

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 21/45131

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

07 /09/2022

In the matter between:

MICHELLE BANDS

Excipient

and

JOHANNES PETRUS MOSTERT

Respondent

in re:

JOHANNES PETRUS MOSTERT

Plaintiff

and

MICHELLE BANDS

First Defendant

**THE SHERIFF FOR THE DISTRICT OF
RANDBURG SOUTH WEST**

Second Defendant

JUDGMENT

Olivier, AJ:

Introduction

- [1] The excipient is the first defendant in an action instituted by the plaintiff (respondent in this exception application). The second defendant is the Sheriff for the district of Randburg South West. For considerations of practicality and/or ease of reference and clarity, I shall refer to the parties herein as in the main action.
- [2] The first defendant, an adult female, and the plaintiff, an adult male, are former spouses. One child was born of the marriage, on 1 June 1993. The marriage was dissolved on 20 September 1995. The settlement agreement concluded between the parties was made an order of court.
- [3] The settlement agreement provided for the maintenance obligations of the plaintiff. At the time of the divorce, the plaintiff was already in arrears in respect of his maintenance obligations. The settlement agreement provided for payment of past and future maintenance for the child, and for other expenses, including educational and medical.
- [4] On 6 April 2021 the Registrar of this Court issued a writ of execution against the plaintiff's movables in the amount of R 2 154 461.81. The debt arises from the plaintiff's alleged failure to meet his obligations in terms of the settlement agreement. She approached the Registrar with an affidavit, to which was attached a schedule setting out certain amounts, drawn from source documentation in her possession. The source documentation was not presented to the Registrar.
- [5] On 21 September 2021 the plaintiff caused a combined summons to be issued to set aside the warrant of execution.
- [6] The first defendant raises an exception against the formulation of the plaintiff's claim, alleging that it fails to disclose a cause of action. She seeks

that the exception be upheld and that the plaintiff's claim be dismissed with costs on a punitive scale. The plaintiff seeks dismissal of the exception with costs.

[7] The first defendant raises a point in limine, which must first be considered.

Point in limine

[8] The essence of the preliminary point is that the only way to challenge a writ of execution is by way of application proceedings in terms of Rule 45A of the Uniform Rules of Court ("the Rules"). The first defendant calls the action proceedings launched by the Plaintiff a tactic of delay.

[9] It is trite that any party initiating litigation must make an election whether to proceed either by way of action, or by application. Critical to this decision is whether the litigant anticipates a *bona fide* dispute of fact to arise which will require oral evidence to be led. If such a dispute is anticipated, a trial action should be instituted.¹

[10] A litigant runs the risk that should a matter be initiated by way of an application, and the court finds that she or he should have foreseen that a material dispute of fact will arise at the time the application was brought, the court may dismiss the application with costs. A litigant must therefore consider her or his options carefully.

[11] The plaintiff submits that such disputes of fact exist in this case and that the only way to resolve them is by way of trial. The plaintiff disputes the veracity of the claim, the amount of indebtedness, the computation of the claim, the reasonableness and legality of the alleged expenses, and more. He contends that it is not a liquidated sum and cannot be ascertained without leading evidence.

[12] According to D.E. van Loggerenberg, "[t]he proper procedure for setting aside a writ is by application to set it aside, at least where no facts are in dispute ...".² The statement from the learned author implies that if there are

¹ See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

² *Erasmus Superior Court Practice* Volume 2, D1-605 [RS 17, 2021]. See too *Mears v Pretoria Estate & Market Co Ltd* 1906 TS 661; *Reinhardt v Ricker and David* 1905 TS 179.

facts in dispute, the challenge to the writ of execution can be launched as action proceedings.

[13] The first defendant submits that the plaintiff did not plead any dispute of fact and that he has also not made out a case that there are any disputes of fact. It appears to me from the particulars of claim that there are disputes of fact.

[14] It is my view that a challenger to a writ of execution may bring the challenge by way of action proceedings, provided he anticipates a dispute of fact at the time that the litigation is launched. The point *in limine* is accordingly dismissed.

Relevant legal principles

[15] Exceptions are regulated by Rule 23(1). The function of an exception is that if a pleading does not disclose a cause of action, it disposes of the case, in whole or in part. It raises a substantive question of law which may have the effect of settling the dispute between the parties. To assess whether a pleading lacks the necessary averments to sustain a cause of action, it is necessary to consider the contested pleading (in this case the particulars of claim).

[16] The legal principles applicable to exceptions were set out very recently by Van Oosten J in *Vayeke Sivuka & 328 Others v Ramaphosa and Others*, with reference to Supreme Court of Appeal jurisprudence:³

[4] In the recent judgment of the Supreme Court of Appeal in *Luke M Tembani and Others v President of the Republic of South Africa and Another* (Case no 167/2021) [2022] ZASCA 70 (20 May 2022), the general principles relating to and the approach to be adopted in regard to adjudicating exceptions were summarised as follows (para14):

‘Whilst exceptions provide a useful mechanism ‘to weed out cases without legal merit’, it is nonetheless necessary that they be dealt with sensibly (*Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3). It is where pleadings are so vague that it is impossible to determine the nature of the claim, or where

³ ZAGPJHC 446 (30 June 2022) at paras [4]--[6].

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 (Cilliers et al Herbstein & Van Winsen *The Practice of the High Courts of South Africa* 5ed Vol 1 at 631; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 899E-F). The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable (*Ocean Echo Properties 327 CC and Another v Old Mutual Life Insurance Company (South Africa) Ltd* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) para 9). 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 (*Trustees for the Time Being of the Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) para 36 (*Children's Resource Centre Trust*)).'

[5] In adjudicating this exception, the court is enjoined to accept the facts pleaded by the plaintiffs as true and not to have regard to any other extraneous facts or documents (*Pretorius and Another v Transport Pension Fund and Another* 2019 (2) SA 37 (CC) para 15). Only primary factual allegations that are necessary for the plaintiff to prove (*facta probanda*) in order to support his right to judgment of the court, must be pleaded and a plaintiff is not required to plead secondary allegations (*facta probantia*) upon which the plaintiff will rely in support of the primary factual allegations (*Trope v South African Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (T) 210G-H, quoted with approval in *Jowell*). But, as Vally J pointed out in *Drummond Cable Concepts v Advancenet (Pty) Ltd (08179/14)* [2018] ZAGPJHC 636; 2020 (1) SA 546 (GJ) (para 7):

'The question that arises from this legal requirement is, what facts are necessary to ensure that the cause of action has been disclosed? The answer depends on the nature of the claim - a claim arising from a breach of contract requires different facts from a claim based in delict.'

- [17] The purpose of pleadings is to bring clearly to the notice of the Court and to the opposing party in an action the issues upon which reliance is to be placed.⁴
- [18] In order to sustain a cause of action, a party must set out a clear and concise statement of the material facts upon which it relies for its claim with sufficient particularity to enable the other party to understand the case it has to meet and to reply thereto.⁵
- [19] If a pleading lacks an essential material fact without which there would be no foundation in law for the claim being made, the pleading is bad in law on the basis that it does not disclose a cause of action, and it would be excipiable.⁶
- [20] The pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (the material facts, known as *facta probanda*). The *facta probanda* necessary for a complete and properly pleaded cause of action does not comprise every piece of evidence which is necessary to prove each fact. A plaintiff is required to plead the material facts, not conclusions that (if proved) will disclose a cause of action.
- [21] It is also a fundamental principle that when considering whether an exception should be upheld the pleadings are considered as a whole and one does not read paragraphs in isolation.⁷
- [22] Where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, an exception is competent. If it does not have that effect the exception should not be entertained.
- [23] The defect must be apparent *ex facie* the pleading, meaning that no external facts may be raised or considered.
- [24] Should a court uphold an exception, the respondent is usually afforded an opportunity to remedy the defective pleading by making an appropriate amendment, provided that it is capable of remedy. If not, then the claim must be dismissed.

⁴ *Durbach v Fairway Hotel (Pty) Ltd* 1949 (3) SA 1081 (SR) at 1082; *Minister of Agriculture and Land Affairs & Another v De Klerk & Others* 2014 (1) SA 212 (SCA) at para [39].

⁵ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 471 (SCA) at para [11].

⁶ *Baliso v Firstrand Bank Limited t/a Wesbank* 2017 (1) SA 292 (CC) at 303D-E.

⁷ See *Nel and others NNO v McArthur* 2003(4) SA 142 (T) at 149F.

Exceptions

- [25] The first defendant raises an exception against the plaintiff's particulars of claim on the basis that it fails to disclose a cause of action. The specific objections are not numbered.
- [26] The first defendant complains that the plaintiff makes a bald denial in his particulars of claim that he owes any maintenance at all to the first defendant or that he is liable to refund any amount to the first defendant in terms of the court order, which even if taken as true, fails to disclose a cause of action. The plaintiff pleads the existence of the settlement agreement, which contains specific and determined amounts of payment, but fails to plead that the amounts in the writ are incorrect.
- [27] The first defendant submits further that the plaintiff's claims that the debt is in dispute, that the writ issued is incompetent in part or at all, that the writ is faulty, that the writ was issued based on an affidavit by the first defendant, and that reliance was placed on a schedule based on source documentation, do not evince a cause of action.
- [28] A further objection is that the plaintiff has not set out his claim with sufficient particularity. He merely contends that he is entitled to contest the veracity of the defendant's claim, the computation of the amounts, the nature of the claim (which the first defendant says has no merit as the nature of the claim is the court order), and the possibility that certain amounts other than maintenance have become prescribed, and the reasonableness and legality of expenses which the first defendant is alleged to have made.
- [29] The plaintiff does not plead the necessary allegations to meet any of the established grounds on which a writ of execution may be set aside. D.E. van Loggerenberg identifies them as the following:⁸
- a. Where the writ had not been issued in conformity with the judgment;
 - b. Where the wrong person is named in the writ as a party;

⁸ *Supra* note 2. See too *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T), which sets out the most common grounds.

- c. Where the amount payable under the judgment can be ascertained only after deciding a further legal problem;
- d. Where the debt in respect of which the judgment was obtained has been extinguished before obtaining judgment, or where payment of the debt has been tendered;
- e. Where the judgments upon which the writ is based have been set aside;
- f. Where it is proved that an attachment is in material respect faulty on formal grounds.

[30] The applicability, or otherwise, of the Maintenance Act 99 of 1998 was raised neither in the notice of exception, nor during oral argument by either counsel.

Plaintiff's particulars of claim

[31] From the prayers, it is evident that the plaintiff is seeking that the writ be set aside. The Plaintiff submits that the cause of action appears clearly from the factual allegations made in the particulars of claim.

[32] The plaintiff raises four specific grounds. For purposes of convenience, the grounds and the first defendant's objections are discussed simultaneously.

First ground: dispute about the existence, and amount, of the debt

[33] The plaintiff contends that the *lis* between the parties has not been finally resolved in the judgment dated 20 September 1995, being the settlement agreement. Further judgment is required to resolve the dispute on the existence and the amount of the judgment debt.

[34] He submits further that neither the judgment nor the writ possesses the degree of liquidity or certainty with respect to the amount of money which the plaintiff was ordered to pay in respect of educational expenses, and medical and dental expenses in terms of clauses 2.4 and 2.6 of the settlement

agreement. These amounts can neither be ascertained *ex facie* the settlement agreement, nor are the amounts capable of prompt and quick ascertainment. The settlement agreement provides merely a method of calculation but it is dependent on a court in further proceedings to determine the amount payable. If the first defendant relies on a schedule to determine the outstanding amount, this, in itself, needs to be ventilated at a trial by way of the discovery process as well as oral evidence. The actual supporting documents on which the schedule is allegedly based were not presented to the Registrar, and it contains no breakdown of the alleged expenses.

- [35] The first defendant submits that no case is made out by the plaintiff that there exists a dispute about the debt that needs to be determined at a subsequent hearing. The first defendant contends that the quantum is capable of easy ascertainment and constitutes a liquidated sum in money. The settlement agreement provides in clear terms for payment of R 750 per month as maintenance, while the sum of R 27 750 as arrear maintenance is clearly stated in the settlement agreement. Payment of school fees and tertiary education is easily ascertainable from the agreement and capable of prompt and quick ascertainment. The plaintiff does not plead what future intervention or proceedings are required, to establish the amount owing.

Second ground: demand for payment

- [36] Plaintiff claims that no demand for payment was made and that the warrant was therefore issued without cause. The first defendant was required to satisfy the Registrar that demand had been made to the plaintiff for payment of expenses in specific amounts since the judgment does not settle the amounts payable. The plaintiff contends that no debt for payment of tertiary education becomes due prior to demand being made. According to the plaintiff the settlement agreement specifically provides that in the event that the first defendant makes payment in respect of any of the plaintiff's obligations the plaintiff shall refund the first defendant forthwith on demand (clause 2.6). The plaintiff claims that the purpose of the demand was to

make the plaintiff alive to the intention to claim the amount from him. The warrant of execution presented the plaintiff with a *fait accompli*.

- [37] The first defendant submits that the service of the writ is the demand. The settlement agreement, which was made an order of court, provides in unequivocal terms and language that the agreement would be a judgment debt – accordingly, it can be executed on. The first defendant disputes that Clause 6 of the settlement agreement refers to a demand, submitting that presumably the Plaintiff is referring to a *mora* notice, but this is not provided for in the agreement.

Third ground: prima facie case

- [38] The plaintiff avers that the first defendant failed to present the Registrar with *prima facie* evidence of the existence of the judgment debt in the amount claimed, because she presented none of the supporting documents she claimed to have used to compile her schedule and to determine the amount of the plaintiff's alleged indebtedness to her. According to the particulars of claim, the source documents have not been made available to the plaintiff, at the date of the issue of summons, despite a request for inspection from the plaintiff's attorneys.
- [39] The first defendant submits that no facts are pleaded by the plaintiff in this respect, and that the affidavit to the Registrar and her confirmation therein that the schedule of the debt is based on source documentation under her control and which she has verified, was sufficient to satisfy the Registrar that a proper case had been made out and to issue the writ.

Fourth ground: waiver

- [40] The plaintiff pleads an express waiver by the child of any further maintenance against him – specifically, that on or about her 18th birthday, and at the house of the first defendant, she told the plaintiff in the presence of the first defendant that she wanted nothing more to do with him and did not need his money. The plaintiff submits that this constitutes waiver, which the plaintiff

accepted. Notwithstanding, the first defendant claims maintenance until 2019. The plaintiff argues that this is an issue for trial, which impacts significantly on the value of the purported claim of the first defendant. If the waiver is found to be valid, no claim can exist on behalf of the child after the date of waiver. Clause 6 reads as follows: “This agreement constitutes the full and final settlement of all claims between the parties. Save in respect of the obligations towards the minor child, this Agreement shall not be capable of alteration or waiver or be subject to estoppel unless reduced to writing or is ordered by a competent Court.” The settlement agreement does not explicitly state when the obligation to pay maintenance terminates.

[41] The first defendant submits that the settlement agreement expressly excludes waiver unless done so in writing. In other words, oral variation is impermissible. Waiver must be properly pleaded, but the Plaintiff alleges no written variation. There is also a common law presumption against waiver.

Evaluation

[42] In respect of the first and third points, the plaintiff’s position is that the settlement agreement (which was made a court order) does not give rise to a judgment debt sounding in money, and that the first defendant could never make out a *prima facie* case for the issuing of the writ. The plaintiff relies on *Dezius v Dezius* where it was held that maintenance orders are not money judgments or an order *per se* insofar as they fall within a special category in which such relief is competent.⁹

[43] First defendant’s counsel brought to the attention of the court the very recent judgment of the Supreme Court of Appeal in *SA v JHA*,¹⁰ which he argues is authority that a maintenance obligation in a consent paper incorporated in a divorce order is a judgment debt, subject to a prescription period of thirty years, and executable. Both counsel made submissions on the relevance of this case to the present application.

[44] I do not intend to deal with it exhaustively. There are indeed differences between that case and the present case, as pointed out by plaintiff’s

⁹ 2006 (6) SA 395 (T) at 402F—H.

¹⁰ 2022 (3) SA 149 (SCA).

counsel. For example, in *JHA* there is no record of any disputes pertaining to the amounts claimed, or that the maintenance obligation of the appellant terminated upon the children reaching majority. However, these differences are not necessarily relevant.

[45] Although the primary question was whether a maintenance order is a judgment debt for purposes of prescription, Smith AJA held that it will depend on the determination of the question whether maintenance orders possess the essential nature and characteristics of civil judgments.¹¹ After considering both Constitutional Court and Supreme Court of Appeal jurisprudence, the learned acting judge of appeal concluded that a maintenance order was indeed a civil judgment, an enforceable court order, dispositive of the relief claimed, definitive of the rights of the parties, and capable of execution without any further proof.¹² And further:

Its decision, either by way of a reasoned judgment or by agreement between the parties, disposed of the *lis* which was in existence between the parties at that point in time. An application for variation of that order thus introduces a new *lis*, the party applying for such an order contending that circumstances have changed to such an extent that they justify a reconsideration of the original decision. Thus, the matter is *res judicata* on the facts which were before the court that made the original maintenance order.¹³

[46] The import of Smith AJA's judgment is that a maintenance order is a civil judgment debt, which is enforceable without any proof. It is definitive of the rights of the parties, to the extent that it decides a just amount of maintenance payable based on the facts in existence at that time, and final and enforceable until varied or cancelled. This impacts negatively on the plaintiff's argument that the first defendant had not made out a *prima facie* case to the Registrar, as it is executable without any further proof.

[47] The plaintiff cannot deny the terms of the settlement agreement as this is settled between the parties. He is bound by them, but so too is the other

¹¹ Para [14].

¹² Paras [15]—[19].

¹³ Para [19].

party to the agreement. The agreement as it stands has provisions dealing with demand and waiver.

[48] On the face of it, the condition that alteration or waiver should be reduced to writing does not apply in respect of the obligations towards the child. The plaintiff pleads waiver by the daughter upon her reaching majority. The agreement does not stipulate when the maintenance obligations end. This could arguably be a point that could influence the extent of his liability.

[49] On the issue of demand, the recent judgment of Siwendu J in *VDB v VDB* in this division is potentially relevant.¹⁴ It concerned an application by the applicant, who was in maintenance arrears, to order the respondent to first furnish a notice to the applicant if she intends at any time to make application to any Court on an *ex parte* basis for an order issuing a warrant of execution against the applicant in respect of maintenance arrears.

[50] A deduction had been made from the applicant's retirement annuity, without notice, in terms of a writ of execution issued out of the Maintenance Court, in terms of the Maintenance Act 99 of 1998, following an *ex parte* application by the first respondent, after presenting a schedule which purported to show arrear maintenance.

[51] Siwendu J concluded that the applicant was not entitled to notice or demand:

[w]here there is a pre-existing Maintenance Court Order, there is no mechanism to resolve a dispute about the quantum owing before the issue of a writ nor a requirement for a notice before the issue of such a writ.¹⁵

[52] In the present case the writ was issued by the Registrar of this Court, in terms of the settlement agreement which had been made an order of court. As far as I can see there is no mention in the judgment that the settlement agreement had a clause requiring demand to be made first, as there is in the present case.

[53] The plaintiff raises some potentially arguable points relating to waiver and notice, but these on their own, taking into consideration the judgment in *JHA*, are not sufficient, in my opinion, to found a cause of action. The plaintiff

¹⁴ *VDB v VDB and Others* (22/11181) [2022] ZAGPJHC 271 (20 April 2022).

¹⁵ Para [25].

disputes not only the amounts he must pay; he denies owing maintenance or that he is liable to refund the first defendant at all in terms of the court order. Although he is not required to set out in detail the evidence he would present at trial, he should set out the material facts on which he bases his denial of liability. It is incumbent on a plaintiff to plead a complete cause of action which identifies the issues which the plaintiff seeks to rely upon and on which evidence will be led. It is insufficient to give what essentially amounts to a blank denial of liability.

[54] The first defendant's exception on this ground is valid. I take the view that the claim should not be dismissed, nor that the particulars of claim should be struck out at this point. I intend to grant the plaintiff 20 (twenty) days within which to amend his particulars of claim. Should he not do so, the particulars of claim will be struck out.

Costs

[55] Costs should follow the result. First defendant seeks costs on an attorney-client scale. I do not consider there to be sufficient justification to award punitive costs.

THE FOLLOWING ORDER ISSUES:

- a. First Defendant's exception is upheld.
- b. Plaintiff is afforded 20 (twenty) days from the date of this order to amend his particulars of claim.
- c. In the event of Plaintiff failing to amend the particulars of claim within 20 (twenty) days, the particulars of claim will be struck out.
- d. Plaintiff is ordered to pay the costs of the exception.

M Olivier
Acting Judge of the High Court
Gauteng Local Division Johannesburg

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 16h00 on 7 September 2022.

Date of hearing: 23 May 2022

Date of judgment: 7 September 2022

On behalf of Excipient/First defendant: R. Cohen

Instructed by: Glynnis Cohen Attorneys

On behalf of Respondent/Plaintiff: L. Posthumus

Instructed by: JNS Attorneys