IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: **9888/2023P**

In the matter between:

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK **PLAINTIFF**
Registration Number 1929/001225/06

and

JLR SERVICES AND WAREHOUSING CC **FIRST DEFENDANT**
Registration Number 2010/117059/23

ZAINUB MOTALA **SECOND DEFENDANT**
Identity Number 8[...]

Coram: Mossop J

Heard: 29 July 2024

Delivered: 29 July 2024

ORDER

The following order is granted:

1. The second defendant's exception is dismissed.

2 The second defendant shall pay the plaintiff's costs, to be taxed on scale B.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] The plaintiff, a commercial bank, has sued the first defendant on what it alleges is a written agreement (the agreement) in terms of which it afforded the first defendant an overdraft facility with it. In terms of the agreement, it was agreed that the overdraft would be repayable by the first defendant on demand. The plaintiff claims that it has demanded the repayment of the overdraft but no payment has been made to it by the first defendant. The plaintiff has accordingly issued summons against the first defendant claiming the repayment of the balance owing on the overdraft account. It was a condition of the agreement that security in the form of a deed of suretyship would be put up for the obligations of the first defendant to the plaintiff. The second defendant is that surety and has been joined to the action because of that fact.

[3] The second defendant has now brought an exception to the plaintiff's particulars of claim. Uniform rule 23(1) deals with exceptions. It provides as follows:

'(1) 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 and may set it down for hearing in terms of paragraph (f) of subrule

(5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.'

[4] The notice of exception alleges that the plaintiff's particulars of claim lack averments necessary to sustain a cause of action. There is therefore no suggestion that the particulars of claim are to be construed as being vague and embarrassing.

[5] The notice of exception itself is not a shining example of such a notice. It contains argument as well as a commentary on the applicability of other Uniform rules which have apparently been resorted to by the second defendant and which have no bearing on the exception. A notice of exception should set out the complaint and no more. In short, this is not a good example of what a notice of exception should contain.

[6] The notice of exception is presented as a continuing narrative and appears to comprise a single complaint, not formally being divided up into different complaints. But a careful reading thereof demonstrates that the stream of the narrative has islands of complaints that are not necessarily connected to each other. I shall therefore isolate each of the islands of complaint raised and deal with them individually.

[7] Before doing so, it is prudent to briefly consider the correct approach to an exception. Exceptions are not to be approached in an over-technical manner,[1] meaning that a court ought to look benevolently at a pleading to which exception has been taken and ought not to be over-critical of the manner in which it is framed.[2] Moreover, as was set out in *Voget v Kleynhans*:[3]

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[1] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465H.
[2] *First National Bank of Southern Africa Ltd v Perry N.O.* 2001 (3) SA 960 (SCA) 972I.
[3] *Voget v Kleynhans* 2003 (2) SA 148 (C) para 9.

'[f]or the purpose of deciding an exception a court must assume the correctness of the factual averments made in the relevant pleading, unless they are palpably untrue or so improbable that they cannot be accepted'.

In line with the principle that he who alleges must prove, the party taking the exception bears the onus of establishing that the pleading objected to is, indeed, excipiable.[4] In establishing this, neither of the parties may adduce any facts extraneous to what is stated in the pleadings, other than agreed facts.[5] It follows that the defect in respect of which the exception is raised must appear from the pleading to which objection is taken.[6] In discharging the onus that the excipient bears, it has the duty to persuade the court that upon every interpretation that the pleading can possibly bear, no cause of action is disclosed.[7] Finally, an excipient must satisfy the court that it would suffer prejudice of a serious nature if the offending pleading were allowed to stand, and is therefore required to make out a very clear, strong case before the exception can succeed.[8]

[8] The first ground of exception raised by the second defendant is that the plaintiff has pleaded that the agreement was a written agreement and it has put up a copy of what it says is that written agreement. The second defendant notes, however, that the agreement has not been signed by the plaintiff and therefore submits that because of that fact, it cannot be regarded as a written agreement. A cause of action is therefore not disclosed, so it is submitted.

[9] The point raised is superficial and baseless and fails to consider the specific content of the agreement. The document is comprised of an initial section that covers three pages. Those three pages contain, inter alia, a quotation for the overdraft being offered to the first defendant.[9] The quotation proposes an overdraft facility of R950 000, with a monthly overdraft fee of R1 187.54 and a credit initiation

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[4] *Breetzke and others v Alexander and others* [2015] ZAKZPHC 44 para 10; [2015] JOL 34010 (KZP); *South African National Parks v Ras* 2002 (2) SA 537 (C) 541-542.
[5] *First National Bank of Southern Africa Ltd v Perry NO and others*, supra, para 6.
[6] *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 754*; Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) para 7.
[7] *Francis v Sharp and others* 2004 (3) SA 230 (C) 237G.
[8] Ibid at at 240 E-F and 237 D-I.
[9] This section of the first page of the agreement has as its heading the word 'Quotation'.

fee of R10 925.00 and offered the first respondent an interest rate linked to the prime rate.

[10] In other words, the plaintiff has formulated a proposal, in writing, relating to the basis upon which it offers an overdraft facility to the first defendant. Because it is an offer directed to the first defendant there is no provision for the plaintiff to sign the document: the only party required to sign it is the first defendant. If the offer was acceptable to the first defendant, it was required to sign it. The agreement was, indeed, signed by a person representing the first respondent. That signature appears at the appropriate place on the third of the three pages, affirming that the offer has been accepted and that the signatory was authorised to represent the first defendant.

[11] Just above the signature line on the third page of the agreement appears the following recordal:

'The quotation, declaration, pre-agreement statement, terms and conditions, application form, the application information supplied to FNB telephonically, electronically or by fax and the voice log call (if applicable) forms the credit agreement (Facility Agreement) between the Client and FNB.'

[12] Attached to the first three pages of the document are the plaintiff's standard terms and conditions applicable to the facility offered to the first defendant. They are in writing and cover a further two pages. They do not have a place for signature of either of the parties to the agreement.

[13] It is abundantly clear from the agreement put up by the plaintiff that it is a quotation directed to the first respondent and which was to either be accepted or rejected by it. In the event of it being accepted, it would become effective once the first defendant signed it. It was not intended to be signed by the plaintiff. Once the first defendant signed it, the terms recorded in the quotation became binding on both parties. It is therefore entirely correct for the plaintiff to plead, as it has done, that the agreement between it and the first defendant was in writing and that the document

attached to the particulars of claim is that writing. The first ground of exception must thus fail.

[14] The second ground of exception isolated from the notice of exception is the complaint that the plaintiff has not pleaded in its particulars of claim who concluded the agreement on its behalf. In her notice of exception, the second defendant draws attention to Uniform rule 18(6), which reads as follows:

'A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.'

[15] At paragraph 3.1 of the plaintiff's particulars of claim, the plaintiff pleads as follows:

'On or about **06 NOVEMBER 2019**, at **DURBAN** the Plaintiff represented by a duly authorised person and the first Defendant, duly represented, concluded a written **OVERDRAFT FACILITY AGREEMENT**, containing the terms and conditions applicable to that facility (the "overdraft agreement"). A copy of the overdraft agreement is annexed hereto as annexure "**POC2**", the contents of which the Plaintiff prays be read as if incorporated herein.'

[16] This mode of pleading is routinely followed in this Division without controversy. It is of no material consequence who the person was that acted for either party in concluding the agreement. What is of significance is that such persons be authorised to act in that fashion. That has been pleaded. The actual identity of the representatives so acting can be revealed by evidence at the trial. The particulars of claim are otherwise unobjectionable and the second ground of exception must suffer the same fate as the first ground.

[17] Reference is made in the notice of exception to further steps taken by the defendants pursuant to the provisions of Uniform rule 35(12). Those allegations

should not appear in a notice of exception because they do not arise from the particulars of claim. They may, therefore, not be considered in an exception and are, in any event, irrelevant to the determination of the exception.

[18] In the circumstances, the exception was frivolous and ill-considered. It is perfectly clear what the plaintiff has pleaded and what it contends is the written agreement. The second defendant has not established that it would be prejudiced in any way by pleading to the plaintiff's particulars of claim.

[19] The exception must accordingly fail and the second defendant must pay the applicant's costs. In my view, it would be fair to order those costs to be taxed on scale B.

[20] I accordingly grant the following order:

1. The second defendant's exception is dismissed.

2 The second defendant shall pay the plaintiff's costs, to be taxed on scale B.

MOSSOP J

APPEARANCES

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