


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER : 425588/2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES / NO
(2) OF INTEREST TO OTHER JUDGES	YES / NO
(3) REVISED ✓	
17/2/2017 DATE	 SIGNATURE

In the matter between

**NORMAN DROR LOWENTHAL**

Plaintiff/Respondent

and

**STREET GUARANTEE (PTY) LTD**

First Defendant / First Excipient

**DORON JEREMY DEFRIES**

Second Defendant / Second Excipient

**JEFFREY LIONEL FROOM**

Third Defendant / Third Excipient

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**JUDGMENT**

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## ANDRÉ GAUTSCHI AJ

- [1] The defendants in this matter, respectively a borrower and two sureties, have excepted to the plaintiff's amended particulars of claim on a number of grounds.
- [2] The claims by the plaintiff, as lender, involve three loan agreements (referred to as loan agreement 2, loan agreement 3 and loan agreement 5), loan agreement 5 allegedly being a consolidation of loan agreements 2 and 3.
- [3] The legal principles relevant to the adjudication of an exception are not in dispute. In the case of an exception on the basis of no cause of action disclosed, the excipient must satisfy me that the conclusion of law for which the plaintiff contends cannot be supported on any interpretation that can be put upon the facts<sup>1</sup>. They should be dealt with sensibly and I should avoid an over-technical approach<sup>2</sup>. It must not be possible to lead evidence which can disclose a cause of action<sup>3</sup>.
- [4] In the case of an exception on the basis of a pleading being vague and embarrassing, the excipient must show vagueness amounting to embarrassment and embarrassment amount to prejudice; the vagueness and

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<sup>1</sup> H v Fetal Assessment Centre 2015 (2) SA 193 (CC) at para [10]

<sup>2</sup> Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at para [3]

<sup>3</sup> McKelvey v Cowan NO 1980 (4) SA 525 (Z) at 526D-E

embarrassment must strike at the root of the cause of action as pleaded. Again, I must not look too critically at that pleadings and not adopt an overly technical approach<sup>4</sup>. Prejudice to a litigant facing an embarrassing pleading must lie ultimately in an inability to prepare properly to meet an opponent's case<sup>5</sup>.

- [5] I shall set out only a brief summary at this stage of the allegations which make up claim A in the particulars of claim, which is the subject of the attack on exception. The plaintiff alleges that loan agreement 2 was concluded on 29 October 2010 for R1 000 000, and that the amount of the capital was increased by a further R528 000 by written agreement. Loan agreement 3 was concluded on 2 March 2011 for R2 000 000, where the lenders were the plaintiff and one Herman Fechter ("Fechter"); the amount of the capital was increased by written agreement by a further R90 000.
- [6] On 10 June 2016 (long after the capital in respect of loan agreement 3 was due to be repaid), Fechter ceded his rights in respect of loan agreement 3 to the plaintiff. The plaintiff then alleges that at February 2013, when the total amounts outstanding in terms of loan agreements 2 and 3 amounted to R2 202 000, the plaintiff, Fechter and the defendants negotiated a further loan

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<sup>4</sup> See for instance Jowell v Bramwell-Jones & Others 1998 (1) SA 836 (W) at 902/3

<sup>5</sup> Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1) 2010 (1) SA 627 (C) at para [10]

which would involve a consolidation of loan agreements 2 and 3 and an additional capital advance of R1 530 000. This was concluded on 15 February 2013 between the plaintiff and the first defendant and was loan agreement 5. Although Fechter's name is mentioned loan agreement 5, there is a claim for rectification that he was not a joint lender. There is in addition, a cession by Fechter of his rights in terms of loan agreement 5 to the plaintiff.

[7] I shall now deal with the grounds of exception.

#### **Ground 1**

[8] In order to explain the outstanding balances of loan agreements 2 and 3, the plaintiff relies upon, and has annexed, annexure POC3 to the amended particulars of claim. The first page thereof is a spreadsheet setting out capital advances and receipts, cumulative balance and "interest receipts". I do not find that document confusing or objectionable. Then follows six pages of notes which cross-refer to 30 pages of emails and an extract from the first defendant's detailed ledger.

[9] The defendants complain that annexure POC3 contains "inadmissible evidence", that they are unable to understand the content of annexure POC3 and are not able to plead properly thereto. Save to query whether the "evidence" is "inadmissible", I think that the complaint is well founded. Annexure POC3, save for the first page thereof, contains more than 30 pages of evidence, confusingly set out, and, since it is relied upon in the particulars

of claim, the defendants are forced to plead thereto. Not all of the detail (indeed very little as I see it) is relevant to the allegations made in the particulars of claim and in respect of which the plaintiff relies on annexure POC3.

- [10] I therefore find that the first ground of exception is well founded.

### **Ground 2**

- [11] The defendants complain that the plaintiff has mixed, in its particulars of claim, two loan agreements, namely loan agreement 2 which was an agreement between the plaintiff and the first defendant only, and loan agreement 3 which was an agreement between the plaintiff, Fechter and the first defendant.

- [12] As formulated, I do not believe that this is a valid ground for complaint. It is so that the plaintiff has failed to deal with the presence of Fechter in loan agreement 3 in proper fashion, but that is a separate matter which I shall deal with below.

- [13] I therefore do not uphold the second ground of complaint.

### **Ground 3**

- [14] The defendants complain that the addition of a further R528 000 to the capital of loan agreement 2 is contrary to the terms of loan agreement 2, and conflicts with the "whole agreement" clause (clause 13) of that loan agreement. I point

out that there is no "no variation save in writing" clause.

- [15] Clause 13 of loan agreement 2 provides that :

"This agreement constitutes the whole agreement between the parties as to the subject matter hereof and no agreements, representations or warranties between the parties regarding the subject matter hereof other than those set out herein are binding on the parties."

- [16] Mr Maselle for the defendant submitted that this clause prevented any amendments to loan agreement 2. I do not agree. The fact that no other agreements are binding on the parties is a reference to agreements which existed at the time when the agreement was concluded. The clause does not, in my view, prevent later amendments to loan agreement 2.

- [17] In the absence of a "no variation save in writing" clause, loan agreement 2 was capable of being amended orally, or in writing without signature.

- [18] The amended particulars of claim are worded oddly in this regard. In paragraph 10 the plaintiff alleges that :

"The First Defendant requested in writing, which was accepted by Howard Lowenthal (the Plaintiff's duly authorised representative) in writing, a further R528 000.00 in respect of the capital amount of R1 million, ... thus bringing the capital amount to R1 528 000.00. In this regard, the Notes to Annexure "POC3" hereto refer."

One of the (many) notes to annexure POC3 refers to this additional amount and cross-refers to an email attached. I must confess that it is not readily ascertainable from the notes, which are relevant and which are not.

[19] The basis of the complaint, that no amendments are possible to loan agreement 3, is without merit, but I would have expected the plaintiff to have pleaded, that on a certain date and at a certain place the parties to loan agreement 2 amended it in writing by increasing the capital to be lent thereunder to R1 528 000, and to attach the relevant writing. Since this is not a complaint in the notice of exception, I mention it so that the plaintiff will correct this aspect at the same time as correcting other aspects, but I will not take it into account in the final order or in the question of costs.

[20] This ground of exception therefore does not succeed.

#### **Ground 4**

[21] The first part of the defendants' complaint is to the same effect regarding the written agreement to increase the capital by a further R90 000 in the face of a whole agreement clause. My comments in that regard are the same as under ground 3, and the result is the same.

[22] However, there is a further complaint, which is that the plaintiff alleges, despite the fact that he and Fechter were joint lenders, only that he (and not Fechter as well) had performed his obligations in terms of loan agreement 3. In addition, the written amendment (my construction of the written agreement regarding the further amount of R90 000) is said to have been between the plaintiff and the first defendant, and simply ignores the fact that Fechter was also a party to loan agreement 3.

[23] The plaintiff seeks to cure this by referring me to the cession concluded some years later, in terms of which Fechter gave up all his rights to loan agreement 3. That does not to my mind cure the problem. Whilst he might give up his rights to loan agreement 3, there could be no amendment to that loan agreement without his consent, and none is alleged.

[24] Accordingly, the second part of the fourth ground of exception is in my opinion well taken.

#### **Ground 5**

[25] This complaint is confusingly phrased but overlaps with grounds 6 and 7. I therefore make no order on the fifth ground.

#### **Ground 6**

[26] The defendants complain that the consolidation of loan agreements 2 and 3 into loan agreement 5 is alleged to have been concluded only with the plaintiff, and not with Fechter as well, to the extent that he was a party to loan agreement 3.

[27] Whilst the defendants allege that the plaintiff, Fechter and the first defendant were required to agree in writing that the indebtedness in connection with loan agreement 3 could be transferred to the plaintiff alone and included in loan agreement 5, no such writing was necessary, as I have pointed out in paragraph 17 above. However, the fact remains that Fechter's consent and

involvement were required before any balance outstanding in terms of loan agreement 3 could be consolidated into loan agreement 5. There is no such allegation made, and accordingly this exception is well taken.

#### **Ground 7**

[28] The defendants complain under this ground that the plaintiff seeks to rely on Fechter's cession some years later to cure his lack of involvement in the consolidation of loan agreement 3 into loan agreement 5. As I have pointed out in paragraph 23 above, the cession cannot cure Fechter's lack of involvement or consensus in the conclusion of loan agreement 5.

[29] This ground of exception is also, to my mind, well taken.


#### **Conclusion**

[30] There are therefore a number of the exceptions which are to my mind well taken, and which renders claim A to the particulars of claim excipiable.

[31] Accordingly, I make the following order :

1. The exceptions in ground 1, the second part of ground 4, and grounds 6 and 7 are upheld.
2. Claim A to the plaintiff's particulars of claim, incorporating paragraphs 6 to 39, is struck out.

3. The plaintiff is afforded an opportunity to amend his amended particulars of claim, using rule 28, within 20 days of the date of this order.
4. The plaintiff is ordered to pay the defendants' costs of the exception, jointly and severally.

  
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**ANDRÉ GAUTSCHI**  
**ACTING JUDGE OF THE HIGH COURT**

**Date of hearing** : 13 February 2017

**Date of judgment** : 17 February 2017

**Counsel for the plaintiff / respondent** : Mr M Nowitz

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