REPUBLIC OF SOUTH AFRICA

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 19942/2011

In the matter between:

ABSA BANK LIMITED Plaintiff

and

HERBERT CLIFFORD NICHOLAS First Defendant

ELSA JOHANNA NICHOLAS Second Defendant

CASE NO: 18243/2011

In the matter between:

ABSA BANK LIMITED Plaintiff

and

ELSA JOHANNA NICHOLAS First Defendant

HERBERT CLIFFORD NICHOLAS Second Defendant

JUDGMENT DELIVERED ON 20 FEBRUARY 2013

DAVIS AJ

[1] These two matters came before me as opposed applications for summary judgment. In case number 19942/2011 the defendants, who are married to one another, are the owners of Erf 11520 Milnerton, Cape ("the Milnerton Property"), an immovable property which is subject to a mortgage bond registered in favour of the plaintiff. The Milnerton property serves as the primary residence of the defendants. In case number 18243/2011, the first defendant is the owner of an immovable property situated in Napier ("the Napier property") which is also subject to a mortgage bond registered in favour of the plaintiff. The second defendant bound himself in favour of plaintiff as surety for the obligations of the first defendant in terms of the mortgage loan in respect of the Napier property.

[2] In both matters the plaintiff instituted action against the defendants for payment of the full balances owing on the mortgage loans and for orders declaring the relevant immovable properties specially executable. The plaintiff made use of simple summonses to which were annexed, inter alia, copies of the relevant mortgage bonds and the deed of suretyship in the case involving the Napier property. The plaintiff did not, however, annex copies of the relevant underlying loan agreements secured by the mortgage bonds and suretyship.

[3] The defendants opposed both applications for summary judgment, chiefly on the basis of section 85 of the National Credit Act 34 of 2005 ('the NCA'). It was contended that this was an appropriate case for the Court to exercise its discretion under section 85 to refer the matter to the defendants' debt counsellor with a request that the debt counsellor evaluate their circumstances and make a recommendation to the court in terms of section 86 (7) of the NCA. The defendants did not raise any dispute regarding the merits of the plaintiff's claims.

[4] Two defences were raised *in limine* in the summary judgment opposing affidavits filed by the defendants in both matters. The first defence was that of *lis pendens,* which fell away when the plaintiff withdrew the prior actions which gave rise to this defence. The second point raised was that the plaintiff had failed to annex copies of the relevant loan agreements to the simple summonses and that this rendered the summonses defective. I shall refer to this defence as 'the annexure point".

[5] The defendants did not persist with the second point *in limine*. In the heads of argument filed on behalf of defendants the annexure point was apparently abandoned and reliance was placed solely on section 85 of the NCA.

[6] Subsequent to the hearing of this matter on 8 November 2012, I became aware that the Full Bench of this Court was to hear argument on the question of whether Rule 17(2)(b) requires that copies of the relevant agreements be annexed to a simple summons. In the circumstances I considered it appropriate to await the decision of the Full Bench before deciding this matter, and I informed Counsel accordingly. Counsel were then afforded an opportunity to furnish me with written submissions dealing with the impact of the Full Bench decision in *ABSA Bank Limited v Janse van Rensburg & Others* ('*Janse van Rensburg*')[1] on the present application.

[7] I requested Counsel to consider in particular, whether the decision in *Janse van Rensburg* lays down a general rule which must be applied, regardless of the fact that reliance on the annexure point was apparently abandoned.

[1] As yet unreported decision of the Western Cape High Court in Case number 16071/12, handed down on 24 December 2012.

[8] In *Janse van Rensburg* the Full Bench held that, on a proper interpretation of rule 17(2)(b), read with Form 9, it is necessary to attach a copy of the written agreement to the summons where the plaintiff's cause of action is based on such agreement.[2] In the course of his judgment Griesel J, with whom Fourie J and Saldanha J concurred, referred to the following statement in Erasmus: [3]

> '*Where the cause of action is founded on some document, reference thereto should be made in the simple summons and a copy should be attached to the summons and the original should be handed in at the time when application for default judgment is made. <u>If a copy of the required document is not attached to the simple summons, the summons would not disclose a cause of action</u>*.' (Emphasis added.)

[9] As authority for the latter proposition, the learned authors refer to the decision of Wepener J in *ABSA Bank Limited v Studdard and Another* ('*Studdard*'),[4] a case which Griesel J referred to with approval in *Janse van Rensburg*. In *Studdard,* Wepener J referred to the following remarks of Swain J in *Moosa v Hassam* [5] concerning a party's failure to annex to the particulars of claim a copy of the written agreement relied upon, as required by rule 18(6):

> '*In the present case the respondents base their cause of action against the applicants upon the written agreement. The written agreement is a vital link in the chain of respondents' cause of action against the applicants. In order for the respondents' cause of action to be properly pleaded, it is necessary for the written agreement relied upon to be*

[2] *Janse van Rensburg supra* n 1 at para [15].

[3] DE van Loggerenberg & PBJ Farlam, Erasmus <u>Superior Court Practice</u> B1-124 at nn 5 and 6 (Service 39,2012).

[4] [2012] ZAGPJHC 26 (13 March 2012).

[5] 2010 (2) SA 410 (KZP).

> *annexed to the particulars of claim. In the absence of the written agreement the basis of the respondents' cause of action does not appear* ex facie *the pleadings.*' [6]

Wepener J went on to say in *Studdard* that:

> '*If it is correct that it is necessary for a plaintiff to attach the document to properly plead its cause of action, such would be correct not only for the purposes of Rule 18, but also for the purposes of Rule 17 as, the plaintiff would disclose no cause of action pursuant to the provisions of Rule 17 if it fails to attach the written agreement*.' [7] (Emphasis added.)

He concluded that, although Rule 17(2)(b) does not in so many words require the contract upon which the plaintiff relies to be attached to the summons, the effect of the failure to do so is that the summons does not disclose a cause of action.[8]

[10] Although the Courts in *Janse van Rensburg* and *Studdard* were seized with applications for default judgment and not summary judgment, in my view these cases, and the authorities referred to therein, are authority for the general proposition that, where a plaintiff's cause of action is based on written document, a copy thereof is required to be attached to the simple summons in order for the summons to disclose a cause of action. In my view, *Janse van Rensburg* lays down an interpretation of rule 17(2)(b) which must be consistently applied, regardless of whether one is dealing with an application for default judgment or summary judgement.

---

[6] At para [18].

[7] *Studdard supra* n 4 at para [15].

[8] *Studdard supra* n 4 at para [16].

[11] To my mind two consequences flow from a plaintiff's failure to attach to the simple summons a copy of the written agreement relied for the cause of action:

11.1 First, the Court is not in a position where it can decide whether or not judgment should properly be granted in respect of the claim.

11.2 Second, the verifying affidavit required for summary judgment in terms of rule 32(2) will be defective for failure to verify all the facts supporting the cause of action.

[12] As regards the first, it is trite that one of the purposes of a simple summons is to enable the court to decide whether or not judgment should be granted.[9] Without the relevant agreement being annexed to the summons it is difficult to see how the court can be satisfied that judgment ought properly to be granted. For instance, it would be impossible to know that a deed of suretyship contravened the requirements of section 6 of Act 50 of 1956, or that a credit agreement contained provisions which violated section 90 of the NCA and/or section 51 of the Consumer Protection Act 68 of 2008, unless the relevant agreements were annexed to the simple summons.

[13] It is no answer, in my view, to say that applications for summary judgment do not call for the same degree of caution as applications for default judgment, for in the former the defendant is present before the Court and able to defend him or herself. I consider that, even where the defendant is before the Court, with legal representation, and does not rely on an apparent defect in the plaintiff's cause of action, the Court is duty bound to refuse judgment where it is apparent that the plaintiff is not lawfully entitled to the relief claimed. And to be properly satisfied that the plaintiff is indeed entitled to the relief

[9] Janse van Rensburg *supra* n 1 at para [17]; Volkskas Bank Ltd v Wilkinson and three similar cases ('Wilkinson') 1992 (2) SA 388 (C) at 395 A.

claimed, the Court must have sight of the relevant agreement, or parts thereof, on which the cause of action is based.

[14] As regards the second consequence, rule 32(2) requires that a plaintiff who applies for summary judgment file an affidavit verifying the cause of action and the amount claimed. The requirement that the cause of action be verified has been interpreted to mean that all the facts supporting a cause of action must be verified, including every element of the cause of action.[10]

[15] If, as has been held, a written contract is a '*link in the chain*' of the plaintiff's cause of action, and if attachment thereof to the simple summons is necessary to disclose a cause of action, it would seem to me to follow that, if the document is not annexed, an essential element in the cause of action is lacking and has not, therefore, been verified on oath, as required by rule 32(2).[11]

[16] Mr Jonker, who appeared for the plaintiff, submitted that summary judgment ought not to be refused in these circumstances where the defendants did not allege any prejudice as a result of the plaintiff's failure to annex the loan agreements to the summonses and did not persist with their reliance on the annexure point. He referred to the case of *Standard Bank of South Africa v Roetstof ('Roetstof')*[12] in which Blieden J criticised the approaches taken in *ABSA Bank Ltd v Coventry*[13] and in *Gulf Steel (Pty) Ltd v Rack-Rite Bop (Pty) Ltd and another,*[14] where the Court emphasised the technical

---

[10] *All Purpose Space Heating Co of S A (Pty) Ltd v Schweltzer* 1970(3) SA 560 (D) at 563 H; *Dowson & Dobson Industrial Ltd v Van Der Werf and others ('Dowson & Dobson')* 1981(4) S A 417(C) at 426-8.

[11] See *Dowson & Dobson supra* n 10 at 428 A-B.

[12] 2004 (2) SA 492 (W)

[13] 1998 (4) SA 351 (N) at 354 B - E

[14] 1998 (1) SA 679 (O) at 683 G – 684 B

correctness of the plaintiff's pleadings as a prerequisite for the granting of summary judgment. Blieden J stated that:[15]

> *'If the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and understands the plaintiff's case against him.'*

[17] The approach of Blieden J was criticised by Wallis J, as he then was, in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another.*[16] He pointed out that Blieden J's remarks were '*plainly obiter*' since, the rule 32(2) affidavit in that case, properly read, did in fact comply with the technical requirements of the rule, so that no question of prejudice could arise. He proceeded to make the following pertinent observations:[17]

> '*Insofar as the learned judge suggested that a defective application can be cured because the defendant or defendants have dealt in detail with their defence to the claim set out in the summons, that is not in my view correct. That amounts to saying that defects will be overlooked if the defendant deals with the merits of the defence. … The fact that they set out that defence does not cure the defects in the application, and to permit an absence of prejudice to the defendants to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective, then* cadit quaestio*.'*(Emphasis added.)

---

[15] *Roetstof supra* n 12 at p 496 G - H

[16] 2010 (5) SA 112 (KZP) at para [24] – [25]

[17] At para [25]

[18] I respectfully agree with the approach taken by Wallis J, as he then was, and all the more so where the defect lies in the plaintiff's summons, and not merely in its application for summary judgment. I am also in respectful agreement with the views expressed by Marais AJ, as he then was, in *Dowson v Dobson,* where the learned judge stated as follows:[18]

> '*For generations the Courts have* mero motu *refused to grant judgments upon summonses which fail to disclose a cause of action, even although the defendant may not have entered appearance to defend. The drastic consequences of summary judgment militate against a more benevolent view being adopted by the Courts in applications for summary judgment. Thus, even if a defendant has not raised the excipiability of the summons or particulars of claim, if it is clear that the pleading would be excipiable, or liable to be set aside … I cannot see how the Court can ignore it… I may add that, where summary judgment is sought, more is involved than a technically excipiable pleading. If the pleading lacks an essential allegation, it follows that there will also be a failure to verify upon oath the existence of a good cause of action.'* (Emphasis added.)

[19] I am forced to conclude, for the reason given, that the plaintiff's summons is defective for want of compliance with rule 17(2)(b), that it does not disclose a cause of action, and therefore that the plaintiff's verifying affidavits, which purport to verify *'the facts and cause of action stated in the summons'* do not comply with the requirements of rule 32(2). On this basis the application for summary judgment cannot, in my view, succeed.

[20] Furthermore, and even if I am wrong in these regards, I am of the view that, without having had sight of the written loan agreements on which the plaintiff's claims

[18] *Supra* n 10 at p 430 G - H

are based, I cannot be certain that this is a case in which I ought properly to grant judgment in favour of the plaintiff. I also consider that I cannot be certain that there may not be some injustice to the defendant arising from the plaintiff's failure to annex the agreements to the summonses. One cannot rule out the possibility that, had the loan agreements been annexed to the summonses, a defence might have been apparent therefrom. In these circumstances I consider it imprudent to grant a final judgment against the defendants, and I would exercise my discretion in terms of rule 32(5) to refuse summary judgment.

[21] The application for summary judgment must accordingly fail. In the light of the conclusion which I have reached, it is not necessary for me to deal with the defendant's request for relief in terms of section 85 of the NCA.

[22] In the result, I make the following order in both case numbers 19942/2011 and 18243/2011:

(1) The plaintiff's application for summary judgment is refused, and the defendants are given leave to defend the action.

(2) The costs of the summary judgment proceedings are to be borne by the plaintiff.

D M DAVIS
Acting Judge of the High Court

20 February 2013

Court:	DAVIS, AJ
Heard:	08 NOVEMBER 2012
Delivered:	20 FEBRUARY 2013

COUNSEL FOR PLAINTIFF: **Adv. Wynand Jonker**

INSTRUCTING ATTORNEYS; **Velile Tinto Associate Inc.**

COUNSEL FOR DEFENDANT: **Adv. Peter Coston**

INSTRUCTING ATTORNEY **Eben Klue Attorneys**