REPORTABLE

CASE NO: I 3329/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ANDRIES PETRUS VELDMAN	**FIRST PLAINTIFF**
LEONORA VELDMAN	**SECOND PLAINTIFF**

and

MURRAY HENDRIK BESTER	**DEFENDANT**

CORAM: Geier, AJ

HEARD ON: 08/02/2011

DELIVERED ON: 17/02/2011

JUDGMENT

GEIER, AJ

[1] In this matter first and second plaintiff instituted action on 28 September 2010 against defendant for payment of the sum of N$ 127 265.00 together with ancillary relief.

[2] The matter was defended and in response an application for summary judgment was promptly launched.

[3] Instead of resisting summary judgment in one of the modes prescribed by Rule 32(3) of the Rules of High Court, the defendant brought an application in terms of Rule 30 of the Rules of High Court seeking the setting aside of the plaintiffs' summons as a irregular step.

[4] First and second plaintiffs in turn, and also in terms of Rule 30, applied for the setting aside of the defendant's application in terms of Rule 30.

[5] At the hearing of this matter counsel were agreed that the merits of the first and second plaintiffs' Rule 30 application should be considered first, as a finding in favour of plaintiffs, would obviate the need to deal with the defendants Rule 30 application.

For the sake of convenience I will continue to refer to the parties as the first and second plaintiffs and defendant respectively

THE FIRST AND SECOND PLAINTIFFS' APPLICATION IN TERMS OF RULE 30

[6] Under the heading of what was styled "Notice in terms of Rule 30" First and Second Plaintiffs as Applicants gave notice that:

> *"... THAT the above-named applicants will apply to the above Honourable Court on Friday, 12 November 2010, or as soon thereafter as counsel may be heard, for an order in the following terms:*
>
> > *1. That, in terms of Rule 30, the respondent's notice of application in terms of Rule 30 (1) dated 26 October 2010 constitutes an irregular and/or improper step and falls to be struck out.*
> >
> > *2. That the respondent be ordered to pay the costs of this application*
> >
> > *3. Further and/or alternative rehef.*
>
> *KINDLY TAKE NOTICE FURTHER THAT the grounds upon which the*
>
> *applicants rely for the aforesaid relief are that:*
>
> > *(a) On 28 September 2010 the applicants issued summons against the respondent claiming the sum of N$ 127,265.00, together with interest, which action was defended*

by the respondent;

(b) On 22 October 2010 the applicants filed an application for summary judgment, which matter is set down for hearing on 12 November 2010;

(c) On 26 October 2010 the respondent filed a notice of application, purportedly m terms of Rule 30;

(d) The notice of application purportedly in terms of Rule 30 is premature. It was incumbent upon the respondent to await the filing of a declaration by the applicants in terms of Rule 20, alternatively to serve a notice of bar on the applicants should the declaration not be filed timeously in terms of the Rules of this Honourable Court;

(e) The notice of application brought purportedly in terms of Rule 30 is brought by way of notice of motion. Rule 30 (2) in peremptory terms provides that an application in terms of Rule 30 (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged;

(f) It is accordingly self-evident that the applicants are prejudiced by the aforegoing and are entitled to the relief sought in this Rule 30 application.

Kindly place the matter on the roll for hearing accordingly... ".

[7] At the hearing of these applications, Mr. Corbett, who appeared on behalf of first and second plaintiffs, indicated that he was no longer pursuing the ground set out in paragraph e) above but that he persisted with point d) in that the defendants application in terms of Rule 30 was submitted to be premature as it was incumbent upon the defendant to await the filing of a declaration by the plaintiffs in terms of Rule 20 alternatively to service a Notice of Bar should the Declaration not be filed timeously in terms of the Rules of the Honourable Court.

[8] I might pause to mention that the defendant had delivered a Notice of Opposition to the first and second plaintiffs application in terms of Rule 30, but no answering papers were filed.

[9] Mr. Barnard, who appeared on behalf of the defendant, indicated that the defendant's grounds of opposition were nevertheless contained in the Heads of Argument filed on behalf of the defendant subsequently. Mr Corbett made no issue of this and as it appeared that the

plaintiff was, in such circumstances, nevertheless in this unorthodox manner appraised of such grounds of opposition, and as it thus appeared, that no prejudice was occasioned as a result, I allowed argument to proceed.

[10] Mr Barnard submitted further that the plaintiffs 'Notice of Application' was irregular and liable to be set aside as it did not comply with the requirements of Rule 6 (11) as, so the submission went further, ' .. this notice simply aspires to be a 'Notice' and not a 'Notice of Motion' as is required by the Rule... '. He referred the court to *Ondjava Construction CC and Others v HAW Retailers 2008 (1) NR 45 HC* at p 48 where the court held:

> **"An application in terms of Rule 30 is an interlocutory application brought on notice to all parties. There is authority that where an application is brought on notice the short form, Form 2 (a), to the First Schedule to the High Court Rules should be utilized."**
>
> **See: *Government of the Islamic Republic of Iran v Berends* 1997 NR 140 HC "**

[11] He pointed out that it appears with reference to the referred to Form 2(a) that it *inter alia* states ' ... that the affidavit of ... annexed hereto will be used in support thereof... ' and that this formulation of Form 2(a) was linked to Rule 6 (11) of the Rules of High Court which provides that **"notwithstanding the aforegoing sub rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down for a time assigned by the registrar or as directed by a judge."**

[12] It was then submitted with reference to the rule and the *Ondjava Construction* decision that this was indicative of the requirement of the number and nature of the affidavits which had to be annexed in support of an interlocutory application. This rule, so Mr Barnard submitted, did however not give an applicant the right to file no affidavits whatsoever. He also took issue with the heading of the defendants notice, which did not indicate that it was a 'Notice of Motion' as was required in a substantive application or as would be required also in

an interlocutory or other incidental application.

[13] While conceding that the first portion of the plaintiff's notice, up to and inclusive of prayer 3, could in essence be regarded as complying with the requirements of a 'Notice of Motion', he disputed further that it was permissible for the plaintiffs to have set out their grounds of the relied up irregularity in the 'Notice of Application'. This is, so it was argued, contrary to all rules and forms as the plaintiff was in essence setting out evidence in the 'Notice of Application'. All in all, and on a proper interpretation of the plaintiffs 'Notice' same should really be regarded as a 'Notice' which was irregular, as not countenanced by the rules, in terms of which it was incumbent on the plaintiffs to have brought a 'Notice of Application' in terms of the rules and not have approached the court by way of

'Notice'.

[14] Mr. Corbett on the other hand insisted that the 'Notice' referred to was a 'Notice of Application' and therefore was regular. He submitted that it was compliant with the requirements of Rule 30 (2), which in peremptory terms provides that an application in terms of Rule 30(1) shall be on Notice to all parties specifying the particulars of the irregularity and impropriety alleged.

[15] He relied in this regard on the decision of *Scott and Another v Ninza*[1] were Jansen J held:

> **"Defendants Notice in terms of Rule 30 certainly did not require to be supported by an affidavit. All that Rule 30 (2) requires is that the notice must specify the particulars of the irregularities complained of. It is analogous to an exception. Nor does Rule 30 provide for any form of reply. Plaintiff was quite entitled to give notice of intention to oppose defendants application, but whether an answering affidavit on behalf of plaintiff would in any way be justified can be decided by the court hearing the application. As was held in *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O), in certain applications, *in casu* an application to**

1 1999 (4) SA 820 (ECD)

strike out, *"the court must have regard only to the pleadings filed and cannot consider any fresh matter introduced by way of evidence on Affidavit or in any other matter."* In my view Rule 30 applications are in a similar category."[2]

[16] This was said with reference to what Mullins J had stated in *Chelsea Estates & Contractors CC v Speed -O-Rama* 1993 (1) SA 198 (SE) 202 E-G.

[17] It appears however on a further reading of the *Scott and Another v Ninza* judgment that such decision must be viewed against then applicable Rule 30, as it existed during 1999 in South Africa, which required the giving of a notice prior to the bringing of an application in terms of Rule 30, which is not the requirement in Namibia[3]. It appears further that the respondent there had failed to respond to such a notice calling upon the plaintiff to remove the cause of the defendant's complaint failing which an application was threatened. As the respondent had failed to respond to such 'Notice' this resulted in the applicants launching the application by way of 'Notice of Motion' in support of the application, founding affidavits were filed on behalf of applicants. In opposing the application, answering affidavits were filed on behalf of the respondent. Replying and supporting affidavits were again filed by applicants.[4]

[18] It would appear therefore that the relied upon *dictum* does not exactly answer the question as to whether or not it is incumbent on an applicant in terms of Rule 30 to file any affidavits in support of such application.

[19] The answer to this question is however found in *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (WLD) were Claasen J analysed the distinction between applications 'on notice' and those brought on 'notice of motion' as follows:

---

2 At 823 A-B

3 See Ondjava Construction CC & Others v HAW Retailers 2008(1) NR 45 (HC) at p 48 - 49 paras [19] to [26]. I also respectfully consider the finding made by Hoff, J in paragraph [27] and [32] as correct, which finding I endorse hereby.

4 Scott and Another v Ninza *op.cit* at p 822 I

"3. The Rule 6 motion procedure has always been interpreted as referring to the initiating of 'fresh proceedings'. The words 'on notice of motion' used in the Rule have been interpreted as referring to such fresh legal proceedings. (Yorkshire Insurance Co Ltd v Reuben 1967 (2) SA 263 (E) at 265) An application to amend pleadings is interlocutory and not a fresh legal proceeding. The parties are already engaged in litigation and have already complied with the formalities of appointingattorneys and supplying addresses for the service of documents. It is therefore not necessary to repeat all of these formalities when seeking leave to amend pleadings which have already been filed in accordance with these formalities.

4. An application for leave to amend pleadings is indeed an interlocutory application which is 'incidental to pending proceedings' as contemplated in Rule 6 (11). (SA Metropolitan Lewensverskerings Maatskappy Bpk v Louw N.O 1981 (4) SA 329 (O) at 332 B). Thus the application for leave to amend a pleading contemplated in Rule 28 (4) must of necessity be an interlocutory application falling within the meaning of Rule 6 (11). In terms of the latter Rule, such applications are brought 'on Notice' and not on 'notice of motion'. The difference between these two concepts has been set out clearly in the past. (Yorkshire Insurance Ltd v Reuben (supra); Viljoen v Federated Trust Ltd (supra)[5]; Hendriks v Santam Insurance Co Ltd 1973 (1) SA 45 (C) at 46 D - 47 C and then Muller v Paulsen 1977 (3) SA 206 E at 208 F-G; SA Metropolitan Lewensversekering Maatskappy v Louw N.O (supra). An application brought on notice does not require a supporting affidavit unless the particular circumstances so require. That is why Rule 6 (11) expressly uses the words '... supported by such affidavits as the case may require ...'. Not all applications for amendments will require affidavits as I have already set out above.

5. Finally it should be borne in mind that Rule 6 (11) commences with the words: 'Notwithstanding the aforegoing sub-rules ... 'Rule 6 (11) is therefore an exclusionary provision which is to be read in contradiction to the rest of the provisions in Rule 6. It indicates an exception to the normal rule that all applications are to be brought on notice of motion supported by an affidavit. Inmy view an application to obtain leave to amend is one such an exception contemplated in Rule 6 (11)."[6]

[20] Claasen J's analysis seems correct and should be read in conjunction with what said by

---

5 1971 (1)755A

6 *Swartz v Van der Walt t/a Sentraten at p 57 -58*

the court in *Ondjava Construction CC & Others v HAW Retailers* at p 48 paragraph [15]. I respectfully associate myself with what was said by the learned judges in this regard.

[21] It has also already been held by Hoff J in the *Ondjava Construction CC and Others v HAW Retailers* matter that an application in terms of Rule 30 is an interlocutory application to be brought 'on notice' to all parties. It is accordingly clear that such application is governed by Rule 6 (11). It is also clear that a Rule 30 application is an application which is incidental to pending proceedings. It appears expressly from Rule 30 (2) that an application in terms of Rule 30 is to be brought 'on notice'. Such application, so it was held in *Swartz v Van der Walt t/a Sentraten,* does not require supporting affidavits unless the particular circumstances require it. Should the circumstances however require supporting affidavits, and indeed a full exchange of affidavits, as was countenanced by the court in *Scott and Another v Ninza,* such Rule 30 application would necessarily have to be brought on Notice of Motion, the 'short form', Form 2(a)[7], to ensure a fair procedure.

[22] If regard is then had to the plaintiffs' notice it appears that it informs the defendant that an application for the relief set out in prayers 1 to 3 of the 'notice' would be made on Friday 12 November 2010 at 10h00. It also informed thedefendant further of the bases, (the grounds), on which the application would be made.

[24] It importantly also requested the Registrar to enroll the matter accordingly.

[25] In substance it appears therefore that the defendant was given 'notice' of all the essential aspects pertaining to the intended 'application on notice'. In that regard the 'notice of application' of the plaintiffs' was compliant with Rule 30(1) and (2). The evidentiary effect of

---

7 See also Ondjava Constructing CC & Others v HAW Retailers 2008(1) NR45 (HC) at p48 paragraph [15]

the plaintiffs' election not to fortify their 'notice of application' by way of affidavits is of course another matter.

[26] In the premises it must be concluded that the plaintiffs acted within the parameters of the rules when they brought their 'application' in terms of Rule 30 'on notice'[8]. The submissions made on behalf of defendant in this regard can accordingly not be upheld.

[27] This finding then clears the way for the determination of the remaining sole ground of irregularity relied upon by plaintiffs in support of their application in terms of Rule 30, which was to the effect that:

> **"the Defendants Notice of Application purportedly in terms of Rule 30 was premature as it was always incumbent on the Defendant to await the filing of an Declaration by the Applicants in terms of Rule 20,**
>
> **alternatively to serve a Notice of Bar to the Applicants should the Declaration not be filed timeously in terms of the Rules of Court."**

[28] In this regard it was immediately pointed out that Mr. Corbett had neither in his Heads of Argument, nor during oral argument, relied on any authority for this proposition. On the contrary, so Mr. Barnard on the other hand submitted, it was clear from the provisions of Rule 30 that a party may, within 15 days after becoming aware of an irregularity, apply to court to have the irregular step or proceeding set aside. That would mean that such application can be made at any stage of legal proceedings.

[29] Mr Barnard's submission seems to be correct as the only pre-conditions set by the Rule would be that such application would have to be brought within the aforesaid 15 day period,

---

8 They clearly did not issue the type of "notice" which the South African Rule requires prior to the launching of an application in terms of Rule 30

(or possibly within an extended 15 day period in terms of Rule 27(1)),, and provided that no further step in the cause was taken[9]. It would indeed appear that the legislature intended that an application in terms of Rule 30 could be brought at any stage of 'a cause' for as long as the applicant in a Rule 30 application would be a party to 'a cause' in which an irregular step proceeding had been taken.

[30] In this regard the learned authors of *Erasmus Superior Court Practice* state with reference to Rule 30 (1) of the Rules of Court:

> ***"Prior to the amendment of the sub-rule in 1987 the phrase 'any cause' was used and it was held that the words were used in the widest possible sense and referred to any judicial proceedings of what so ever nature.***

[31] They submit further that " ... the phrase 'a cause' in the present *(the South African),* sub-rule has a similar wide meaning." [10]

[32] I can see no reason to disassociate myself from this interpretation. Is it not a matter of daily experience in our courts that resort to the mechanisms provided by Rule 30 is had in a wide spectrum of judicial proceedings?

[33] I conclude therefore that a party to any judicial proceedings, *(a cause),* such as the defendant, in the present instance, and subject to the further requirements set by the rule, would be entitled to utilise the mechanisms provided for by Rule 30 at any stage of the judicial proceedings to which it is a party.

---

9 See: Proviso to Rule 30(1)

10 *See: Erasmus Superior Court Practice at p B1-189 Revision Service 8 of 1997 See also : Participation Bond Nominees (Pty) Ltd v Mouton (3) 1978 (4) SA 508 (W) at 515 D*

[34] In coming to this conclusion I take into account further that neither the provisions of Rules 20, 30 nor those contained in Rule 26 pose a bar to a party to a cause to resort to Rule 30 prior to the filing of a declaration. Therefore and subject also to the requirement of prejudice[11], I can see no reason why a party, should be precluded from attacking an irregular step or proceeding immediately and at any stage of judicial proceedings, and why such party should have to await the filing of a declaration in circumstances where, for example, a summons has not been properly issued or where the necessary power of attorney has not been filed.

[35] It follows therefore that the plaintiffs' application in terms of Rule 30 cannot succeed.

THE DEFENDANTS APPLICATION IN TERMS OF RULE 30

[36] The defendant's application took aim at the plaintiffs' simple summons, and more particularly it took issue with the claim formulation, as contained therein.

[37] The defendant was informed in such simple summons that the first and second plaintiff's had thereby instituted action against him in which they claimed together with ancillary relief:

> " ... Payment of the sum of N$ 127,265.00 being instalments for July and August 2010 payable in terms of a loan agreements entered into between the parties on 23 June 2010 which the amount is now due and payable by Defendant to the Plaintiffs and which amount, despite due demand, the Defendant refuses and/or neglects and/or fails to
>
> pay;

11 See for instance : *Ondjava Construction CC and Others v HAW Retailers at paras [55] and [60]*

[38] The essence of the attack mounted on behalf of defendant was that the plaintiffs' simple summons dismally failed to inform the defendant of the case he had to meet. In this regard it was averred further that the simple summons herein and were plaintiffs' claims were based in contract, should have complied with the provisions of Rule 18 (6) of the Rules of High Court. In support of these contentions it was pointed out that it was evident from the content of plaintiffs' simple summons that plaintiffs relied on one or more purported loan agreement(s), that the Plaintiff had not stated that the relied upon contract(s) was/were written or oral and when, where and by whom it/they was/were concluded and that, if such contract was written, a true copy thereof had not been annexed. These omissions, so Mr. Barnard's argument ran further, caused prejudice to the defendant as he would be required to plead to a summons that was vague and unintelligible and which, furthermore even contained grammatical errors. Accordingly the defendant was unable to meaningfully and contextually respond to such allegations by way of an answering affidavit to be filed in defence of the summary judgment proceedings which had been launched against him.

[39] Ultimately it was submitted that there was simply not sufficient information contained in plaintiffs summons to appraise defendant properly of what case he had to meet. This lack of particularity and the non- compliance with the provisions of Rule 18 also undermined the defendants fair trial rights, as entrenched by the provisions of Article 12 of the Namibian Constitution.

[40] Mr. Corbett on behalf of plaintiffs immediately conceded that the claim formulation, as contained in the summons, did not specify whether or not the relied upon agreement was written or oral and that it was furthermore correct that the written agreement had not been annexed. He disputed however that Rule 18 (6) was applicable to a simple summons in which debts or liquidated demands were claimed. He relied in this regard on *Namibia Beverages v Amupolo* 1999 NR 303 (HC) and the decision of *Frank Keevey (Pty) Ltd v Koos*

van der Merwe Beleggings (Kroonstad) (Edms) Bpk en „n Ander 1970 (3) SA 430 (O).

[41] He submitted further that the relied upon cause of action as pleaded was setting out the plaintiffs cause of action in sufficiently precise terms. He argued therefore that the summons should stand and the defendants Rule 30 application should be dismissed accordingly.

[42] In the *Namibia Beverages v Amupolo* Maritz J, (as he then was), analysed the distinction between a simple summons and a declaration as follows:

> **"Whereas a plaintiff is only required to set out his or her cause of action and the relief claimed in concise terms in a simple summons (see *Volkskas Bank Ltd v Wilkinson and Three Similar Cases* 1992 (2) SA 388 (C) at 395A), the paucity of such particulars would not necessarily meet the threshold requirements prescribed for the particulars to be alleged in a declaration.**
>
> **The object of a simple summons is to bring the defendant before Court and to inform him or her of the nature and cause of the claim or demand he is required to meet (see *B W Kuttle & Association Inc v O'Connell Manthe and Partners Inc* 1984 (2) SA 665 (C) at 668C-D).**
>
> **The particulars of the debt or liquidated demand to be stated in a simple summons need not be more than that required to sufficiently inform the defendant of the claim to enable him or her to decide whether or not to defend the action and to enable the Court to decide, on an application for default or summary judgment, whether a cause ofaction has been established or not (compare *Cohen Limited v Koekemoer* 1949 (2) SA 807 (SWA) at 808 and *Landman Implemente***
>
> ***(Edms) BPK v Leliehoek Motors (Edms) Bpk* 1975 (3) SA 347 (O) at**
> **350A) Once the defendant has entered appearance to defend the action commenced with a simple summons he is entitled to be informed with sufficient particularity about the nature of the claim, the conclusions of law on which the plaintiff relies and the relief claimed (Rule 20 (2) so as to plead to except to or tender an amount in settlement of that claim and, once the issues have been defined in the pleadings, to prepare for trial and present his/her defence on the**

basis thereof.

**Because the purpose of a simple summons and that of a declaration are significantly different from one another, it follows that the extent to which the claim should be particularised in the declaration must be more extensive than the limited nature of the particulars required by the rules applicable to a simple summons. The requirement of Rule 20 (2) that a declaration 'shall set forth the nature of the claim', when read together with Rule 18 (4) demands of the plaintiff to plead, in a clear and concise manner the material facts relied upon by him or her in support of the claim (see *Trope v South African Reserve Bank and*
Another and Two Other Cases 1992 (3) SA 208 (T) at 210G-H).**
Moreover, the plaintiff is also required to comply with the other requirements of Rule 18 and with the guidelines relating to pleadings developed by judicial pronouncements in that regard."[12]

[43] Mr. Barnard, in seeking to avoid the impact of this decision, submitted that the above quoted observations by Maritz J had nothing to do with the issue that had to be decided in the matter and that they were clearly *obiter* as the learned judge had stated: *"The real issue between the Plaintiff and the Defendant is therefore of a limited factual nature: What, if any, is the agreed credit which the plaintiff had topass in favour of the Defendant for the promotional products of the Plaintiffs sold by the Defendant during the promotion?'*[13].

[44] Mr. Barnard also drew the courts attention to the effect of an *obiter* remark in a judgment and its interaction with the *stare decisis* rule as formulated by the South African Supreme Court of Appeal in *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) at par [100].

[45] It would appear that these submissions by Mr. Barnard have substance, but this does of course not mean that I cannot consider what was said by Justice Maritz J in this regard.

---

12 *Namibia Beverages v Amupolo* at p 304 - 305
13 *Namibia Beverages v Amupolo* at p 304H

[46] Mr. Barnard further, upon an analysis of the *Volkskas Bank Ltd v Wilkinson and 3*[14] *Similar Cases* decision, which, in turn had approved the dictum of the Cape Supreme Court in *BW Kuttle Associates Incorporated v O'Connell Marthe and Partners Incorporated*[15]*,* pointed out that the relied upon passage by Maritz J in Amupolo made it clear that the decision made in *Volkskas Bank Ltd v Wilkinson* had to be distinguished as that decision had dealt with an application for default judgment, where no notice of intention to defend had been delivered, and where there was accordingly no need to inform the defendant what the case was that he had to meet - and that the Defendant there did, in any event, not intend to meet any case at all.

[47] Mr. Corbett tried to lessen the impact of these submissions by submitting in turn that the remarks by his Lordship Mr. Justice Maritz (as he then was) were not entirely irrelevant to the issues before him, as the learned judges remarks made in regard to the unsatisfactory nature of the pleadings show, and on the basis of which, he ultimately granted a special costs order.

[48] In view however of what was said by the South African Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Oneanate Investment (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA), (and which authority counsel seemed to have overlooked), it becomes unnecessary for me to decide this issue finally.

[49] The South African Supreme Court of Appeal per Zulman JA held that the objects and requirements of a simple summons are as follows:

> **"A simple summons is for a 'debt or liquidated demand'. In terms of Uniform Rule 17 (2) (b) such a summons is required to be 'as near as may be in accordance with Form 9 of the First Schedule' to the Rules. The words 'as nearly as possible' can 'hardly be taken at their full face value' (per Schreiner JA in *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 277A,**

14 1992 (2) SA 388 C at 395A
15 1984 (2) SA 665 C at 668 C-D

dealing with the previous Transvaal Rule 19 which contained a similar phrase). Form 9 requires that the plaintiff's cause of action be set out in concise terms. All that is required is that 'the claim be 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' (per Berman *et* Selikowitz JJ in *Volkskas Bank Ltd v Wilkinson and Three Similar Cases* 1992 (2) SA 388 (C) at 395A). As stated by Tebbut J in *B WKuttle & Association Inc v O'Connell Manthe and Partners Inc* 1984 (2) SA 665
(C) at 668C-D:

> **"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' ... or 'a general indication of claim'"**

A simple summons stands on its own feet. So, for example, a plaintiff's 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.

In an event and as pointed out by Eksteen JA in *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15H - 16B, it is not even necessary for the purposes of interrupting prescription that a summons, in terms of which a creditor seeks to obtain payment of a debt, sets out a 'cause of action' Even a summons which does not set out a 'cause of action' can nevertheless serve to interrupt prescription of the debt claimed. The only qualification is that the summons must not be so defective that it amounts to a nullity."[16]

[50] Not only does it appear that the South African Supreme Court of Appeal seems to cite with approval the dicta of Berman *et* Selikowitz JJ in *Volkskas Bank Ltd v Wilkinson and Three Similar Cases* and of Tebbut J in *B W Kuttle & Association Inc v OConnell Manthe and*

16 *Standard Bank Ltd v Oneate Investment (Pty) Ltd (in liquidation) at p 825 B-H*

Partners Inc, it also appears that it's dictum is absolutely in line with what was stated by Maritz J in *Namibia Beverages v Amupolo.*

[51] The above cases indicate an impressive concensus on this issue and constitute strong persuasive authority, which I respectfully adopt. Accordingly I find that, in order to pass muster, a plaintiff's simple summons for a 'debt or liquidated demand' in terms of High Court Rule 17 (2) (b), has to be 'as nearly as possible' in accordance with Form 9 of the First Schedule' to the Rules. The plaintiff's cause of action has to be set out in concise terms which sets out the claim with sufficient particularity to enable a Court to decide whether judgment should/can be granted and for the defendant to be made aware of what is being claimed from him'. In this regard the simple summons must be able 'to stand on its own feet' and not amount to a nullity. 'The object of the summons is not merely to bring the defendant before Court; it must also inform the defendant sufficiently 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' and it need not comply with Rule 18(4) and (6)[17].

[52] When applying these principles to the present matter I would think that the defendant here was appraised with 'sufficient clarity' and in sufficiently concise terms that the claim against him was contractual in nature, that the contract relied on was concluded on 23 June 2010, and that two instalments, being the instalmentsfor July and August 2010, totalling N$ 127,265.00, had become due and payable in terms thereof.

[53] This, in my view, is a claim formulation, which, so to speak, can 'stand on its own feet', and on the strength of which a Court can quite competently decide whether judgment should be granted or not. This is then the one side of the coin.

[54] On the other, and if a court is able to competently decide on such claim formulation

17 This would also be in line with the requirement set by Rule 20(1) of the Rules of the High Court for instance

whether judgment should be granted or not, I can see no reason, why a defendant, resisting summary judgment, and facing such 'a general, but sufficiently precise, indication of claim' cannot give a 'general indication of its defence'. After all that is all that is really required of a defendant formulating a *bona fide* defence to such action in an affidavit resisting summary judgement in terms of Rule 32 (3) (b) of the Rules of High Court.[18]

[55] It should be mentioned though that it was also conceded, correctly so, by Mr. Corbett that the claim formulation in the simple summons, relating to the loan agreement here, was formulated in the plural. He submitted further, that in spite of this, this aspect was remedied in the Notice of Summary Judgment and the verification under oath contained in the supporting affidavit thereto, in which first and second plaintiffs clarified this aspect and from which it appears in no uncertain terms that payment of the sum of N$ 127 265.00 was claimed on the basis of one loan agreement only.

[56] Mr. Corbett submitted further, with some force, that, despite the defendant's protestations to the contrary, (ie. that he was not be able to meaningfully and contextually respond to the contents of the plaintiffs' summons and depose to an answering affidavit in the Summary Judgment proceedings), that these allegations were directly contradicted in the same affidavit by the allegations :

> ***"I have read the Affidavit filed in support of the application for Summary Judgment against me. I deny that I have entered an appearance to defend herein solely for purposes of delay. I have bona fide defences against the claim of the Plaintiffs, details of which I shall set out at the opportune moment, subject as what is set out below."***

[57] From these allegations, so Mr Corbett reasoned further, it must be deduced that the claim formulation, (as contained in the plaintiffs' simple summons, as verified in the affidavit filed in support of the application for Summary Judgment), must have been specific enough,

---

18 In this regard it must be of relevance that it has for instance been held that : " ...that it is not incumbent on a defendant to formulate his or her opposition to the summary judgment application with the precision that would be required of a plea ... " See for instance *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (AD) at 426E

on defendant's own version, to enable the defendant to positively state that he had *'defences against the claim of the plaintiff's'.* Not only did this statement indicate that the Defendant was able to conclude on the information supplied in the simple summons that he had more than one defence to such claim, it also indicated, in no uncertain terms, that he was also able to formulate an opinion on such defences to the effect that they were indeed *bona fide.*

[58] It would appear that this argument is sound as this would clearly also be the only inference that can reasonably be drawn from the defendant's own allegations.

This argument now also reinforces the conclusion arrived at in paragraphs [52] -[54] above.

[59] Defendant also complained that the alleged lack of particularity in the summons, and the non-compliance with rule 18(6) severely and materially undermined his entitlement to a fair trial, entrenched by the provisions of Article 12 of the Constitution of the Republic of Namibia, given the fact that summary judgement against him would be finalise and adjudicate upon the plaintiffs' claims against him definitively, without him ever having been in a position to properly defend such action.

[60] I have already on the facts of this matter rejected the defendant's contentions, that he was not able to meaningfully and contextually respond to the contents of the plaintiffs' summons and depose to an answering affidavit in the summary judgment proceedings. This finding at least impliedly, if not directly, means that I also hold the view that the defendant, on the facts of this matter, was indeed placed in the position to properly and effectively resist the plaintiffs' claims at this stage of the proceedings, given the less stringent requirements set by the rules of court in regard to summary judgment proceedings.

[61] In any event I fail to see how, (in circumstances were a valid claim formulation in the simple summons, as verified for summary judgement purposes, and which contains sufficient

particularity to enable a defendant to be aware of what is being claimed from it, and which particularity will even enable a court to decidewhether judgment should be granted), such a defendant is unable to formulate an affidavit in opposition thereto.

[62] It must be kept in mind in this regard that all a defendant is required to do at this stage is to put enough information before the court to persuade a court that there is a genuine desire and intention of adducing at the trial, evidence of facts, which if true, would constitute a valid defence. In order to achieve that degree of persuasiveness a defendant must do no more than assert an intention to establish a defence by evidence at the trial. The defendant must place on affidavit enough of his evidence to convince the court that the necessary testimony is available to him and that if accepted it would constitute a defence.[19]

[63] The threshold, which a defendant, that is facing summary judgment proceedings, needs to overcome, is extremely low, as it has for instance also been held in this regard that summary judgment should for instance only be granted if a plaintiff has a 'clear and unanswerable case'.[20]

[64] If one has regard to the present claim formulation it appears that it would have been a simple matter for the defendant to have responded to such allegations by either stating that there was a loan agreement entered into between the parties on 23 June 2010, or there was not. Even if it is considered that possibly two loan agreements were relied upon, (which aspect was clarified), it would have been a simple matter for the defendant to admit or deny the fact that two agreements were concluded on 23 June 2010. Similarly it does not take much to admit or deny, (and on the assumption that an agreement was admitted, that the instalments which were allegedly payable for July and August 2010), were either due and

---

19 See for instance *Erasmus Superior Court Practice at p B1-224 Revision Service 35 of 2010 and the authorities cited in footnotes 2 -4* : " ...The subrule does not require the defendant to satisfy the court that his or her allegations are believed by him or her to be true. It will be sufficient if the defendant swears to a defence, valid in law, in a manner which is not inherently or seriously unconvincing;' or, put differently, if his or her affidavit shows that there is a reasonable possibility that the defence he or she advances may succeed on trial.'

20 See for instance Standard Bank of Namibia Ltd v Veldsman 1993 NR 391 HC at p 392

payable or not. It would also have been a simple matter for the defendant to state the ground on which payment of such instalments was either made or not made or refused on the ground, for instance, of a counterclaim, the foundation of which, would in any event have been self-contained and not dependant on the claim formulation contained in the summons.

[65] It seems to me therefore that just because a claim formulation does not need to go into minute particulars that this must necessarily mean that the fair trial rights of a defendant have been breached. While I have no doubt that insufficient particularity in a simple summons may also infringe on a defendant's fair trial rights, (as a defendant would clearly be entitled to be appraised with sufficient particularity of the claim he or she has to meet), it seems ultimately to be a question of degree, or rather of particularity, (as either a claim formulation is sufficient or it is not), which will determine whether or not a litigants fair trial rights have been infringed or not.

[66] In this case I have already held on the facts that sufficient particularity was provided to the defendant to enable him to effectively resist this summary judgement application, by way of a 'meaningful and contextual response' and to raise the alleged ' .. *bona fide defences against the claim of the Plaintiffs, ... at the opportune moment... '.* In such scenario an infringement of the defendant's fair trial rights just did not occur.

[67] Finally sight should also not be lost of the fact that the defendant, in terms of Rule 32 (3) (a), could also have given security to ward off the application for summary judgment and to simply proceed to trial thereafter.

[68] It follows that also the defendant's application in terms of Rule 30 must fail in law and on the facts.

THE ASPECT OF POSTPONEMENT

[69] In view of the dismissal of both applications in terms of Rule 30 the issue of whether or not summary judgment should now be granted comes to the fore.

[70] The plaintiffs seek summary judgment.

[71] The defendant on the other hand, in his affidavit filed in opposition to the application for jummary judgment, prays that the summary judgment application should stand over for determination subsequent to the hearing of the Rule 30 application.

[72] It needs to be clarified in this regard that, although such affidavit was annexed to a 'Notice of Opposition', in which the defendant indicated that the affidavit of the defendant would be used in support of the opposition of the summary judgment application, and although such affidavit, in part, was styled in the same fashion that an affidavit filed in opposition to summary judgment proceedings would customarily be styled, (in that it stated that appearance to defend was not entered into solely for purposes of delay, alleging at the same time that he had certain *bona* fide defences against the Plaintiffs claim etc.), defendant also indicated expressly that he wished to raise such defences at the opportune moment. The remainder of the body of this affidavit basically echoed the allegations made by Mr. Roets, the defendant's legal practitioner of record, in support of the Defendants application made in terms of Rule 30.

[73] As these affidavits contained no ' pleading over', the defendant was clearly at risk for

failing to disclose any defence on the merits therein. Thus it became imperative that a postponement be sought and obtained.

[74] The defendant is rescued in my view by the proviso contained on Rule 30 (1), which states :

> " ... : Provided that no party who has taken a further step in the cause with knowledge of the irregularity shall be entitled to make such application.

[75] The filing of an affidavit in terms of Rule 32(3)(b) would have constituted such a further step in the cause.[21]

[76] As it was also not contended on behalf of plaintiffs' that the defendant's affidavit styled ' affidavit filed in support of the Notice of Opposition', constituted such a further step, I will accept that the defendant was precluded by the proviso to the rule, from filing an affidavit in terms of Rule 32(3)(b), on the merits, the moment he elected to activate the mechanisms of Rule 30. The dictates of justice surely demand, in such circumstances, that he now be given such opportunity.

[77] In the result in the following orders are made:

1. The First and Second Plaintiffs' application in terms of Rule 30 is dismissed with costs, including the cost of one instructed and one instructing counsel.

2. The Defendant's application in terms of Rule 30 is dismissed with costs, including the costs of one instructed and one instructing counsel.

3. The application for Summary Judgment is postponed to the next motion court date, being Friday 25 February 2011, to be dealt with in accordance with the

---

21 ie." *It would have been a step which would have advanced the proceedings one step nearer to completion"*

applicable Practice Directive, if necessary.

GEIER, AJ

COUNSEL FOR FIRST AND SECOND PLAINTIFFS:	Mr. A.W. Corbett
Instructed by:	LorentzAngula Inc
COUNSEL FOR DEFENDANT:	Mr. T. Barnard
Instructed by:	Chris Roets Legal Practitioners