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## NOTES

### TOO SIMPLE FOR NATIONAL CREDIT ACT MATTERS: RECONSIDERING THE SCOPE OF MAGISTRATES' COURTS RULE 5(2)(b)

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#### INTRODUCTION

Rule 5 of the Rules Regulating the Conduct of Proceedings of Magistrates' Courts of South Africa in GN R720 GG 33487 of 23 August 2010 provides for the process that parties should follow when they institute an action against another in a magistrate's court. The sub-rule states:

- '(2) (a) In every case where the claim is not for a debt or liquidated demand the summons shall be a combined summons similar to Form 2B of Annexure 1, to which summons shall be annexed a statement of the material facts relied upon by the plaintiff in support of plaintiff's claim, and which statement shall, amongst others, comply with rule 6, but in divorce matters a combined summons substantially compliant with Form 2C shall be used.
- (b) Where the claim is for a debt or liquidated demand the summons may be a simple summons similar to Form 2 of Annexure 1.'

Causes of action based on the National Credit Act 34 of 2005 ('NCA') qualify for the simpler process provided for by sub-rule 2(b). As is the case with its counterpart in high court practice (rule 17(2)(b) of the Uniform Rules Regulating the Conduct of Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa in GN R48 GG 999 of 12 January 1965), this rule allows the plaintiff in these matters the option of circumventing the more cumbersome process under sub-rule 2(a), which requires additional information and effort in drafting the 'statement of the material facts ... in support of plaintiff's claim ...'. Due to the overwhelming majority of NCA-related cases occurring within its jurisdiction, this note will focus on the position in the magistrates' courts. The arguments proposed in this note apply mutatis mutandis to the situation in the higher courts.

On 12 December 2018, the Rules Board for Courts of Law of the Republic of South Africa circulated an invitation for comments regarding the proposed amendments to rule 5 of the Magistrates' Courts Rules ('MCR'). The invitation had its origin in representations addressed to the Rules Board to reconsider the function and requirements of the simple and combined summons in terms of the MCR, with regard to matters where the NCA is applicable. These representations suggested that the current stipulations for the rule regarding the simple summons, as an instrument to initiate claims based on the NCA, failed adequately to address the requirements stated in ss 129 and 130 of the NCA. It pointed out that this failure to comply with the rules left plaintiffs who had used the simple summons in NCA matters in an untenable position of facing resulting points in limine raised by defendants. This attempt to bring the process in the magistrates' courts in line with the provisions of the NCA is not without precedent, as the NCA has previously warranted other comparable amendments: for example that in s 29(1)(e) of the Magistrates' Courts Act 32 of 1944 (Michelle Kelly-Louw *Consumer Credit Regulation in South Africa* (2012) 515–16).

In response to these representations, the Rules Board proposed to amend certain parts of rule 5 of the MCR. First, it recommended the insertion of rule 5(2)(b)(ii), to provide that 'if the cause of action is based on a contract the plaintiff shall indicate whether the contract is in writing or oral, when, where and by whom it was concluded, and if the contract is in writing a copy thereof or of the part relied on shall be annexed to the simple summons'. Secondly, the Rules Board proposed to amend rule 5(7) in order to extend its applicability in NCA matters by deleting the restriction to include related provisions only in the case of judgments in terms of s 58 of the Magistrates' Courts Act (see paras 3 and 4 of the Rules Board's invitation to proposed amendments dated 12 December 2018). The proposal was to amend rule 5(7) to read as follows:

'Where the plaintiff issues a simple summons in respect of a claim regulated by legislation the summons may contain a bare allegation of compliance with the legislation, but the declaration, if any, must allege full particulars of such compliance: Provided that where the original cause of action is a credit agreement under the National Credit Act, 2005, the plaintiff shall in the summons deal with each one of the relevant provisions of sections 129 and 130 of the National Credit Act, 2005, and allege that each one has been complied with.'

This note will critically evaluate the Rules Board's proposal to bring rule 5 of the MCR in line with the provisions of the NCA. This will be done by considering the purpose of the simple summons and the associated 'label' (Stephen Peté, David Hulme & Max du Plessis *Civil Procedure: A Practical Guide* 3 ed (2016) 183), as well as the difference between this label and the declaration which follows the defended simple summons in NCA-related matters. The relevant requirements of the NCA will be examined briefly to illustrate the label's inability to meet these requirements, and will assess the Rules Board's suggested solution to address this deficiency. In the final instance, I will consider

whether the suggested amendments are the best course to follow, and proffer an alternative solution.

#### A CRITICAL ASSESSMENT OF THE CURRENT AND PROPOSED RULES RELATING TO THE SIMPLE SUMMONS WHEN WEIGHED AGAINST THE PROVISIONS OF THE NCA

As the name suggests, the simple summons is less arduous in its drafting requirements than the combined summons. It is used in cases where the cause of action is based on a liquid claim, in other words for a ‘fixed, certain or ascertained amount or thing’ (Peté et al op cit at 182). The simple summons is not a pleading and does not contain a separate particulars of claim. Instead, it incorporates ‘merely a label’ (D E van Loggerenberg *Jones & Buckle: The Civil Practice of the Magistrates’ Courts in South Africa* 10 ed (2017) Rule 5-6A), done in ‘legal shorthand’ (Peté et al op cit at 183). This label succinctly describes the basis of the plaintiff’s claim and the nature of the relief requested. The plaintiff will be obliged to serve a pleading, known as a declaration, on the defendant only in the event of the defendant defending the action. This declaration contains ‘a detailed and complete explanation’ (C Theophilopoulos, C M van Heerden & A Boraine *Fundamental Principles of Civil Procedure* 3 ed (2015) 189) of the cause of action, analogous to that contained in the particulars of claim of a combined summons.

The simple summons is useful for its brevity and the resulting saving in costs. The majority of liquid claims are undefended (Peté et al op cit at 184); therefore, one could argue that they do not require the drafting of a detailed explanation. Importantly, the purpose of the simple summons and its label could be seen as twofold. From the defendant’s perspective, it exists to indicate what type of claim the defendant is facing and to afford the defendant sufficient information successfully to defend an application for summary judgment. From the perspective of the court, the simple summons needs to contain sufficient detail to enable it ‘to decide whether [summary or default] judgment should be granted’ (Van Loggerenberg op cit at Rule 5-6A), which, obviously, is also the plaintiff’s agenda in drafting it.

In keeping with the stated purpose of the simple summons, a ‘legal shorthand’ has evolved over the years to describe the various types of liquid claims that often reoccur in the label part of these summonses. Labels drafted as a result of cases based on the NCA will typically contain the following allegations:

‘The plaintiff’s claim is against the defendant for payment of the sum of R150 000 being the amount due, owing and payable by the defendant to the plaintiff in respect of monies lent and advanced by the plaintiff to the defendant at the defendant’s special instance and request during the period May to August 2016 (both months inclusive), which amount is due (as from ... [due date]).’ (See for example Peté et al op cit at 638.)

Of particular relevance is the fact that these ‘summarized cause[s] of action and the concise particulars of claims included in a simple summons’ do not have to comply with rule 6 of the MCR (Theophilopoulos et al op cit at 191). While the label should disclose the cause of action to a lesser extent, it is therefore not necessary to abide by the rules that generally relate to pleadings.

In contrast, a declaration is a proper pleading, requiring strict adherence to the requirements set forth by rule 6. It has to be filed within fifteen days of delivery of the defendant’s notice of intention to defend. In the case of claims based on the NCA, Harms suggests that a declaration should contain the following averments (L T C Harms *Amler’s Precedents of Pleadings* 9 ed (2018) 140–1):

- ‘1. Plaintiff is a credit provider registered with the National Credit Regulator in terms of the National Credit Act 34 of 2005.
2. On [date] at [place], plaintiff and defendant concluded a written agreement of lease in terms of which plaintiff let to defendant a certain motor vehicle. A copy of the agreement is attached.
3. The agreement complies with the Act.
4. The material terms of the agreement of lease are the following: [detail].
5. Plaintiff has performed its obligations in terms of the agreement of lease.
6. In breach of the agreement of lease, defendant has [state nature of breach].
7. Plaintiff has cancelled [not cancelled] the agreement.
8. Defendant is in default and has been in default for at least 20 days.
9. Plaintiff has complied with the provisions of section 130 of the Act. A copy of the section 129 notice is attached.
10. Defendant has not responded to the notice.
11. There is no matter arising out of the credit agreement pending before the National Consumer Tribunal.
12. Plaintiff is entitled to payment of the full balance outstanding, being the sum of [R<sub>x</sub>].
13. Defendant is entitled to a reduction of finance charges of [R<sub>y</sub>].
14. In the premises, defendant is indebted to plaintiff in the sum of [R<sub>x</sub> – R<sub>y</sub>].
15. Payment of the aforesaid amount of [R<sub>x</sub> – R<sub>y</sub>] will not place plaintiff in a better financial position than that in which plaintiff would have been had defendant carried out his obligations in terms of the agreement of lease.

The plaintiff claims [detail].’

In addition to abiding by the requirements of MCR 6 (and specifically sub-rule 6), the declaration therefore also caters to the requirements of ss 129 and 130 of the NCA. These requirements, and their significance, are discussed by Kelly-Louw (op cit at 442):

‘Section 130(3) introduces a number of aspects on which a court must be satisfied before it will determine a matter in any proceedings to which the National Credit Act applies. It provides that despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which the National Credit Act applies, the court may determine the matter only if the court is satisfied that — ...’.

Kelly-Louw then proceeds to list several factors, including whether proceedings prescribed by ss 127, 129 and 131 of the NCA have been complied with when relevant, whether a matter arising from the particular credit agreement is currently pending before the National Consumer Tribunal, whether the plaintiff approached the court while the matter is still before a debt counsellor, ombud, consumer court, and so forth. Kelly-Louw also refers to further authority to submit that when a court is approached to enforce a credit agreement or to enforce 'remaining obligations' of consumers, 'compliance with all the relevant provisions (e g, s 130(1), (2) or (3)) is peremptory and has to be alleged ...' (Kelly-Louw op cit at 442n263, emphasis supplied).

The aim of this note is not to elaborate on the specific allegations that are, or could be, required in terms of the NCA under every applicable scenario. The point is that there are sound reasons why the content of the declaration is detailed to the extent suggested.

While the declaration addresses these elaborate requirements, it is likewise clear that the content of the simple summons' label, in terms of current practice, fails to measure up to the requirements of the NCA. Our courts have confirmed as much in various decisions quoted by Van Loggerenberg (Van Loggerenberg op cit at Rule 5-6A). When defendants have raised these deficiencies as points in limine, the courts have generally focused on the need to attach copies of the relevant documents (contracts) to the simple summons (see Van Loggerenberg op cit at Rule 5-6A, quoting *Absa Bank Ltd v Janse van Rensburg* 2013 (5) SA 173 (WCC) at 176F-180E and *ABSA Bank Ltd v Studdard* [2012] ZAGPJHC 26). Nevertheless, the mere inclusion of a copy of the relevant contract (similar to the process prescribed for pleadings in MCR 6(6)) would fall short of alleviating the problem. As noted earlier, the requirements of the NCA demand much more.

The Rules Board has accordingly suggested two amendments to the MCR dealing with the content of the simple summons. In the first instance, they suggest that MCR 5(2)(b) be expanded to provide for details, and written copies, of contracts when the cause of action is based on a contract. Secondly, they submit that the ambit of MCR 5(7) should be widened to require allegations of compliance with ss 129 and 130 of the NCA in NCA-related matters.

I support the suggested insertion of sub-rule (ii) into MCR 5(2)(b). As a general practice, when a simple summons is issued on the basis of a contract, there should be some detail about that contract in the label. At the same time, however, it must be acknowledged that this amendment is likely to cause additional concern to the parties, courts and processes in general. The proliferation of formal requirements to produce valid forms, including the simple summons, will probably mean that a greater number of simple summonses will be formally defective in future, rendering them susceptible to applications for irregular steps. This will prolong and complicate the civil procedure and contribute to further congestion in our courts. That said, I am not in favour

of the approach suggested by the proposed amendment of MCR 5(7), which will have the effect of requiring substantial detail and a significant addition to the content of the existing label, as sanctioned by MCR 5(2)(b). As discussed above, the court is unable to determine a matter involving the NCA unless the substantial requirements of the relevant sections of that Act have been properly canvassed in the document. In *Standard Bank of South Africa Ltd v Dawood* 2012 (6) SA 151 (WCC) at 157A–B the court observed:

‘Nowadays ... the simple summons can no longer be regarded as merely “a label to the claim”, at least not in claims where the NCA is applicable. This is so ... due to “the myriad allegations which a plaintiff is [now] required to make regarding NCA compliance where the statute is applicable and compliance with the constitutional imperatives prescribed by s 26(1) of the Constitution”.’

In the case of *Absa Bank Ltd v Janse van Rensburg* (supra) para 17), the court stated that ‘this latter requirement [the court deciding whether judgment should be granted] has assumed added importance in the light of the constitutional and statutory need for judicial oversight in matters involving the NCA, especially where the homes of debtors are concerned ...’.

The ‘myriad’ allegations that would now have to be condensed into the label of the simple summons in NCA matters in order to withstand constitutional scrutiny is at complete odds with the nature and purpose of the label as discussed above. If the proposed amendment is accepted and implemented, the nature of the simple summons in NCA-related matters would be radically altered. It will no longer be suited to the ‘abbreviated form’, as prescribed by Form 2 of Annexure 1 as required by MCR 5(2)(b). This is problematic, as ‘Form 2 requires that the plaintiff’s cause of action *must* be set out in “concise terms”’ (Van Loggerenberg *op cit* at Rule 5–6, emphasis supplied).

In addition, to require this level of detail in the label would distort the difference between the simple summons and the subsequent declaration in defending matters. One has to question to what extent, if at all, these two documents will differ, and what value the declaration will add. Requiring similar details in the label and the declaration will lead to an unnecessary duplication in the process and an increase in associated legal costs. Finally, it could also be argued that limiting the extension of MCR 5(7) to incorporate only the requirements of ss 129 and 130 of the NCA might be ineffective in light of the various other sections that may be relevant under specific circumstances.

## AN ALTERNATIVE SOLUTION

In my opinion, the level of detail now expected from the summons in NCA matters has, for the most part, annulled the distinction in content between the label contained in the simple summons and the particulars of claim attached to the combined summons. In this regard, it is important to note further that MCR 5(2)(b) affords the plaintiff the option to use the combined summons, even in liquid claims. The rule provides for this option by the use of the word

'may'. Some authors argue that this permission in the magistrates' courts is an improvement to the more prescriptive situation in the high court, and that the appropriate high court rule should follow suit (see Peté et al op cit at 184).

There is strong authority for the view that the simple summons should not be used in cases where the cause of action is not susceptible to the 'concise' and 'abbreviated' description required by Form 2. Peté et al argue that issuing a combined summons instead of a simple summons makes sense when the plaintiff suspects that the matter may be defended, as this will not only save costs in the long run, but also that 'there are certain liquidated claims ... which require fairly complex pleading and do not lend themselves to the manner in which simple summonses are customarily drafted' (ibid). Van Loggerenberg expresses the view that '[i]f this [setting out the cause of action in 'concise' terms] is not possible[,] a combined summons could be used although the action is for a debt or liquidated demand' (Van Loggerenberg op cit at Rule 5-6).

MCR 5(2)(b) currently allows the plaintiff to choose whether or not to make use of a simple summons. This permission confirms that the intention is not for a simple summons to be utilised in every circumstance where it is available. Without a doubt, there are also other more complicated liquid cases, like causes of action based on mortgage bonds, which should not be brought to court by way of simple summonses (see Peté et al op cit at 184). Accordingly, where NCA matters are concerned, the use of a combined summons should be prescriptive. Such arrangement would address most, if not all, of the concerns raised in this note in terms of the existing impasse between the requirements of the NCA and the stipulations of the MCR regarding the simple summons.

In the final event, as an alternative to the position taken by the Rules Board, I propose that the existing MCR ought to be amended as follows, the suggested amendments being indicated in italics:

- (2) (a) In every case where the claim is not for a debt or liquidated demand, *other than a claim in terms of the National Credit Act, 34 of 2005*, the summons shall be a combined summons similar to Form 2B of Annexure 1, to which summons shall be annexed a statement of the material facts relied upon by the plaintiff in support of plaintiff's claim, and which statement shall, amongst others, comply with rule 6.
- (b) (i) Where the claim is for a debt or liquidated demand, *other than a claim in terms of the National Credit Act, 34 of 2005*, the summons may be a simple summons similar to Form 2 of Annexure 1.
- (ii) *if the cause of action is based on a contract, the plaintiff shall indicate whether the contract is in writing or oral, when, where and by whom it was concluded, and if the contract is in writing a copy thereof of the part relied on shall be annexed to the simple summons.'*