Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

Case Number: 16051/2012

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED Applicant / Plaintiff

and

CHARLES JOHANNES HAMILTON Respondent / Defendant

JUDGMENT DELIVERED ON 04 DECEMBER 2012

ZONDI, J:

[1] The plaintiff seeks summary judgment to be entered against the defendant for:

1. Payment of the sum of R2 195 488.13 plus interest thereon at the rate of 8.7% per annum from 15 June 2012 to date of payment;
2. An order in terms of which the immovable property erf 7261, Somerset West, Western Cape, is declared executable;
3. Costs of suit on the scale as between attorney and client.

[2] The plaintiff instituted action by way of a simple summons in which action it claimed payment of R2 195 488.13 being the balance owing in respect of monies lent and advanced to the defendant at the latter's special instance and request in terms of

the two written loan agreements. As security for the amount owing two mortgage bonds over the defendant's immovable property, being erf 7261, Somerset West, Western Cape, were registered in favour of the plaintiff.

[3] The amount of R2 195 488.13 together with interest is claimed on the basis that it has now become due and payable by reason of the defendant's failure to pay on demand the instalments due in terms of the mortgage agreements. The amount claimed as well as the applicable rate has been established by means of a certificate of balance attached to the summons reflecting these details. In the summons the plaintiff has drawn the defendant's attention to the provisions of section 26 (1) and 26 (3) of the Constitution of the Republic of South Africa 1996 and Rule 46 (1) of the Uniform Rules, as required by the practice of this Court. (*Standard Bank of South Africa Ltd v Saunderson & Others* 2006 (2) SA 264 (SCA); *Standard Bank of South Africa Ltd v Bekker & Four Similiar Cases* 2011 (6) SA 111 (WCC)).

[4] The plaintiff further alleges that it has complied with the provisions of sections 86 (10)[1], 129 (1) (b) (i)[2] and 130[3] of the National Credit Act 34 of 2005 (the NCA). The

---

[1] *(10) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to-*
(a) the consumer;
(b) the debt counsellor; and
(c) the National Credit Regulator,
at any time at least 60 business days after the date on which the consumer applied for the debt review.

[2] *(1) If the consumer is in default under a credit agreement, the credit provider-*
(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before-
(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and
(ii) meeting any further requirements set out in section 130.

[3] *(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-*
(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (9), or section 129 (1), as the case may be;
(b) in the case of a notice contemplated in section 129 (1), the consumer has-
(i) not responded to that notice; or
(ii) responded to the notice by rejecting the credit provider's proposals; and
(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.
(2) In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if-
(a) all relevant property has been sold pursuant to-

defendant opposes the summary judgment application and has filed an opposing affidavit in which he has raised a number of defences including that the certificate of balance annexed to the plaintiff's summons does not correctly reflects the amount owing to the plaintiff. The defendant alleges that to the best of his knowledge the amount that should be owing is R957 693.37 not R2 195 498.13 as claimed by the plaintiff.

[5] The defendant has also raised three further defences which are technical in nature and these are: firstly, that this Court lacks jurisdiction to entertain the matter; secondly that the plaintiff failed to give a proper notice terminating the debt review process which he had initiated under section 86 (1) and thirdly, that the simple summons is defective by reason of its failure to annex the first loan agreement.

(i) an attachment order; or
(ii) surrender of property in terms of section 127; and
(b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.
(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-
(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;
(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and
(c) that the credit provider has not approached the court-
(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or
(ii) despite the consumer having-
(aa) surrendered property to the credit provider, and before that property has been sold;
(bb) agreed to a proposal made in terms of section 129 (1) (a) and acted in good faith in fulfilment of that agreement;
(cc) complied with an agreed plan as contemplated in section 129 (1) (a); or
(dd) brought the payments under the credit agreement up to date, as contemplated in section 129 (1) (a)
(4) In any proceedings contemplated in this section, if the court determines that-
(a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;
(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (a), or has approached the court in circumstances contemplated in subsection (3) (c) the court must-
(i) adjourn the matter before it; and
(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;
(c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may-
(i) adjourn the matter, pending a final determination of the debt review proceedings;
(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85 (b); or
(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85 (b);
(d) there is a matter pending before the Tribunal, as contemplated in subsection (3) (b), the court may-
(i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or
(ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or
(e) the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter.

[6] Before considering the defendant's defence on merits it is necessary to deal first with the defendant's technical defences. In argument Mr **Matthysen**, who appeared for the defendant conceded, quite correctly in my view, that this Court does have jurisdiction to entertain this matter by virtue of the fact that the loan and mortgage agreements, on which the plaintiff sues, were concluded within its area of jurisdiction and the property forming the subject matter of this litigation is situated within the area of jurisdiction of this Court. The fact that the defendant had prior to the institution of the action relocated from its area of jurisdiction does not have an effect of depriving it of its power to hear the matter.

[7] The next point to consider is the defendant's contention that the proceedings were prematurely instituted as the debt review process was not properly terminated. The defendant advances three grounds for this contention; first, he contends that he did not receive a section 86 (10) notice, secondly, that to the best of his knowledge his debt counsellor did not receive the termination notice. I agree with Mr Sievers, who appeared for the plaintiff, that this ground must fail as the contention which it seeks to advance is based on inadmissible hearsay evidence. There is no evidence in the form of a confirmatory affidavit by the debt counsellor to confirm this allegation. The defendant cannot testify as to the receipt or otherwise of the termination notice in terms of section 86 (10) by the debt counsellor. The only person who can attest to this fact is the debt counsellor himself.

[8] The third ground is that the plaintiff failed to deliver the termination notice to the National Credit Regulator. This ground must also be dismissed. The plaintiff delivered the section 86 (10) notice to the National Credit Regulator by email on 18 July 2012 which is one of the methods by which a document may be delivered in terms of section 65 (2) of the Act.

[9] In considering the correctness of the defendant's contention that the section 86 (10) notice was not properly served, it is necessary to have regard to the provisions of the loan and mortgage agreements as well as the NCA as to the giving of notices and/or documents.

[10] Both the loan agreement and the mortgage bond contain provisions dealing with the appointment of addresses for service of notices. In the loan agreement and mortgage bond the defendant's chosen *domicilium citandi* is indicated as 18 Graceland Place, Gordon Weg, Somerset West 7129 and the postal address as P.O. Box 135, Somerset Mall, 7137. In terms of clause 33.3 of the loan agreement and clause 14.4 of the mortgage bond, the defendant could change the appointed addresses by giving the plaintiff 14 days' written notice.

[11] The defendant alleges that in terms of the loan agreement in or about January 2008 he changed his chosen *domicilium citandi et executandi* to 50 Hull Road, Ferrydale, Nigel. He further says he notified the plaintiff of the change and to substantiate his claim the defendant annexes to his opposing affidavit a notice in terms of section 129 of the NCA which the plaintiff addressed to the defendant's new address, namely 50 Hull Road, Ferrydale on or about 10 May 2011. The defendant contends that at the time of delivery of a section 86 (10) notice the plaintiff was aware or should have been aware that his chosen postal address was no longer P.O. Box 135 Somerset Mall, 7135.

[12] I am satisfied from these facts that the defendant had given the plaintiff a proper notice advising it of the change of the address as required by the relevant provisions of the loan and mortgage agreements and that to be effective any notice that required to be given in terms of these instruments, had to be addressed to the defendant's new

address.

[13] It is common cause that the address to which a section 86 (10) notice was sent on 3 July 2012 is P.O. Box 135 Somerset Mall, 7137 which was no longer the defendant's postal address. It is apparent from the track and trace report annexed to the plaintiff's summons that as at the issue of the summons the section 86 (10) letter was still lying at Somerset West post office (*Sebola v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC)). In my view the section 86 (10) notice was not properly served in the manner prescribed by section 65 (2) read with section 96 of the NCA. In terms of these sections a document that is required to be delivered to a consumer in terms of the Act, must be delivered in the manner prescribed by the parties in terms of the loan agreement or mortgage bond and must be delivered to the consumer in the manner chosen by the consumer. In the instant matter this requirement was not met.

[14] The situation regarding delivery of the notices under the NCA is succinctly summarised by Olsen AJ in *ABSA Bank v Mkhize* 2012 (5) SA 574 (KZD) at para 42 as follows:

> *"[42] Again in summary :*
>
> *(a)section 96 provides that when a legal notice is required it must be delivered to the intended recipient at the address of that party set out in the agreement, or at the address most recently provided by that party when giving notification of intention to change that party's address set out in the agreement;*
>
> *(b)section 65(2) of the Act determines that in the absence of a method prescribed by regulation for delivery of a particular document, a document required to be delivered to a consumer must be made 'available to the*

consumer' through one or more of a number of alternative mechanisms (including ordinary mail), and that the delivery must be made in the manner chosen by the consumer from those options set out in the section; and (c)section 168 is to the effect that when the Act requires a document to be served it 'will have been properly served' when it is either delivered to that person or 'sent by registered mail to that person's last known address'."

[15] The defendant in the instant matter advised the plaintiff of the change of his postal address which means that any notice including a notice in terms of section 86 (10) that was required to be sent to the defendant in terms of the loan and bond agreements should have been delivered to the defendant's chosen address. A section 86 (10) notice was not properly delivered as it was sent to the wrong address and by reason thereof it could not effect a valid termination of the debt review process. For these reasons I hold that the debt review process was not properly terminated. I will return later in this judgment to the consequence which attaches to the plaintiff's failure to comply with the provisions of section 86 (10) and whether such failure could be remedied by using a safety net under section 130 (4) (b).

[16] The final point raised by the defendant is that the summary judgment should be refused on the ground that the plaintiff's simple summons does not comply with Rule 17 (2) (b) of the Uniform Rules of Court or the rule of practice in this Division in that, it did not attach the loan agreement upon which the plaintiff's cause of action is founded. It is important to point out that in the instant matter the plaintiff attached to its simple summons a copy of the loan agreement concluded in or about April 2006, a mortgage bond registered in May 2006 as well as a copy of the mortgage bond registered in August 2004. What the plaintiff failed to attach is a copy of the loan agreement, the

payment of which was secured by a mortgage bond which was registered over the defendant's property in August 2004.

[17] The defendant's contention is inspired by a dictum in ABSA *Bank Ltd v Studdard and Another* (2011/24206) [2012] ZAGPJHC 26 (13 March 2012) in which it was held that a copy of the loan agreement must be annexed to the simple summons and failure to do so would render the summons defective. At paras 5 and 6 of the judgment Wepener J held:

> *"[5] The written loan agreement is the basis of the claim and the cause of action rather than the bond, which is an instrument hypothecating landed property, which does not constitute the principal debt. Klerck NO v Van Zyl and Maritz 1989 (4) SA 263 at 275 and Standard Bank of South Africa Ltd v Gordon and Others [2011] ZAGPJHC 114 (2011/6477) (21 September 2011) at paras 9 and 10.*
>
> *[6] It has been a rule of practice in this Division that copies of both the written agreement of loan as well as the bond document must be attached to a summons, including a simple summons, and to produce the original documents at the time when judgment is requested, whether the matter is brought by way of summons or application. In most of the matters coming before the court for default judgment, practitioners adhere partially to the practice by attaching copies of the documents, also where a simple summons is used, but the applicant argues that such attachment is not necessary despite it having attached a copy of the bond document to the simple summons. Since 1994 when Rule 31(5) was introduced, default judgments were largely dealt with by the Registrar and not by Judges in open court and it appears that the practice may not have been strictly adhered to, even to the extent, that it is now argued,*

that it is not necessary to attach the written agreement of loan at all. However, since the decision in Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others, [2004] ZACC 25; 2005 (2) SA 140 (CC), default judgments are often heard in court, together with a request to declare immovable property executable. There is no suggestion that the practice, to annex true copies of the documents and then to hand in the original documents when judgment is sought, has fallen into disuse, and it has not."

[18] The learned judge in the *Studdard* matter after a thorough review of the authorities, including the recent judgment of this Court in *Standard Bank of South Africa Limited v Hunkydory Investments 194 (Pty) Ltd and Another (No.1)* 2010 (1) SA 627 (WCC) at 630, concluded at para 24 of the judgment:

"that the cases requiring the attachment of the written document, where it forms a link in the chain of the cause of action or is the foundation of the plaintiff's cause of action, are correct and should be followed. As is the case in this Division, the practice in the Western Cape High Court is a salutary one and I find no reason why I should not follow what the Full Bench said in Wilkinson regarding the attachment of the written contract where it forms a link in the chain of the cause of action or the cause of action is found thereon as well as the allegations, which are required to be contained in a simple summons."

[19] The dictum at para 24 in *Studdard* was quoted with approval by Bozalek J in the judgment of this Court in *Nedbank v Charters* (18036/2011) [2012] ZAWCHC 80 (23 April 2012).

[20] In Charters the learned Judge observed that it would indeed appear to be a salutary practice for the mortgage loan to be attached to the simple summons since

such a document is the underlying cause for the relief sought by the plaintiff and given the importance of the service and notice provisions of the NCA.

[21] The question whether a plaintiff who sues by way of a simple summons on a mortgage bond or loan agreement should annex such a document to the simple summons will in my view depend on whether or not the simple summons is a pleading.

[22] Rule 17 (2) (b) deals with simple summons. It reads:

> *"(b) 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."*

[23] Form 9 of the First Schedule to the Rules sets out the pro forma content of a simple summons and enjoins a plaintiff to set out in concise terms its cause of action (*Icebreakers No 83 v Medicross Health Care Group* 2011 (5) SA 130 (KZD) at para 5).

[24] On the other hand Rule 17 (2) (a), which deals with the combined summons, requires that in every case in which the claim is not for a debt or liquidated demand there must be annexed to the summons a statement of the material facts relied upon by the plaintiff in support of the claim, which statement must, *inter alia*, comply with Rule 18. The sub-rule requires the summons to be as near as may be in accordance with Form 10 of the First Schedule.

[25] In particular Rule 18 (6) provides as follows:

> *"(6) A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the*

pleading shall be annexed to the pleading."

[26] In *Standard Bank v Dawood* 2012 (6) 151 (WCC) this Court had this to say at para 14 – 17 regarding what a simple summons should contain:

"[14] In my view, this principle also applies to the interpretation of rule 17(2). I accordingly agree with Gamble J that it is not impermissible or irregular to use a combined summons in matters of this kind. It may well be preferable in certain instances to make use of a combined summons -as has already been done in many cases in this Division. This would, generally, make for neater and more elegant pleading and would at the same time make the plaintiffs case more easily readable and comprehensible, not only to the defendant, but also to the court. Having said that, however, for the reasons that follow, I am not prepared to require as an absolute rule of practice - that a combined summons invariably be used in matters of this kind.

[15] First, such a rule of practice would fly in the face of the clear wording of rule 17(2)(b) and, as such, would impermissibly usurp the function of the Rules Board for Courts of Law. If the procedure laid down in rule 17 is to be changed, the interests of the administration of justice would be better served by a thorough consideration of the matter by the Rules Board in a uniform and holistic manner, resulting in a uniform rule binding in all divisions, instead of the piecemeal process of judicial tinkering that is presently taking place all over the country, which has already resulted in the undesirable situation where divergent views and practices abound, creating uncertainty for litigants and practitioners alike.

[16] Secondly, the mere fact that a summons may have to contain a number of paragraphs and may have several relevant documents annexed

thereto does not mean that the use of a simple summons would be in-appropriate. By way of example, reference could be made to the lengthy and detailed allegations made in two of the simple summonses quoted in Wilkinson's case, supra, where Berman and Selikowitz JJ - in their day two of the most accomplished exponents of motion court practice in this Division - did not bat an eyelid at the form of the somewhat prolix summonses before them. In any event, as pointed out by the amicus in her argument, it is not the summons that is required to be concise; it is the plaintiffs cause of action that must be set out 'in concise terms'.

[17] Thirdly, I am not convinced that the use of a simple summons is an obstacle to compliance by a plaintiff with the duties resting on it in matters of this kind regarding necessary allegations to be made. As demonstrated by the authors of Erasmus, this may be accomplished without too much difficulty and should, as a matter of practice, be followed in this Division in future."

[27] It is, however, not necessary for me to decide whether the provisions of Rule 18 (6) apply when action is instituted by way of a simple summons and whether I should follow either *Studdard* or *Icebreakers N.O.* line of cases. The present matter is on the facts distinguishable from *Studdard*.

[28] In *Studdard* the loan agreement, upon which the plaintiff sued, was not attached to the simple summon whereas in the instant matter the plaintiff has attached the two mortgage bonds as well as the second loan agreement. In my view the claim in the simple summons has been set out with sufficient clarity 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. (*Volkskas Bank Ltd v Wilkinson and three similar cases*, 1992 (2) SA 388 (C) at 394 J – 395 D). The alleged lack of particularity which the

defendant claims renders the summons defective has not been shown to have caused him any prejudice. The defendant in his opposing affidavit has not explained precisely why he is unable to respond properly to the claim as presently formulated. In the circumstances the defendant's contention that summary judgment should be refused because of the summons' failure to comply with Rule 17 (2) (b), must fail.

[29] I now return to deal with the consequences of the plaintiff's failure to comply with the provisions of section 86 (10) and whether such failure can be remedied by invoking the provisions of section 130(4) (b)[4]. In this regard it is apposite to refer to the observations of Malan JA in the decision in *Collett v Firstrand Bank* 2011 (4) SA 508 (SCA) at 518 G – 519 A:

> *"Overindebtedness is not a defence on the merits. However, because of its extraordinary and stringent nature, a court has an overriding discretion to refuse an application for summary judgment. It would be proper for a defendant to raise termination of the debt review by reason of the credit provider's failure to participate or its bad faith in participating when application for summary judgment is made. These issues may be raised, not as a defence to the claim, but as a request to the court not to grant summary judgment in the exercise of its overriding discretion. Of course, sufficient information on which the request for a resumption of the debt review is based must be placed before the court."*

[30] I am fully in agreement with the sentiments expressed in this passage as they accord well with the objects of the NCA which *inter alia* is to encourage consumers to fulfil their financial obligations not to evade paying their creditors.

---

[4] *(4) In any proceedings contemplated in this section, if the court determines that-*
(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (a), or has approached the court in circumstances contemplated in subsection (3) (c) the court must-
(i) adjourn the matter before it; and
(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;

[31] I was urged by the defendant to dismiss the summary judgment application and to, in terms of section 86 (11), make an order in terms of which the debt review process is reinstated subject to conditions, which in the exercise of my discretion I may consider appropriate. On the other hand Mr **Sievers** submitted that in the event that I should find that a section 86 (10) notice was not properly sent to the defendant I should not dismiss the summary judgment application but should rather postpone the proceedings in terms of section 130 (4) (b) of the NCA and make an appropriate order setting out the steps the plaintiff must complete before the matter may be resumed.

[32] I have fully considered the parties' submissions. In my view the option of ordering the reinstatement of a debt review process in terms of section 86 (11) is not a viable one as I have not had the benefit of full argument on the question of resumption of the debt review and the defendant did not place before the Court sufficient information on which the request to reinstate the debt review was based. Accordingly granting an order in terms of section 86 (11) is out of the question.

[33] Postponing the proceedings in terms of section 130 (4) (b) is also not a viable option in the context of an application for summary judgment. Rule 32 (4) limits a plaintiff's evidence in summary judgment proceedings to the affidavit supporting the notice of application. The SCA made it clear in *Rossouw v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) at para 36 that a plaintiff seeking summary judgment should disclose fully in its supporting affidavit proof of delivery or service of documents and when he is challenged about delivery and service of a notice he is not allowed to hand in proof of delivery, even if the defendant consented, because all of his evidence in the summary judgment must be in the founding affidavit. And the approach adopted in *Nedbank v Binneman* 2012 (5) SA 569 (WCC) in terms of which the matter is postponed in

situations where there has been non-compliance with the provisions of section 129 (1) read with section 130 (1) is in my view not applicable in the context of summary judgment proceedings.

[34] Section 129 (1) (b) makes it clear that service of a notice in terms of section 86 (10) is a peremptory prerequisite for commencing legal proceedings under a credit agreement and failure to comply with its provisions precludes a plaintiff from enforcing its claim (*Rossouw supra* at para 38). In these circumstances as there has been no proper compliance with the provisions of the Act regarding service of a section 86 (10) notice, summary judgment should be refused.

[34] In the result the following order is made:

1. The summary judgment application is refused.
2. The defendant is granted leave to defend the action.
3. Costs shall stand over for later determination.

D H ZONDI
HIGH COURT JUDGE