

SOUTH AFRICA / JUDGMENT

Phofung Project Consulting (Pty) Ltd v Standard Bank Of South Africa Ltd (A232/2017) [2018] ZAFSHC 21 (8 March 2018) [2018] ZAFSHC 21

COURT

Free State High Court, Bloemfontein

BEFORE

DAFFUE, RAMPAI

CASE / FILE NUMBER

A232/2017

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Source record**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO Of
Interest to other Judges:	NO Circulate
to Magistrates:	NO Case number: A232/2017 In the appeal PHOFUNG PROJECT CONSULTING (PTY) LTD Appellant and STANDARD BANK OF SOUTH AFRICA LTD Respondent HEARD ON: 05 MARCH 2018
CORAM:	RAMPAI, J et DAFFUE, J

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 08 MARCH 2018

I

INTRODUCTION

- [1] This is an appeal by the two unsuccessful defendants in summary judgment proceedings heard in the Magistrate's Court, Bloemfontein ("the court a quo"). The crucial issue on appeal is whether or not the summary judgment application is defective to such an extent that summary

judgment

should not have been granted.

II THE PARTIES

- [2] First appellant is Phofung Project Consultings (Pty) Ltd, cited in the court a quo as first defendant, it allegedly being the principal debtor.
- [3] Second appellant is Daniel Pocklington Erasmus, cited as second defendant in the court a quo in his capacity as alleged surety.
- [4] Respondent is the Standard Bank of South Africa Ltd, the plaintiff in the court a quo who successfully applied for summary judgment as will be shown in more detail infra.
- [5] In order to avoid confusion I shall refer to the parties as cited in the appeal.

III THE COURT A QUO'S ORDERS

- [6] After hearing argument during an opposed summary judgment application, the court a quo granted the following orders which I quote verbatim:

"That summary judgment is granted against the 1st and 2nd Defendants, jointly and severally, the one paying the other to be absolved for:

- a. Payment of the sum of R311 102.66;
- b. Interest on the sum of R311102.66 at the rate of 14.81% per annum, calculated daily and compounded monthly in arrears from 25 August 2016 to date of final payment;
- c. Costs of suit on an attorney and client scale."

IV THE GROUNDS OF APPEAL

[7] I do not intend to quote the grounds of appeal, but shall merely summarise the relevant grounds for purpose of adjudicating the appeal. The court a quo allegedly erred in the following instances:

7.1 in adjudicating the respondent's summary judgment application although the application was filed with the clerk of the court a quo out of time, to wit 16 days after notice of intention to defend was given (service was effected on appellants on the 15th day);

7.2 in accepting the veracity of the founding affidavit in support of the application for summary judgment, notwithstanding the fact that the deponent incorrectly referred to allegations contained in a particulars of claim whilst

there were no such particulars of claim as the respondent did not issue a combined summons, but a simple summons; and furthermore

insofar as documents were placed before the court a quo and relied upon which were not attached or referred to in the summons;

7.3 that the simple summons disclosed a cause of action and that all necessary averments were made to sustain a cause of action, whilst it was not the case;

7.5 in finding that appellants have raised technical defences only and failed to set out a bona fide defence.

V RELEVANT RULES AND AUTHORITIES

[8] Rule 14 (2)

(a) of the Magistrate's Court Rules stipulates the following:

"The plaintiff shall within 15 days after the date of service of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by plaintiff or by any other person who can swear positively to the

facts

verifying the cause of action and the amount, if any, claimed and stating that in his or her opinion there is no bona fide defence to the action and that notice of intention to defend has been served solely for the purposes of delay."

[9] Although it is required in rule 14(3) of a defendant in a summary judgment application to "disclose fully the nature and grounds of his defence and the material facts relied upon therefor", in order to show a bona fide defence, the starting point, in adjudicating the application for summary judgment, is the application itself.

[10] Wallis, J (as he then was) said the following in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP) at paragraph (25)

[25] Insofar as the learned judge (the reference is to Bliden, J's judgment in *Standard Bank of South Africa Ltd v Roestof* 2004 (2) SA 492 (W)) 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. It requires a defendant who wishes to contend that the application is defective to confine themselves to raising that point, with the concomitant risk that if the technical point is rejected, they have not dealt with the merits. It will be a bold defendant that limits an opposing affidavit in summary judgment proceedings to technical matters when they believe that they have a good defence on the merits. 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 defendant 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. Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons. (emphasis added)

See also: *Butterlum Properly Letting (Pty) Ltd v Dih/abeng Local Municipality* [2016] 4 All SA 895 (FB) at paragraphs [33] - [35].

[11] In *Butterlum supra* I dealt with the requirements a plaintiff has to meet in summary judgment proceedings. The claim must not only be clearly established, but the plaintiff must ensure that his pleadings are technically in order. Several judgments were referred to and considered from paragraph [28] and further. The point was made in paragraph [30] that reliance on unnecessary formalism should be rejected. It would be, for example, too technical to find that a founding affidavit referring to "defendant" (in the singular) instead of to "defendants" (plural), where it is clear that the husband and wife married in community of property, are cited as co-defendants by the bank claiming money due and payable in respect of a home loan for which a mortgage bond was registered, does not comply with the requisites for summary judgment. Insignificant typographical errors should not be used to dismiss an application where there is no hint of prejudice to the defendant. The question to be decided in this appeal is whether respondent's application for summary judgment is technically in order or defective.

[12] It was found in paragraph

[35] of *Butterlum* that where a plaintiff relies on more than one cause of action in its summons or particulars of claim, all such causes of action must be verified. I shall consider this issue as well infra.

[13] It is also necessary to consider the authorities relating to how causes of action should be pleaded in a simple summons. The respondent relied on a written overdraft agreement in respect of the main claim against the

principal debtor. It is accepted practice in the High Court that, although a simple summons is not a pleading and Uniform Rule of Court 18 does not apply, a plaintiff issuing a simple summons relying on a written agreement must attach a copy of such agreement to the summons. If the document relied upon for the cause of action is not attached, the summons would not disclose a cause of action. There is no reason why this practice should not be followed in the Magistrate's Courts. I refer to the decision of the full bench in *Absa Bank Ltd v Janse van Rensburg and Another* 2013 (5) SA 173 (WCC) and I quote from paragraphs [11] - [15]:

"[11] More recently, in *ASSA Bank v Studdard*, 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 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.' 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.

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 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.'

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*, 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 would not disclose a cause of action.'

[13] In the same context, Harms 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 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 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, they deviate from the long-standing practice in this division (and elsewhere) and should no longer be followed.

VI EVALUATION OF THE COURT A QUO'S JUDGMENT AND SUBMISSIONS IN LIGHT OF THE AUTHORITIES

[14] Respondent's counsel, who also appeared for respondent in the court a quo, submitted that appellants failed to disclose their defences and the material facts upon which the defences are based. Consequently, he supported the judgment of the court a quo.

[15] The court a quo only dealt with the late filing of the summary judgment application, but did not mention any defects appearing from the respondent's

application. It relied on *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (AD) for the finding that "... where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to proceedings which are properly before Court." The relevant dictum in *Maharaj*, regarded as the locus classicus in respect of summary judgment applications, can be found at 423H. I do not agree that reliance on *Maharaj* is justified in casu for the reasons set out in the next two paragraphs.

[16] In the first instance, no particulars of claim was attached to the summons and therefore, respondent's deponent made an incorrect statement under oath. Secondly, respondent relies on two separate and totally different

causes of action, to wit in respect of money lent and advanced and a claim based on suretyship. The defendants in respect of the two claims are not the same persons/entities. Notwithstanding this, the deponent has sworn "... positively to the claim set out in the Summons and Particulars of Claim and verified the Plaintiffs cause of action." (emphasis added). The deponent and/or respondent's attorney was apparently oblivious of the two separate causes of action. In line with the Buttertum judgment, this should be regarded as fatal. Thirdly, respondent alleged in the summons that an application to open an enterprise/business account is attached to the summons as annexure "A1". Whilst this is so, a further document not referred to in the summons and which was therefore not properly before the court a quo, being Part A, a portion of an overdraft agreement, to wit the pre-agreement statement and quotation - formed part of the documents before the court a quo. The application annexed as annexure "A" is dated 24 March 2003 and the next document, Part A of an alleged overdraft agreement, is dated 26 October 2013. Clearly these are two separate and distinct documents. The second one is dated ten and a half years later than the first. Part A is in any event merely a quotation or pre-agreement statement as the heading thereof reads. The vital Part B of an apparent overdraft agreement was not referred or attached to the summons and never placed before the court a quo. Respondent failed to comply with the principles applicable to attachment of documents relied upon in a simple summons as stated in *Absa Bank v Janse Van Rensburg supra*. Therefore, the summons did not disclose a cause of action and the verifying affidavit could not cure the material defect.

[17] The claim against the surety is, over and above the shortcomings stated in the previous paragraph, far from being unimpeachable. No court could ever have granted judgment by default, not to speak of summary judgment, if it was alerted to the following further hurdle. It is stated in the summons and verified to be correct in the affidavit that a suretyship agreement was entered into on 24 March 2003, but contrary thereto, the document attached as annexure "C" is dated 21 May

2012. The summons, read with annexure "C", is vague and embarrassing to the extent that it is excipiable in my view. This material defect was not considered by counsel or the court a quo. Certainly it cannot be seen as a mere technical or typographical error which can be condoned. I refer to the authorities quoted *supra*.

[18] It may be argued that appellants did not make a full disclosure and might have been found wanting if they were facing a proper application for summary judgment. It is merely denied that first appellant, the principal debtor, breached any of the terms of annexure "A". By so contending they apparently wished to

state that the principal debtor was never in default with any of its obligations and, therefore, that summary judgment could not be granted against either the principal debtor or the surety. The court a quo mistakenly focused on appellants' reliance on technical defences and as a result found that they "failed to set out a bona fide defence." Such an approach was incorrect. In acting as it did, it failed to accept that the starting point in adjudicating

summary judgment applications is the application itself. Once it is found to be defective, then "cedit quaestio." Even if the court a quo's criticism of appellants' answering affidavit is regarded as fair and it is accepted that appellants failed to set up a defence to meet the standard required to successfully resist summary judgment, this is immaterial for the reasons stated by Wallis J in Shackelton Credit Management supra. Consequently the appeal is bound to succeed.

VII COSTS

[19] Generally, and once the court is satisfied that a defendant has made out a bona fide defence in opposed summary judgment proceedings, it is ordered that costs of the application shall be costs in the principal matter,

alternatively that costs shall stand over for adjudication at the trial. However, where the plaintiff launches a summary judgment

application which is materially defective, as in casu, there is no valid reason why he shall not bear the costs of the application, including the costs of opposition. That is the order I intend to make.

VIII

ORDERS

[20] Consequently the following orders are made:

20.1 The appeal succeeds with costs.

20.2 The order of the court a quo is set aside and substituted with the following orders:

"(a) The application for summary judgment is dismissed.

(b) Leave is granted to the defendants to defend the action.

(c) Plaintiff is ordered to pay the costs of the opposed application for summary judgment, such costs to include defendants' costs of opposition."

JP DAFFUE, J

I concur

MH RAMPAI, J

On behalf of the Appellant: Adv

C Snyman

Instructed by: JG

KRIEK & CLOETE ATTORNEYS

BLOEMFONTEIN

On behalf of the Respondent: Adv E Lubbe

Instructed by: STRAUSS

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