

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: **20th July 2021** Signature: _____

A handwritten signature in black ink, appearing to be "R. J. Adams", is written over the signature line.

CASE NO: 43962/2019

DATE: 20TH JULY 2021

In the matter between:

FIRSTRAND BANK LIMITED

Plaintiff

and

MBANA, SHAUN SISA

First Defendant

MABENA, BATHABILE INGRID

Second Defendant

Coram: Adams J

Heard: 20 July 2021 – The 'virtual hearing' of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 20 July 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 21 July 2021.

Summary: Civil procedure – Exception to particulars of claim – plaintiff contends that particulars of claim do not disclose a cause of action – cause of action alleged to be unlawful and a contravention of the National Credit Act – exceptions dismissed

ORDER

- (1) The first and second defendants' exception to the particulars of plaintiff's claim is dismissed with costs.
 - (2) The first and second defendants jointly and severally, the one paying the other to be absolved, shall pay the plaintiff's costs of the exception on the scale as between attorney and client.
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JUDGMENT

Adams J:

[1]. The defendants except to the particulars of plaintiff's claim on a number of grounds, all of which allege that the particulars do not disclose a cause of action. Some, if not all of the grounds of exception are of an overly technical nature.

[2]. So, for example, the first ground is to the effect that, in terms of the National Credit Act, Act 34 of 2005 ('the NCA'), the plaintiff is only entitled to claim from the defendants 'payment of the default amount' – that is the amount of the arrears – and not the total amount outstanding on the bond. This means that the statutory demands in terms of s 129 of the NCA, so the defendants contend, were also defective.

[3]. Additionally, so the defendants contend s 129(1)(b), read with section 129(3) of the NCA, provide that any legal proceedings to enforce the credit agreement (unlike the present legal proceedings) must be such as to enable the defendants to 'remedy a default'. Therefore, so the contention goes, in law the

plaintiff is therefore not entitled to claim the full outstanding amount against the defendants.

[4]. There is no merit in this contention.

[5]. Secondly, the defendants except to the particulars of claim on the ground that a clause in the Home Loan Agreement, which requires the plaintiff to draw in writing to the notice of the defendants the default, and to enforce the agreement by claiming the amount of the default, only entitles the plaintiff to claim the arrears and not the full amount.

[6]. This ground of exception is based on a particular interpretation of the contract. This interpretation does not accord with the agreement and a proper interpretation of the agreement. In any event, a particular interpretation of the contract can never be a ground for an exception especially if the agreement is open to another interpretation, which supports a cause of action. Accordingly, this ground of exception is void of any merit.

[7]. The third ground of objection is directed at the balance outstanding and the fact that, according to the certificate of balance, which certified that the outstanding balance was accelerated as and at 7 November 2019, from which date interest would be running. The arrears, so the defendants aver, cannot be increasing after this date. In addition to this point making little sense to me, I am of the view that there is no merit in the contention that it is a valid ground of exception.

The Applicable Legal Principles and its Application in this Case

[8]. A brief overview of the applicable general principles is necessary before I consider the exception raised by the defendants and the grounds on which they are based. These general principles, as gleaned from the case law, can be summarised as follows.

[9]. 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. 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.

[10]. The purpose of an exception is to raise a substantive question of law 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. An excipient who alleges that a pleading does not disclose a cause of action or a defence must establish that, upon any construction of the pleading, no cause of action or defence is disclosed.

[11]. 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. 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. Minor blemishes and insignificant embarrassments caused by a pleading can and should be cured by further particulars.

[12]. Having said the foregoing, however, exceptions are to be dealt with sensibly since they provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility and insofar as interpretational issues may arise, the mere notional possibility that evidence of surrounding circumstances may influence the issue should not necessarily operate to debar the Court from deciding an issue on exception.

[13]. Where, however, an exception is based upon the fact that a pleading is vague and embarrassing, the 'every reasonable interpretation' approach highlighted above does not apply, and an exception may be taken to protect one's self against embarrassment.

[14]. In sum, the exception raised by the defendants is based on the proposition that the acceleration clause relied upon by the plaintiff to claim the whole amount outstanding in terms of the loan is unlawful as it offends and falls foul of the NCA. As I have already indicated, in my view, this submission is misplaced for the simple reason that a reading of the NCA as a whole and of the individual parts do not support this legal conclusion. Nowhere in the NCA is it provided that an

accelerated clause in a Credit Agreement is prohibited. In that regard, a superficial consideration of the Act alludes to certain provisions and outlaws same – not so of acceleration clauses.

[15]. Therefore, on the basis of a proper interpretation of the NCA, I am not persuaded that the grounds of exception are valid. Importantly, one should also consider the provisions of the Home Loan Agreement itself, which supports the plaintiff's a cause of action.

[16]. Accordingly, the exception to the particulars of plaintiff's claim should be dismissed.

Costs

[17]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*¹.

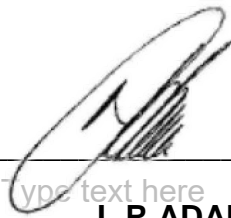
[18]. Applying this general rule, the defendants should be ordered to pay the costs of the exception applications on the scale as between attorney and client, as provided for in the agreement.

Order

[19]. Accordingly, I make the following order: -

- (1) The first and second defendants' exception to the particulars of plaintiff's claim is dismissed with costs.
- (2) The first and second defendants jointly and severally, the one paying the other to be absolved, shall pay the plaintiff's costs of the exception on the scale as between attorney and client.

¹ *Myers v Abramson*, 1951(3) SA 438 (C) at 455


Type text here**L R ADAMS**

*Judge of the High Court
Gauteng Local Division, Johannesburg*

HEARD ON:	20 th July 2021 – in a ‘virtual hearing’ during a videoconferences on the <i>Microsoft Teams</i> digital platform
JUDGMENT DATE:	20 th July 2021 – judgment handed down electronically
FOR THE PLAINTIFF / RESPONDENT:	Adv H M Viljoen
INSTRUCTED BY:	Charl Cilliers Incorporated, Johannesburg
FOR THE DEFENDANT / EXCIPIENT:	Adv P W Makhambeni
INSTRUCTED BY:	S A Maninjwa Attorneys, Roodepoort