



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 35484/2020

(1) REPORTABLE: YES/NO (2) OF INTEREST TO OTHERS JUDGES: YES/NO (3) REVISED <div style="text-align: center;"> <div style="border-bottom: 1px solid black; display: inline-block; width: 100px;">5/5/21</div> DATE </div>	 <div style="border-bottom: 1px solid black; display: inline-block; width: 100px;"></div> SIGNATURE
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In the matter between:

JV GOLD BRIDGE (PTY) LTD

1ST EXCIPIENT/ DEFENDANT

VISSER CORNELIUS DU PLESSIS

2ND EXCIPIENT/ DEFENDANT

JACOBUS PETRUS GOOSEN

3RD EXCIPIENT/ DEFENDANT

and

**KAMONYAKA PROPERTY
DEVELOPMENTS (PTY) LTD**

RESPONDENT/ PLAINTIFF

JUDGMENT
On Exception

FRANCIS-SUBBIAH AJ

INTRODUCTION

[1] This is an opposed motion where the excipients being the defendants in the main action raise an exception to the plaintiff's (respondent's) particulars of claim in terms of Rule 23(1) of the Uniform Rules of Court. In particular they raise a lack of cause of action and/ or that the entire claim has prescribed.

[2] The excipients having noted the exception took no further steps to have the matter set down timeously for hearing within fifteen (15 days). The respondent took it upon itself to have the matter set down but complained of the excipients' failure to lodge an application for condonation because the exception had effectively lapsed. The respondent, in taking the step to set down the exception for hearing, has homogeneously conceded, accepted or re-instated the exception. On this premise the delay for setting down the exception is condoned and the matter proceeds without further delay to be argued on the merits.

[3] The parties henceforth will be referred to as in the main action as plaintiff and defendants.

[4] The plaintiff argued that raising prescription by way of exception is an incorrect procedure and in action proceedings should have been raised by way of a plea or a special plea. Conversely the defendants submit that a litigant cannot be denied an opportunity to raise an exception if no evidence needs to be lead, which ultimately will expedite the proceedings and will result in less costs being incurred as no evidence of witnesses will need to be tendered.

[5] In *Sanan v Eskom Holdings Limited*,¹ the court stated that it is the nature of the defence (merits) which is more important than the procedure adopted, be it raised by special plea or exception.

[6] It is common cause between the parties that the material, express and relevant terms of the written loan agreement are that:

- 6.1 The plaintiff would lend and advance the amount R 4 million, and any such further amounts as agreed in future;
- 6.2 The interest on the loan amount, calculated at a monthly rate of 1.67%, will be paid by the first defendant to the plaintiff on the first day of every month; and
- 6.3 The loan amount, or any stipulated amount, would become payable on 30 days' written notice by the plaintiff to the first defendant.

[7] In this regard the defendants raise five (5) grounds of exception to the clauses of the agreement as follows:

- 7.1 The loan agreement is silent on the due date for repayment of any of the loan amounts advanced to the first defendant. The only indication regarding the due date for repayment of the loan is it "would become payable on 30 days' written notice by the Plaintiff to the First Defendant."
- 7.2 When a loan is "payable on demand" it entails that no specific demand for repayment is necessary and the debt becomes repayable as soon as it is incurred and not only after demand has been given by the creditor;
- 7.3 Where an agreement is silent on a due date, the debt is regarded as due and payable immediately on conclusion of the contract, alternatively when the loan advance is made;
- 7.4 In the absence of a due date for payment and in the event that the contract

¹ 2010 (6) SA 638 (GSJ) at paras 20 – 21.

becomes payable on demand (in contrast to due and payable), the cause of action arises on the conclusion of the contract, alternatively on the date that each loan amount was advanced and not when demand for payment was made;

- 7.5 As the loan agreement was entered into on 5 September 2014, alternatively the last loan amount was advanced on 22 October 2015, the plaintiff's entire claim has become prescribed in terms of section 11 of Prescription Act² and the exception must therefore be upheld.

[8] In *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*,³ it was held that a loan without stipulation as to a time for repayment was repayable on demand unless the parties agree otherwise. When no due date was specified, the debt was generally due immediately on conclusion of the contract. However, the parties may intend that the creditor be entitled to determine the date for performance and that the debt would become due only when demand had been made as agreed. Where there was such a *clear and unequivocal intention*, (own emphasis) the demand would be a condition precedent to claim ability and a necessary part of the creditor's cause of action and prescription would begin to run only from demand.

[9] The defendants rely upon *Trinity* on the basis that the loan without stipulation as to a time for repayment was repayable on the date that each loan was advanced and prescription ran from that date. The plaintiff argues that the facts in *Trinity* differ from the current matter on the basis that it did not have such a clause as "would become payable on 30 days' written notice by the Plaintiff to the First Defendant." That demand is made as agreed.

[10] The plaintiff is of the view that a debt can only be said to be claimable immediately if a creditor has a right to institute action for its recovery. In order to be able to institute an action for the recovery of a debt, a creditor must have a complete

² 68 of 1969.

³ 2018 (1) SA 94 (CC).

cause of action in respect of it, as was held in *Anglorand Securities Limited v Mudau and Another*.⁴

[11] Hence on 11 March 2020, the plaintiff elected to terminate the loan agreement by virtue of the provisions of clause 6.1 of the loan agreement. The plaintiff notified the first, second and third defendants in writing that it claimed repayment of the total outstanding balance of the loan amount within 30-days from date of dispatch of the written notices.

[12] The plaintiff further adds that its claim did not prescribe because section 15(1) of the Prescription Act provides that the running of prescription is also interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.⁵

[13] The last payment made by the first defendant was less than three years prior to the issuing of the summons and the last interest payment received from the first defendant was during March 2019. In terms of section 14(2) of the Prescription Act, if the running of prescription is interrupted as contemplated in section 14(1), prescription shall commence to run afresh from the day of which the interruption takes place.⁶ In addition to the aforementioned interest payments, the second defendant repaid an amount of R2,000,000.00 in respect of the capital loan amount to the plaintiff on 29 June 2019. The third defendant unconditionally acknowledged in writing that the first defendant is indebted to the plaintiff in the total sum of R9,328,864.45 on 25 February 2020.

[14] The matter of *Road Accident Fund v Mothupi*⁷ held that an acknowledgement of liability for the purpose of section 14 of the Prescription Act is a matter of fact and not a matter of law.

[15] Further the test on exception is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every

⁴ [2011] ZASCA 76.

⁵ 68 of 1969

⁶ 68 of 1969

⁷ 2000 (4) SA 38 (SCA) at para 37.

interpretation that can be put upon the facts. In *Francis v Sharp and Others*⁸ it was held that an exception may be taken only when the vagueness and embarrassment strike at the root of the cause of action pleaded, i.e. if the other party will be seriously prejudiced if the allegations remain. No such submissions have been made that the defendants will be prejudiced. On the contrary, without the leading of evidence, the upholding of the exception will close the door to the plaintiff without being given the opportunity to lead evidence and this will result in serious prejudice for the plaintiff.

[16] In *Screening & Earthworks (Pty) Ltd and Another v Capital Outsourcing Group (Pty) Ltd: In re Capital Outsourcing Group (Pty) Ltd v Screening & Earthworks (Pty) Ltd & Another*⁹ it was held that the exception rule cannot be used to attack the vagueness of a contract relied upon by a party, an exception is only concerned with pleadings. Hence the intention in a contract must be pleaded as a special plea and cannot be raised in an exception. When a debt is due in a contract it is determined with reference to the intention of the parties. Lack of a cause of action alternatively prescription must be pleaded. Evidence supporting the contentions can be tested and will be examined.

[17] For the defendants to succeed on striking out the plaintiff's claim they must show that the plaintiff's claim is bad in law. Similarly in *Belet Industries CC t/a Belet Cellular v MTN Service Provider (Pty) Ltd*¹⁰ it was held that the excipient must show that the claim does not bear the meaning contended for by the plaintiff. In this regard the plaintiff does rely on the agreements and conducts of the defendants to have its claims settled. Therefore the court may allow the question raised by an exception to stand over for the decision at the trial especially if it appears that the question may be interwoven with the evidence that will be led at the trial. In *South African National Parks v Ras*¹¹ it was held that unless the excipient can satisfy the court that there is a real point of law or a real embarrassment, the exception should be dismissed.

⁸ 2004 (3) SA 230 (C) at 240.

⁹ [2008] 1 All SA 611 (B).

¹⁰ [2014] ZASCA 181.

¹¹ 2002 (2) SA 537 (C) at 541.

[18] The submissions by both parties indicate that a 'clear and unequivocal intention' of the parties at the time of concluding the agreement is in dispute. A court may interpret provisions of an agreement but parties to an agreement do not interpret or speculate on their intended meaning but by the leading of evidence can reveal their intention at the time when the particular agreement was entered into.

[19] As a result the exception on the grounds advanced by the defendants cannot succeed.

ORDER

[20] In the event the following order is made:

- 20.1 The late filing of the exception is condoned.
- 20.2 Raising of prescription by exception in the current circumstances is not an appropriate process and it should be raised by special plea.
- 20.3 The exception is dismissed with costs.



R FRANCIS-SUBBIAH
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Delivered: This judgment was prepared and authored by the Judges whose names is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 05 May 2021.

APPEARANCES

Counsel for the Excipients:

ADV M COETZEE

Counsel for the Defendant:

ADV J A DU PLESSIS

Date of Hearing:

21 APRIL 2021

Date of Judgment:

05 MAY 2021