

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

28/2/2014

CASE NO: 23733/12

In the matter between:

LAND AND AGRICULTURAL BANK OF SOUTH AFRICA

and

H. AL DEUR WAT NIE VAN TOEPASSING IS NIE	
(1) RAPPORTEERBAAR: JA/NEE.	
(2) VAN BELANG VIR ANDER REGTERS: JA/NEE.	
(3) HERSIEN. ✓	
28/02/2014	<i>[Signature]</i>
DATUM	HANDTEKERING

WESTSIDE TRADING 570 (PTY) LTD

1ST DEFENDANT

PETER JACOB SIHLANGU

2ND DEFENDANT

MANDLA JONATHAN SHUMA

3RD DEFENDANT

DESMOND KHALID GOLDING

4TH DEFENDANT

FIRST EXCIPIENT

LINDIWE MICHELLE MASEKO

5TH DEFENDANT

KENEILWE LYDIA SEBEGO

6TH DEFENDANT

JUDITH SUSAN BORNMAN

7TH DEFENDANT

GEZINA DOROTHEA VAN ROOYEN

8TH DEFENDANT

SECOND EXCIPIENT

NGWANE ROUX SHABANGU

9TH DEFENDANT

ANTON JOHANNES DU PLESSIS

10TH DEFENDANT

JUDGMENT

BAM, J

1. The two excipients, fourth and eight defendants, raised an exception against the plaintiff's particulars of claim. The claim against the defendant's was initially based on a written loan agreement but subsequently, after lodging of the exception, amended, substituting the cause of action with two other causes. The grounds of exception were however not amended and remained the same.
2. The exception is based thereon that the particulars of claim are vague and embarrassing and/or do not disclose a cause of action.
3. The grounds for the exception are the following:
 - (i) Failing to allege that the conditions in paragraph 2 of the loan agreement were fulfilled or waived;
 - (ii) Failure to allege, in respect of the settlement agreement or acknowledgement of liability, whether such agreement was oral or in writing, who represented the plaintiff and the company in liquidation (Westside Trading), and the date and place where the agreement was concluded; and
 - (iii) Failure to allege that a transaction between a third party and the company to which repayment in terms of the settlement agreement was allegedly subject, was concluded.
4. The amended particulars of claim were delivered on 23 October 2013. It was not opposed. The plaintiff now claims payment of R82 million based on an acknowledgement of liability and a suretyship. Despite the amendment the excipients, as alluded to above, persist with the exception based on the issues initially complained about, except for one issue which is not relevant, pertaining to a now deleted paragraph of the particulars of claim. The grounds of exception also include an objection in terms of Rule 18(6) in respect of par 27.2 of the present particulars of claim.

5. It was contended on behalf of the plaintiff that in view of the plaintiff now basing its claim on an acknowledgement of liability and not on the agreement between the plaintiff and the Company, as initially alleged in the Particulars of Claim, that the excipients' complaints, save for the objection in terms of Rule 18(6) against the averment contained in paragraph 27.2 of the amended particulars of claim, have fallen away.
6. It is common cause that the *Company* referred to in the particulars of claim is *Westside Trading 570 (Pty) Ltd* (in liquidation), represented by the liquidator, first defendant. The written agreement in question was concluded on 6 July 2006.
7. The two excipients, fourth and eighth defendants, are cited in their personal capacities. The plaintiff did not aver that the two excipients were parties to the said agreement or how they were involved with the business of the *Company*, except to aver that the two excipients were parties to a written deed of suretyship, attached to the particulars of claim s annexure "C". The plaintiff's case against the two excipients is clearly based on the alleged suretyship.
8. Mr Venter, appearing on behalf of the two excipients, submitted that the plaintiff was obliged to deal with the conditions precedent to which the agreement was subject to. In this regard the plaintiff's failure still caused the particulars of claim, despite the amendment, to be without a cause of action, alternatively, vague and embarrassing.
9. The excipients are also complaining about the lack of necessary averments in regards to paragraph 27.2 of the amended particulars of claim. In this paragraph the plaintiff referred to the contents of a letter dated 13 February 2009, attached to the particulars of claim as annexure "D", directed by the plaintiff to the Financial Director of the *Company*, Mr Golding. The letter contains, inter alia, the following:
"*... the Company and the plaintiff agreed to fully and finally settle the Company's indebtedness to plaintiff on payment of R82 Million.*"

10. The plaintiff further averred that the "*Company*" appended its signature to the letter and thereby acknowledged receipt of the letter..."

Annexure "*D*" was indeed signed by somebody representing the *Company*. Mr Seleka, appearing for the plaintiff, submitted it was signed by the first excipient. This was not contested.

11. Rule 18(6) is clear. It provides, amongst others, that when a party bases its case on an agreement it needs to state whether the agreement was oral or in writing and who represented the parties. The question arising in this matter is whether the plaintiff was obliged to be more specific in regards to the averments in par 27.2 of the amended particulars and whether the *conditions* referred to in the agreement should have been addressed.

12. Both counsel referred to *Nel and Others NNO v MacArthur 2003(4) 142 (T)*. In view of the ruling in that decision it is clear that a Court seized with an application of this nature has to consider the particulars of claim as a whole.

13. It is indeed so that the plaintiff in its amended particulars of claim still refers to the written agreement entered into between the parties. However the new cause of action does not rely on the initial agreement and the conditions referred to in the agreement. The basis for the claim has shifted to a totally different cause of action being the alleged acknowledgement of debt and the subsequent signing of the suretyship. In so far it concerns the two excipients, the plaintiff's claim is based on the written suretyship.

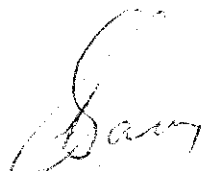
14. Accordingly, the excipients' complaint that the plaintiff failed to make averments in regards to whether the conditions in paragraph 2 of the agreement were fulfilled, or waived, seems to me not to be material as far as it may concern the new causes of action. In this regard I am in agreement with Mr Seleka that the applicant's complaints do not strike at the root of the plaintiff's cause of action, as it is required to do in order to be effective. The complaints seem to be of a peripheral nature and should not preclude the excipients from pleading to the plaintiff's averments in respect of the new

causes of action. The excipient's complaints seem to be directed to isolated issues in the particulars of claim. This is contrary to what was ruled in inter alia *Jowell v Bramwell-Jones* 1998(1) A 836(W) at 899F-G and the dictum in *Nel, supra*.

15. In considering the excipients grounds of exception, it is of importance to determine whether they are material and whether they affect the whole cause of action. In view of what the causes of action now are, I have arrived at the conclusion that the particulars of claim are not vague and embarrassing, and, in my view, comply with the provisions of Rule 18(6). The issues material to the excipients' alleged liability are sufficiently addressed to enable the excipients to plead. There was no need that the plaintiff had to be more specific. The excipients were sufficiently informed of what the case against them is based upon. The mere fact that certain disputes may exist between the parties in respect of certain provisions of the agreement does not affect the excipients' ability to plead to the averments. In my view those issues, if they remain in dispute, can be sorted out during the trial.

16. Accordingly the exception cannot succeed and the following order is made:

1. The exception is dismissed with costs.
2. The excipients are ordered to file their plea to the plaintiff's particulars of claim not later than 20 March 2014.



A J BAM JUDGE OF THE HIGH COURT
27 February 2014.