HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: Electronic reporting only
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

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DATE SIGNATURE

Case No: 31648/2016

In the matter between:

HLANO INVESTMENTS (PTY) LTD Plaintiff

and

INVESTEC BANK LIMITED Defendant/Excipient

***Case Summary*: Practice – Pleadings – Exceptions on grounds that particulars of claim bad in law and vague and embarrassing – Exceptions dismissed.**

JUDGMENT

MEYER, J

[1] The defendant, Investec Bank Ltd (Investec), raised four exceptions against the summons of the plaintiff, Hlano Investments (Pty) Ltd (Hlano), asserting that the particulars of claim lacked averments necessary to sustain an action and that the particulars of claim are vague and embarrassing. Investec did not persist in its first exception.

[2] By the nature of exception proceedings the correctness of the facts averred in the particulars of claim must be assumed (see for example *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 3-10; *Stewart & another v Botha & another* 2008 (6) SA 310 (SCA) para 4).

[3] According to the particulars of claim Investec and Hlano Financial Services (Pty) Ltd (the principal debtor) concluded an original loan agreement on 3 November 2010 and a re-stated loan agreement on 22 August 2011. In terms of the original loan agreement Investec lent and advanced the sum of R150 million to the principal debtor and in terms of the re-stated loan agreement an additional sum of R50 million (the loan agreements).

[4] Hlano is the sole shareholder in the principal debtor. It is also a party to the loan agreements. It bound itself as guarantor/surety to Investec for whatever sums were owing by the principal debtor in terms of the loan agreements. On 3 November 2010, Investec and Hlano also concluded a written cession and pledge in security (the deed of cession and pledge) in terms whereof Hlano pledged in favour of Investec the entirety of its shareholding in the principal debtor (the HFS shares) and it ceded in favour of Investec the rights in its shareholder loan claims against the principal debtor.

[5] The principal debtor breached the terms of the loan agreements by failing to pay certain instalments due in terms thereof. In consequence, on 20 August 2013, Investec demanded payment of the sum of R69 055 174.49 from the principal debtor, and on 10 September 2013, it demanded payment from Hlano of the accelerated amount then due and owing in terms of the loan agreements. The demand was for payment of the sum of R195 666 334.14.

[6] Clause 8 of the deed of cession and pledge affords Investec the right, on the occurrence of an 'Event of Default' by the principal debtor, to realise the 'Secured Property' constituted by Hlano's HFS shares and shareholder's loan claims. Those rights are defined in clause 8 (the realisation rights) and entitle Investec, at its election, to give effect to the provisions of clause 8 and, in doing so, to either sell the HFS shares and shareholder's loan claims by public auction, or at a fair value by private treaty, or to take over for itself all or some of the 'Secured Property' at fair value (clause 8.1.4).

[7] Clause 8.1.4 of the deed of cession and pledge has a further provision which reads thus:

'For the purposes of this Clause, the fair value of any Secured Property will be the value agreed in writing between the Lender and the Pledgor or, failing agreement within ten Business Days after delivery of a notice to the Pledgor stating that the lender exercises its rights under this Clause 8.1, the value determined by an independent accountant agreed to by the Lender and the Pledgor (or, failing agreement within 5 Business Days, appointed, at the request of either Party, by the President of the Southern African Institute of Chartered Accountants, or the successor body thereto), which independent accountant shall act as an expert and not as an arbitrator, shall be instructed to make his determination within ten Business Days and shall determine the liability for his charges (which shall be paid accordingly), provided that if a determination is manifestly unjust and a court exercises its general power, if any, to correct such determination, the Parties shall be bound thereby;'

[8] And clause 9 of the deed of cession and pledge provides as follows:

'Subject to the Credit Agreement, the Lender shall apply the net proceeds of all amounts received pursuant to the sale or other realisation of the Secured Property under this Agreement (after deducting all properly evidenced costs and expenses reasonably incurred by the Lender in relation to that sale or realisation, including brokerage fees and legal fees)

in reduction or discharge of the Secured Obligations, in such order and in such manner as the Lender deems fit. Any amount remaining thereafter shall be paid to the Pledgor within 15 Business Days of the Final Discharge date and, pending such payment, shall be deposited by the Lender in a call account nominated by the Lender.'

[9] Hlano's case is that Investec elected to exercise the realisation rights in terms of clause 8 of the deed of cession and pledge and, having so elected, it further elected to acquire the entirety of the Secured Property (the HFS shares and the shareholder's loan claims). It is required, in terms of clause 8.1.4(c), to take it over 'at a fair value'. The allegations in the particulars of claim are that, despite Investec's elections, it failed to determine the 'Fair Value' of the Secured Property and it failed to 'set-off' that 'Fair Value' against the sums owing to it by the principal debtor.

[10] The presently relevant part of the particulars of claim reads thus:

'18. In or about June 2015 the defendant, represented by Brett Copans, and further authorised representatives, elected to exercise the rights afforded the defendant in terms of clause 8.1 of the *"cession and pledge"*.

19. In exercising that election, the defendant decided, as contemplated in clause 8.1.4(c) of the *"cession and pledge"* to take over all of the plaintiff's shareholding and shareholder's claims in and against HFS.

20. Despite the exercise by the defendant of its election as pleaded in paragraphs 18 and 19 above, and the communication of that election to the plaintiff, the defendant has now, in affidavits exchanged in Case No: 15/23138, denied that it has exercised those elections.

21. Given the current denial by the defendant of the exercise of its rights under clause 8.1 of the cession and pledge (including clause 8.1.4 thereof) there exists a dispute between the plaintiff and the defendant as contemplated in Section 21(1)(c) of the

Superior Court Act, 10 of 2013 which entitles the plaintiff to the declaratory relief it claims.

22. The plaintiff and the defendant have not agreed on the 'fair value' of any Secured Property' as contemplated in paragraph 8.1.4(c) of the cession and pledge.

23. The defendant has not delivered to the plaintiff a notice recording that the defendant exercises its rights under clause 8.1 of the cession and pledge as contemplated in clause 8.1.4(c) of the cession and pledge.

24. In the premises, and as is contemplated in clause 8.1.4(c) of the cession and pledge, the value of the "Secured Property" is to be determined by an independent accountant agreed to by the plaintiff and the defendant alternatively appointed at the request of either party by the president of the Southern African Institute of Chartered Accountants or any successive body.

25. The defendant, as surety for the obligations of HFS to the plaintiff, as pledgor of the pledged shares, as cedent of the ceded shareholder loan claims and as beneficiary of the rights afforded by clause 9 of the cession and pledge, is unaware of the extent of the indebtedness of HFS to the defendant.

26. It was a tacit or implied term of the deed of surety furnished by the plaintiff to the defendant . . . , the original and re-stated loan agreements and the cession and pledge that the defendant would render to the plaintiff a full account of the indebtedness of HFS to the defendant in the event that:

26.1 the defendant demanded payment from the plaintiff of the amount allegedly then due and owing by HFS;

26.2 the defendant exercised its realisation rights as contemplated in clause 8 of the cession and pledge.

27. Despite demand, the defendant has failed to render any account to the plaintiff of the indebtedness of HFS to the defendant.'

[11] Hlano claims certain declaratory relief, including declaratory orders that Investec had exercised its realisation rights in terms of clause 8 of the deed of cession and pledge and that it had elected to take over the entirety of the Secured Property, as contemplated in clause 8.1.4(c). It also seeks from Investec a statement and debatement of account to determine what amount, if any, is owing to it by Investec as a 'balance' as contemplated in clause 9.

[12] The second exception raised by Investec, as formulated in its exception, was firstly that because Hlano has pleaded that Investec exercised its election under clause 8.1 of the cession and pledge (in paragraph 18 of its particulars of claim) and that Investec denies having exercised the election and has not given it notice of the exercise of its election (in paragraph 20), '. . . it is unclear on what basis the plaintiff alleges that the election was exercised'. The complaint was further that '. . . the plaintiff does not plead how the defendant communicated with the plaintiff, whether it did so orally or in writing, who communicated on behalf of the defendant, to whom the communication was made, when the communication was made or what the contents of the communication was' and that it '. . . is further unclear whether the alleged communication is the same event or a different event to the alleged exercise by Capons in June 2015 of an election on behalf of the defendant'. There is no merit in these objections.

[13] Clause 8.1 of the deed of cession and pledge provides Investec with the exclusive election whether to invoke the realisation provisions of clause 8 and, once it had done so, to determine which of the realisation processes contemplated in clause 8.1.4 are to be exercised. It is alleged in paragraphs 18 and 19 of the particulars of claim that Investec elected to exercise its rights in terms of clause 8.1

and that it elected, in terms of clause 8.1.4(c) to take over the secured property at fair value. It is pleaded in paragraph 20 of the particulars of claim that Investec communicated those elections to Hlano. What is pleaded in paragraph 23 is that Investec 'has not delivered' to Hlano 'a notice recording that [it] exercises its rights under clause 8.1 of the cession and pledge as contemplated in clause 8.1.4(c) of the cession and pledge'. Furthermore, there is no obligation that I am aware of on a party to aver by whom, to whom and in what form an election, such as the one under consideration, was communicated.

[14] Investec further argues that the delivery of a notice to Hlano stating that Investec exercises its rights under clause 8.1 is a requirement for the exercise of the realisation rights. There is no allegation in the particulars of claim, it argues, that Investec exercised its realisation rights by delivery of such notice. It relies on the further provision in clause 8.1.4 of the deed of cession and pledge, which I have quoted in paragraph 7 supra, in support of this argument.

[15] I agree with Hlano that this objection has not been pertinently raised in the exception delivered by Investec in terms of rule 23 of the Uniform Rules of Court. Furthermore, the question whether the giving of written notice is a condition for the exercise of the realisation rights raises the proper interpretation of clause 8.1.4. That contractual provision must be interpreted in accordance with the established principles of interpretation. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.) Interpretation is now 'essentially a unitary exercise'. 'The "inevitable point of departure is the language of the provision itself", read in context and having regard

to the purpose of the provision and the background to the preparation and production of the document'.

[16] Hlano's opposing contention is that upon a proper interpretation of clause 1.1.4 of the deed of cession and pledge the provision relating to the delivery of a notice does not escalate the delivery of such notice to a precondition for exercising the realisation rights. It has, in my view, not been established that clause 8.1.4 of the deed of cession and pledge cannot reasonably bear the meaning contended for by Hlano. That clause gives rise to difficulties of interpretation and (this being an exception) cannot be construed without the benefit of evidence relating to the full factual matrix. The opposing contentions on the proper interpretation of that provision satisfy me that at least two possible meanings are available on the language used. In my view the proper meaning of clause 8.1.4 should only be determined after the hearing of evidence at the trial. (See *Belet Cellular v MTN Service Provider* (936/2013) [2014] ZASCA 181(24 November 2014), paras 11-12.)

[17] The third exception raised is that the particulars of claim do not disclose a dispute between the parties entitling Hlano to the declaratory relief that it claims in terms of s 21(1)(c) of the Superior Courts Act 10 of 2013. This objection is clearly factually incorrect. First, there is the factual allegation that Investec has elected, in terms of clause 8.1.4(c) of the deed of cession and pledge, to take over the entirety of Hlano's shareholding and shareholder's claims in and against the principal debtor. Second, when considering whether an exception should be upheld, the pleading is considered as a whole and one does not read paragraphs in isolation. (See *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) at 149F.) It is clear from the particulars of claim as a whole and the declaratory relief sought that Hlano contends that

Investec exercised its realisation rights and acquired the shareholding and shareholder's claims. Third, the averment is pertinently made that, despite that election, Investec now disputes that it had done so.

[18] The fourth exception is that Hlano 'does not plead the legal basis upon which it relies for the contention that it is entitled to a statement of account'. In *Rectifier and Communication Systems (Pty) Ltd v Harrison and Others* 1981 (2) SA 283 (C), at 286D-H, Watermeyer JP said the following:

'The action for an account is well known to our law and circumstances in which it can be claimed have been laid down in a number of cases. In *Maitland Cattle Dealers (Pty) Ltd v Lyons* 1943 WLD 1 MILLIN J at 19 said:

"nobody is entitled to sue at common law for an account unless the person sued stands in a fiduciary relationship to him, or some statute or contract has imposed upon him the duty to give an account".

Likewise in *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W) at 963 Moll J said:

"The right at common law to claim a statement of account is, of course, recognized in our law, provided the allegations in support thereof make it clear that the said claim is founded upon a fiduciary relationship between the parties or upon some statute or contract which has imposed upon the party sued the said duty to give an account. Allegations which do no more than to indicate a debtor and creditor relationship would not justify a claim for a statement of account. *Erasmus v Slomowitz (1)* 1938 TPD 236 at 239; *Maitland Cattle Dealers (Pty) Ltd v Lyons* 1943 WLD 1 at 19. See also *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A) where HOLMES JA at 762 discuss what the practice should be not only in regard to what either side must prove in an action for a statement of account, debatement thereof and payment of the amount found to be due, but also in regard

to what degree of accounting is required and whether the debate of an ordered account must in the first instance take place between the parties."

(Also see *ABSA Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (A), para 15.)

[19] In the present case Hlano's allegations in its particulars of claim do more than to indicate a debtor and creditor relationship. It avers that Investec's obligation to render an account flows from a tacit or implied term of the loan agreements, the deed of suretyship and the deed of cession and pledge once it had demanded payment from it and had exercised its realisation rights as contemplated in clause 8 of the deed of cession and pledge. Whether the contracts should be construed in that way and such an obligation to account on the part of Investec be imported, are matters that should also only be determined after the hearing of evidence at the trial.

[20] Finally the matter of costs. Hlano requests a punitive costs order on the attorney-and-client scale. I am, however, not persuaded that the circumstances of this case warrant a deviation from the general principle that costs should follow the event, on the party-and-party scale.

[21] In the result the following order is made:

The exceptions are dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	8 June 2017
Date of judgment:	1 November 2017
Counsel for the plaintiff:	ARG Mundell SC
Instructed by:	Meiring and partners Inc, Bryanston C/o Sithatu and Stanley Attorneys, Selby
Counsel for the defendant/excipient:	MM Antonie SC
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