REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 27419/2021

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

Date: 28 November 2022 E van der Schyff

In the matter between:

SHOPFITTERS STUDIO (PTY) LTD EXCIPIENT/DEFENDANT

and

DYNAMIC DESIGN UPHOLSTERY (PTY) LTD RESPONDENT/PLAINTIFF

JUDGMENT

Van der Schyff J

Introduction

[1] The excipient, the defendant in the action, excepts against the plaintiff's particulars of claim on the basis that the particulars of claim lack the averments necessary to

sustain a cause of action. I focus only on the salient aspects of the exception as argued.

The particulars of claim

[2] In its particulars of claim, the plaintiff, among others, pleads that pursuant to liquidation proceedings instituted by the plaintiff against the defendant, the parties concluded an agreement by exchange of correspondence between their respective attorneys on or about 17 September 2020, at Pretoria, in the terms set out in Annexure B attached to the particulars of claim– one of the letters exchanged. Copies of the correspondence exchanged were attached to the particulars of claim, and the terms were recorded in the particulars of claim.

[3] The terms of the agreement, as captured in the particulars of claim, and set out in Annexure B, were that:

i. The defendant would make monthly payments in reduction of the capital amount of R1, 581, 106.91 to the plaintiff in the sum of R10 000.00 on the last day of each month commencing on 30 September 2020 until such time as the Sasfin loan comes through ('the installment clause');
ii. In the event of any payment(s) not being paid on its due date, the full balance of the capital, interest, and attorney and client costs then outstanding shall immediately become due and payable without further notice to the defendant (the acceleration clause').

[4] On or about 11 February 2021 at Pretoria, the abovementioned agreement was varied and amended by the parties, when the defendant in writing offered to increase the monthly payments to be made to the plaintiff to R15 000.00 with effect from 31 March 2021. This offer was accepted on behalf of the plaintiff by Magda Kets Attorneys. Thereafter the defendant commenced paying the increased monthly sum of R15 000.00.

[5] The Sasfin loan, which the defendant allegedly applied for in order to liquidate its debt to the plaintiff, did not come through. The defendant failed to pay the monthly

payment of R15 000.00 on 31 May 2021. As a result. The defendant was in breach of the installment clause. The plaintiff elected to enforce the acceleration clause. In the premise, the outstanding unpaid balance of the capital amount became due, owing, and payable by the defendant to the plaintiff.

The grounds of exception the defendant persisted with

(i) The excipient's case

[6] Annexure B to the particulars of claim contains the terms of the agreement concluded between the parties. In the letter marked Annexure B, the plaintiff's attorney set out the terms in accordance with which her client was amenable to conclude a settlement, in nine numbered paragraphs. The letter concludes with the sentence, in a paragraph that is not numbered: 'All the above is subject to the Sasfin loan being granted within the next 4 (four) months.'

[7] Based hereon, the defendant contends in the Rule 23 notice that the agreement between the parties contains a suspensive condition, which was not fulfilled. As a result, the agreement lapsed due to non-fulfillment, because the Sasfin loan was never granted. During argument, counsel submitted that it is irrelevant whether the paragraph is regarded as embodying a suspensive or resolutive condition. The fact that the Sasfin loan was not granted led to the agreement's demise.

(ii) The plaintiff's response

[8] The plaintiff submits that the exception is bad in law. On the exception, as contained in the Rule 23 notice, it seems that the excipient's version is that there was no agreement in place and that the excipient would not be liable whatsoever in the event of the loan being rejected. This argument, counsel submitted, does not take into account the fact that the defendant proposed to, and did, in fact, increase the monthly installment payments from R10 000.00 to R15 000.00 after four months

have passed since September 2021. The argument is devoid of logic, specifically in light of the defendant's acquiescence to the terms of the agreement.

Applicable legal principles pertaining to exceptions

[9] It is trite that the aim of the exception procedure is to avoid the leading of unnecessary evidence.[1] The Supreme Court of Appeal recently summarised the approach to be adopted in regard to adjudicating exceptions in *Luke M v Tembani and Others v President of the Republic of South Africa and Another.*[2] The SCA stated:[3]

> 'Whilst exceptions provide a useful mechanism 'to weed out cases without legal merit', it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.' (References omitted).

[10] The same court stated that:[4]

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[1] *Dharumpel Transport (Pty) Ltd v Dharumpel* 1956 (1) SA 700 (A) at 706.

[2] (Case no 167/2021) [2022] ZASCA 70 (20 May 2022).

[3] *Luke M, supra,* at para [14].

[4] *Luke M, supra,* at para [16].

'It is thus only if the court can conclude that it is impossible to recognize the claim, irrespective of the facts as they might emerge at the trial, that the exception can and should be upheld.

[11] The dismissal of an exception does not deprive the defendant of the opportunity of raising the same defence as a substantive defence in its plea and for the merits thereof to be determined after the leading of evidence at the trial. This is, as the court explained in *Pretorius and Another v Transport Pension Fund and Another,*[5] probably, in any event, a better way to determine the potentially complex factual and legal issues involved.

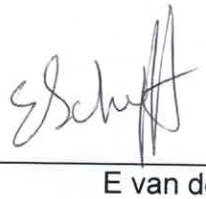
[12] As it stands, the plaintiff's particulars of claim contain the averments necessary to sustain a cause of action. Nothing prevents the defendant from pleading that the agreement concluded between the parties contained terms different from the terms pleaded by the plaintiff. The exception, therefore, stands to be dismissed.

[13] No reason exists to deviate from the principle that costs follow success. No case was made out for the granting of a punitive costs order, and neither was the exception so complicated as to justify the costs of two counsel.

ORDER

In the result, the following order is granted:

1. The exception is dismissed with costs.



E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

[5] 2019 (2) SA 37 (CC) para [22].

For the excipient:	Adv. J. A. Booyse
Instructed by:	VAN DYK STEENKAMP ATTORNEYS
For the respondent:	Adv. D. Keet
Instructed by:	WWB BOTHA ATTORNEYS
Date of the hearing:	9 November 2022
Date of judgment:	28 November 2022