I 359/99

SOUTH WEST AFRICAN BUILDING SOCIETY vs M D COETZEE

Hannah. J. Matritz J, Hoff AJ

1999/10/01

PRACTICE

SUMMARY JUDGMENT - Defendant opposed grant of judgment on basis of lack of particularity in plaintiffs simple summons - Relied on *First National Bank of Namibia v Interbel Holdings (Pty) Ltd* (Case No I 1115/98 Nm.H.Ct.) - Principles relating to a simple summons considered. - Also, what is meant by a "cause of action" - Court concluded that the *First National Bank of Namibia* case was wrongly decided on the point in question. Plea of lack of knowledge is insufficient to avoid summary judgment.

Declaration that property is executable - Reason for asking for such declaration considered.

Case No.: I 359/99

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SOUTH WEST AFRICAN BUILDING SOCIETY **APPLICANT**

and

MARTIN DAVID COETZEE **RESPONDENT**

CORAM: Hannah, J et MARITZ, J et HOFF, AJ

Heard on: 1999-09-28

Delivered on: 1999-10-01

JUDGMENT

HANNAH, J: This opposed application for summary judgment was placed for decision before the full bench for reasons which will emerge in this judgment. I will refer to the applicant as the plaintiff and to the respondent as the defendant.

The plaintiff issued summons in the High Court for payment of the amount of N$l 310 193,20 and compound interest on that amount at the rate of 21% per annum from 1st November 1998 to date of payment. As the manner in which the plaintiffs claim is particularised lies at the root of the defendant's opposition to summary judgment being granted I will set it out in full.

"1. Payment of the amount of **NS1 130 193.20** which amount includes compound interest as agreed

between the parties at the rate of **21%** per annum until **31 October** *998*, being the balance due and owing in respect of monies lent and advanced by the Plaintiff to the Defendant in respect of which loan the Defendant, as security for the aforesaid indebtedness, passed Mortgage Bond No **B5287/97** in favour of the Plaintiff as a first Mortgage over the following property, to wit **Remaining Extent of Erf No 2211, Swakopmund, (Extension No 1),** situate in the Municipality of **SWAKOPMUND,** which amount has become due and payable as a result of the Defendant's breach of a material term of the said loan, being his failure to pay the monthly instalments in respect thereof, and which amount, the Defendant fails, refuses and/or neglects to pay to the Plaintiff despite due demand.

4. Compound interest on the said amount at the rate of **21%** per annum, capitalised monthly as from **1 November** *1998* to date of payment.

5. An order declaring the immovable property, to wit **Remaining Extent of Erf No 2211, Swakopmund, (Extension No 1), Swakopmund,**
executable.

6. Costs of suit on an attorney and client scale as agreed upon.

7. Further and/or alternative relief."

The summons was duly served and the defendant entered an appearance to defend whereupon the plaintiff launched the present application. A copy of the bond referred to in the summons was attached to the application for summary judgment. In his answering affidavit the defendant denies that he has no *bona fide* defence and advances a number of legal contentions as to why leave to defend should be granted. The defendant does not deny that he owes money to the plaintiff but his stance or defence is that he is unable to ascertain the amount owing because of the way in which the plaintiffs claim is formulated in the summons. The bond was not annexed to the summons and as it was not permissible to attach it to the application, so it is contended, no assistance can be derived from that. Capital and interest are lumped together and it is therefore impossible to determine the capital amount owing, what interest has been charged and to what extent, if at all, instalments which have been paid have been taken into account. The defendant contends that if leave to defend is granted he will then be in a position to request further particulars in order to establish what the plaintiffs claim should actually be and whether any part of the interest claimed was usurious.

In support *of his* submission that the plaintiffs summons is defective for lack of particularity Mr Grobler, who appeared for the defendant, relied heavily on *Commercial Bank of Zimbabwe Ltd v M MBuilders and Suppliers (Pty) Ltd and Others and three similar cases* 1997(2) SA 285 (ZH) and on

First National Bank of Namibia v *Interbel Holdings (Pty) Ltd t/a Zambezi Timbers and Another* (Case No.I 1115/98) (Nm.H.Ct) (unreported). In the former case the plaintiffs, commercial banks, instituted action by summons claiming repayment of moneys alleged to have been advanced on overdraft to the various defendants, together with interest alleged to have accrued on the amounts outstanding in accordance with the banks' conditions of business. The rate of interest was 43%. The summons and particulars of claim did not specify the capital sum advanced, they did not show as a separate figure interest that had accrued, there was nothing to show whether any repayment had been made nor, if they had, the manner in which they had been apportioned as between interest and capital. When applications for judgment by default came before the judges concerned it was considered that the lack of particularity in the summons coupled with the high rate of interest claimed and the period over which the amounts were alleged to have been outstanding raised a very real likelihood that interest equal to the amount of the loans had accrued some time before and that more than that amount was being claimed. The judges concerned therefore issued a direction requiring the plaintiff in each case to file a further affidavit particularising its claim so as to show the principal sum advanced and the manner in which the amount outstanding was apportioned as between capital and interest. Argument was then heard on the *in duplurn* rule. Having made a detailed analysis of this rule in his judgment, Gillespie J. then made certain orders in respect of each of the cases and Smith, J, with whom both the other judges concurred, gave the following direction:

"In my opinion papers supporting a claim for payment of a debt which includes interest on a capital sum should clearly indicate the following. The amount of the capital due; the total amount of interest due thereon as at a specified date; whether or not interest on the total amount is claimed and, if so, the amount in respect of which the interest is claimed and the date with effect from which the interest will run. In the case of a claim relating to a bank overdraft, the papers should show the total amount of the debt claimed and, separately, the total capital > amount loaned by the bank to the client, the total amount of interest due thereon as at a specified date and, if appropriate, the total amount due in respect of bank charges, cheque books, etc and the interest, if any, due thereon as at a specified date. If the client has made any payments in respect of the overdraft account, the papers should specify the total amount paid and also indicate how the payments have been appropriated."

It is this direction upon which Mr Grobler relies on in the instant case and no doubt counsel has been encouraged to do so by his success in persuading Mtambanengwe J. in the *First National Bank of*

Namibia case *{supra)* to adopt it. That case was in certain respects similar to the *Commercial Bank of Zimbabwe* case *(supra)* and, having set out the direction, Mtambanengwe J. said at page 24 of the typed judgment:

"I respectfully agree with this directive and respectfully add that a failure to do as directed could in a proper case result in the claim being regarded as fatally defective."

I should add for completeness that the rate of interest claimed in the *First National Bank of Narnibia* case *(supra)* was prime plus 3%.

It is clear that the particulars set out in the summons in the instant case do not comply with the direction just referred to and adopted by Mtambanengwe J. as part of our practice and procedure and accordingly Mr Grobler submitted that we should hold either that the summons is fatally defective, or, at very least, that leave to defend should be granted so as to enable the defendant to seek further particulars.

Where a claim is for a debt or liquidated demand, and no dispute is anticipated, it is normal and indeed good practice to use a simple or ordinary summons as was done in the instant case. The principles which apply to a simple summons are described in *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa* (4lh ed) at 400 as follows:

"In setting out the cause of action, one need not go into detail and set out the particulars of the basis of the plaintiffs 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 declaration, 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 of case so complete as not to be excipiable."

That statement is supported by a number of cases referred to in the footnotes and it will suffice if I refer to three only. In *South African Permanent Building and Investment Society v Gornitzka* 1939 TPD 385

the question before the court was whether a summons was irregular or improper within the meaning of Transvaal Rule 37 because it failed to allege specifically that the sum of £800 claimed under a mortgage bond was presently due' and payable and the grounds upon which

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it had so become due and payable. The prayer under consideration read:

"(1) The sum of £800 (eight hundred pounds) being the principal sum remaining owing under Mortgage Bond passed in favour of the Society specially hypothecating Lot No. 61 in the Township of Edenburg, District of Johannesburg, and registered in the Office of the Registrar of Deeds, Pretoria, on the 14,h day of January, 1938 under No. 499/1938."

Having referred to two cases in which it was held that the object of a summons is twofold, namely to bring the defendant to court and to intimate to him the nature of the claim he has to meet, Murray J. observed that the defendant, in consequence, was entitled not only to a statement of the relief sought but also to a concise statement of the ground upon which the claim is founded and continued at p. 387:

"The present applicant's contention, however, appears to me to go much further in claiming that a summons is defective if it does not specifically aver that the balance of the sum secured by bond is presently due and payable, and the reasons for this. It is true that particularity of this character is required in a summons for provisional sentence *(Rand Provident Building Society v Fuller,* 1930, T.P.D. 271) which stands upon a different footing. But in regard to simple original actions, the applicant's .contention requires in a summons the precision of the declaration of which it is the forerunner, and would necessitate a detailed statement of all the essential averments required for a statement of case so complete as not to be excipiable. I am not aware of any authority justifying this position. It is, to my mind, sufficient if a summons not only sets out the relief claimed, but concisely states (as I consider the present one does) the legal relationship between the parties as a consequence of which the plaintiff alleges his right to that relief. The defendant is thereby sufficiently advised not only for what, but also upon what ground, he is brought into Court, and there can be no prejudice to him due to ignorance as to what he is called upon to face. The particularisation of the claim, the detailed allegation of such facts as are necessary for the averment of an immediately enforceable obligation, is matter for the declaration."

In *Dowson & Dobson Industrial Ltd v Van Der Werfand Others* 1981 (4) SA 417 (C) Marais A.J. made the following observations at p. 423 C:

'There can be no doubt that summary judgment cannot be obtained in respect of a summons which fails utterly to disclose a cause of action. *L S Enterprises (Pty) Ltd* v *Couck* 1971 (1) SA 438 (T) AT 440F; *Caltex Oil (SA) Ltd* v *Crescent Express (Pty) Ltd* 1967(1) SA 466 (D) at 469C. But, having said that, one must not lose sight of the fact that Rule 32 of the Uniform Rules of Court entitles a plaintiff who

has issued and served a simple summons, of the kind set out in Form 9, to apply for summary judgment. Such a summons need only set out 'in concise terms plaintiffs cause of action'. As was pointed out by Fannin J in *Mahomed Essop (Pty) Ltd* v *Sekhukhulu & Son* 1967(3) SA 728 (D) at 730H, the Rules envisage, once an appearance to defend has been entered, that a plaintiff will file a declaration complying with Rules 18 and 20. It follows that it could never have been intended that the initiating summons should contain the degree of particularity which is appropriate in a declaration."

The third case is *B W Kuttle & Association Inc* v *O 'Connell Man the and Partners Inc* 1984(2) SA 665(C) in which Tebbutt J. said the following at p. 668 B:

"It must be remembered that under Rule 17, which is the Rule dealing with summonses, a plaintiff can issue a simple summons or a combined summons where the particulars of claim are annexed to the summons. It has on many occasions been laid down that the requirement that the cause of action must be set out in the summons in 'concise terms'(the phrase used in Form 9 with which the simple summons must be in accordance, in terms of Rule 17), does not mean that it must be done with the particularity required of a declaration (or the particulars of claim annexed to a combined summons). The object of a summons is not merely to bring the defendant before Court; it must also inform the defendant of the nature of the claim or demand he is required to meet. But it need do no more than that. It need not go into minute particulars. It is for this reason that a Supreme Court summons has been described as 'merely a label' (see *Emdon and Another* v *Margau* 1926 WLD 159 at 162) or 'a general indication of claim' (see *Singh* v *Vorkel* 1947 (2) SA 400 (C) at 405)."

Reference should, I think, also be made to *Standard Bank of South Africa Ltd* v *Oneanate Invcstments (Pty) Ltd (in Liquidation)* 1998(1) SA 811 (SCA) where Zulman J.A. stated the following at 825 F:

"A simple summons stands on its own feet. So, for example, a plaintiffs right to obtain summary judgment will be adjudicated upon in the light of averments made in the summons. There can be no doubt that the simple summons in the instant matter sets out a 'cause of action'. This 'cause of action' is based upon a claim for an amount due and payable by the defendant to the plaintiff in respect of moneys lent and advanced to the defendant by way of overdraft at the former's special instance and request. This is sufficient particularity to enable the defendant to be aware of what was being claimed from it and is sufficiently clear to have enabled a court to have decided whether to have granted judgment on it."

See also *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999(1) SA 515 (SCA) at 525; *Namibia Beverages v Martin Amupolo* Nm.H.Ct. Case No. (P) I 2450/97 (13th August, 1999).

Mr Grobler boldly submitted that these cases were wrongly decided in that the learned judges erred in equating a "claim" with a "cause of action". Form 9 enjoins the plaintiff to:

set out in concise terms plaintiffs cause of action and the relief claimed."

and Mr Grobler submitted that the first question to be addressed is what is a cause of action. The answer, he said, is to be found in *Read v Brown* 22 QBD 131 where "cause of action" was defined by Lord Esher, MR to be:

"every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

Counsel also relied on *Trust Bank of Africa Ltd v Hansa and Another* 1988 (4) SA 102 (W) where Flemming J. agreed at 104 H that:

"A 'cause of action' consists of those facts which must be proven before the plaintiff is entitled to judgment."

Thus far I have no difficulty with Mr Grobler's submission. The definitions to which he referred us are classic definitions of a "cause of action". However, I can find no reason to think that the learned judges in the cases in question were not fully aware of what a cause of action is or were, as counsel contends, equating a claim with a cause of action. Indeed, if by "claim" Mr Grobler means "the relief claimed", and so far as I can see this can only be what he means, it is patently obvious from the passages which I have set out that the judges distinguished between relief claimed and cause of action. What they were at pains to point out, however, was that in a simple summons it is permissible to set out the cause of action in an abbreviated form but the abbreviated form must, of course, still contain all the essential averments.

Mr Grobler's next submission was that the plaintiffs claim in the instant case comprises several

causes of action and, to use counsel's expression, they have all been lumped together. This, so counsel submitted, is not in compliance with the Rules of Court nor, for that matter, with the direction made in the *Commercial Bank of Zimbabwe* case *(supra)* as adopted in the *First National Bank of Namibia* case *(supra)* and the summons must for this reason be regarded as defective. Mr Grobler argued that this is no mere technicality. The defendant is faced with a claim for a lump sum containing different components and is prejudiced by being unable to ascertain what is being claimed in respect of different causes of action.

In support of his submission Mr Grobler referred us to *Standard Bank of South Africa Ltd v Lotze* 1950(2) SA 698 (C) but in my view this case is of no assistance to him. The passage in the judgment on which counsel relies reads:

"There is authority that where interest is claimed from a date prior to the issue of summons, the court cannot grant such interest unless the cause of action upon which the interest is claimed is set out, i.e. either that there has been an express or implied stipulation for interest, or that the defendant has been placed *in mora* from the date from which interest is claimed."

That is a far cry from saying that the cause of action upon which interest is claimed is separate and distinct from the cause of action upon which capital repayment is claimed.

The answer to Mr Grobler's submission is, in my view, a simple one. There is but one cause of action set out in the summons, namely repayment of the balance of monies lent and advanced by the plaintiff to the defendant together with interest as agreed, the defendant having breached the loan agreement by failing to pay monthly instalments. The essential facts which the plaintiff must prove to entitle it to judgment are concisely or briefly set out in the summons, as required by the Rules, and, in my opinion, the fact that matters such as the capital balance, the amount of the interest and the date of the loan are not stated matters not. However, that is not an end to the

matter. We still have to consider the *First National Bank of Namibia* case *(supra)* which has the

effect of requiring more detail and particularity.

Ms Vivier, for the plaintiff, submitted that the adoption of the direction formulated by Smith J. in the *Commercial Bank of Zimbabwe* case *(supra)* drives a coach and horses through the general principles established over the years in South Africa and Namibia with regard to simple summons. The adoption of that direction by Mtambanengwe J. in the *First National Bank of Namibia* case *(supra)* she submitted was wrong and should not be followed.

Mr Grobler, on the other hand, submitted that the adoption of the direction by Mtambanengwe J. was done for good reason, namely the protection of borrowers. It is very much in line, he said, with the provisions of Section 10(2) of the Usury Act, No 73 of 1968 which entitles a borrower to demand certain information concerning monies lent to him. If a borrower has a statutory right to demand such information then it can only be right that such information is set out in a summons when a claim for repayment of capital and interest is made. But that was not the rationale underlying the direction formulated by Smith, J. in the *Commercial Bank of Zimbabwe* case *(supra)* and I very much doubt whether it would have been regarded as a sufficient reason for the direction.

What led to the *Commercial Bank of Zimbabwe* case *(supra)* being set down for argument was the view that the judges took that the lack of particularity in the summons coupled with the high rate of interest claimed and the period over which the amounts were alleged to have been outstanding raised the very real likelihood that interest equal to the amount of the loans had accrued some time before and that more than that amount was being claimed. I can well understand the judges' concern when the interest rate in the cases before them was as high as

43%. And if that is the rate of interest normally to be found in Zimbabwe I can well understand why Smith J. made the direction he did. The same likelihood would arise in case after case. But that is not the position here in Namibia where the norm is for interest rates to hover around the 20% mark. One sees this in every motion court. And, in my opinion, good reason should exist for a departure from well-established principles relating to such matters as the content of a simple summons. It is not, in my view, sufficient simply to adopt a new practice introduced in a foreign jurisdiction as it would appear

Mtambanengwe J. did without some sound basis for doing so. With great respect to the learned judge I am of the view that he was wrong to do so in such a general way though that is not to say that there may not be cases where lack of particularity in a summons will lead to judgment by default or summary judgment being refused. Those will be cases such as the *Commercial Bank of Zimbabwe* case *(supra)* where there is a very real likelihood that payment of interest in contravention of the *in duplum* rule or payment of usurious interest is being sought. However, a mere suspicion that that may be the case will not suffice: *Volkskas Bank Ltd v Wilkinson and three similar cases* 1992(2) SA 388 (C) at 395 G.

In reaching the foregoing conclusion I have not overlooked Mr Grobler's brief argument to the effect that Rule 32 offends against Article 12(l)(a) of the Constitution. Mr Grobler blew hot and cold when dealing with this accepting at one point that the rule serves a useful purpose in preventing defendants with bogus defences from delaying a plaintiffs claim and then contending that the requirements of the rule can be so onerous in certain circumstances as to infringe a defendant's constitutional rights. I can see no merit in the submission and do not consider it worthy of any further consideration.

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Turning now to the plaintiffs claim as formulated in the summons there can be no doubt that it

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sets out a cause of action and that there is sufficient particularity for the defendant to know what is being claimed from him. Also, there is nothing on the face of the claim which gives rise to a suspicion, let alone a likelihood, that payment of interest in contravention of the /'/; *duplum* rule or payment of usurious interest is being sought. In these circumstances I am of the view that Mr Grobler's attack on the summons cannot be sustained.

Rule 32(3) of the High Court Rules provides:

"(3) Upon the hearing of an application for summary judgment the defendant may -

(a) .....

(b) satisfy the court by affidavit ..... that he or she has a *bona fide* defence to the action, and such affidavit.....shall disclose fully the nature and grounds of the defence and the material facts relied upon."

In his affidavit the defendant denies the allegation that he has no *bona fide* defence but apart from that general denial he does not deny any of the averments made in the summons. All he states is that it is impossible to determine from the summons the capital amount being claimed, the amount of interest which has been capitalised and the manner in which such interest has been capitalised and whether instalments which have been paid have been taken into account. He makes the allegation that the plaintiff is charging interest on interest which he contends is not permissible and avers that the claim for interest may include usurious interest.

Mr Grobler wisely did not seek to argue that the plaintiff cannot charge interest on interest and indeed at the end of the day conceded that should his attack on the summons fail the defendant's

affidavit discloses no *bona fide* defence. This concession was clearly correctly made. The defendant's affidavit comes nowhere near satisfying the requirements of Rule 32(3)(b). There is ample authority for the proposition that a plea of lack of knowledge is insufficient to avoid summary judgment: *Summary-Judgment a Practical Guide* by van Niekerk et al at 9-15 to 9-28 and the cases cited. In the ordinary course a person in the position of the defendant would have financial statements from which he can check and calculate his indebtedness to the bank or building society which has lent him money and, if the defendant is not in that position, then, in my view, it was incumbent upon him to explain why.

Finally, I will deal with Mr Grobler's submission that no case is made out in the summons in terms of which the plaintiff can claim that the property referred to be declared executable. The reason for asking the Court to declare property executable was stated by Murray J. in *Gerber v Stolze and Others* 1951(2) SA 166 (T) at 172F in the following words:

"The only reason for applying to Court at all is to have a short-cut in the one case where a money judgment has been obtained and the money judgment is secured to the plaintiff by specially hypothecated immovable property; then, in the normal course, the Court is asked, in advance, to dispense with the circumlocution of having to take execution against the movable property first and only on that property failing to realise the money sum, then to have recourse against the immovable property. When an order is granted declaring executable the property specially hypothecated, that order permits the grantee, the creditor, to take his execution straightaway against the immovable property."

The matter was also considered by the Full Bench in *Namib Building Society* v *Du Plessis* 1990 NR 161, Du Toit A.J. said at p. 163 J:

"A mortgagee plaintiff should in principle be entitled to realise the property over which a mortgage bond was registered for the very purpose of securing the debt on which he sues. Such a plaintiff has advanced money on the understanding that he can preferentially look to the proceeds of the mortgaged property. Unless some compelling reason exists to require such a plaintiff first to execute against movables, no reason occurs to me why he should not be given the benefit of his bargain. If some such compelling reason exists, the duty surely lies on the mortgagor defendant to persuade the Court why the property should not be declared executable."

The learned judge then went on to consider whether the absence of a foreclosure clause in the mortgage bond would preclude a plaintiff from seeking to have the mortgaged property declared executable and he concluded that it would not.

The particulars in the summons in the instant case aver that the loan made to the defendant was secured on certain identified property and that, in my view, is sufficient to grant the relief sought in prayer 3. I would add that in the *Namib Building Society* case *(supra)* the Full Bench approved the practice of producing a copy of the mortgage bond to court when an application is made for default judgment. The same must hold true when application is made for summary judgment and that is why in the instant case a copy of the bond was attached to the application. The contention made by the defendant in his affidavit that it was not permissible to attach the bond to the application is clearly wrong.

In my judgment, the plaintiff is entitled to summary judgment and accordingly the following order is made.

It is ordered that:

For the Applicant: Advocate S Vivier

Instructed by: Messrs Fisher, Quarmby & Pfe

For the Respondent: Advocate Z J Grobler Instructed by: Messrs A Louw & Co

1) The defendant pays to the plaintiff the amount of NS1 130 193,20;

2) The defendant pays compound interest on the aforesaid sum at the rate of 21% per annum capitalised monthly as from 1st November, 1998 to date of payment;

3) The immovable property, to wit Remaining Extent of Erf No 2211, Swakopmund, (Extension No 1), Swakopmund is declared executable;

4) The defendant pays the plaintiffs costs on an attorney and client scale.

HANNAH, J

I agree

I agree