**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

**CASE NUMBER: 2019/34170**

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

01 DECEMBER 2022

In the matter between:

| | |
|---|---|
| **INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA** | Plaintiff |
| and | |
| **PETER WILLIAMS HUGHES** | First Defendant |
| **CAREL VISSER** | Second Defendant |
| **KEVIN JOHN ALBERTS** | Third Defendant |
| **SEAN THOMPSON** | Fourth Defendant |
| **LENA LYNNECE JANSEN** | Fifth Defendant |
| **PAUL VISSER** | Sixth Defendant |
| **RONALD ALEXANDER BRINK** | Seventh Defendant |

*This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be 10h00 on 01 December 2022.*

**JUDGMENT**

**REDMAN AJ**:

[1] The seventh defendant ("**the excipient**") excepts to the plaintiff's particulars of claim on the basis that they lack averments to sustain a cause of action, alternatively are vague and embarrassing.

[2] The plaintiff's claim against the excipient is based on a guarantee agreement signed by him (and the other defendants) on 20 May 2014 in terms of which, *inter alia*, the excipient irrevocably and unconditionally guaranteed as a primary obligation in favour of the plaintiff the due, proper and punctual performance by Spring Romance Properties 34 (Pty) Limited t/a Impahla Clothing ("**Impahla**") of the guaranteed liabilities defined in the guarantee agreement. The excipient further undertook to the plaintiff that each time a guarantee claim notice was delivered to it, it would within three business days after receipt thereof pay all sums claimed in such the guarantee claim notice.

[3] The guarantee agreement guaranteed amounts owed or which may become owing to the plaintiff by Impahla under certain finance documents.

[4] The liability under the guarantee was limited to R2 million for each of the signatories, jointly and severally the one paying the other to be absolved.

[5] The plaintiff in its particulars of claim pleads that prior to, and subsequent to, the signing of the guarantee agreement Impahla entered into three written credit loan agreements with the plaintiff, namely –

5.1. a loan agreement dated 7 October 2011 in terms of which the plaintiff made available and advanced a loan of R4 million to Impahla, which amount has been fully repaid;

5.2. a loan agreement dated 2 June 2014 in terms of which the plaintiff made available and advanced a loan of R2 million to Impahla, and in terms of which there was an amount of R1 379 455,07 outstanding (the second loan agreement);

5.3. a loan agreement dated 24 February 2016 in terms of which the plaintiff made available and advanced a loan of R10 million to Impahla, and in terms of which there was an amount of R11 176 576,87 outstanding (the third loan agreement).

[6] The plaintiff's claim against the excipient was limited to an amount of R2 million under the guarantee agreement in respect of both the second and third loan agreements. The total claim against the excipient is for payment of the globular amount of R2 million together with costs and interest.

[7] The excipient excepts to the plaintiff's particulars of claim on nine grounds, some of which overlap. Before addressing the grounds of exception it is apposite to reiterate the Court's approach in these matters.

[8] In order to establish that particulars of claim fail to disclose a cause of action, the excipient bears the onus of establishing that on every reasonable interpretation that can be placed on the particulars of claim no cause of action is disclosed. See *Francis v Sharp and Others* 2004 (3) SA 230 (C) at 237G.

[9] An exception must be determined on the pleadings as they stand and on the assumption that the facts contained therein are true. (See *Stewart v Botha* 2008 (6) SA 310 (SCA) at paragraph [4]). This requires a holistic analysis of the pleadings. The purpose of an exception is to dispose of the entire matter and to avoid the

leading of any evidence. (See *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F-I).

[10] One cannot look at the individual paragraphs or prayers in isolation. "*Cause of action*" was defined in *McKenzie v Farmers' Cooperative Meat Industries Ltd* 1922 (AD) 16 at 23 to mean "*every fact which it will be necessary for the plaintiff to prove, if traversed in order to support his right to the judgment of the court*".

[11] When approaching an exception a court should not adopt an overly technical approach and minor blemishes should not be elevated (See, for example *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at para [15]).

[12] In *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 221A-E, the Court described the process in determining exceptions on the grounds that a pleading is vague and embarrassing:

> "*An exception to a pleading on the ground that it is vague and embarrassing involves a twofold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced …. As to whether there is prejudice, the ability of the excipient to produce an exception proof plea is not the only, or indeed the most important test …. If that were the only test the object of pleadings to enable parties to come to trial, prepare to meet the other's case and not be taken by surprise may well be defeated. Thus it may be possible to plead to particulars of claim which can be read in any number of ways by simply denying the allegations made, likewise to a pleading which leaves one guessing as to the actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing."*

[13] It follows that averments in a pleading which are contradictory and which are not pleaded in the alternative are vague and embarrassing, one can but be left guessing as to the actual meaning if any conveyed by the pleadings. Pleadings are required to be drafted in a lucid, logical and intelligible form (c.f. *Trope supra*). The

need for clarity and conciseness is of crucial importance when a matter involves complex legal or factual issues.

[14] Although a Court will adopt a benevolent approach to the consideration of pleadings, it should not allow a matter to proceed in circumstances where the issues have not been properly defined and encapsulated in the pleadings. In *Jowell v Bramwell Jones* 1998 (1) SA 836 (W) at 902J – 903E, Heher J set out the general principles applicable, namely:

> "*(a) Minor blemishes are irrelevant;*
>
> *(b) Pleadings must be read as a whole; no paragraph can be read in isolation;*
>
> *(c) A distinction must be drawn between the facta probanda or primary factual allegations which every plaintiff must make, and the facta probantia, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence;*
>
> *(d) Only facts need be pleaded; conclusions of law need not be pleaded;*
>
> *(e) Bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them implied allegations and the pleadings must be so read; c.f. Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 (4) SA 371 (D) at 377, 379B, 379G-H. Thus an allegation of negligent conduct, especially where the negligence is particularised, implies that a reasonable person would not have so acted or would have acted otherwise. So, in a case involving a motor vehicle collision, it is sufficient to plead that the defendant acted negligently in particular respects. This implied that a reasonable person would not have so acted. If*

*damage is alleged to flow therefrom this implies in turn that there was a breach of a legal duty not to act so."*

[15] If a party adequately knows what the plaintiff's case is and its attorneys are able to take instructions and record a meaningful response to such pleadings, such pleading should not be struck down as excipiable. See *Absa Bank v Boksburg Transitional Local Council (Government of the Republic of South Africa, third party***)** 1997 (2) SA 415 (W) at 418.

[16] The fundamental test which is applicable is whether the plaintiff has made out a case which is clear enough to enable the respondent to plead thereto. See *Venter and Others NNO v Barrett* 2008 (4) SA 639 (CPD) at 644G. As stated in *Luttig v Jacobs* 1951 (4) SA 563 (O) at 571A-B:

*"[I]t is essential for the defendant to know what the contract is on which the plaintiff is relying ..."*

If the particulars of claim leave this in doubt they are excipiable.

[17] The nine grounds of exception are dealt with below.

**First and sixth grounds of exception – fulfilment of conditions precedent.**

[18] The plaintiff's claim is divided into two parts. Claim 1 addresses Impahla's liability under the second loan agreement and Claim 2 addresses its liability under the third loan agreement. Both the second and third loan agreements contain conditions precedent. The second loan agreement recorded the following conditions precedent:

*"4. CONDITIONS PRECEDENT*

*4.1. The advance of any Loan by the [plaintiff] is subject to the following conditions precedent being fulfilled (or waived by the [plaintiff] in writing) to the satisfaction of the [plaintiff]:*

*4.1.1 The execution and delivery of the relevant Finance Documents to the [plaintiff];*

*4.1.2 The Borrower shall have provided the [plaintiff] with a resolution of its Board of Directors in the form provided for in annexure "A1" hereto authorising conclusion of the Finance Documents to which it is a party;*

*4.1.3 The Borrower shall have furnished the [plaintiff] with all documents as may be required by the [plaintiff] in relation to compliance by the [plaintiff] with the Financial Intelligence Centre Act. No. 38 of 2001, as amended, in relation to the transactions contained in the Finance Documents;*

*4.1.4 The Borrower shall have furnished and/or shall ensure that the [plaintiff] is furnished with the Security and, to the extent applicable, confirmation that all obligations in respect of Section 45 of the Companies Act relating to the Security shall have been complied with;*

*4.1.5 The Borrower shall have furnished the [plaintiff] with a certified copy of its securities register;*

*4.1.6 The Borrower shall have procured that each shareholder delivers the letter of undertaking in the form provided for in annexure "D" form pursuant to which each shareholder undertakes to procure that the Borrower complies with its obligations under the Finance Documents, ensure that the Borrower does not issue any further shares and does not dispose of its shares in the Borrower;*

*4.1.7 The Borrower shall have furnished the [plaintiff] with a signed debit order form in the form provided for in annexure "C" hereto; and*

*4.1.8 The Borrower shall have furnished the [plaintiff] with written confirmation from the Borrower's auditor, confirming current shareholders and directors of the Borrower."*

[19] The conditions precedent contained in the third loan agreement were similar to the second loan agreement but included the following conditions:

*"4.1.3 The Borrower shall have furnished the [plaintiff] with a bank certified debit order, duly signed and completed by the Borrower substantially in the form of annexure "B" hereto;*

*4.1.8 The Borrower shall have furnished the [plaintiff] with the written consent obtained from Absa Bank Limited for the Borrower to -*

*4.1.8.1 enter into the Loan Agreement with the [plaintiff] for the loan and to provide the Security, in format contained in annexure "E" hereto; and*

*4.1.8.2 specifically to provide second the mortgage bond referred to in clause 1.`9.2.6 above;*

*4.1.9 The Borrower shall have furnished the [plaintiff] with an amendment to its lease agreement concluded with Fusion Properties dated 12 July 2012, in terms of which the property situated at [....] P [....] Avenue, Epping Industria was leased, such that the terms of this lease agreement is extended to be a period equal to or surpass the Term of the Loan;*

*4.1.10 The Borrower shall have furnished the [plaintiff] with undertakings signed by each of Fusion Properties and Kitunda Properties in their capacities as landlords, acknowledging the Lenders interest in the existing and new general and special notarial bonds registered and/or to be registered over certain assets contained / to be contained on each of their premises, and that each landlord's rights under their lease agreements and at law may be made subject to the said bonds.*

*4.1.11 The Borrower shall have furnished the [plaintiff] with a fully executed lease agreement between it and Acucap Investments (Proprietary) Limited for the building situated at Portion of 3rd floor Park Terraces, Erf [....], Mowbray, which agreement should include an undertaking by the landlord acknowledging the [plaintiff's] interest in the existing and new general and special notarial bonds registered and/or to be registered over certain assets contained / to be contained on each on the premises, and that the landlord's rights under their lease agreement and at law be made subject to the said bonds."*

[20] The conditions precedent in respect of the loan agreements are addressed in the particulars of claim as follows:

*"The advance of the loan by the Plaintiff was subject to the Conditions Precedent as contained in para 4 of the ... Loan Agreement being fulfilled (or waived by the Plaintiff in writing), which said Conditions Precedent were fulfilled to the satisfaction of the Plaintiff, alternatively waived by the Plaintiff;"*

[21] The excipient excepts to the manner in which the particulars of claim addresses the fulfilment or waiver of the conditions precedent. It complains that the plaintiff has failed to allege when and in what manner the conditions were fulfilled, which conditions were fulfilled and which conditions were waived in circumstances where they could not have both been fulfilled and waived. It also complains that there is no allegation that any alleged waiver was in writing.

[22] In argument it was contended on behalf of the excipient that the allegations of fulfilment of the conditions precedent and waiver are mutually destructive and cannot both be relied on by the plaintiff. I, do not, however, understand the pleading to suggest that the applicant is simultaneously relying on both the fulfilment and the waiver of any of the conditions. The alleged waiver was clearly pleaded in the alternative.

[23] The conditions precedent described in the loan agreements are conditions for the benefit of the plaintiff, primarily to ensure that Impahla's indebtedness was secured. No doubt it is for this reason that the conditions were required to be fulfilled to the satisfaction of the plaintiff.

[24] Significantly the conditions prescribed in clause 4 of the loan agreements do not appear to govern the whole of the loan agreements but merely place conditions on the advancement of any loans thereunder. I am alive to the fact that a court should exercise caution when deciding questions concerning the interpretation of contracts on exception. The plaintiff, in respect of both loan agreements, pleads that it complied with all its duties and obligations "*insofar as the asset and working capital loans were advanced to Impahla at Impahla's special instance and request and utilised by Impahla*".

[25] The manner in which each condition was fulfilled or waived and when this was done is a matter for evidence. For the purposes of pleading it is unnecessary for the particulars of claim to contain any further detail in this regard.

[26] In regard to the alleged waiver, however, the loan agreements specified that any waiver had to be in writing. The failure to allege a written waiver renders the particulars of claim vague and embarrassing. The excipient would be entitled to know whether any alleged waiver was compliant with the provisions of the loan agreements.

[27] The first and sixth grounds of exception are accordingly upheld only to the extent that the plaintiff has failed to allege that any waivers relied on were in writing.

**Grounds 2 and 7 – Draw-down conditions**

[28] The second and third loan agreements provided that the plaintiff would "*not be obliged to make any advances unless the draw-down conditions had been satisfied in form and substance satisfactory to the plaintiff*".

[29] The draw-down conditions did not place any obligation on the plaintiff. The provisions merely entitled the plaintiff to refuse to make any advances if the conditions recorded therein were not satisfied. In the light of the plaintiff's allegations that monies were lent and advanced pursuant to the second and third loan agreements, it was unnecessary for it to make any reference to the draw-down conditions which do not constitute an essential allegation to complete its cause of action. The allegation that the draw-down conditions were "*satisfied in the form and substance satisfactory to the plaintiff alternatively waived by the plaintiff*" is sufficient to enable the excipient to plead thereto. The alleged contradictory mechanisms by which the draw-down conditions were satisfied, i.e. being fulfilled alternatively waived, are pleaded in the alternative.

[30] Accordingly, the second and seventh grounds of exceptions cannot be sustained.

**Third and eighth grounds**

[31] In paragraph 13.9.2 of its particulars of claim the plaintiff pleads that the full amount due under the second loan agreement became payable fourteen days after the plaintiff had given notice in writing of a breach to Impahla. A similar allegation is made in respect of the third loan agreement.

[32] The excipient is entitled to know what amount is owing by Impahla under the relevant loan agreements. It is those amounts that, according to the plaintiff, the excipient has guaranteed. Impahla's obligation to make payment of the full amount of the loans would thus only arise after the 14-day notice had been given. The failure to allege that the 14-day breach notice was given and that Impahla had failed to remedy its breach is a necessary allegation to sustain a cause of action based on the guarantee agreement. The plaintiff's failure to make this allegation renders the particulars of claim excipiable.

[33] Grounds 3 and 8 of the exception are accordingly upheld.

**Fourth ground**

[34] In paragraph 21 of the plaintiff's particulars of claim, it is pleaded that a letter of demand was served by the Sheriff at the *domicilium* address of *inter alia*, the excipient. In the letter of demand reference is made to three certificates confirming the outstanding guaranteed liability, yet no certificates were attached to the particulars of claim. The excipient contends that in the absence of these certificates it is not possible to ascertain whether the demand was as a proper demand and alleges that the particulars of claim are accordingly excipiable.

[35] I do not agree. Sufficient allegations have been made in the particulars of claim to enable the excipient to plead thereto. The plaintiff has alleged that a letter of demand was served and attaches a copy thereof. There is no reason why the excipient cannot address these allegations in its plea.

**Fifth ground**

[36] The excipient avers that the third loan agreement was not a loan agreement to which the guarantee agreement related alternatively no and/or insufficient allegations have been made by the plaintiff from which this conclusion can be drawn. The determination of this ground of exception necessarily involves an interpretation of the guarantee agreement. The excipient bears the onus of persuading the Court that on every reasonable interpretation no cause of action has been revealed. See *Francis v Sharp supra*.

[37] The guarantee agreement guaranteed "*the due, proper and punctual performance by [Impahla] of the Guaranteed Liabilities including the full, prompt and complete payment of all the guaranteed liabilities when and as same shall become due*". The Guaranteed Liabilities were defined in the guarantee to mean:

> *"all present and future monies and liabilities (whether actual or contingent and whether owed jointly or severally or in any other capacity whatsoever) which are now, or which may hereafter become owing by [Impahla] to [the plaintiff] in terms of the Finance Documents together with all damages and all costs, charges and expenses incurred by [the plaintiff] in connection with*

*a breach by [Impahla] of its obligations under the Finance Documents and which [the plaintiff] is entitled to recover from [Impahla] in terms of the Finance Documents, including all items which would be Guaranteed Liabilities but for the winding-up, absence of legal personality or incapacity of [Impahla] of any statute of limitations and a reference to the "Guaranteed Liability" shall be to any one or more of the Guaranteed Liability as the context requires."*

[38] Clause 1.1.5 of the guarantee agreement provided that "*Finance Document*" would bear the meaning ascribed to that term in the "*Loan Agreemen*t". "*Loan agreement*" was defined to mean the loan agreement concluded or to be concluded between Impahla and the plaintiff "*on or about the Signature Date*". The "*Signature Date*" was defined to be the date of signature of the guarantee agreement by the party last signing (being 4 June 2014).

[39] The excipient argues that because the second loan agreement was the only loan agreement signed on or about 4 June 2014, the guarantee only covers Impahla's liability under that loan agreement. This conclusion, however, does not accord with the terms of the guarantee agreement. The guarantee covered liability under the Finance Documents. The meaning of "*Finance Documents*" was "*ascribed*" in the loan agreement. The second and third loan agreements record the term "*Finance Documents*" to mean –

"1.8.1 *this loan agreement;*

*1.8.2 any one or more Security*";

*1.8.3* "*any other agreement or document designated as a Finance Document by written agreement between [the plaintiff] and [Impahla*]".

[40] If one were to accept that reference to the "Loan Agreement" in the guarantee agreement is reference to the second loan agreement, one would still be left with the question as to whether the third loan agreement constitutes a document

designated as a Finance Document by written agreement between the plaintiff and Impahla.

[41] In the particulars of claim the plaintiff alleges that the guarantee served as security for Impahla's indebtedness towards the plaintiff in terms of the third loan agreement. I am not persuaded that on every reasonable interpretation the third loan agreement did not constitute a Finance Document to which the guarantee related. The allegation that the third loan agreement was secured by the guarantee provides sufficient particularity to enable the excipient to understand the plaintiff's case and to plead thereto.

**Ninth ground**

[42] Under claim 1 of the particulars of claim (relating to the second loan agreement) the plaintiff avers that there is an amount of R1 379 455,07 due by Impahla. Under claim 2 (relating to the third loan agreement) it is averred that there is an amount of R11 176 576,87 due. The plaintiff's prayer for judgment, however, is limited to R2 million.

[43] The excipient claims that the failure to delineate between the first and second claims in the prayers renders the particulars of claim excipiable.

[44] The plaintiff's claim against the excipient is not based on the two loan agreements, it is based on the guarantee agreement. The plaintiff has alleged that Impahla is indebted to it in an amount in excess of R2 million. The plaintiff has correctly limited its claim against the excipient to R2 million.

[45] The pleadings are not vague and embarrassing in this regard and the ninth exception accordingly falls to be dismissed.

[46] Although the excipient was successful in four out of the nine exceptions it was unsuccessful in five. It cannot be contended that either party was substantially successful in this application and in the exercise of my discretion I make no order as to costs.

[47] In the result, I make an order in the following terms:

1. Exceptions one, three, six and eight are upheld.

2. Exceptions two, four, five, seven and nine are dismissed.

3. The plaintiff is afforded a period of fifteen days from date of this Order to amend its particulars of claim.

**N. REDMAN**
Acting Judge of the High Court
Gauteng Division, Johannesburg

**Heard**: 22 November 2022

**Judgment**: 01 December 2022

Appearances:

**For Plaintiff**: Z. Mokatsane

**Instructed by**: N. Meyer and Associates Inc.

**For Seventh Defendant**: L. Hollander

**Instructed by**: Smith Tabata Buchanan Boyes