REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 17224/2018

REPORTABLE: **NO**
OF INTEREST TO OTHER JUDGES: **NO**
REVISED.
23 JUNE 2021

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED **PLAINTIFF**
(Registration number: 1962/000738/06)

And

JACK WILLIAM DARIER **FIRST DEFENDANT**
(Identity number [....])

ERIC ARTHUR DARIER **SECOND DEFENDANT**
(Identity number [....])

JEAN ELIZABETH DARIER **FOURTH DEFENDANT**
(Identity number [....])

JUDGMENT

Delivered: This order was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 23rd June 2021.

TWALA J

[1] This is an application wherein the third defendant excepts to the plaintiff's particulars of claim as amended on the basis that certain paragraphs therein when read together fail to disclose and or sustain a cause of action against the third defendant.

[2] The plaintiff's action against the defendants is defended and the third defendant has filed an exception against the plaintiff's particulars of claim raising the point that they fail to disclose and or sustain a cause of action as against the third defendant. The plaintiff persists that there is nothing amiss with its particulars of claim and refused to remove the cause complained about. In this judgment, I propose to refer to the parties as the plaintiff and defendant going forward.

[3] It is common cause that the plaintiff instituted proceedings against the first defendant, based on the breach of a loan agreement entered into between the parties on the 14th of September 2010 for payment of the sum of R2 413 559.63 and declaring the property which is the subject matter executable. Furthermore, as against the second and third defendants based on a suretyship agreement executed by the second defendant on the 21st of September 2010 with the consent of the third defendant to whom he is married in community of property, in favour of the plaintiff in terms whereof he bind himself as surety and co-principal debtor in solidum for the repayment on demand of all the amounts which the first defendant may presently or at any time in the future owe to the plaintiff, its successors in title or assigns.

[4] The defendant contends that it did not sign the suretyship agreement as a surety as required by law but as a consenting spouse of the surety. She contends that she signed the document only consenting to her husband to whom she is married in community to bind himself and surety in favour of the plaintiff. Therefore,

so the argument goes, she cannot be sued as a co-surety with her husband - thus the particulars of claim do not disclose a sustainable cause of action and are bad in law.

[5] It is trite that an exception that a pleading is defective to the extent that it does not disclose or sustain a cause of action strikes at the formulation of the cause of action and its legal validity. It is not directed at a particular paragraph within the cause of action but at the validity of the cause of action as a whole, which must be established that in law does not give rise to a claim as pleaded. Furthermore, it is trite that, for the purposes of determining an exception, the Court must assume that the factual averments made in the pleading are correct. It is therefore the duty of the excipient to persuade the court that upon every interpretation that can be ascribed to the pleading, it does not disclose or sustain a cause of action.

[6] Almost a century ago the Appellate Division, as it then was, in the case of *McKenzie v Farmer's Cooperative Meat Industries Ltd 1922 AD 16 at 23* defined the phrase *"cause of action"*, which definition has been quoted as trite in many recent judgments as follows:

> *'…every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*

[7] In *M Ramanna and Associates cc v The Ekurhuleni Development Company (Pty) Ltd, case No: 25832/2013 (4 April 2014) ZAGPJHC* this Court stated the following:

> *"It is a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the abolition of the requests for further particulars of pleading and the further requirement 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. Pleadings must therefore be lucid and logical*

and in an intelligible form; and the cause of action or defence must appear clearly from the factual allegations made.

The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed and this fundamental principle can only be achieved when each party states his case with precision".

[8] In *Khan v Stuart 1942 CPD 386 at 392* a decision, which was quoted with approval in the Ramanna case supra, the Court stated the following:

"It is the duty of the court, when an exception is taken to a pleading, first to ascertain if there is a point of law to be decided which will dispose of the case in whole or in part. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed".

[9] It is necessary to restate the provisions of section 6 the General Law Amendment Act, 50 of 1956 on which the defendant's contentions are based which state the following:

"6 Formalities in respect of contracts of Suretyship

No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments".

[10] Since this case involves litigants who are married in community of property, it is appropriate to mention the relevant provisions of the Matrimonial Property Act,88 of 1984 ("the Act") which provides as follows:

"15 Powers of Spouses

(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.

(2) Such a spouse shall not without the written consent of the other spouse –

(a) ……...

(h) bind himself as surety.

17 Litigation by or against spouses

(1) A spouse married I community of property shall not without the written consent of the other spouse institute legal proceedings against another person or defend legal proceedings- instituted by another person, except legal proceedings –

(2) ……

(5) Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessaries for the joint household, the spouses may be sued jointly or severally therefor.

[11] Having regard to the trite principles of our law as enunciated above and my understanding of the authorities referred to herein, the undisputed facts are that the defendant signed the suretyship agreement albeit as a consenting spouse. The defendant consented to the second defendant to sign the suretyship agreement, as spouses married in community of property, to bind their joint estate for the fulfilment of the obligations stated therein in favour of the plaintiff. Subsections 17 (1) and (5) of the Act are plain, clear and unambiguous that spouses married in community of property cannot be sued separately for debts recoverable from the joint estate and, where the debt has been incurred for the joint household necessaries, the spouses may be sued jointly or severally therefor.

[12] I do not agree with the contentions of the defendant that she only signed and gave the second defendant the consent to bind itself as surety. I hold the respectful view that the defendant signed the consent granting the second defendant the power and authority to bind the joint estate and by extension binding the co-owners of the joint estate as co-sureties. I disagree with the defendant that there is non-compliance with the provisions of section 6 of the General Law Amendment Act and therefore

there is no merit in the contention that the pleading is bad in law. It follows ineluctably therefore that, when the pleading is considered in the whole, it does disclose a sustainable cause of action for it avers every fact which would be necessary for the plaintiff to prove at the trial of the case.

[13] In *Cherangani Trade and Invest 50 (Pty) Ltd v Razzmatazz (Pty) Ltd and Another (2795/2018) [2020] ZAFSCHC 100 (28 May 2020)* the Court stated the following:

> *"Paragraph 20: Unnecessary technicality should be avoided during litigation as reliance thereon by a litigant is often aimed at trying to evade judgment on the merits and more often than not, the party relying on a technicality know full well that he/she does not have a proper defence on the merits."*

[14] I am unable to disagree with counsel for the plaintiff that the defendants are overly technical in their approach in this matter which does not help to resolve the real issues between the parties. Courts have in a number of decisions emphasised the point that parties should at all times attempt to bring finality to litigation between them and that unnecessary technicalities which delay the proper ventilation of the real issues to bring the case to finality should be avoided. This is one such case where the exception is raised, in my respectful view, only for the purposes of delaying the plaintiff from receiving the remedy it seeks without incurring further unnecessary costs. It is patently an abuse of the process of the Court which should not be countenanced. Such conduct by a litigant should be censured by the Court with a punitive costs order.

[15] In the circumstances, I make the following order:

1. The exception is dismissed with the excipient to pay the costs of the exception on the scale as between attorney and client.

TWALA M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing:	**11th June 2021**
Date of Judgment:	**23rd June 2021**
For the Plaintiff:	**Advocate PMP Ngcongo**
Instructed by:	**Van Hulsteyns Attoneys** **Tel: 011 523 5300** **daniel@vhlaw.co.za**
For the Defendants:	**Advocate JK Berlowits**
Instructed by:	**Anthony Berlowitz Attorneys** **Tel: 011 457 6599** **tony@berlowitz.co.za**