



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

Case No.: 22207/21

- (1) REPORTABLE: ~~YES~~ / NO  
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO  
(3) REVISED.

19/04/2022.  
DATE

.....  
SIGNATURE

In the matter between:

**NEDBANK LIMITED**

Plaintiff/Respondent

and

**LIMOR MUSKAT**  
IDENTITY NUMBER: [...]

Defendant/Excipient

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**JUDGMENT**

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**MNGQIBISA-THUSI J**

- [1] The defendant, Mrs Limor Muskat, is excepting to the plaintiff's particulars of claim, as amended, on the ground that the particulars of claim do not contain the necessary averments to sustain the plaintiff's claim.
- [2] In its particulars of claim the plaintiff alleges the following. On 12 June 2015 it and the defendant and Mr Shaun Muskat (Mr Muskat), who is married to the defendant out of community of property, concluded a written loan agreement. As security for their indebtedness to the plaintiff, the defendant and Mr Muskat registered a covering mortgage bond in favour of the plaintiff and specially hypothecated their jointly owned immovable property. Due to the defendant and Mr Muskat defaulting on their monthly instalment payments, the plaintiff instituted an action against the defendant, claiming repayment of the money owed under the loan agreement. Mr Muskat's estate has been finally sequestrated.
- [3] For the relief sought against the defendant, the plaintiff's prayer in its amended particulars of claim dated 11 August 2021, reads as follows:

**"WHEREFORE** Plaintiff prays for judgment against the Defendant, jointly and severally with any indebtedness recovered from the insolvent estate of SHAUN MUSKAT, if any, the one paying the other to be absolved, in the following terms:-

1. Payment of the sum of **R3 214 352.15**;
2. Payment of interest on the amount of **R3 214 352.15** calculated at the rate of 7.00% per annum, compounded monthly in arrear from the **1<sup>st</sup> May 2021** to date of final

payment, both days inclusive (being the base rate of **7.00% as at the 1<sup>st</sup> May 2021**);

3. An order declaring the defendant's half share in the ownership of the immovable property known as  
**PORTION [...] (FIVE HUNDRED AND TWENTY TWO) SQUARE METRES HELD BY DEED OF TRANSFER NO. T32804/2012**

**SUBJECT TO THE CONDITIONS THEREIN CONTAINED**

is declared specially executable;

4. An order in terms of Rule 46 to authorize the Registrar to issue a Warrant of Execution against the immovable property to obtain an attachment over the property and an ultimate sale in execution;
5. That the Defendant be ordered to pay the cost of suit and execution of the said property, on the scale as between attorney and own client; (section 129 letter at R126.50 per letter, Summons at R4427.50 per summons, Judgment at R9200.00, appearance at court at R1500.00, Writ of attachment at R4025.00, sale in execution at R3450.00, Attendance at sale in execution at R1150.00 and all disbursements incurred, which will include sheriff's fees;
6. Further and/or alternative relief."

[4] On 16 August 2018 the defendant filed a notice in terms of Rule 23(1), in which the defendant gave notice of its intention to except to the plaintiff's particulars of claim. The defendant's notice of exception reads as follows:

**"BE PLEASED TO TAKE NOTICE** that the Defendant hereby notes an exception to the Plaintiff's particulars of claim on the grounds that it does not disclose a cause of action, for the following reason:

1. The Plaintiff's Prayer of its Particulars of Claim reads as follows:

*"WHEREFORE Plaintiff prays for judgment against the Defendant, jointly and severally with any indebtedness recovered from the insolvent estate of Shaun Muskat, if any, the one paying the other to be absolved"*

2. *The Plaintiff has failed to institute action as and against Mr Shaun Muskat and/or his trustee."*

[5] In terms of Rule 23(1) a litigant may raise an exception against an opponent's pleading on the basis, *inter alia*, that the pleading does not disclose either a cause of action or a defence. This means that the court must look at the pleading excepted to as it stands and cannot take into account any facts outside those stated in the pleading except those stated in the pleading and cannot refer to any other document.

[6] To succeed an excipient has to convince the court that upon every interpretation which the pleading in question can reasonably bear no cause of action or defence is disclosed.

[7] An exception on the basis that the particulars of claim do not disclose any cause of action is designed to obtain a determination of a point of law which will dispose of the case either in whole or in part, thereby avoiding the leading of unnecessary evidence at a trial. *Alphina Investments Ltd v Blacher*<sup>1</sup>.

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<sup>1</sup> 2008 (5) SA 479 (C) at 483B

[8] Further, in *McKenzie v Farmers' Co-operative Meat Industries Ltd*<sup>2</sup> the court described "cause of action" in the following terms:

"Every fact which it will be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

[9] It was submitted on behalf of the defendant that the particulars of claim do not disclose any cause of action in view of the fact that the prayer therein refers to the defendant being jointly and severally liable for the plaintiff's claim, in circumstances where Mr Muskat has not been cited as a party to the action even though he has an interest in the matter. Further that the plaintiff should have pleaded that it has instituted an action against Mr Muskat or lodged a claim with the trustee of the insolvent estate. Counsel for the defendant contended that the plaintiff's prayer as it appears in its original particulars of claim before it was amended makes it clear that the relief sought is against the defendant only.

[10] The plaintiff's prayer before the particulars of claim was amended, reads, in part, as follows:

**"WHEREFORE,** Plaintiff prays for judgment against Defendant, for:..."

[11] On behalf of the plaintiff it was submitted that the particulars of claim clearly indicates that the defendant and Mr Muskat are co-principal

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<sup>2</sup> 1922 AD 16.

debtors and are therefore jointly and severally liable for the debt owed to the plaintiff. Counsel for the plaintiff argued that since a creditor was entitled, in circumstances where two or more debtors are jointly and severally liable, to pursue any of the co-debtors for the payment of the full amount of the judgment. Counsel further argued that the plaintiff's amended prayer as it stands, makes it clear that whatever amount is recovered from the insolvent estate of Mr Muskat would be deducted from the judgment obtained against the defendant. It is the plaintiff's contention that for the plaintiff to pursue judgment against the defendant for the payment of the full amount of the judgment, it was not a pre-requisite that an action should have been pursued against Mr Muskat or the trustee of the insolvent estate or for a claim to have been lodged with the insolvent estate.

- [12] In its heads of argument, the plaintiff makes reference to the following quotations from Christie's **Law of Contract in South Africa** 7<sup>th</sup> edition, in relation to (i) the nature of liability incurred by co-debtors who are held to be jointly and severally liable and (ii) the remedy a co-debtor who has been held liable for the full amount of indebtedness against the other co-debtor:

"Each is liable to the creditor for the full amount of the debt, and the creditor can at his or her option claim the full debt or any lesser amount from any of them, provided of course he or she does not recover in total more than the full amount of the debt, since by definition there is only one debt due. By electing to sue one debtor for the full amount, or more than one for equal or varying amounts, the creditor does not thereby commit to recovering from that debtor, or

those debtors, alone and abandoning the right to claim against the others. This is so even if the creditor pursues his or her claim to judgment, because while the judgment remains unsatisfied the debt remains owing by all the debtors jointly and severally. Similarly, if the creditor receives less than the full amount of the debt from any one co-debtor, the creditor is not thereby debarred from claiming the balance from that debtor or the others<sup>3</sup>.

....

A joint and several debtor who has been obliged to pay the full debt or more than his or her proportionate share will naturally wish to redistribute the burden that has thus fallen entirely or predominately on his or her own shoulders....'it is nowadays commonly laid down by the lawyers' that any joint and several debtor who has paid more than his share has a right of contribution without taking cession of actions."

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[13] As correctly pointed out by Counsel for the plaintiff, co-debtors are individually responsible for making sure that the total amount of the debt is repaid to the creditor. In this case, the plaintiff, in the event of the loan being in default, may choose to pursue the defendant or Mr Muskat or the trustee of the insolvent estate for repayment of the full outstanding balance.

[14] From the reading of the particulars of claim as a whole, it cannot be disputed that the plaintiff's claim is based on the defendant and Mr Muskat's indebtedness under the loan agreement and that the Muskats are jointly liable for the debt owed. Further, because the Muskats are jointly and severally liable, and although the plaintiff is claiming the full outstanding amount from the defendant, as it is entitled to, the plaintiff

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<sup>3</sup> At 296.

<sup>4</sup> At 298.

seeks execution only against the defendant's half share ownership of the property. On any reasonable interpretation of the whole pleading it is clear that the action is against the defendant as a co-principal debtor.

[15] In *Jowell v Bramwell-Jones and Others*<sup>5</sup> the court stated that:

“Minor blemishes are irrelevant: pleadings must be read as a whole; no paragraph can be read in isolation...

A distinction must be drawn between *facta probanda* or primary factual allegations which every plaintiff must make, and the *facta probantia*, which are secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter matters for particulars for trial and even then are limited. For the rest, they are matters of evidence.

Only facts need be pleaded; conclusions of law need not be pleaded”.

[16] The fact that Mr Muskat has not been cited as a party to the action or no claim has been lodged with the trustee of the insolvent estate is of no moment as the plaintiff has the choice to pursue either of the co-debtors for the full amount of the outstanding debt as in law the defendant and Mr Muskat are individually liable for payment of the full amount.

[17] In the event of the defendant paying the full amount claimed by the plaintiff, it is up to her to pursue a claim for a proportionate contribution from Mr Muskat or the insolvent estate.

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<sup>5</sup> 1998 (1) SA 836 at 902J-903B.



[18] As a result, I am of the view that there is no basis for the exception noted by the defendant and make the following order:

‘The exception is dismissed with costs on an attorney and client scale.’

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**NP MNGQIBISA-THUSI**

**Judge of the Gauteng High Court**

**Date of hearing : 13 April 2022**

**Date of Judgement : 19 April 2022**

Appearances:

For Excipient/Defendant: Adv N Riley (instructed by Darryl Furman & Associates)

For the Respondent/Plaintiff: Adv CL Markram-Jooste (instructed by Hack Stupel & Ross Attorneys)