REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2019/16373

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

23 March 2023

…… ……

Date **TSAUTSE AJ**

In the matter between:

ABSA BANK LIMITED	**PLAINTIFF**
and	
KAPUDA PROPERTIES 14 CC	**FIRST DEFENDANTS/EXCIPIENT**
JOHN ANDRES BOYER	**DEFENDANTS/EXCIPIENT**
MEGAN LEE KENEALY	**THIRD DEFENDANTS/EXCIPIENT**

JUDGMENT

TSAUTSE AJ

[1] This is an exception application brought by the defendants to the plaintiff's particulars of claim, on the basis that the plaintiff did not adhere to the Uniform Rules of Court and that the particulars of claim are vague and embarrassing and or lack the averments necessary to sustain a cause of action.

[2] For the purposes of this judgement, I will refer to the parties as they appear in their main papers, that is plaintiff and defendant.

[3] The plaintiff had instituted action proceedings against the defendants for debt owed Defendants under an agreement which was secured by registering a mortgage bond with bond number SB104523/2007. This mortgage bond was a result of a mortgage loan agreement between the plaintiff and the defendants, wherein the plaintiff lent and advanced monies to the defendants. The mortgage loan agreement was not attached to the particulars of claim. The plaintiff attached the standard agreement used by the plaintiff in instances of this nature.

[4] In response to the plaintiff's action, the first and second defendants entered an appearance to defend, and after a notice of bar was served on them, they raised an exception to the plaintiff's particulars of claim.

[5] In ***Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen***,[1] it was held that if a pleading both fails to comply with Uniform Rule 18, and is vague and embarrassing, the opposite party has a choice to raise an exception in terms of Uniform Rule 23. Uniform Rule 23(1) provides that:

> "Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto. . .."

[6] The defendants have sought to except to the particulars of claim and detailed their exception to the particulars of claim. The exception is opposed by the plaintiff. The defendants bear the onus of proof that the particulars of claim do not address the cause of action and amount to vagueness which causes embarrassment. In ***Vermeulen v Goose Valley Investments (Pty) Ltd***,[2] Marais JA stated as follows:

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

[1] 1992 (4) SA 466 (W) at 469H.
[2] [2001] 3 All SA 350 (A) at para 7.

[7] It is established principle that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise.

[8] In **Living Hands (Pty) Ltd NO & Another v Ditz & Others**[3], Honorable Makgoka J enunciated the following principles with regards to exception as follows:

"(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law

[3] **2013 (2) SA 368 (GSJ) at 374 G**

which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole, and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars."

EXCEPTION 1: NON-COMPLIANCE WITH RULE 18(6)

[9] The defendants except to the plaintiff's particulars of claim in that it does not adhere to the dictates of rule 18(6). The Rule reads as follows: -

> *"(6) A party who is his pleading relies upon a contract shall state whether the contract is written or oral and where, where and by whom it was concluded, and if the contract is written a true copy thereof or part relied on in the pleadings shall be annexed to the pleadings. "*

[10] In addressing the non-compliance with Rule 18(6), the defendants argued that the plaintiff failed to attach the true copy or part thereof of the written agreement and has failed to seek condonation thereof. This matter has been exhausted by our courts and a permissive view seems to have been adhered to in the Western Cape and in Gauteng Divisions.

[11] It is common cause that ABSA lost a lot of their original documents regarding accounts in a fire at their paper storage facility and this has brought untold challenges in the actions that were brought in by ABSA as they were non-compliant with rule 18(6). This was the case in ***ABSA Bank Ltd v Zalvest Twenty (Pty) Ltd and Another***,[4] where the signed mortgage loan agreement was destroyed in a fire. The plaintiff attached a copy of the standard loan agreement regularly used in finalizing mortgage loan agreements and they

[4] 2014 (2) SA 119 (WCC).

averred, in their particulars of claim, that despite a diligent search, the plaintiff could not find a copy of the mortgage loan agreement. The agreement that was annexed to the particulars of claim contained the terms and conditions similar to those in the agreement it had concluded with the defendants.

[12] The defendants alleged non- compliance with rule 18(6), and therefore raised an exception alleging that the plaintiff had not annexed a true copy or part thereof of the written contract to its particulars of claim.

[13] **Rogers J, in *Zalvest***,[5] dismissed the exception as he reflected on the very nature of rule 18(6):

> "The rules of court exist in order to ensure fair play and good order in the conduct of litigation. The rules do not lay down the substantive legal requirements for a cause of action nor in general are they concerned with the substantive law of evidence. The substantive law is to be found elsewhere, many in legislation and the common law. There is no rule of substantive law to the effect that a party to a written contract is precluded from enforcing it merely because the contract has been destroyed or lost. Even where a contract is required by law to be in writing (e.g. a contract for the sale of land or a suretyship), what the substantive law requires is that a written contract in accordance with the prescribed formalities should have been executed; the law does not say that the contract ceases to be of effect if it is destroyed or lost. "

[5] Id at para 9.

He further states, at para 10:

> "In regard to the substantive law of evidence, the original signed contract is the best evidence that a valid contract was concluded, and the general rule is thus that the original must be adduced. But there are exceptions to this rule, one of which is that where the original has been destroyed or cannot be found despite a diligent search. In such a case the litigant who relies on the contract can adduce secondary evidence of its conclusion and terms. There are in modern law no degrees of secondary evidence (i.e. one does not have to adduce the 'best' secondary evidence). While a photocopy of the lost original might be better evidence than oral evidence regarding the conclusion and terms of the contract, both forms of evidence are admissible once the litigant is excused from producing the original. . .." (Footnotes omitted)

Furthermore, at para 12:

> "A rule which purported to say that a party to a written contract was deprived of a cause of action if the written document was destroyed or lost would be *ultra vires*. But the rules say no such thing. Rule 18(6) is formulated on the assumption that the pleader is able to attach a copy of the written contract. In those circumstances the copy (or relevant part thereof) must be annexed. Rule 18(6) is not intended to compel compliance with the impossible. (I may add that it was only in 1987 that rule 18(6) was amended to require a pleader to annex a written copy of the contract on which he relied. Prior to that time the general position was that a pleader was not required to annex a copy of the contract –

see, for example, ***Van Tonder v Western Credit Ltd*** **1966 (1) SA 189 (C) at 194B-H;** ***South African Railways & Harbours v Deal Enterprises (Pty) Ltd*** **1975 (3) SA 944 (W) at 950D-H.)"**

[14] The point of the introduction of the secondary evidence was further elucidated in ***ABSA Bank Ltd v Jenzen, Kevin Glynn; ABSA Bank Ltd v Grobbelaar*****,** ***James*****,**[6] where Sutherland J held that failure to annex a copy of an agreement relied upon does not erase a cause of action as a litigant who relies on the contract can adduce secondary evidence of its conclusion and terms.

[15] **Sutherland J,**[7] further addressed the point raised by the defendants that the plaintiff was to seek a condonation. He held that:

> "it seems to me, as a matter of logic, the very possibility that a barrier to the pursuit of a claim can be resolved by a discretionary excusing of a failure to comply with a procedural step, as distinct from the need to amend the averments by the addition of substantive allegations, demonstrates the inappropriateness of the perspective that the controversy could be about the cause of action. If that is correct, the true gravamen of the complaint cannot find an exception."

[6] Case No. 2014/877 (GLD).
[7] Id at para 11.

[16] I concur with the above sentiments, that non-compliance with rule 18(6) does not render the pleading excipiable, more so where the plaintiff has shown cause that they exhausted all the necessary steps to find the missing agreement, therefore they can rely on the secondary evidence of the written contract which, in this instance, is the inclusion of the copy of the standard loan agreement, together with mortgage bond that was registered as security of the loan that was to be advanced to the defendants. The introduction of the secondary evidence does not place the defendants in any sort of embarrassment. Expecting the Plaintiff to annex an agreement that they have already exhausted their efforts to look for it is nothing else but expecting the plaintiff to perform a miracle to cure the impossibility. Looking at the extent particulars of claim of the plaintiff, it follows that the exception, which is solely based on the non-compliance with rule 18(6), should fail.

EXCEPTION BASED ON PARTICULARS OF CLAIM NOT BEING ABLE TO SUSTAIN A CAUSE OF ACTION AND / OR VAGUE AND EMBARRASSING

[17] Further to the non-compliance with rule 18(6), the defendants have addressed further grounds for exception that I have grouped under the topic above. These mainly addressing the fact that the particulars of claim are unable to sustain a cause of action and/ or are vague and embarrassing.

[18] The defendants aver that the plaintiff was unable to plead in the particulars of claim the parties who represented the plaintiff in finalising the loan agreement.

Ad Para 8 of the particulars of claim, the plaintiff avers that when finalising the agreement with the defendants, the plaintiff and the defendants were duly represented by authorised officials, without providing the identity and details of those authorised officials. The defendants except to this failure as they aver that it is not just about pleading that they were authorised officials but link it to the non-compliance with rule 18(6) as it requires that the party in the pleadings relying on the contract, should plead '*when, where and by whom'* the contracts were concluded. The defendants aver that the above information is material for them to be able to plead, thus the particulars of claim are excipiable.

[19] In **Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 913B-G** it was explained thus:

> *"…The Plaintiff is required to furnish an outline of its case. This does not mean that the Defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements".*

[20] An exception to a pleading on the ground that it lacks averments necessary to sustain a cause of action requires the excipient to show that upon every interpretation which the pleading in question can reasonably bear, no cause of

action is disclosed. If the excipient cannot show this, the exception ought not to be upheld.

[21] I am of the view that this exception automatically fails due to the fact that the plaintiffs have set out the cause of action succinctly and intelligible in a manner that the defendants can plead. The defendants can admit or deny the allegations or confess and avoid the allegations, importantly, raise a special plea. I am of the view that paragraph 8 of the particulars of claim has addressed all the required forms of pleading and does not form any embarrassment on the part of the defendants.

[22] **In *Venter and Others NNO v. Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd,*[8]** Potgieter AJ referred to the phrase – vague and embarrassing – as follows:

> "Generally, the information in a declaration or particulars of claim need only be sufficient for the defendants to plead thereto. The exception stage is not the time for the defendants to complain that he does not have enough information to prepare for trial or may be taken by surprise at the trial. That comes later in the (often long and cumbersome) journey to the doors of the court, after, inter alia, discovery of documents and requests for trial particulars had been made."

[8] 2008 (4) SA 639 (C) at para 14.

[23] The plaintiff has, in paragraph 9 of the particulars of claim, also annexed a copy of the terms and conditions as annexure “POC 3”. The defendants have brought this as a ground for exception as they aver that the date on the terms and conditions annexed pre-dates the conclusion of the agreement, the date on the terms and conditions is 17 June 2005 and the loan agreement was concluded in November 2007.

[24] The defendants also aver that the agreement does not accord with the cited parties in that the address mentioned, which is 160 Main Street, Johannesburg does not correspond with the address in the particulars of claim, which reflects the principal business of the plaintiff to be No 9 Lothbury Road, Corner Kingsway Avenue, Auckland Park. Thus, the defendants aver that the pleading seems to disclose two different parties, more so as the defendants have been unable to expatiate on the agreement that has been attached.

[25] The defendants also aver that the particulars of claim do not provide particularity on the clauses that are relied upon by the plaintiff when citing and relying between the express terms relied on and the tacit terms in the agreement. The defendants highlight that in paragraphs 10.7 to 10.9, the particulars of claim refer to the specific clauses in the loan agreement.

[26] The approach to be adopted in dealing with the principles of exception were described as follows in Trope v South African Reserve Bank 1992 [3] SA 208 T at `221A-E:

"An exception to a pleading on the ground that it is vague, and embarrassing involves a twofold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. As to whether there is prejudice, the ability of the excipient to produce an exception proof plea is not the only, or indeed the most important test. If that were the only test the object of pleadings to enable parties to come to trial, prepare to meet other's case and not be taken by surprise may well be defeated. Thus, it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made, likewise to a pleading which leaves one guessing as to the actual meaning. There, there can be no doubt that such a pleading is excipiable as being vague and embarrassing."

[27] I am of the view that these exceptions raised above have address the particulars in a satisfactory manner and that the vagueness that the defendants seek to raise do not prevent them to plead and the information that is highlighted is not properly pleaded can be cured through further particulars in terms of Rule 29, or evidence during trial.

[28] The grounds of exception that the defendants have sought to bring the exception on, that is the date of the terms and conditions, the address and the clause of the terms and conditions have not rendered the particulars of claim, as they stand, to preclude the defendants from pleading.

[29] The particulars of claim are clear that the rely on the loan agreement that was entered into by parties and the plaintiff advances the mortgage loan to the defendant which in turn registered, and they have attached the standard loan agreement and the tacit and/ or expressed terms of the agreement are clear, therefore, there is no merit in this exception raised that they did not plead the clause upon which they rely on.

[30] In paragraph 16 of the particulars of claim, the plaintiff pleads that the suspensive conditions of the loan agreement, were timeously fulfilled or alternatively, timeously waived as thought were being for its sole benefit. The defendants aver that the waiver is not adequately pleaded. In paragraph 12 of the particulars of claim, the plaintiff sets out all the conditions precedent that were complied with, that is the registration of the bond as evidenced in the Bond Registration Documents that were annexed to the particulars of claim as Annexure POC3.

[31] The defendants' exception is clearly misplaced as the plaintiff has made a case of what was to be complied with in paragraph 12 of the particulars of claim, that is the Bond Registration. The waiver that is pleaded in the alternative falls away and cannot be said to bring any form of hardship to the defendants on responding to these allegations. I accordingly surmise that the complaint is nothing else but a nit-picking exercise as the exception does address the root cause of the action and is neither vague nor embarrassing.

[32] Lastly, the defendants' exception on the agreement is that the particulars of claim are not properly pleaded in relation to the monthly instalments, as they aver that the plaintiff did not allege what the finance charges consisted of in terms of the agreement, the amount of the monthly instalments and the manner in which the monthly instalments were altered. The defendants aver that by failing to plead the particularity of the monthly statements, they were unable to ascertain the amount due by them.

[33] The exception has to go to the root cause of the cause of action. To raise an exception that the instalment was not properly pleaded in paragraph 10.4 of the particulars of claim is seriously *mala fide*. The defendants defaulted in his monthly instalment payments, which have been altered over time, due to several reasons. This is a matter to be addressed at trial and indeed the plaintiff does have to provide evidence of the amount due by the defendants, however the defendants can plead and put the plaintiff to proof thereof than to merely raise an exception.

[34] The defendants bears the onus to satisfy the court that the pleadings are excipiable, however in this application, they have failed to make out a clear case that the plaintiff's particulars of claim are excipiable.

[35] The Supreme Court of Appeal has held in **Telematrix (Pty) Ltd t/a Matric Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 465H** that.

"Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility"

[36] The exceptions that have been brought by the defendants have not met the above requirements, instead they have proven that the Plaintiff case is indeed with merit and the nitpicking exercise destroyed the very nature of the exception.

[37] The Plaintiff's particulars of claim, as pleaded are complete and valid and contains all the averments which are necessary to sustain a cause of action.

[38] The onus is on the Defendant's to show that upon every interpretation that the Plaintiff's particulars of claim can reasonably bear, no cause of action if disclosed. The defendants have not eloquently and completely discharge of this obligation.

[39] In the circumstances, the Defendant's has failed to make out a case for the relief sought and accordingly the Plaintiff seeks orders that the Defendant's exception be dismissed with costs.

[40] I therefore make the following order:

1. The application is dismissed.
2. The applicants/defendants/excipients to pay costs of this application.

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TSAUTSE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the plaintiff	: M Msomi
Instructed by	: Lowndes Dlamini Attorneys
On behalf of the excipients	: R Blumenthal
Instructed by	: Lee Attorneys
Date of hearing	: 07 September 2021
Date of judgment	: 23 March 2023