IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 2570/2021P

In the matter between:

ABSA BANK **FIRST PLAINTIFF**

ABSA HOME LOANS GUARANTEE COMPANY (RF) PTY LTD **SECOND PLAINTIFF**

and

KATPAKARASI NAIDOO **DEFENDANT**
[IDENTITY NO: [....]]

ORDER

The following order is granted:

Both the defendant's exceptions are dismissed with costs.

JUDGMENT

Mossop J:

[1] The defendant has delivered two exceptions to the plaintiffs' particulars of claim on the grounds that they lack averments necessary to sustain a cause of action against her.

[2] When the matter was argued, the plaintiffs were represented by Mr Nair and the defendant by Mr Eades. Both counsel are thanked for their considered arguments, which were of assistance to the court.

[3] The plaintiffs have pleaded that the first plaintiff is a commercial bank and that the second plaintiff is a 'private ring-fenced company' that guarantees the obligations of the first plaintiff's clients who take out loans from the first plaintiff. That they have a symbiotic relationship with each other can be discerned from the similarities in their respective names. The defendant is a private citizen who negotiated a loan from the first plaintiff.

[4] The loan between the defendant and the first plaintiff was recorded in writing in a document titled a 'mortgage loan agreement' (the loan agreement). As security for her obligations to the first plaintiff arising out of the loan agreement, the first plaintiff required the defendant to obtain a guarantee (the guarantee) for those obligations from the second plaintiff. In the event of the defendant defaulting on her obligations to the first plaintiff, the second plaintiff was at risk of being called upon to perform the defendant's obligations. It accordingly concluded an indemnity agreement with the defendant (the indemnity agreement). As security for her indemnity to the second plaintiff, the defendant agreed to pass a sectional indemnity bond (the indemnity bond) over the immovable property that the loan from the first plaintiff had been used to acquire.

[5] The indemnity bond was duly passed in favour of the second plaintiff by the defendant and the guarantee was provided by the second plaintiff to the first plaintiff and the loan was advanced to the defendant by the first plaintiff.

[6] The defendant thereafter allegedly defaulted on her repayment obligations to the first plaintiff arising out of the loan agreement. The first plaintiff made demand of her to make payment but none was forthcoming. As a consequence, the first plaintiff demanded payment under the guarantee from the second plaintiff. The second plaintiff, in turn, demanded payment from the defendant. While it is not explicitly pleaded, it is safe to assume that the second plaintiff did not pay the first plaintiff nor did the defendant pay either the first or second plaintiffs. That led to summons being issued against the defendant.

[7] From the foregoing, it is evident that the amount loaned by the first plaintiff to the defendant has been separated from the indemnity bond. The indemnity bond serves as security not for the loan, as it would conventionally do, but as security for the indemnity agreement.

[8] The prayer to the particulars of claim reads, in part, as follows:

> '**WHEREFORE** the First and Second Plaintiffs prays [sic] for judgment against the Defendant, for:'

I shall return to the significance of this shortly.

[9] Before turning to consider the two exceptions, it is appropriate to briefly restate the principles that govern the adjudication of an exception. In line with the principle that he who alleges must prove, the party taking the exception bears the onus of establishing that the pleading objected to is, indeed, excipiable.[1] In establishing this, neither of the parties may adduce any facts extraneous to what is stated in the pleadings, other than agreed facts.[2] It follows that the defect in respect of which the exception is raised must appear from the pleading to which objection is

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[1] *Breetzke and others v Alexander and others* [2015] ZAKZPHC 44 para 10; [2015] JOL 34010 (KZP); *South African National Parks v Ras* 2002 (2) SA 537 (C) at 541-542.
[2] *First National Bank of Southern Africa Ltd v Perry NO and others* 2001 (3) SA 960 (SCA); [2001] 3 All SA 331 (A) para 6.

taken.[3] In discharging the onus that the excipient bears, it has the duty to persuade the court that upon every interpretation that the pleading can possibly bear, no cause of action is disclosed.[4] Finally, '[f]or the purpose of deciding an exception a court must assume the correctness of the factual averments made in the relevant pleading, unless they are palpably untrue or so improbable that they cannot be accepted'.[5]

[10] The first ground of exception taken by the defendant is directed at the first plaintiff. The substance of the complaint is that the first plaintiff, having received the guarantee from the second plaintiff, subsequently made demand of the second plaintiff for it to honour its obligations arising therefrom after the defendant had defaulted on her repayment obligations to the first plaintiff. In doing so, so it is submitted, the first plaintiff failed to disclose a cause of action against the defendant. Why this is legally so, is not identified in the exception. The thrust of the exception appears, therefore, to be that the simple act of making demand of the second plaintiff extinguished the first plaintiff's cause of action against the defendant.

[11] Uniform rule 10(1) reads as follows:

> 'Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.'

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[3] *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 754*; Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) para 7.
[4] *Francis v Sharp and others* 2004 (3) SA 230 (C) at 237G.
[5] *Voget v Kleynhans* 2003 (2) SA 148 (C) para 9.

The philosophy behind the rule appears to be that of convenience to litigants and the desire to avoid a multiplicity of actions.

[12] More than one plaintiff being joined in an action is accordingly contemplated and permitted. The fact that one plaintiff may not share a cause of action with another plaintiff is of little or no consequence. Plaintiffs with different causes of action resulting in separate claims may join in one summons and may even claim relief alternatively.[6] The only requirement is that the plaintiffs' right to relief must be 'dependent upon the determination of substantially the same question of law or fact'.[7]

[13] The two plaintiffs have different causes of action: the first plaintiff's cause of action is based upon a breach of the loan agreement, and the second plaintiff's cause of action is based upon the issuing of the guarantee, the provisions of the indemnity bond and the underlying indemnity agreement. However, the determination of these separate causes of action will, in essence, involve a consideration of the same facts and whether the defendant has failed to comply with her obligations to the first plaintiff will be a common consideration in both causes of action.

[14] The first plaintiff has pleaded that it made demand of the second plaintiff on 10 March 2021. The second plaintiff has pleaded that it made demand of the defendant a week later. Nothing further is pleaded concerning the outcome of such demands.

[15] If the first exception is to be upheld, I must find that the mere act of calling upon the second plaintiff to perform in terms of the guarantee automatically terminated any rights that the first plaintiff had to proceed against the defendant. I am not able to come to that conclusion as I do not understand that to be the law. The purpose of providing security is to cover a creditor in the event of default by its debtor.[8] Creditors seek security for debts owed to them in order to ensure that they

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[6] *Sackstein and others NNO v Du Preez* 2004 (2) SA 459 (SE) at 462C-D.
[7] *Vitorakis v Wolf* 1973 (3) SA 928 (W) 931 at 931E-F.
[8] *Van Oudtshoorn v Investec Bank Ltd* [2011] ZASCA 205 para 32.

have more than one option as to who they may proceed against in the event of the debtor defaulting, and not to forego any rights that they may have against the original debtor. The security put up is in addition to the obligations assumed by the defendant, not in place thereof. The fact that the second plaintiff agreed to provide a guarantee as a form of security but apparently did not honour its undertakings relating thereto accordingly does not mean that the first plaintiff forfeited its claim against the defendant. To find that this is the case would be grotesque. The first plaintiff's claim against the defendant could therefore only be extinguished by payment, whether by the second plaintiff or by the defendant (or a third party for that matter), or by some other act which divested the first plaintiff of that cause of action, such as a cession. None of these events have been pleaded.

[16] Had the second plaintiff not been cited and had there been no mention of the guarantee in the particulars of claim, a perfectly acceptable cause of action is made out against the defendant by the first plaintiff: it has pleaded the conclusion of a loan agreement, the terms thereof, the advancement of the loan amount to the defendant and the breach of the terms of the loan agreement by the defendant. The joinder of the second plaintiff and the reference to the guarantee does not change the completeness of the case pleaded by the first plaintiff insofar as itself is concerned.

[17] But the particulars of claim are not beyond criticism. From the particulars of claim, and particularly from the prayer thereto referred to earlier, it is clear that the plaintiffs are cited as joint plaintiffs. This is expressly permitted in terms of Uniform rule 10(1). On the pleadings as they now stand, each plaintiff would be entitled, in the event of the claim succeeding, to a portion of any judgment amount awarded against the defendant. I am sure that this was not the pleader's intention: what surely was intended was that either the first or the second plaintiff should receive payment in the full amount claimed. This has not been pleaded. That, however, does not mean that no cause of action has been made out against the defendant by the first plaintiff.

[18] I cannot in the circumstances find that no cause of action against the defendant has been pleaded by the first plaintiff. The first exception must thus fail.

[19] The second ground of exception is directed at the second plaintiff. The defendant asserts that the loan agreement concluded between herself and the first plaintiff constituted a credit agreement in terms of section 8(5) of the National Credit Act 34 of 2005 (the Act).[9] The defendant further alleges that the guarantee given by the second plaintiff to the first plaintiff is also a credit agreement in terms of section 8(1) of the Act. Thus, the defendant concludes that the second plaintiff is a credit provider and is obliged to be registered as a credit provider in terms of the provisions of section 40(1) of the Act. There are no allegations that it is so registered and therefore the second plaintiff has not disclosed a cause of action against the defendant.

[20] It is common cause that the second plaintiff is not registered as a credit provider in terms of the Act.

[21] In *Van Heerden v Nolte*,[10] Murphy J stated as follows:

> '… the defendant has contended that where a plaintiff sues contractually to recover money owing under a credit agreement, and the principal debt is in excess of R500 000, he or she is obliged to make the allegation in his or her particulars of claim that he or she is registered as a credit provider. I agree. The failure to plead such facts renders the summons excipiable for want of necessary averments on which to found a contractual cause of action.'[11]

[22] In his heads of argument, Mr Nair, who appears for the plaintiffs, conceded that the second plaintiff must be regarded as being a credit provider. I shall assume that this admission is correctly made. Mr Nair, however, submitted that notwithstanding this admission, the second plaintiff did not have to register as a credit provider because of the provisions of sections 40(1) and 40(6)*(b)* of the Act.

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[9] It is pleaded that the first plaintiff is registered in terms of the Act.
[10] *Van Heerden v Nolte* 2014 (4) SA 584 (GP) para 17.
[11] This judgment was delivered prior to the amendment of the threshold amount by the Minister on 11 May 2016. See para 26 supra.

[23] Section 40(1) of the Act reads as follows:

'A person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42 (1).'

[24] Section 40(6)*(b)* of the Act reads as follows:

> 'When determining whether, in terms of subsection (1), a credit provider is required to register:
>
> '*(a)* …
>
> *(b)* any credit guarantee to which a credit provider is a party is to be disregarded.'

[25] Section 42(1) of the Act provides as follows:

'The Minister, by notice in the Gazette, must determine a threshold for the purpose of determining whether a credit provider is required to be registered in terms of section 40 (1).'

[26] On 11 May 2016, the Minister of Trade and Industry changed the threshold amount from R500 000 to R0.00.[12]

[27] It must consequently be considered whether the guarantee put up by the second plaintiff is a credit guarantee as contemplated by the Act. A credit guarantee is defined in section 1 of the Act as being:

> 'an agreement that meets all the criteria set out in section 8(5)'.

[28] Section 8(5) reads as follows:

> 'An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit guarantee if, in terms of

[12] Determination of a Threshold for Credit Provider Registration, GN R513, *GG* 39981, 11 May 2016.

that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.'

Subsection 2 is of no relevance and consequently does not apply.

[29] The guarantee provided by the second plaintiff to the first plaintiff provides, in part, as follows:
'In accordance with, and subject at all times to the terms of the Agreement, with effect from the date of registration of the relevant Indemnity Bonds, granted by the Borrowers, in respect of the Accounts listed in Annexure A hereto, to the Guarantee SPV, the Guarantee SPV guarantees the due and punctual payment of all sums and the performance of any other obligations which are now and which may subsequently become due to the Lender, by the Borrowers in respect of the Accounts listed in Annexure A hereto …'
The reference to 'Lender' is a reference to the first plaintiff and the reference to the 'Guarantee SPV' is a reference to the second plaintiff. The defendant's account is included in Annexure A to the guarantee.

[30] From the foregoing, the guarantee is a security guarantee contemplated by the Act.

[31] Based on the allegations in the particulars of claim, the argument was advanced by Mr Nair that the only business that the second plaintiff has is that of providing guarantees to the first plaintiff in respect of its clients. However, in accordance with the Act, the value of these guarantees are not to be utilized to calculate whether the second plaintiff has exceeded the threshold value imposed by the Minister of Trade and Industry for registration as a credit provider. If the value does not exceed the value of R0.00, so the argument went, the second plaintiff is not required to register.

[32] As a matter of mathematical certainty, R0.00 does not exceed R0.00: it equals it, but it does not exceed it.

[33] The manner in which home loans are now granted has taken on a different form compared to the direct, traditional way that they were dealt with in the not too distant past. The method used in this matter now appears to be a rather common way of granting such loans, as other financial institutions have also adopted the same methodology. The only matter that I have found that deals with this type of arrangement is *Changing Tides 17 (Pty) Ltd NO v Congwane*.[13] That was a matter where default judgment was sought by the plaintiff. A similar scheme was employed to that employed in this matter. The judgment records that both the credit provider and the guarantee company were credit providers, and I assume by that it is meant that both were duly registered in terms of the Act, unlike this case where the second plaintiff is not so registered. It accordingly does not address the question of registration.

[34] An exception, properly taken, may provide a useful mechanism to filter out cases that lack legal merit.[14] I cannot find that this matter lacks legal merit. On the face of it, a case has been made out that the second plaintiff is not required to register because of the nature of its business and the wording of the Act. I cannot find that such argument is so palpably untrue or improbable that it cannot be accepted. I must therefore find that a cause of action is pleaded in respect of the second plaintiff.

[35] In the result, the second exception must also fail.

[36] I accordingly make the following order:

1. Both the defendant's exceptions are dismissed with costs.

MOSSOP J

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[13] *Changing Tides 17 (Pty) Ltd NO v Congwane* [2016] ZAGPJHC 128.
[14] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; [2006] 1 All SA 6 (SCA) para 3.

APPEARANCES

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Date of Hearing	:	20 October 2022
Date of Judgment	:	15 November 2022