

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

33865/2021

- (1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

MARK PETER VAN AS,
(in her capacity as Executor Estate late of
CHARLES JOHN SON VAN AS)

Plaintiff

And

VAN AS KARIN INGRID

Defendant

JUDGMENT

MAKUME, J:

[1] On the 15th July 2021 the Plaintiff issued summons against the Defendant in which he seeks the following:

- i) Payment of the sum of R1 300 000.00.
- ii) Interest on the said amount.

iii) Payment of costs on an and client scale.

- [2] On receipt of the summons the Defendant entered appearance to defend. The claim is based on an Acknowledge of Debt executed by the Defendant and one Michael Van As in favour of the late Charles John Van As.
- [3] On the 4th August 2021 the Defendant filed a Notice in Terms of Rule 23(1) contending that the Plaintiff's particulars of claim were vague and embarrassing in various respects and called upon the Plaintiff to remove such offending particulars within a certain period.
- [4] In response to that notice the Plaintiff sent a notice to amend the particulars of claim by replacing paragraphs 3 to 8 with new paragraphs. In the final analysis the claim was reduced to R650 000.00 (Six Hundred and Fifty Thousand Rands).
- [5] On the 22nd September 2021 the Defendant served a second notice in terms of Rule 23(1) still maintaining that despite the intended notice of amendment the particulars of claim were still vague and embarrassing.
- [6] On the 20th October 2021 the Defendant filed a Notice of Exception to the Plaintiff's particulars of claim in which she excepts to paragraph 3 of the amended particulars of claim.
- [7] The particulars of claim read that on the 27th April 2017 the Plaintiff along with the Defendant and one Michael Van As concluded a written acknowledgement of debt marked "VA2". The Defendant's complaint is that ex facie the Acknowledgement of debt the signatories were the Defendant, Michael Van As and the deceased Charles Johnson Van As. In the result the Defendant argues that the particulars and claim and Annexure "VA2" contradicted each other thus rendering the amended particulars of claim vague and embarrassing.
- [8] On the 27th October 2021 the Plaintiff filed a notice to oppose the Exception. The gist of the exception is to the effect that whilst in paragraph 3 of the

amended particulars of claim it is pleaded that on the 27th April 2017 the Plaintiff and the Defendant as well as one Advocate Michael Van As concluded an acknowledgement of debt agreeing to pay Charles Van As the Plaintiff's father an amount of money, the Acknowledgment of Debt was in fact not signed by the Plaintiff but by his late father Charles Van As.

[9] The Plaintiff was appointed executor of his late father's estate on the 7th September 2018. The Plaintiff in actual fact has instituted action against the Defendant in his capacity as the Executor in the Estate of his late father Charles Van As.

[10] The Defendant (Excipient) maintains that the allegations made in the amended particulars of claim when compared to annexure "VA2" thereto upon which the Plaintiff relies for his cause of action against the Defendant Clearly contradicts each other and is thus vague and embarrassing and prejudicial to the Defendant in pleading thereto.

[11] On the other hand the Plaintiff in opposing the exception says that it made an error by referring to the signatory to the Acknowledgment of debt as the Plaintiff when it should have indicated that the signatory to the Acknowledgement of Debt was Charles Van As. The Plaintiff pleads that a mere error on the pleadings does not reach the threshold for the exception to be granted.

[12] The Plaintiff's claim is based on an acknowledgement of debt which the Defendant does not dispute having signed during the year 2017. It is however correct that the particulars of claim in so far as they refer to the Acknowledge of Debt having been concluded by the Plaintiff in his capacity as the Executor of the estate of his late father Charles Van As that is clearly incorrect.

[13] It is trite law that an excipient has the duty to persuade the Court that upon every interpretation which the particulars of claim could reasonably bear no cause of action were disclosed or that the pleadings are vague and

embarrassing. A court must look benevolently instead of over-critically at the pleadings.

- [14] The Transvaal Provincial Division of the High Court in the matter of **MEC and Others NNO v Mc Arthur & Others 2003 (4) SA 142** per Basson J said the following at 149F

“In order for an exception to succeed it must be excipiable on every interpretation that can reasonably be attached to it. See **First National Bank of Southern Africa Ltd v Perry NO and Others 2001 (3) SA 960 (SCA)** at 965 D. Further a charitable test is used on exception, especially in deciding whether a cause of action is established. The pleader is also entitled to benevolent interpretation. The pleadings must be read as a whole, no paragraph can be read in isolation. Conclusions of law need not be pleaded. Bound up with the last mentioned consideration is the fact that certain allegations expressly made may carry with them implied allegations and the pleadings must then be so read.”

- [15] In **Small v Herbert 1914 CPD 273** it was held that if the document is ambiguous and capable of more than one interpretation and if on one of these interpretations the Defendant may be liable on the basis alleged in the summons, the summons is not excipiable, the meaning of the document itself may be put in issue on the pleadings for decision at the trial (See also **Cairns (Pty) Ltd v Playdon & Co Ltd 1948 (3) SA 99 (S) at 106; Sacks v Venter 1954 (2) SA 427 (W) at 431.**

- [16] According to the Defendant she is uncertain whether there is another Acknowledgement of Debt that the Plaintiff possess. This in my view is a technical point the Defendant is able to plead despite the obvious error on the pleadings. She can easily deny that the agreement was concluded by the Plaintiff as executor. The Plaintiff will then have a choice to amend or lead evidence to cure the obvious error. There is thus no prejudice.

[17] The Defendant knows and does not dispute that she signed Annexure VA2 and no other agreement and it is on that agreement that she must plead and put her own version. The Defendant can thus not be under any illusion that a different agreement is being referred to.

[18] As stated in Cairns (Pty) Ltd (supra) the meaning of Annexure VA2 may be put in issue on the pleadings for decision at the trial.

[19] In the final analysis the excipient (Defendant) has failed to demonstrate any prejudice and should be able to plead one way or the other. In the result I make the following order:

ORDER

1. The Exception dismissed.
2. The Defendant is to pay the Plaintiff's taxed party and party costs.

Dated at Johannesburg on this 30th day of AUGUST 2022.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 22 AUGUST 2022
DATE OF JUDGMENT : 30 AUGUST 2022

FOR APPLICANT : ADV ANTHONY BISHOP
INSTRUCTED BY MESSRS FIONA MARCANDONATOS

FOR RESPONDENT : ADV POTTAS
INSTRUCTED BY MESSRS ROSSOUW LESLIE