IN THE WESTERN CAPE HIGH COURT, CAPE TOWN

Case No 16071/12

In the matter between:

ABSA BANK LIMITED **Plaintiff**

and

PIETER JACOBUS JANSE VAN RENSBURG First Defendant

GINA MARI JANSE VAN RENSBURG **Second Defendant**

Case No 16815/12

ABSA BANK LIMITED **Plaintiff**

and

ELIZABETH FRANCINA MAREE **First Defendant**

STEFANUS MAREE **Second Defendant**

Court: GRIESEL, FOURIE & SALDANHA JJ

Heard: 30 November 2012

Delivered: 24 December 2012

JUDGMENT

GRIESEL J:

Introduction

[1] These two matters initially came before me in motion court as unopposed applications for default judgment, based on mortgage bonds registered in favour of the plaintiff ('the bank') over immovable properties belonging to the defendants. In both matters the spouses of the respective owners have signed a deed of suretyship in respect of the indebtedness arising from the loan. In both, the bank has instituted action by way of an ordinary or 'simple' summons, annexing copies of the relevant mortgage bonds and suretyships, but not the underlying credit agreements secured by such bonds and suretyships. The question arose whether or not it was necessary to attach copies of the relevant agreements as well. Counsel for the bank submitted that this was not necessary, as a simple summons is not a 'pleading', with the result that the requirements of Uniform rule 18, particularly rule 18(6), are not applicable.[1]

[1] Rule 18(6) provides:
'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

[2] In view of differences of approach among some of the judges of this division, it was decided, in consultation with the Judge President, to refer the present matters for a hearing before a full court so as to get some consistency as to the correct practice to be followed in this division in matters of this kind.

[3] At the subsequent hearing before us Adv *Sievers* appeared on behalf of the bank, while Adv *Wessels* appeared as *amicus curiae.* We are indebted to both counsel for the assistance provided to the court.

Discussion

[4] The question whether or not a simple summons is a pleading was recently considered by Wallis J (as he then was) in *Icebreakers No 83* v

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part relied on in the pleading shall be annexed to the pleading. ’

Medicross Health Care Group.[2] The plaintiff, by way of such a summons, claimed payment of three amounts, namely R283 767 'arising out of arrear rental due in respect of leased premises'; R169 435,26 'being the reasonable and necessary costs of building alterations carried out' to those premises; and R49 587 'in respect of the costs and repairs to dental equipment leased to the defendant'. The defendant delivered a notice of exception on the grounds that the claims as set out in the summons lacked averments to sustain a cause of action. In the course of a comprehensive judgment, the learned judge referred *inter alia* to the requirement in Form 9 of the First Schedule that the plaintiff's cause of action be set out in 'concise terms' and pointed out that there is a 'plethora of authority' that all that is required in setting out the concise terms of a cause of action 'is to give a general indication of the claim amounting merely to a label'.[3] For

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[2] 2011 (5) SA 130 (KZD).

[3] Para 5.

this, and a variety of further reasons, Wallis J accordingly concluded that a simple summons is not a pleading, with the result that it cannot be attacked by way of an exception.

[5] The *Icebreakers* judgment has been referred to with approval in the Free State in *Pioneer Hi-Bred RSA (Pty) Ltd* v *Du Toit*[4] and also in this division in *Williams* v *Absa Bank Limited*[5] Moreover, in various other decisions in this division, a similar approach was followed and it has pertinently been held that the provisions of rule 18(6) are not applicable to a simple summons, because it is not a pleading.[6] Although I find the reasoning in the *Icebreakers* judgment persuasive, it is not necessary for

[4] (399/2012) [2012] ZAFSHC 78 (26 April 2012) paras 4 and 5.

[5] (Unreported, WCC Case no 15223/12, 7 November 2012), para 19.

[6] See eg *Standard Bank v Hunkydory Investments (No 1)* 2012 (1) SA 627 (WCC) paras 6-12; *Absa Bank v Z andK Sons Traders* (Unreported, WCC case no 1639/12, 26 April 2012), para 5; *Absa Bank v Greeff* (Unreported, WCC case no 5432/12, 5 June 2012), para 5.

purposes hereof to come to any final decision on this abstract question. This is so, as rightly pointed out by the *amicus,* because the more important practical question remains unanswered, namely whether a plaintiff is nevertheless required to annex copies of the written agreements on which it relies in order to comply with the requirement of Form 9 that the cause of action should be 'concisely' stated in the simple summons. I will accordingly accept in favour of the plaintiff (without so finding) that a simple summons is not a pleading.

Rules of practice

[6] The question whether or not a plaintiff is required to annex copies of the underlying agreement (and other relevant documents) to a simple summons frequently arises in the context of matters where the provisions of the National Credit Act 34 of 2005 ('the NCA') apply, especially where they

concern home loans in respect of residential properties constituting the primary residences of the debtors involved, such as in the two matters before us. These kinds of matters form the vast majority of applications for default and summary judgment coming before judges in motion court in this division - to such an extent that it has become necessary to place a limit on the number of these matters that may be set down in motion court on any given day and to constitute special courts from time to time to deal with the resultant backlog.[7]

[7] As an aside, all 'ordinary' applications for default judgment where the claims are for a debt or liquidated demand are normally dealt with by the registrar in terms of the provisions of rule 31(5). This power was given to registrars pursuant to the report by Mr Justice O Galgut, who motivated this innovation by observing that '[m]y inquiries show that the Republic is the only Western country in which a supreme court judge solemnly sits in open court and grants judgments by default. This in fact detracts from his dignity. I am firmly of the view that the registrars should be

[7] Some of the problems arising in matters governed by the NCA have been alluded to in recent judgments of full courts in this division[8] Thus, in *Dawood*, reference was made to the form of process to be utilised (simple or combined summons). In the course of the judgment I observed[9] that '[n]owadays, . . . the simple summons can no longer be regarded as merely "a label to the claim", at least not in claims where the NCA is applicable. This is so . . . due to "the myriad allegations which a plaintiff is now required to make regarding NCA compliance where the statute is applicable and compliance with the constitutional imperatives prescribed by s 26(1) of the Constitution".[10]' Notwithstanding these requirements, it was held that it

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given greater powers. ' (See *Report of the Commission of Inquiry into Civil Proceedings in the Supreme Court of South Africa,* dated 14 May 1980, p 36). Cf also *Standard Bank v Bekker* 2011 (6) SA 111 (WCC) para 28.

8 Bekker's case, *supra; Standard Bank v Dawood* 2012 (6) SA 151 (WCC) paras 6-7.

9 In para 8.

10 *Absa Bank v Marshall; Absa Bank v Uys* [2011] ZAWCHC 500 (29 November 2011) para 30.

is not irregular to supply in a simple summons the particularity required in a combined summons,[11] nor is it impermissible or irregular to make use of a combined summons in claims for a debt or liquidated demand.[12] In fact, it was suggested that -

'[i]t 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 plaintiff's case more easily readable and comprehensible, not only to the defendant, but also to the court.'[13]

[8] Turning to the need to annex copies of documents to a simple summons, this question was considered by Berman and Selikowitz JJ in

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[11] *Dawood*, para 7.

[12] Paras 14, 19.

[13] *Ibid*

Volkskas Bank v *Wilkinson*,[14] where the requirements for a simple summons were succinctly summarised as follows:

'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, ie that an agreement of loan (or of overdraft) was 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 should be attached to the summons and the original should be handed in at the time when application for default judgment is made.*'[15]

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[14] 1992 (2) SA 388 (C).

[15] At 397I-398B (emphasis added). See also at 395C-E.

[9] In *Nedbank* v *Jacobs*[16] Thring J held that summary judgment could not be granted where neither the relevant loan agreement nor the mortgage bond had been annexed to the simple summons. He referred to this requirement laid down in the *Wilkinson* judgment, before concluding:

'. . . 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.'[17]

[10] In *Marshall, supra,*[18] Gamble J followed the *Wilkinson* and *Jacobs* decisions and concluded that it was necessary for the plaintiff in the cases before him to have annexed copies of, *inter alia*, the relevant mortgage

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[16] 2008 JDR 0445(C); [2008] JOL 21940 (C).

[17] Page 24

[18] Footnote 10 above, paras 23-26.

bonds to its summons.[19] He regarded one of the cases before him to be ‘ a good example as to why all the relevant documentation should be before the Court’:[20] in that case, a deeds office search revealed that the two mortgage bonds referred to in the simple summons have not been registered in favour of the plaintiff bank at all.

[11] More recently, in *ABSA Bank* v *Studdard,*[21] Wepener J in the South Gauteng High Court also considered the very issue confronting us herein namely whether, having regard to the wording of rule 17(2)(b) read with Form 9 or any other requirement, the written agreement of loan should be attached to the summons. He observed that ‘[i]t has been a rule of practice

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19 It should be noted that the full court in *Dawood, supra,* did not follow *Marshall* insofar as the latter decision deprecated the use of a simple summons in claims for debts or liquidated demands involving the NCA. The full court, however, having concluded that the use of a simple summons was permissible in those matters, was not called upon to pronounce on the further question whether any supporting documents had to be attached to such summons.

20 Para 28

21 [2012] ZAGPJHC 26 (13 March 2012); [2012] JOL 28604 (GSJ).

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.'[22] He also referred to the *Wilkinson* and *Jacobs* decisions, *supra,* in support of the finding that it is „a long standing rule of practice in the Western Cape High Court' that the written agreement of loan should be attached to a simple summons.[23]

After referring to various other authorities, he concluded as follows:

'I consequently conclude 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

[22] Para 6
[23] Para 13

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.'[24]

[12] Apart from the judicial authority referred to above, all the foremost authorities in this country on civil procedure in the High Court appear to support this line of authority. In *Erasmus,*[25] reference is made to the *Wilkinson* and *Studdard* judgments, *supra,* in support of the following statement:

'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. If a copy of the required document is not attached to the simple summons, the summons

[24] Para 23

[25] D E van Loggerenberg & P B J Farlam, Erasmus *Superior Court Practice* B1-124 at nn 5 and 6 (Service 39, 2012).

would not disclose a cause of action.'

[13] In the same context, Harms[26] states as follows:

'Where a document is the very foundation of the cause of action or defence, it is good practice, and a legitimate and perfectly proper method of pleading, to annex a copy of the document to it' [i.e. a simple summons].'

[14] Herbstein & Van Winsen[27] put it thus:

'Where it is necessary, in order to show what the cause of action is, to annex a contract or other document on which the action is based, this should be done. Where the summons is a combined summons, rule 18(6) requires the annexation of any written contract on which the plaintiff relies. Even where a simple summons is issued, however, it has been held that if a cause of action is founded on a document, a copy of the

[26] D R Harms *Civil Practice in the Superior Courts* (September 2012 - SI 46) B18.13.

[27] AC Cilliers *et al* Herbstein & Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5 ed) Vol. 1 p 704 and the authorities referred to in footnotes 27 and 28.

document should be annexed to the summons and the original should be handed in at the time when application for default judgment is made.'

Conclusion

[15] To sum up, the weight of authority appears to favour a view that, although a simple summons is not a pleading, it is nevertheless necessary, on a proper interpretation of rule 17(2)(b), read with Form 9, to attach a written agreement where the plaintiff's cause of action is based on such agreement. Having regard to the long-standing practice, both in this division and in South Gauteng, and bearing in mind the need for uniformity in the practice of some of the larger divisions in this country, I have not been persuaded that we should deviate from that practice. To the extent that a different approach has been adopted in some of the cases referred to above,[28] they deviate from the long-standing practice in this division (and

[28] Footnotes 5 and 6 above.

elsewhere) and should no longer be followed.

[16] This conclusion is subject to two riders: first, in my view, it should no longer be required of a plaintiff, when applying for default or summary judgment, as a matter of course to hand in the original document unless called for by the presiding judge where circumstances so require. In my experience, this practice has fallen into disuse in this division. Secondly, to the extent that rule 18(6) requires of a plaintiff relying on a written agreement to annex ‘a true copy thereof *or of the part relied on* in the pleading’ (my emphasis), it would be incongruous to have a more onerous requirement in respect of a simple summons; in other words, it should be open to a plaintiff who relies on portion only of a voluminous written agreement only to attach such portion to the summons, and not the whole document.

[17] Apart from the authorities and precedents referred to above, there are important considerations of principle and policy supporting such an approach. In this regard, it should be borne in mind that the purpose of a simple summons is not merely to inform the defendant of the nature of the claim being instituted by the plaintiff, but also - and perhaps more importantly - to enable the court 'to decide whether judgment should be granted'.[29] More recently, this latter requirement has assumed added importance in the light of the Constitutional and statutory need for judicial oversight in matters involving the NCA, especially where the homes of debtors are concerned.[30] There is no doubt in my mind that this function can be more readily performed if copies of the relevant documents (including underlying agreements on which the claims are based) were to be attached to the simple summons.

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[29] *Wilkinson, supra,* at 395A.

[30] See eg s 26(3) of the Constitution, 1996 as well as the provisions of rule 46(1)(a).

[18] It is correct, as pointed out by counsel for the bank, that the requirement of attaching relevant documents to a simple summons may tend, to some extent, to frustrate the purpose of the rules, as succinctly summarised in *Herbstein & Van Winsen*:[31]

'The Rules of Court, which constitute the procedural machinery of the courts, are intended to expedite the business of the courts. Consequently, they will be interpreted and applied in a spirit that will facilitate the work of the courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible.'

[19] However, I agree in this regard with Wepener J where he held in *Studdard, supra,* that '[t]he additional costs of attaching a few pages to a summons cannot outweigh the importance of attaching the documents.'[32] Furthermore, the practical importance of attaching relevant documents to a simple summons is amply demonstrated by the example referred to in

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[31] *Op cit* Vol 1 p 30 (footnotes omitted).
[32] Para 20

Marshall, supra.[33] I cannot, therefore, agree with the suggestion that attachment of the underlying agreements to a simple summons is un-necessary.

[20] What is indeed unnecessary is the practice that has sprung up in this division in matters of this kind of including unnecessary papers in the court file. The two matters presently before us illustrate the problem. The plaintiff's attorney has duly attached to the simple summons in each case a copy of the certificate of balance in respect of both defendants, as well as copies of the notice in terms of s 129 of the NCA sent to both defendants, together with the relevant proofs of registered posting as well as a track and trace report in respect of both postal items. So far, so good. However, in the affidavit filed in terms of Practice Note 33(2) in support of the application

[33] Para 24-25

for default judgment,[34] the Homeloans Legal Manager of the bank again found it necessary to attach all these documents to his affidavit. Not yet content that compliance with the Act has been sufficiently established, the same manager thereupon filed a 'Certificate of Compliance in terms of section 129 of the National Credit Act, No 34 of 2005', once more attaching the letters in terms of s 129 that had earlier already been attached to both the summons and the affidavit in terms of Practice Note 33(2). In the process, a not insignificant volume of unnecessary paper has been placed before the court, which practice is to be strongly censured and discouraged. Practitioners should note that the affidavit filed in compliance with Practice Note 33(2) should be concise and it should confirm rather than repeat the relevant allegations already made in the summons or particulars of claim. Furthermore, it should *not* have attached thereto as

[34] Practice Note 33(2) provides:
'In order to satisfy the court of the matters referred to in section 130(3) of the Act, an affidavit must be filed when a credit provider applies for judgment. '

annexures copies of any document which is already annexed to the summons or particulars of claim.

Individual cases

[21] Reverting to the two individual cases before us, as mentioned earlier, each of the claims before us has been commenced by way of a simple summons, annexing copies of the relevant mortgage bonds and the suretyships, but not of the underlying credit agreements secured by such bonds. In attaching the mortgage bonds and the suretyships, the bank appears to recognise the need to attach a document to a simple summons in certain circumstances. However, the wrong documents were attached in these instances, as the plaintiff's claims are based on the terms of the individual loan agreements, not the mortgage bonds or suretyships which secure those agreements.[35]

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[35] Cf *Studdard, supra,* para 5.

[22] In the light of the conclusions reached above, the papers are not in order and require amendments to the respective summonses so as to refer to the underlying agreements and to attach copies thereof. It follows that the bank is not, at this stage, entitled to default judgment as claimed, nor is it entitled to recover costs from the defendants herein in relation to the first appearance on 31 October 2012 in third division or in respect of the hearing before us on 30 November 2012.

[23] Both matters are accordingly postponed *sine die*, with no order as to costs.

[original signed]
B M GRIESEL
Judge of the High Court

FOURIE J: I agree

P B FOURIE

Judge of the High Court

SALDANHA J: I agree

V C SALDANHA

Judge of the High