect which would warrant the setting aside of these documents?

11. The Bank's claims are undoubtedly for debts and the peremptory provisions of Rule 17(2)(b) are therefore applicable: the Bank is ordinarily obliged to issue a simple summons as near as possible in accordance with Form 9.

12. The correct approach to such a summons was set out by Berman and Selikowitz JJ in **Volkskasbank Limited v Wilkinson and three similar cases**[1]:

"*It appears to us accordingly that where a plaintiff sues for repayment of a loan (or an overdraft) all that a simple summons need contain is a statement setting out the relief claimed and a succinct outline of the cause of action, i.e. that an agreement of loan (or of overdraft) was*

1 **1992 (2) SA 388 (C) at 397I – 398B** .

concluded between the parties providing for interest on the balance outstanding from time to time at a specified (or ascertainable) rate and which loan (or overdraft) was repayable on demand (or on a fixed or ascertainable date) and which, despite demand (or the arrival of that date), has not been repaid. Where the cause of action is founded on some document, reference thereto should be made in the summons and a copy thereof should be attached to the summons and the original should be handed in at the time when the application for default judgment is made ….

The simple point is that all that is required of the summons, as far as the cause of action need be set out, is that the defendant should be made aware of why (and for what relief) he is being called upon to answer to plaintiff's claim, and if the summons adequately serves that purpose, no more is needed of the plaintiff when applying for judgment in cases where the defendant, duly served, elects … [not] … to defend the action."

13. Applying that approach Mr Viviers argued that all that the Bank had to do in the instant case was to attach the six suretyships relied upon (each Defendant having executed three suretyships in favour of the Bank as the loan escalated) and the certificates of balance reflecting the amount outstanding by the principal debtor. This certificate is mandated by clause 14 of the suretyships.

14. Having considered the cause of action herein, I am of the view that it has been set out with more detail than would ordinarily be regarded as "*concise*". For

example, there is an unnecessary recitation in the summons of certain of the terms of the suretyships. And, the formulation of the relief claimed in the style of prayers in particulars of claim is also excessive. But I do not think that the extent of these excesses warrants a declaration of invalidity of the simple summons. [2]

NATIONAL CREDIT ACT IMPLICATIONS

15. In the simple summons the Bank makes concise reference to certain provisions of the National Credit Act, 34 of 2005 ("*the NCA*"). The legal conclusion which the Bank arrives at as a consequence thereof is that the NCA is not applicable *in casu*.

16. Mr Wessels pointed out that the relief sought in the summons included declarations of executability in respect of two immovable properties which were allegedly mortgaged as additional security by the two sureties. However, the Bank failed to attach copies of these mortgage bonds to the summons. This, said Mr Wessels, was a major defect in the Bank's papers and warranted the refusal of summary judgment. He relied in this regard on the unreported judgment of Thring J in this Division in **Nedbank Limited v Jacobs and Another (Case No. 5227/07; 20 March 2008)**.

17. In the **Jacobs case**, the Bank sued for money lent and advanced under a loan secured by a covering mortgage bond, a copy whereof was not attached to the simple summons. The relief sought included a prayer declaring the

2 See **Harms , Civil Procedure in the Supreme Court , para J7**.

mortgaged property executable. In opposing summary judgment the debtor did not disclose a defence on the merits, but raised a number of points of potential excipiability which Thring J disposed of. The Court found, however, that the failure on the part of the Bank in that matter to annex the mortgage bond to the summons was a defect of sufficient magnitude to warrant the refusal of summary judgment.

18. Thring J relied on the authority in the **Wilkinson case** **(*supra*)** that when a plaintiff's cause of action is based on a document, a copy thereof is to be attached to the simple summons and the original is to be handed up at the hearing of the matter. The Learned Judge went on to make the following observation at p 21 of the typed judgment:

> "*From the summons it would seem that the plaintiff's cause of action here is based partly on an unspecified 'agreement of loan' and partly on the provisions of a covering mortgage bond. It is possible that the loan agreement was in writing; it is also possible that it and/or the mortgage bond, read either separately or together, constituted a liquid document or documents. Because the plaintiff has made no allegations in this regard, and has attached a copy of neither document to its summons, the court has been left in the dark in this respect.*"

19. The Court relied on three earlier decisions[3] for the proposition that it was "*good practice*" to attach to the summons the documents relevant to the claim to ensure that these may not have been negotiated to third parties. The

3 **McKinnell v Vickers 1914 CPD 683; Volkskas v De Wet and Another 1945 WLD 211** and **Kotze v Van Vreden 1948 (2) SA 934 (SWA)**.

Learned judge put it thus at p 24 of the typed judgment:

> "*It might be said that the risk of such a thing happening in this case is somewhat remote: nevertheless it cannot, in my view, be disregarded. The plaintiff has failed, in my judgment, to comply with the provisions of Rule 17(2)(b), inasmuch as it has not attached to its summons a copy of either the loan agreement (if it was in writing) or of the mortgage bond. If either of these was a liquid document it has also failed to comply with the requirements of Rule 32(2) that, if the claim is founded on a liquid document, a copy thereof shall be annexed to the verifying affidavit in the plaintiff's application for summary judgment. The plaintiff, of course, has only itself to blame for these failures to comply with the Rules.*"

20. Relying on the decisions in **Mowschenson and Mowschenson v Mercantile Acceptance Corporation of S.A. Ltd**[4] and **Breitenbach v Fiat S.A. (Edms) Bpk**[5], the Court found that, in light of the defect in the Bank's summons:

> "*a reasonable possibility exists that an injustice may be done to the defendants if summary judgment is granted against them. Consequently I must, I think, albeit, I must add, with considerable reluctance, exercise my discretion in their favour and refuse the Plaintiff's application*."

21. The provisions of the NCA and its myriad statutory requirements were not

4 **1959 (3) SA 362 (W)**.
5 **1976 (2) SA 226 (T)**.

considered by Thing J in the **Jacobs case** although the statute was, by all accounts, applicable in light of the provisions of Sec 172(3) of the NCA read with Schedule 3 thereto. They do, however, fall to be considered in the present case since the Bank contends that the NCA does not apply while the sureties argue to the contrary.

22. It is not necessary to determine that dispute between the parties which turns on whether one is dealing here with a "*credit facility*" or a "*credit guarantee*" as defined in the NCA, or not. However, I agree with Mr Wessels that there is an absolute dearth of information in the summons as to what the precise nature of the principal debt is. The only hint is the allegation in the certificate of indebtedness that the principal debtor was indebted to the Bank under a numbered cheque account. Of course, that document is only an annexure to the summons attached to certify the extent of indebtedness and does not constitute an allegation in the pleading as such.

23. I have no doubt that the inclusion of the mortgage bonds as annexures would have gone some considerable way towards throwing light on the disputed interpretation under the NCA.

24. But there is an even more fundamental reason why the documents should have been attached. In clause 8 of the summons reference is made to the two mortgage bonds purportedly passed as security. The first of these was allegedly over Erf 8704 Bellville.

25. I was informed from the Bar by Mr Wessels that after a Deeds Office search

perusal of the bond document over the latter mentioned property revealed that it was never bonded in favour of Absa Bank. Mr Viviers was unable to explain this glaring mistake in the summons.

26. I agree with Mr Wessels that this sort of situation demonstrates the necessity for a document such as the mortgage bond to be annexed to the summons. In **Jacobs' case (*supra*)**, Thring J considered that it was necessary to attach the bond document to the summons (and produce the original at Court) to ensure that that bond had not been negotiated or transferred to a third party. While that precaution is still of application, I am of the view that there is a more fundamental reason to require a plaintiff to attach the bond document (if there is one) and any written agreement or other document reflecting the precise nature of the debt.

27. Section 130 of the NCA only entitles a creditor to approach a Court for enforcement of a credit agreement after a number of procedural steps have been complied with. A Court would need to be satisfied that a debt sought to be enforced was (or was not, as the case may be) subject to the NCA and the most efficient way to do so would be to peruse the underlying documentation.

28. The present case is a good example as to why all the relevant documentation should be before the Court. The debtors have not filed an affidavit opposing summary judgment but they have instructed counsel to argue a number of legal points. They clearly have no defence to the merits of the Bank's claims, but they are entitled to raise, and demand compliance with, the provisions of the NCA which, *inter alia*, is aimed at consumer credit protection and

"*providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements*".[6]

29. Mr Viviers led the Court through an veritable maze of provisions in the NCA to demonstrate that the statute had no application in the present case. Mr Wessels did likewise and came to a different conclusion. In the light of my finding regarding the failure to attach the relevant documentation, it is not necessary to resolve this dispute. Suffice it to say that the matter may well have been capable of speedier resolution had the documents been before the Court.

SIMPLE OR COMBINED SUMMONS?

30. In light of my view that it is necessary to annex the relevant documentation to the Plaintiff's summons, the question that arises is whether it is permissible to continue to make use of a simple summons or whether a combined summons is now preferable. While Thring J, in the **Jacobs case**, was satisfied that a simple summons could incorporate the relevant documents such as a mortgage bond and/or an agreement of loan, in my judgment the situation is now different given the myriad allegations which a plaintiff is required to make regarding NCA compliance where the statute is applicable [7]and compliance with the constitutional imperatives prescribed by Section 26(1) of the Constitution.

6 Section 3(i) of the NCA.
7 See **Rossouw and another v Firstrand Bank Limited 2010 (6) SA 439 (SCA) at 455-7.**

31. The necessity to incorporate these allegations in the summons and to annex the relevant documentation thereto will of necessity lead to the summons losing it conciseness. In such event, it seems to me that it is preferable to make use of a combined summons.

32. But what of that peremptory language of Rules 17(2)(a) and (b) which oblige a plaintiff to use a simple summons for recovery of a debt or liquidated sum and a combined for other cases? In the first place, one must have regard to the fact that the current rules of practice predated both the NCA and the constitutional era. It may therefore be necessary for the Rules Board to reconsider the position in the light of prevailing commercial practices and realities.

33. However, I am of the view that a purposive interpretation of Rule 17(2)(a) will not preclude a plaintiff from commencing action for recovery of a debt by using a combined summons. The provisions of the NCA and Section 26 of the Constitution are aimed at offering additional protection to debtors, and if the rule is interpreted against that setting, it seems to me that the necessity to amplify the allegations setting out the cause of action and the incorporation of relevant documentation takes the claim outside the dichotomous characterisation of claims in terms of Rule 17(2) and requires a *sui generis* approach. The effect is that a combined summons is appropriate in such cases notwithstanding the provisions of Rule 17(2)(a).

CONCLUSION

34. In my judgment it is appropriate to exercise the Court's overriding discretion to refuse summary judgment in the Uys matter.[8] Not only has the Court been "*left in the dark*"[9] as to the precise nature of the contractual relationship between the parties, it has been deprived of insight into the relevant mortgage bond and has been asked to enforce execution proceedings in respect of a bond which has not been passed in favour of the Plaintiff Bank.

35. There is no reason why costs should not follow the results in this matter: there is nothing which is likely to emerge at the trial in this matter which will demonstrate that the Defendants' opposition to the claims is spurious.[10] The Plaintiff has only itself to blame for its failure to attach the necessary documentation.

ORDERS

36. IN THE MATTER OF **ABSA BANK LIMITED v ROBERT DOUGLAS MARSHALL AND THREE OTHERS (CASE NO. 8850/2011)** THE FOLLOWING ORDER IS MADE:

8 **Collett v Firstrand Bank Limited 2011 (4) SA 508 (SCA) at 518G**.
9 See **Jacobs case** (***supra***) **at p 22**.
10 See **Jacobs case** (***supra***) **at p 26**.

36.1. the First Respondent is to file his opposing affidavit in the summary judgment application within ten (10) Court days of this order;

36.2. all costs are to stand over for later determination.

37. IN THE MATTER OF **ABSA BANK LIMITED v PETRUS JACOBUS UYS AND ANOTHER (CASE NO. 11921/2011)** THE FOLLOWING ORDER IS MADE:

37.1. the application for summary judgment against the First and Second Respondents is refused;

37.2. the aforesaid Respondents are granted leave to defend the matter;

37.3. the Applicant is ordered to pay the First and Second Respondents' costs of suit in this application.

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P.A.L.GAMBLE