

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: **6th October 2022** Signature: _____

A handwritten signature in blue ink, appearing to be "H. [unclear]", is written over the signature line.

CASE NO: 12175/2021

DATE: 6TH OCTOBER 2022

In the matter between:

FIRSTRAND BANK LIMITED t/a WESBANK

Plaintiff

and

STUART, BARRY

Defendant

Coram: Adams J

Heard: 3 October 2022

Delivered: 6 October 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to *SAFLII*. The date and time for hand-down is deemed to be 14:00 on 6 October 2022.

Summary: Civil procedure – Exception to particulars of claim – instalment sale agreement – National Credit Act – interpretation of provisions – plaintiff contends that particulars of claim are vague and embarrassing and do not disclose cause of action – it must be demonstrated that upon any construction of the particulars, no cause of action is disclosed – exception dismissed.

ORDER

- (1) The defendant's exception to the particulars of plaintiff's claim is dismissed with costs.
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JUDGMENT

Adams J:

[1]. The parties shall be referred to as referred to in the main action, in which the plaintiff sues the defendant *inter alia* for the return of a motor vehicle, which the defendant acquired from the plaintiff pursuant to an Instalment Sale Agreement in terms of the National Credit Act¹ ('the NCA'). The instalment sale agreement was concluded between the parties on 9 March 2020, and a copy of the said agreement is attached to the particulars of plaintiff's claim.

[2]. As already indicated, the plaintiff's cause of action is based on a written instalment sale agreement and in its particulars of claim, the plaintiff pleads that the 'material express, alternatively implied, further alternatively tacit terms of the agreement' are those listed in the particulars of claim. The defendant objects to the way in which the plaintiff has pleaded the 'material' terms of the contract as being either express or implied or tacit. The defendant therefore excepts to the particulars of plaintiff's claim, and one of the grounds of exception relates to the foregoing.

[3]. The supposed difficulty that the defendant has with this part of the particulars of claim is that, according to him, the plaintiff cannot rely on implied or tacit terms of an express agreement. This proposition is misguided. The defendant also takes issue with the fact that the plaintiff's particulars of claim are unclear as to which terms of the agreement are express or implied or tacit. Again, it has to be said that this complaint is baseless if for no other reason than the fact

¹ National Credit Act, Act 34 of 2005;

that the material terms of the agreement are those listed and it is irrelevant whether they are express, implied or tacit. There is therefore nothing vague and embarrassing about this averment in the particulars of plaintiff's claim,

[4]. The second ground on which the defendant's exception is based is the fact that the instalment sale agreement and the so-called 'pre-agreement quotation' are dated the same day, being 9 March 2020. This means, so the defendant contends, that the instalment sale agreement was concluded in contravention of s 92(3)(b) of the NCA in that the five day 'cooling off' period provided for in the aforementioned section was not complied with. Therefore, so I understand the defendant's argument, the plaintiff's cause of action is bad in law – it contravenes the provisions of the NCA. This is an astounding proposition if regard is had to the wording of the s 92(3)(b). But what is even more bizarre is the fact that at a fundamental level this contention is legally flawed because it is abundantly clear that, at best for the defendant, the section is open to an interpretation which favours the plaintiff's cause.

[5]. I return momentarily to the grounds of the exception and its sustainability after a short discussion on the general principles relating to exceptions, which I now turn my attention to and which I deal with in very broad strokes.

[6]. 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.

[7]. 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.

[8]. 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.

[9]. On the basis of these general principles, the first ground of exception falls to be rejected. As already indicated, the particulars of plaintiff's claim can and should be interpreted on the basis that the material terms of the instalment sale agreement are those listed as being either express or implied or tacit. Those are the terms and it matters little, for purposes of excipiability, whether they are express or tacit or implied, which are issues which will be dealt with by the evidence.

[10]. As regards the second ground on which the exception is based, s 92 of the NCA in the relevant part reads as follows: -

'(2) A credit provider must not enter into an intermediate or large credit agreement unless the credit provider has given the consumer

(a) a pre-agreement statement

(i) in the form of the proposed agreement; or

(ii) in another form addressing all matters required in terms of section 93; and

(b) a quotation in the prescribed form, setting out the principal debt, the proposed distribution of that amount, the interest rate and other credit costs, the total cost of the proposed agreement, and the basis of any costs that may be assessed under section 121 (3) if the consumer rescinds the contract.

(3) Subject only to subsection (4), sections 81 and 101 (1) (d) (ii), for a period of five business days after the date on which a quotation is presented in terms of subsection

(2) (b)

(a);

(b) with respect to an intermediate or large agreement, the credit provider must, at the request of the consumer, enter into the contemplated credit agreement at an interest rate or credit cost that

(i) is at or below the interest rate or credit cost quoted; or

- (i) is higher than the interest rate or credit cost quoted by a margin no greater than the difference between the respective prevailing bank rates on the date of the quote, and the date the agreement is made.'

[11]. These provisions, properly interpreted, simply affords the consumer the right to accept a quotation for a period of five days from the date of such quotation. In other words, the Credit Provider is required to furnish a quotation, which can be accepted by the consumer immediately or for a period of up to five days, which would conclude an instalment sale agreement. It is difficult to comprehend on what basis the defendant attaches to the aforesaid clauses the interpretation sought by him. The wording of the said section most certainly does not lend itself to such an interpretation.

[12]. The second ground of exception must therefore suffer the same fate as the first ground and falls to be rejected.

[13]. For all of these reasons, the defendant's exception appears to be ill-advised and falls to be dismissed.

Costs

[14]. 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*².

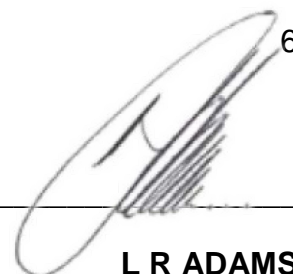
[15]. Applying this general rule, the defendant should be ordered to pay the plaintiff's costs of the exception and the exception application.

Order

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

- (1) The defendant's exception to the plaintiff's particulars of claim is dismissed with costs.

² *Myers v Abramson*, 1951(3) SA 438 (C) at 455;

**L R ADAMS**

*Judge of the High Court
Gauteng Division, Johannesburg*

HEARD ON:	3 rd October 2022
JUDGMENT DATE:	6 th October 2022 – handed down electronically.
FOR THE PLAINTIFF / RESPONDENT:	Advocate Jason Govender
INSTRUCTED BY:	Smith Van der Watt Incorporated, Krugersdorp
FOR THE DEFENDANT / EXCIPIENT:	Advocate Muhammad Amojee
INSTRUCTED BY:	Rosseau Incorporated, Sandton