

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 24972/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	19/07/2021
SIGNATURE	DATE

In the matter between:

THE INDUSTRIAL DEVELOPMENT

Plaintiff

Versus

ZHIGANG QU

Defendant

JUDGMENT

MATOJANE J

Introduction

[1] The Plaintiff issued summons against the defendants on 10 September 2020 for the payment of the amount of R4 460 085.04 in respect of the alleged indebtedness to the Plaintiff of Afri-Greenerwood (Pty) Ltd (“the Company”). The defendants jointly and severally guaranteed the due and proper performance of obligations due to the Plaintiff by the Company and to pay on demand the guaranteed amount to the Plaintiff.

[2] The defendants have taken exception to the Plaintiff’s particulars of claim on the basis that the Plaintiff’s particulars of claim lack the averments necessary to sustain a course of action against the defendants. I shall refer to the parties as they appear in the main action.

[3] The defendant prays for an order in the following terms:

1. That the defendant’s exception be upheld with costs
2. The Plaintiff’s particulars of claim are set aside
3. Further or alternative relief

Background

[4] On 17 February 2014 the Plaintiff and the Company concluded a written Short Form Loan Agreement in terms of which the Plaintiff provided a loan facility to the Company for plant and equipment and working capital. At the same time, the Plaintiff and the Company contemporaneously entered into a Subordinated Loan Agreement in terms of which the Plaintiff provided a loan facility to the third party for the purpose of purchasing new plant and equipment.

[5] On 24 October 2014, the Plaintiff and the defendants entered into a written Guarantee Agreement. Clause 2 of the Master Terms and Conditions states as follows:

"2 INTRODUCTION

The Borrower is obligated to IDC in respect of the Guaranteed Liabilities.

2.2 The Guarantors know and understand the full terms and conditions of the Guaranteed Liabilities.

2.3 The Guarantors have agreed to guarantee the due, proper and punctual performance by the Borrower of the Guaranteed Liabilities and to pay the Guaranteed Amount, subject to the remaining terms of this Agreement."

[6] Clause 3 of the Master Terms and Conditions states as follows:

"GUARANTEE

With effect from the Effective Date, the Guarantors hereby, irrevocably and unconditionally guarantee, as a primary obligation, in favour of IDC, the due, proper and punctual performance by the Borrower of the Guaranteed Liabilities including the full, prompt and complete payment of all the Guaranteed Liabilities when and as the same shall become due whether or not any or all of the Guaranteed Liabilities are enforceable against the Borrower, and undertakes to IDC that each time a Guarantee Claim Notice is delivered to the Guarantors, the Guarantors shall within 3 (three) business days after receipt thereof pay all sums claimed in such Guarantee Claim Notice."

[7] Clause 1.1.8 of the Master Terms and Conditions define "Guaranteed Liabilities" as follows:

"Guaranteed Liabilities" means all present and future moneys and liabilities (whether actual or contingent and whether owed jointly or severally or in any other capacity whatsoever) which are now, or which may hereafter become, owing to by the Borrower to IDC in terms of the Finance Documents together with all damages and all costs, charges and expenses incurred by IDC in connection with a breach by the Borrower of its obligations under the Finance Documents and which IDC is entitled to recover from the Borrower in terms of the Finance Documents, including all items which would be Guaranteed Liabilities but for the winding-up, absence of legal personality or incapacity of the Borrower or any statute of limitation and a reference to a "Guaranteed Liability" shall be to any one or more of the "Guaranteed Liabilities" as the context requires;"

[8] The Plaintiff alleges that it advanced the loan funding to the Company in terms of the Short Form Loan Agreement and the Subordinated Loan Agreement and the Company has defaulted on its loan repayments on both the capital amount and interest to the total amount of R4 460 085.04.

The exception

[9] The defendants' exception at paragraph 3 reads

In terms of clauses 2, 3, 4, 5.3, 6.1 to 6.3, 9 and 10.1.read with 10.1.3,10.1.5, 10.1.6 and 10.1.7 and clause 10.2 of the Guarantee Agreement, and clauses 1.1.5,1.1.6,1.1.8,1.1.11and 1.1.15 thereof, the liability of the Defendants to the Plaintiff is for the liability to the Plaintiff of the Company in respect of the Loan Agreement concluded or to be concluded between the Company and the Plaintiff on or about the date of signature of the Guarantee Agreement by the party last signing the Guarantee Agreement. 4. The date of signature of the Guarantee Agreement by the party last signing the Guarantee Agreement is 24 October 2014 (page 4 of the Guarantee Schedule). 5. Accordingly, the liability of the Defendants to the Plaintiff is for the liability to the Plaintiff of the Company in respect of the loan Agreement concluded on or 6. The Short Form Loan Agreement was concluded on 17 February 2014, being the date of the signature on behalf of the Plaintiff (page 21of annexure B).

[10] The defendants' exception asserts that the guarantee agreement does not cover the Short Form Loan Agreement and the Subordinated agreement because they were not concluded on or about the Signature Date of the Guarantee Agreement.

[11] Clause 1.1.11 of the Master Terms and Conditions define "Loan Agreement" as follows:

"Loan Agreement" means the loan agreement concluded or to be concluded between the Borrower and IDC on or about the Signature Date;."

[12] Clause 1.1.15 of the Master Terms and Conditions define "Signature Date" as follows:

"Signature Date" means the date of signature of this Agreement by the Party last signing;."

[13] The defendants contend that the liabilities incurred under the Short Form loan Agreement and the Subordinated Loan Agreement are not guaranteed liabilities because the agreements were not concluded on or before 24 October 2014, which is a signature date.

[14] On the other hand, the Plaintiff contends that the material date in terms of the Guarantee Agreement is the effective date, which is the inception date of the continuing covering security provided by the defendants. The Plaintiff relies on clause 3 of Part 2 of the Guarantee Agreement, which reads:

"GUARANTEE

With effect from the Effective Date, the Guarantors hereby and unconditionally guarantee, as a primary application, in favor of IDC the due, proper and punctual performance by the Borrower of the Guaranteed Liabilities" ...

[15] Clause 5 of Part 2 of the Guarantee Agreement provides that:

" DURATION

This Guarantee is a continuing covering security and will commence on the Effective Date and be and remain in force until the Release Date."

[16] The Plaintiff submits that the Short Form Loan Agreement and the Subordinated Loan Agreement fall under the Guarantee Agreement and as such, the defendants are liable for the Plaintiff's claim as set out in the particulars of claim.

Discussion

[17] In considering an exception, a Court commences from the premise that the allegations contained in the particulars of claim are correct and then considers the pleadings as a whole. No facts outside those contained in the pleadings can be brought into issue. An Excipient will have to show that the pleading is excipiable on every possible interpretation that can reasonably be attached to it, wherefore the onus rests upon the Excipient. See **McKelvey v Cowan NO** 1980 (4) SA 525 (Z) at 526

[18] An exception founded upon the contention that a plea lacks averments necessary to sustain a cause of action is designed to obtain a decision on the point of law which will dispose of the case in whole or in part and avoid the leading of unnecessary evidence¹.

[19] The purpose of an exception is to protect litigants against claims that are bad in law. An exception on this ground can only succeed if the claim is bad in law, not that it may be better in law. In **Vermeulen v Goose Valley Investments Ltd v Blacher**² Marais JA stated:

¹ Alpha Investments Ltd v Blacher 2008 (5) SA 479 (C) at 483B.

² 2001 (3) SA 960 (SCA) at 965

It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based the claim *is* (not may be) bad in law.

[20] An exception is generally not the appropriate procedure to settle questions of interpretation because, in cases of doubt, evidence may be admissible at the trial stage relating to surrounding circumstances which evidence may clear up the difficulties³.

[21] The question of the interpretation of a contract can properly be decided on exception if the contract is unambiguous so that evidence is not admissible for its interpretation⁴.

[22] It seems to me that the interpretation put forward by the defendants is not the only possible interpretation. The interpretation proffered by the Plaintiff cannot be dismissed as implausible. I am not persuaded that the requirement of unambiguity is satisfied. A trial judge will likely have the benefit of a comprehensive argument and the leading of evidence. Consequently, the exception falls to be dismissed with costs.

Conclusion

[23] In the result, the following order is issued:

“The exception is dismissed with costs.”



**K E MATOJANE
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

³ Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 (1) SA 508 (A)

⁴ Sacks v Venter 1954 (2) SA (W) at 429.

Appearances

Counsel for Applicant:

Advocate R Kayingo

Attorney for Applicant:

Mothle Jooma Sabdia Inc

Counsel for Respondent:

Advocate L Hollander

Attorney for Respondent:

Allan Levin & Associates