

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 51887 / 2021

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

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SIGNATURE

DATE: 5 July 2022

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PLAINTIFF/ RESPONDENT

And

**THE BODY CORPORATE OF EVELEIGH DEFENDANT/ EXCIPIENT
ESTATES**

(Scheme Number SS 31/2009)

JUDGMENT

MANOIM J

- [1] This application concerns an exception brought by the defendant in respect of the plaintiff's particulars of claim. The claim is based on a breach of contract.
- [2] In 2015 the plaintiff entered into a loan agreement with the defendant in terms of which the plaintiff loaned money to the defendant. This was followed by two subsequent addendums to the agreement providing further loans on materially the same terms.
- [3] In terms of the agreement, the repayment of the interest and capital were regulated. The plaintiff advanced the capital and the defendant commenced repaying interest on the loans. At some stage, the defendant is alleged to have breached the terms of the loan by failing to pay the interest when due. The plaintiff instituted an action in this court; to recover both the outstanding capital and the interest.
- [4] The defendant has brought an exception alleging that the particulars of claim, do not make out any cause of action against the defendant.
- [5] The exception can be briefly stated.
- [6] Clause 3.1 of the loan agreement containing a heading "*Necessary Documents*" states as follows:
- "The Borrower shall at its cost and within 5 Business Days after the Signature Date deliver to the Lender the following:"*
- [8] There follows a list of ten types of documents required. It is not relevant for the purpose of this application to state what they are.
- [9] This provision is followed by clause 3.2 which states:
- [10] *"Notwithstanding anything to the contrary contained in this Agreement, the Lender shall have no obligation to advance to the Borrower the Loan or any other amount under this Agreement until the Borrower has complied with its obligations contained in clause 3.1."*

- [11] The defendant states that the “*plaintiff does not plead that the defendant within five Business Days after the Signature Date delivered to the Plaintiff the documents specified in clauses 3.1.1 to 3.1.10.*”
- [12] The defendant argues that absent some averment about the operation or non-operation of the obligation imposed by clause 3.2, there is no obligation on the plaintiff to provide a loan and no obligation on the defendant to repay, at least not on the terms provided in the agreement.
- [13] The plaintiff argues that it was not necessary for it to have made any allegation in this regard. What the defendant is contending, or must need to contend with this argument, is that clause 3.2 constitutes a suspensive condition or condition precedent.
- [14] However - argues the plaintiff, this is not evident from the text itself or an interpretation of the agreement itself. The plaintiff argues that to the extent that the meaning is open to other interpretations this is not a basis for an exception. There is a long line of authority which says where an agreement is open to more than one interpretation the fact that one may lead to a conclusion of no cause of action does not ground an exception when other non-excipient interpretations are available.¹
- [15] This is best set out in the case of ***Francis v Sharp*** where the court explained:
- “Secondly, the Courts are reluctant to decide upon exception questions concerning the interpretation of a contract (Sun Packaging (Pty) Ltd v Vreulink 1996 (4) SA 176 (A) at 186J). In this regard, it must be borne in mind that an excipient has the duty to persuade the Court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed (Theunissen v G Transvaalse Lewendehawe Koöp Bpk 1988 (2) SA 493 (A) at 500D; Lewis v Oneanate (Pty) Ltd and Another 1992 (4) SA 811 (A) at 817F).”²*

¹ Sun Packaging (Pty) Ltd v Vreulink 1996 (4) SA 176 (A) at 186J

² Francis v Sharp 2004 (3) SA 230 (C) at 237F— G.

- [16] Mr Hollander, for the defendant has attempted to meet this argument by suggesting that it was not necessary to classify clause 3.2 as anything. He argues that what mattered was its legal effect and that nothing was alleged in the particulars about this aspect.
- [17] However, I consider that this was an attempt to avoid the interpretation problem. If clause 3.2 does not have the effect of a suspensive condition, then it was not necessary for the plaintiff to allege anything about its compliance or non-compliance.
- [18] The absence of these allegations does not mean that no cause of action is made out in the pleading.
- [19] The clause is not open to one single interpretation. There is a reasonable interpretation that does not require any further particularity as it is not a suspensive condition in terms of its ordinary textual meaning nor does the rest of the contractual context provide any other interpretation to detract from this. As the plaintiff argued the clause may well constitute a *modus* in which case it does not have the effect of a suspensive condition and the plaintiff did not need to allege any particularity on this point at this stage.
- [20] There was no need for the plaintiff to plead an outcome in respect of clause 3.2. That failure did not make the particulars excipiable.

Conclusion

The exception fails.

ORDER

- [1] The exception is dismissed.

[2] The excipient / defendant is liable for the costs of the plaintiff.

N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 5 July 2022.

Date of Hearing: 2 June 2022

Date of Judgment: 5 July 2022

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