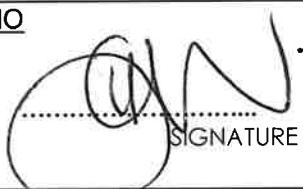




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 17628/2019

| | |
|----------------------------------------------------------------------------------------------------------|----------------------------------------|
| (1) | <u>REPORTABLE: NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: NO</u> |
| (3) | <u>REVISED: NO</u> |
| [20 June 2022] | |
|  SIGNATURE | |

In the matter between:

LYNDSEY BRENDA SEYMOUR

Plaintiff

and

GERHARDUS JACOBUS STRYDOM

Defendant

J U D G M E N T:

NEL AJ

- [1] This is an opposed application for Summary Judgment, in terms of which the Plaintiff claims payment of the amount of R1 740 855.17, together with interest thereon, from the Defendant, based on a written loan agreement, incorporating a suretyship.

RELEVANT BACKGROUND

- [2] On 13 September 2017 the Plaintiff concluded a written Loan Agreement with Simplyfai (Pty) Ltd (“Simplyfai”), in terms of which the Plaintiff would loan the amount of R1 500 000.00 to Simplyfai (“the Loan Agreement”).
- [3] In the Particulars of Claim it is alleged that it was a term of the Loan Agreement that the Plaintiff *“borrowed money to the debtor in the amount of R1 500 000.00”*.
- [4] In the Affidavit filed in support of the Summary Judgment Application, the Plaintiff alleged that it was a term of the Loan Agreement that the Plaintiff *“lent a sum of R1 500 000.00 ...”* to Simplyfai.
- [5] Both allegations imply that it was a term of the Loan Agreement that the amount of R1 500 000.00 had already been loaned and advanced to Simplyfai.
- [6] The relevant portions of the Loan Agreement read as follows:
- “1.1 The Lender (the Plaintiff) hereby agrees to lend to the Borrower (Simplyfai) an amount of R1 500 000.00...
- 1.2 The amount borrowed will be paid within 5 days of date of signature...”
- [7] The terms of the Loan Agreement clearly indicate that payment was to be made after signature of the Loan Agreement, whilst the allegations in the Particulars of Claim and the Affidavit filed in support of the Summary Judgment Application imply that the terms of the Loan

Agreement recorded that payment had already been made as at the time of the signing of the Loan Agreement.

- [8] I raise the apparent contradiction, as it is raised as a defence that the Particulars of Claim are excipiable, as there is no allegation that the amount was advanced.
- [9] It is however clear from the terms of the Loan Agreement that as at the time of the conclusion of the Loan Agreement no amounts had yet been advanced. If the loan amount had already been advanced, the Loan Agreement would have reflected such payment, and clause 1.1 and 1.2 would not have been inserted.
- [10] The Loan Agreement contained a security clause, in terms of which the Defendant and Marc Lee Seymour ("Seymour") bound themselves to the Plaintiff as co-sureties and co-principal debtors with Simplyfai for the performance of Simplyfai's obligations in terms of the Loan Agreement.
- [11] The Plaintiff then appears to have advanced the amount of R1 500 000.00 to Simplyfai in terms of the Loan Agreement. This aspect is contentious, for the reason already set out above, and will be dealt with below.
- [12] During February 2018, an Addendum was concluded in terms of which the instalment payment dates were extended, and the interest rate was changed.
- [13] Simplyfai did not make payment of any instalments as set out in the Loan Agreement as read with the Addendum, and on 12 December 2018 Simplyfai was liquidated.

THE PLAINTIFF'S MAIN CONTENTIONS

- [14] The Plaintiff contends that in terms of the Loan Agreement and the Addendum thereto, Simplyfai ought to have made payment of monthly instalments of R150 000.00 per month to the Plaintiff, but failed to do so.
- [15] The Plaintiff also contends that as a result of the liquidation of Simplyfai, the Defendant, in his capacity as co-principal debtor and co-surety is indebted to the Plaintiff in the amount of R1 740 855.17 together with interest thereon

THE DEFENDANT'S MAIN CONTENTIONS

- [16] The Defendant contends that this Court does not have the jurisdiction to determine the Action, and by implication, the Summary Judgment Application.
- [17] The Defendant also contends that the failure to join Seymour (the Plaintiff's son) amounts to a non-joinder.
- [18] The Defendant alleges that the National Credit Act is applicable to the Loan Agreement, but that the Plaintiff has failed to comply with her obligations in terms of the National Credit Act.
- [19] In the Defendant's Heads of Argument it is contended that the Plaintiff does not rely on any other basis (such as the concept of a large agreement, envisaged by Section 4(1)(a)(b) of the National Credit Act), for alleging that the Loan Agreement is not subject to the National Credit Act.

[20] The Defendant further contends that the liquidation of Simplyfai resulted from the conduct of Seymour, who has transferred the core assets of Simplyfai to a different entity, to the detriment of Simplyfai and the Defendant, with the knowledge of the Plaintiff, who has not advised the liquidators of Simplyfai of such conduct.

[21] The Defendant also contends that the Particulars of Claim are excipiable, and that the Plaintiff has not alleged (and proven) compliance with any antecedent or reciprocal obligations.

THE ISSUES TO BE DETERMINED

[22] Having regard to the various contentions raised by the Parties, as set out above, the following issues need to be determined:

[22.1] Whether the Gauteng Local Division has the required jurisdiction to determine the Summary Judgment Application;

[22.2] Whether the Gauteng Local Division has the required jurisdiction to hear and determine the Action;

[22.3] Whether the failure to join, *inter alia*, Seymour constitutes a non-joinder;

[22.4] Whether the Particulars of Claim are excipiable;

[22.5] Whether the National Credit Act is applicable to the Loan Agreement;

[22.6] Whether the cause of the liquidation of Simplyfai provides the Defendant with a defence to the Plaintiff's claim.

THE RELEVANT LEGAL PRINCIPLES

[23] Prior to considering the various issues separately, it is necessary to record certain of the legal principles applicable to Summary Judgment Applications.

[24] A Plaintiff can only apply for Summary Judgment in respect of a claim based on a liquid document, for a liquidated amount of money, or for delivery of movable property or for ejectment.¹

[25] If a Plaintiff's claim does not fall within the listed categories of Rule 32(1), reliance on the procedure of Rule 32 would be neither appropriate nor applicable.²

[26] It is clear from the Particulars of Claim and the Application for Summary Judgement that the Plaintiff does not seek to rely on a liquid document but relies on a claim based on a liquidated amount of money.

[27] In order to defeat a claim for Summary Judgment a defendant is required to set out a valid defence which is good in law.³

¹ Rule 32(1) of the Uniform Rules of Court

² *ABSA Bank Limited v Ntsane* 2007 (3) SA 554 (T) at 557G; Erasmus, Superior Court Practice ("Erasmus") at D1-388

³ *Maharajah v Barclays National Bank* 1976 (1) SA 418 (A) at 426D

[28] A defendant must set out a *bona fide* defence in order to stave off a claim for Summary Judgment.⁴

[29] In *Maharaj v Barclays National Bank Ltd*, Corbett JA outlined the principles and what is required from a defendant in order to successfully oppose a claim for summary judgment as follows:

".... [One] of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant had "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence."

[30] In the matter of *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd*⁵ it was stated that:

"The remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial. It closes the doors of the court to the defendant. That can only be done if there is no doubt but that the plaintiff has an unanswerable case. If it is reasonably possibly that the plaintiff's application is defective or that the defendant has a

⁴ Erasmus, at B1-223

⁵ 1959 (3) SA 362 (W) at 366E-F.

*good defence, the issue must, in my view, be decided in favour of the defendant.*⁶

[31] The amendments to Rule 32 of the Uniform Rules of Court have changed the nature of summary judgment applications, and it is no longer regarded as an extraordinary remedy.

[32] The defence which a defendant relies on must contain facts, which, if proved at the trial, will constitute an answer to a plaintiff's claim.⁷

[33] A defendant is not required to prove the facts or to persuade the Court of the correctness of the facts.⁸

[34] The court merely has to consider whether the facts as set out by the defendant in the affidavit resisting summary judgment would constitute a good defence in law.

[35] Regarding the remedy provided by summary judgment proceedings, Navsa JA said the following in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*:⁹

“... The summary judgment procedure was not intended to shut a defendant out from defending, unless it was very clear indeed that he had no case in the action. It was¹⁰ intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.”

⁶ 1976 (1) SA 418 (A) at 426 A-D.

⁷ *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227G; Erasmus, at B1-221; Herbstein & Van Winsen, at 531

⁸ *Nair v Chandler* 2007 (1) SA 44 (TPD) at 47B-C

⁹ 2009 (5) SA 1 (SCA).

¹⁰ 2009 (5) SA 1 (SCA)

- [36] Summary judgment must be refused if the Defendant discloses facts which, accepting the truth thereof, or only if proved at a trial in due course, will constitute a defence.¹¹
- [37] Summary judgment proceedings are not and never have been intended to be used as a forum for the resolution of factual disputes.¹² A trial is the proper forum for that process, either because the nature of the relief presupposes a trial or because affidavits are not suitable for that purpose.¹³
- [38] Uniform Rule 32 (5) provides that the court may (not must) enter summary judgment for the Plaintiff. The Court therefore is vested with a residual discretion to refuse summary judgment even if a Defendant has not disclosed a bona fide defence should that be the Defendant's argument.
- [39] A court will only grant Summary Judgment if the Plaintiff has an unanswerable case.¹⁴
- [40] In *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) it was found that even when a Defendant's opposing affidavit falls short of all the material facts with sufficient particularity to enable the Court to assess the Defendant's bona fides, the Court

¹¹ *Raphael and Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C) 245 E - G; *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd supra*

¹² *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) 367C; *Venetian Blind Enterprises (Pvt) Ltd v Venture Cruises Botel (Pvt) Ltd* 1973 (3) SA 575 (R) 578 A).

¹³ *Gulf Steel (PTY) Ltd v Rack-Rite (Pty) Ltd* 1998 (1) SA 679 (OJ); *Shackleton Credit Management (Pty) Ltd v Microzone 88 CC and Another* 2010 (5) SA 112 (KZP) 122 F - I

¹⁴ *Mowchenson v Mercantile Acceptance Corporation of SA Limited* 1959 (3) SA 362 (W) at 366

still has a discretion, which could be exercised in the defendant's favour if there was doubt as to whether the Plaintiff's claim was unanswerable and there was a reasonable possibility that the Defendant's defence is a good one. It is submitted that leave ought to be granted where the defence raised by the Defendant is arguable and not obviously untenable.

- [41] The established legal principles relating to summary judgment applications must however be tempered having regard to the changes to Rule 32, which are intended to lighten the burden on a plaintiff, and to avoid dilatory and unscrupulous defences.

FIRST ISSUE: JURISDICTION TO HEAR SUMMARY JUDGMENT APPLICATION

- [42] The Defendant has raised as a Special Plea that the Defendant denies that the "*whole cause of action*" arose within this Court's jurisdiction, as alleged by the Plaintiff in her Particulars of Claim.
- [43] The Plaintiff alleged in the Particulars of Claim that the "*whole cause of action arose within the jurisdiction of the court*".
- [44] In the Special Plea the Defendant did not specifically allege that this Court does not have the requisite jurisdiction to determine the Action, but in the Affidavit Resisting Summary Judgment it is alleged that as the "*whole cause of action*" did not arise within the jurisdiction of this Court, the Court does not have the necessary jurisdiction to determine the Action.

- [45] In such regard the Defendant alleges that the Addendum to the Loan Agreement was signed by him in Gordon's Bay, and therefore the Agreement was not concluded in Johannesburg.
- [46] The Defendant also states that the witnesses that signed the Addendum, purportedly evidencing that they witnessed his signature, were not present when he signed, and were in fact in Johannesburg. Such conduct, if true (which appears to be the case, based on the evidence before me) is unconscionable, unacceptable, and may be regarded as an attempt to defeat the administration of justice. I make no finding in this regard, as any determination would require evidence on behalf of both parties.
- [47] The Defendant alleges that as the Plaintiff relies on both the Loan Agreement and the Addendum for her cause of action, the "*whole cause of action*" did not arise in Johannesburg.
- [48] In the Affidavit filed in support of the Summary Judgment Application, the Plaintiff alleges that the cause of action relied on is the Loan Agreement and the Suretyship, and that the amendment of the interest rate in the Addendum does not detract from the *ratio rei gestae* of the Plaintiff.
- [49] Counsel for the Plaintiff submitted that the *loci contractus* occurred within this Court's jurisdiction, and therefore the court has the jurisdiction to determine the Summary Judgment Application.
- [50] The Defendant's counsel submitted that the Plaintiff has not established that the "*whole cause of action*" arose within this Court's jurisdiction, and

alternatively to such submission, that evidence would be required to determine whether the “*whole cause of action*” arose within the jurisdiction of this Court.

[51] Counsel for both the Plaintiff and the Defendant relied on the matter of *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd*¹⁵ where the Appellate Division (as it then was) considered the *causa continentia* rule, and held that it was accepted law that the place where the contract must be performed is the *locus solutionis*, and that the place where a portion of a contract must be performed, would establish the jurisdiction to determine a claim for non-performance of that portion of the obligation.¹⁶

[52] If a court has the necessary jurisdiction to determine a portion of the obligations arising from a contract, the *causae continentia* rule would provide such court with the necessary jurisdiction to determine disputes relating to all obligations arising from a contract.

[53] Whilst the Defendant denies that the Plaintiff has established that the “*whole cause of action*” arose within this Court’s jurisdiction, Defendant’s counsel accepted that a contractual cause of action arises where the contract was concluded, or where the contract had to be performed, either fully or in part, or where the breach upon which a party relies for its claim, occurred.

[54] I was advised that it was common cause that the instalment payments as referred to in the Loan Agreement had to be effected within this Court’s

¹⁵ 1962 (4) SA 326 (A).

¹⁶ At 331H.

jurisdiction. Accordingly, at least a portion of the obligations had to be performed in this Court's area of jurisdiction.

[55] In the circumstances, I am satisfied that this Court has the required jurisdiction to hear and determine the Summary Judgment Application.

SECOND ISSUE: JURISDICTION TO DETERMINE THE ACTION

[56] My finding that this Court has the requisite jurisdiction to hear and determine the Summary Judgment Application is not intended to be binding on any other Court required to determine the aspect of the jurisdiction of the Gauteng Local Division to hear and determine the Action.

[57] Any other Court that may be required to finally determine the Special Plea of lack of jurisdiction may hear additional evidentiary facts that could affect the determination of the Special Plea.

[58] In the circumstances, my finding in respect of the First Issue relates only to the Summary Judgment Application, is not binding on any other Court, and is not to be regarded as *res judicata*.

THIRD ISSUE: THE ASPECT OF NON-JOINDER

[59] A party must be joined to legal proceedings if that party has a direct and substantial interest in any order the Court might make, or if such

an order cannot be sustained or carried into effect without prejudicing that party.¹⁷

[60] Such a party is referred to as a “*necessary party*”. A “*necessary party*” is a party that has a direct and substantial interest in the subject matter of the litigation which may be affected prejudicially by the order of the court.¹⁸

[61] The concept of a “*direct and substantial interest*” has been considered in a number of matters over time and has been classified as a legal right which may be affected by an order made in the proceedings.

[62] In the matter of *Amalgamated Engineering Union v Minister of Labour*¹⁹, Fagan JA, held that the court would not determine issues in which a third party may have a “*direct and substantial interest*” without being satisfied that the rights of such third party would not be prejudicially affected by its judgment.

[63] In the matter of *Henri Viljoen (Pty) Ltd v Awerbuch Brothers*²⁰, Horwitz AJP interpreted “the direct interest” referred to in the Amalgamated Engineering matter as:

“...an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation”.

¹⁷ One South Africa Movement v President of the Republic of South Africa 2020 (5) SA 516 (CC) at para [22]

¹⁸ South African History Archive Trust v South African Reserve Bank 2020 (6) SA 127 (SCA) at para [30]; Ex Parte Pearson and Hutton NNO 1967 (1) SA 103 (E) at 107C

¹⁹ 1949 (3) SA 637 (AD).

²⁰ 1953 (2) SA 151 (O)

[64] In the matter of *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC), the Constitutional Court stated that what constitutes a direct and substantial interest is “*the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court*”.

[65] The test for obligatory joinder was set out by the Supreme Court of Appeal in the matter of *ABSA Bank Limited v Naude NO*,²¹ as follows:

“The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined”.

[66] In the matter of *Judicial Service Commission and Another v Cape Bar Council and Another*²² the Supreme Court of Appeal held that:

“It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court.”

[67] The Defendant contends that the Loan Agreement and the Addendum thereto should be read together with the Shareholders Agreement.

[68] The Defendant referred to clause 7.7.3 of the Shareholders Agreement, which recorded, *inter alia*, that in the event of a shareholder or director providing a guarantee, and a call is made upon such guarantee by a third party creditor, such director or shareholder would have a right of recourse, on a pro rata basis, against any other director or shareholder.

²¹ [2015] ZASCA 97 (1 June 2015) at para [10]

²² 2013 (1) SA 170 (SCA) at para [12]

- [69] The Defendant also states that Seymour was the founder of Simplyfai, was the sole director of Simplyfai at the time of its liquidation, and is also a co-surety and co-debtor for the obligations of Simplyfai.
- [70] The Defendant alleges that the decision by the Plaintiff not to join Seymour raises questions as to the Plaintiff's motivation and whether such omission is to the Defendant's prejudice.
- [71] The Defendant's counsel submitted that having regard to such aspects, Seymour "*at the very least, stands to be joined to these proceedings;*".
- [72] It is trite that a co-surety is entitled to proceed in the exercise of his right of recourse against any other co-surety (and the principal debtor) for payment for the full, or a portion, of the debt paid.
- [73] Clause 7.7.3 of the Shareholders Agreement is simply a restatement of such trite principle and does not render the joinder of Seymour a necessary joinder.
- [74] In circumstances where a surety has renounced the benefits of excussion and division, which renunciation the Defendant has admitted, a co-surety cannot insist on the joinder of any other co-sureties by the plaintiff.
- [75] In the matter of *Burger v Rand Water Board and Another*²³ the Supreme Court of Appeal held that the right to demand joinder is limited to specified categories of parties, and parties who have a direct and substantial interest.

²³ 2007 (1) SA 30 (SCA) at para [7]; see also *United Watch and Diamond Company (Pty) Ltd v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415E=F; *Boshoff v Propinvest Eleven (Pty) Ltd* 2007 JDR 0749 (W) at para [25].

[76] Co-sureties do not fall into such recognised categories of parties with respect to whom joinder is necessary, and co-sureties do not have a “*direct and substantial interest*”, but rather an indirect interest, being a financial interest, in litigation involving a claim against one of the co-sureties.

FOURTH ISSUE: EXCIPIABILITY OF THE PARTICULARS OF CLAIM

[77] The Defendant submitted that the Plaintiff's Particulars of Claim are excipiable.

[78] The Defendant also submitted that if a plaintiff's particulars of claim are found to be excipiable, summary judgment cannot be granted.

[79] The Defendant's counsel raised in his Heads of Argument, and during argument, that the Plaintiff is obliged to allege and prove, not only the terms of the Loan Agreement (and the Addendum), but also compliance with any preceding or reciprocal obligations.

[80] In such regard, the Defendant's counsel referred me to, *inter alia*, the matter of *Nkengana and Another v Schnetter and Another*²⁴ where it was stated as follows at paragraph [12]:

“It is settled law that every party to a binding contract who is ready to carry out its own obligations under it has a right to demand from the other party, so far as it is possible, performance of that other party's obligations in terms of the contract.”

²⁴ [2011] 1 All SA 272 (SCA); 2010 JDR 0523 (SCA).

[81] The principle is not strictly applicable to this Summary Judgment Application, but simply illustrates the concept of reciprocal or mutual obligations.

[82] Defendant's counsel also referred me to the matter of *RM van de Ghinste & Company (Pty) Ltd v Van de Ghinste*²⁵, where the Court (King AJ) dealt in detail with the concept of reciprocal obligations, and the aspect of performance applicable to contracts imposing reciprocal obligations²⁶.

[83] The legal principles set out in such matter that are applicable to this Summary Judgment Application are:

[83.1] In a contract in which reciprocal obligations are created, neither party may demand performance from the other unless he has himself performed or tendered performance, or is excused from performance; and

[83.2] A plaintiff claiming performance of a contractual obligation must allege that he has made performance, or must tender performance, or must allege that he is excused from performance.

[84] In the matter of *Crispette and Candy Company Ltd v Oscar Michaelis NO and Another*²⁷ it was held that where a plaintiff sues on a contract, in circumstances where his right to such performance is conditional on performance of a reciprocal obligation, the plaintiff must plead that

²⁵ 1980 (1) SA 250 (C).

²⁶ At 252G-254A.

²⁷ 1947 (4) SA 521 (A) at 537; See also *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A).

such reciprocal obligation has been performed, or must tender performance.

[85] In terms of the Loan Agreement, the Plaintiff was to make payment of an amount of R1 500 000.00 to Simplyfai within 5 days of the signature of the Loan Agreement.

[86] There is no allegation in the Particulars of Claim that the amount of R1 500 000.00 was paid to Simplyfai.

[87] It was submitted, on behalf of the Defendant, that the failure to make such necessary allegation renders the Particulars of Claim excipiable, and that accordingly Summary Judgment cannot be granted.

[88] In the Affidavit filed in support of the Summary Judgment Application, the Plaintiff alleges that in terms of the Loan Agreement she loaned an amount of R1 500 000.00 to Simplyfai. This allegation is not absolutely clear, as it relates to the terms of the Loan Agreement, rather than what factually occurred.

[89] In the Affidavit Resisting Summary Judgment, the Defendant does not specifically deal with the issue of payment or receipt of the amount of R1 500 000.00.

[90] The Addendum to the Loan Agreement does not record that the amount of R1 500 000.00 was paid to Simplyfai.

[91] It can however be inferred from the letter sent by Cyber Horizon Holdings (Pty) Ltd to Seymour and Simplyfai, dated 30 July 2018, that the amount of R1 500 000.00 was paid by the Plaintiff to Simplyfai.

- [92] An inference is however not enough to create a cause of action for the Plaintiff.
- [93] A plaintiff seeking summary judgment must, in the affidavit filed in support of summary judgment verify the cause of action as it appears in the particulars of claim. A plaintiff cannot “*plead*” a cause of action or remedy a defective cause of action in the supporting affidavit.²⁸
- [94] The Plaintiff’s counsel submitted that the advance of the amount of R1 500 000.00 was recorded in an annexure to the Defendant’s Affidavit Resisting Summary Judgment and that it was implied that payment was made.
- [95] If a Plaintiff has failed to allege a proper and complete cause of action in his particulars of claim, a Court must refuse summary judgment²⁹. Whilst the principle was established prior to the amendment to Rule 32, it clearly remains applicable to summary judgment applications, having regard to the requirement in Rule 32(2)(b) that the Plaintiff must verify the cause of action. If there is no proper cause of action, there would be nothing for the Plaintiff to verify.
- [96] The Particulars of Claim are clearly excipiable in that the Plaintiff has failed to allege that she complied with her reciprocal obligations (or was excused from doing so) in terms of the Loan Agreement.

²⁸ *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 GP.

²⁹ *Transvaal Spice Works & Butchery Requisites (Pty) Ltd v Compen Holdings (Pty) Ltd* 1959 (2) SA 198 (W) at 200; *Geyer v Geyer’s Transport Services (Pty) Ltd* 1973 (1) SA 105 (T).

[97] It should also be mentioned that in the absence of an allegation of the precise amount that has been advanced, a claim for payment cannot be said to be based on a "liquidated amount of money."

[98] In the circumstances, no complete cause of action has been pleaded, and Summary Judgment must be refused.

FIFTH ISSUE: IS THE NATIONAL CREDIT ACT APPLICABLE TO THE LOAN AGREEMENT

[99] In terms of Section 130(3)(a) of the National Credit Act, a Court may not determine any matter in respect of a credit agreement to which the National Credit Act applies, unless the procedures required by Sections 127, 129 or 131 have been complied with.

[100] There is clearly a dispute as to whether or not the National Credit Act is applicable to the Suretyship.

[101] The Defendant contends that the recordal in the Loan Agreement at clause 12, to the effect that the National Credit Act does not apply, as Simplyfai has an asset value in excess of R1 000 000.00 is not factually correct.

[102] The Plaintiff relies on clause 12 of the Loan Agreement for its submission that the National Credit Act does not apply to the Action.

[103] The Plaintiff also submitted that the Loan Agreement is a large agreement as described in Section 9(4) of the National Credit Act, but such allegation was not made in the Particulars of Claim.

[104] It was also submitted on behalf of the Plaintiff that based on the Defendant's Affidavit Resisting Summary Judgment, the parties were not at arms' length.

[105] It is clear that whether or not the National Credit Act is applicable to the Loan Agreement (and the Suretyship) can only be determined by way of evidence in due course.

[106] As I have already found that the Summary Judgment Application should be dismissed, there is no need for me to determine whether or not the National Credit Act is applicable. As already indicated above, I would not have been able to do so in summary judgment proceedings, as no evidence could be heard.

THE SIXTH ISSUE: THE CAUSE OF THE LIQUIDATION

[107] I have already found that Summary Judgment cannot be granted, and it is accordingly not necessary for me to determine this issue.

CONCLUSION

[108] I accordingly find that the Application for Summary Judgment must be dismissed.

COSTS

[109] I would have been inclined to order that costs should follow the result, and that the Plaintiff should pay the costs of the Summary Judgment Application.

[110] I have however taken into account that the Defendant did not raise an Exception to the Plaintiff's Particulars of Claim, and did not raise the lack of a proper cause of action in his Plea. The issue of excipiability was only raised for the first time in the Defendant's Heads of Argument.

[111] I have also taken into account that at the time of verifying the cause of action in the Affidavit filed in Support of the Summary Judgment Application, the Plaintiff ought to have ensured that there was a valid cause of action to verify.

[112] In the circumstances, I am of the view that it would be appropriate and just for each party to pay its own legal costs, and I will therefore make no order in respect of costs.

[113] I accordingly make the following Order:

[113.1] The Summary Judgment Application is dismissed.

[113.2] The Defendant is granted leave to defend the Action.



G NEL
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date of Judgment: **20 June 2022**

APPEARANCES

For the Plaintiff: Adv J G Dobie
Instructed by: Lindeque Van Heerden Attorneys

For the Respondent: Adv AJ Reyneke
Instructed by JP Joubert Attorneys