

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

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

DATE

SIGNATURE

CASE NUMBER: 21/43033

THE STANDARD BANK OF SOUTH AFRICA LIMITED
(Registration Number: 1962/000738/06)

Plaintiff

and

BAMBOO ROCK CONSTRUCTION (PTY) LIMITED
(Registration Number: 2015/015085/07)

First Defendant

FD SHARED OFFICE SERVICES (PTY) LIMITED
(Registration number. 2009/010652/07)

Second Defendant

BAMBOO ROCK PLANT (PTY) LIMITED

(Registration number: 2012/014184/07)

Third Defendant

**DIGMIN GROUP (PTY) LIMITED
(Registration number: 2015/042299/07)**

Fourth Defendant

**GERALD DAVID CHAPMAN
(Registration number. [...])**

Fifth Defendant

JUDGMENT: DEFENDANTS' EXCEPTION

FRIEDMAN AJ:

1 In this matter, the plaintiff (“Standard Bank”) sues the first defendant (“Bamboo Rock”) on the basis of alleged indebtedness arising, according to Standard Bank, from:

1.1 the breach by Bamboo Rock of the terms of an overdraft facility; and

1.2 indebtedness of Bamboo Rock to Standard Bank arising from various credit card facilities made available by Standard Bank to Bamboo Rock.

2 The cause of action against the second to fifth defendants is that they signed guarantees in favour of Standard Bank, which the bank says renders them principal co-debtors with Bamboo Rock. I shall describe the second to fifth defendants as “the guarantee defendants”. The guarantee defendants are three companies and one natural person.

3 Standard Bank’s amended particulars of claim rely on an Overdraft Facility Agreement as the basis of the claim against Bamboo Rock. Standard Banks says that the Overdraft Facilities Agreement takes the form of two documents: terms and conditions agreed on 29 October 2018 and amended terms and conditions, agreed on 12 December 2018 (although for some reason the amended particulars of claim allege that the amended

terms were accepted by Bamboo Rock on 29 October 2018). These documents take the form of a covering letter recording that the overdraft facility had been extended and a further covering letter foreshadowing the amendments (which themselves contain some contractual clauses), and then terms and conditions attached to the covering letters.

4 The defendants, all represented by the same attorneys and counsel, have excepted to Standard Bank's amended particulars of claim. They raise six exceptions.

5 It would not be convenient for me to embark on a detailed discussion of the amended particulars of claim and the grounds of exception here. Instead, I shall deal with each exception separately below, explaining each complaint as I go along. I would ordinarily have reproduced the main body of the amended particulars of claim to provide the necessary context for the discussion of each of the exceptions. However, the amended particulars of claim run to around 30 pages and although some appropriate editing could cut them down substantially (at least for the purpose of reproducing them here), it is not necessary for me to do so. As will become clearer when I deal with each exception, they are relatively self-contained, and it is possible for a reader to follow the position of the parties and the relevant disputes without having to see the whole document.

6 Before I tackle each of the exceptions, it would be useful for me to say a few words about the applicable legal principles, most of which are trite:

6.1 When it comes to exceptions based on the contention that no cause of action is disclosed, the well-established test is the following: on every interpretation that

the particulars of claim can reasonably bear, and accepting the truth of the allegations made in the particulars of claim, is a cause of action disclosed?¹

6.2 The test when determining whether a vague-and-embarrassing exception should be upheld is to establish (a) whether the pleading lacks particularity to the extent that it is vague; and (b) whether the vagueness causes prejudice to the excipient.² In this regard:

6.2.1 The plaintiff is required to state its case in its particulars of claim with precision, to assist both the parties and the court to understand the issues arising in the claim.³

6.2.2 It is essential for the plaintiff to plead its case in a way that enables the defendant to know what case it is called upon to meet.⁴ This means that the particulars of claim have to be lucid and logical and in an intelligible form so that the causes of action appear clearly from the factual allegations made.⁵

6.2.3 However, an exception based on the contention that a pleading is vague and embarrassing will only be upheld if there is serious

¹ *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F-G; *First National Bank of SA v Perry NO* 2001 (3) SA 960 (SCA) at 965D-E.

² *Barloworld Logistics Africa (Pty) Ltd v Ford* 2019 (5) SA 133 (GJ) at para 40; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T)

³ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C; *MN v AJ* 2013 (3) SA 26 (WCC) at para 20

⁴ *Venter v Barritt Venter* 2008 (4) SA 639 (C) at para 12; *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 454

⁵ *Trope* (supra) at 210

prejudice to the other party arising from the way in which the pleading is formulated.⁶

7 These are broad principles relating to exceptions which are not controversial. I return to discuss the law briefly again when dealing with the fourth exception because it raises some complexities, especially in the light of the relatively recent decision of the Constitutional Court in the *University of Johannesburg* case.⁷

THE FIRST EXCEPTION

8 The first exception is framed as follows:

1. At paragraphs 8 to 11 of the Plaintiff's Particulars of Claim, the Plaintiff pleads that the Plaintiff and the First Defendant concluded the Overdraft Facility Agreement.

2. At paragraph 13 of the Plaintiff's Particulars of Claim, the Plaintiff pleads that, in terms of the Overdraft Facility Agreement, the rate of interest which would be applied to the Initial Limit would be charged at the Plaintiff's published variable interest rate, commonly known as the "prime rate", which is 7% as at 18 June 2021, plus a margin of 1% i.e. 8%.

*3. At paragraph 23 of the Plaintiff's Particulars of Claim, the Plaintiff pleads that, in terms of the Overdraft Facility Agreement, the First Defendant is indebted to it in the amount of **R19 539 742.45** plus interest thereon at a rate of 8% (eight percent) per annum, which interest is calculated daily and compounded monthly in arrears from **25 July 2021** to date of payment, both days inclusive and which amount is due owing and payable by the First Defendant.*

4. At prayer 1.2 of the prayers, the Plaintiff prays for judgment against the First Defendant for:

*4.1. payment in the amount of **R19 539 742.45**; and*

*4.2. payment of interest thereon at a rate of 8% (eight percent) per annum, which interest is calculated daily and compounded monthly in arrears from **25 July 2021** to date of payment, both days inclusive, the stated interest rate being subject to any changes in the prime rate.*

⁶ *Levitan v Newhaven Holiday Enterprises* CC 1991 (2) SA 297 (C) at 298A

⁷ *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC)

5. The Plaintiff has failed to plead that it was a term of the Overdraft Facility Agreement that interest would be:

5.1. calculated daily; or

5.2. compounded monthly in arrears.

6. The aforesaid renders the Plaintiff's Particulars of Claim excipiable on the basis that they lack averments necessary to sustain a cause of action."

9 In the heads of argument filed on behalf of the defendants, they indicate that they do not persist in the complaint relating to the daily calculation of interest because they now accept that the terms and conditions provide for interest, calculated daily. Therefore, the only issue raised by the first exception is whether the amended particulars of claim do not sustain a cause of action in respect of the claim for interest, compounded monthly.

10 In order to assess this first complaint, one has to have regard to the way in which Standard Bank pleaded the terms of the Overdraft Facilities Agreement. Standard Bank refers to the two sets of terms and conditions which I described above, and says that they collectively constitute the Overdraft Facilities Agreement. It then says that all of these terms and conditions (annexed to the amended particulars of claim) must be read as incorporated into the amended particulars of claim. Then, in paragraph 13, there is a summary of various aspects of what was agreed, all with reference to the terms and conditions. In paragraph 23 of the amended particulars of claim, Standard Bank asserts that Bamboo Rock is "indebted to [Standard Bank] pursuant to the overdraft facility agreement in the amount of R19 539 742.45 . . . together with interest thereon at a rate of 8% . . . which interest is calculated daily and compounded monthly in areas". This proposition – ie, the statement of Bamboo Rock's alleged indebtedness – is a conclusion which is said to follow from the terms of the Overdraft Facilities

Agreement, which in turn is a reference (at least in part) to the two sets of terms and conditions.

- 11 So, in substance, the pleaded terms of the Overdraft Facilities Agreement are those set out in the two sets of terms and conditions. Read in this way, the first exception is based on the proposition that neither of the two sets of terms and conditions provides for compounding interest monthly in arrears.
- 12 Standard Bank, in its heads of argument, refers to clause 8.4 of the terms and conditions. It correctly argues that the first exception turns on the proper interpretation of clause 8.4.
- 13 Clause 8 of the terms and conditions reads as follows:

“8 Interest

8.1 The variable Interest rate applicable to this Overdraft Agreement is linked to our Prime Interest Rate by a Margin related to Prime that is determined by us and has been disclosed in the "Interest" clause in the letter.

8.2 We may from time to time vary the interest rate applicable to this Overdraft Agreement if Prime fluctuates. If we do amend the Interest rate, we will advise you in writing within at least 30 (thirty) Business Days after the change becomes effective.

8.3 We may charge excess availment interest if you exceed any Limit, or Reduced Limit, agreed to in the Overdraft Agreement.

8.4 The interest payable by you is:

8.4.1 calculated on a daily basis on the outstanding balance;

8.4.2 calculated on a 365-day year, irrespective of whether the relevant year is a leap year;

8.4.3 charged monthly in arrears and is due and payable immediately;
and

8.4.4 debited to the Current Account(s) reflected in the "Interest, costs, fees and charges" clause in the attached letter.

8.5 We may immediately amend the pricing structure of the Overdraft Facility if there is a change in:

8.5.1 law or the issue of a directive with which we must comply; or

8.5.2 market conditions resulting in an increasing cost to us.

If we do so we will advise you accordingly.”

14 The references in clause 8 to the “letter” is a reference to the covering letter to which the terms and conditions were attached. It deals (in paragraphs 3.2.2.3 and 3.2.2.5) with the topic of interest briefly but does not cast any light onto the proper interpretation of clause 8.4.

15 In advancing its argument on the proper interpretation of clause 8.4, Standard Bank relies on the evergreen *Endumeni*⁸ principles of interpretation, placing emphasis on the admonition that a contract must be interpreted to give it a commercially sensible meaning.

16 Standard Bank’s argument is, in essence, the following:

16.1 The terms and conditions form part of its pleaded case.

16.2 Clause 8.4, properly interpreted, provides for interest which is “compounded monthly in arrears”.

16.3 Although, in the body of the amended particulars of claim, no allegation is made that the parties agreed that interest would be compounded monthly in arrears, the incorporation of the terms and conditions into the pleaded case

⁸ *Natal Joint Municipal Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

serves the same purpose. This is because, by relying on clause 8.4 of the terms and conditions, Standard Bank is relying on a clause which, properly interpreted, provides for interest compounded monthly in arrears.

16.4 Then, on the proper interpretation of clause 8.4, Standard Bank refers in its heads of argument to the dictionary definition of the word “compounded” and says that it means “to (pay or) charge interest on an amount of money that includes interest already (earned or) charged”. It says that clause 8.4 provides for interest which is calculated daily and debited to the account monthly in arrears. It says that the “debiting of the interest to the account thus amounts thereto that the interest is charged to the account on a monthly basis and the following months [sic] interest is calculated, premised upon such new balance including previous interest”.

16.5 Standard Bank, as a fall-back position, refers to cases which have held that compound interest may only be charged if agreed expressly or by custom.⁹ It says that it will be able to lead evidence to show that the customary practice of banks is to charge compound interest.

16.6 Lastly, it says that there is no prejudice to the defendants if they contest Standard Bank’s prayer for compound interest because “they can simply deny same in the plea”.

17 To dispense with the last argument first: it is no answer, in the face of an exception, to assert that the other party’s complaint that the particulars of claim disclose no cause of action may be assuaged simply by making a bald denial in the plea of the relevant

⁹ See for example *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 566F-H

allegations making up the supposed cause of action. A defendant is entitled to argue that the particulars of claim do not disclose a cause of action at the exception stage and is not required to plead to a claim which discloses no cause of action. That is the whole point of rule 23 of the Uniform Rules.¹⁰

18 Leaving that argument aside, then, the question is whether the amended particulars of claim, by incorporating the terms and conditions, can be read as alleging that the payment of compound interest is a term of the agreement. As will be seen when I deal with the second and third exceptions, clause 14.11 of the terms and conditions provides that a “certificate signed by any of our managers, whose appointment need not be proved, will on its mere production be sufficient proof of any amount due and/or owing by you in terms of this Overdraft Agreement, unless the contrary is proved”.

19 It seems to me that, in pleading reliance on the terms and conditions, and then annexing the certificate of balance to the particulars of claim (as Standard Bank has done in respect of the claim against Bamboo Rock), the reference in clause 14.11 to the certificate is sufficient to defeat a cause of action exception as framed above. Bamboo Rock would be entitled to lead evidence, of course, to dispute what is said in the certificate. But since it provides for compound interest, it would appear to be a basis on which Standard Bank could make out a potential cause of action. This issue is not without its complexities, though, and I accept that a reasonable debate might be had about whether the reference in clause 14.11 to an “amount owing” covers the manner of quantifying the interest.

20 In any event, it is not necessary for me to decide that issue. I deal more fully below, when dealing with the fourth exception, with the changes which have been made to our

¹⁰ See *Hlapolosa v Lishiva* 2019 JDR 2639 (GP) at paras 14-15

law by the Constitutional Court decision in *University of Johannesburg*. As will be seen there, it is not always the case that parties should be given the opportunity to lead evidence as to the proper meaning of contracts. But, there is now a strong default position in that direction, and Standard Bank's construction of the interest clauses in the terms and conditions may well require the leading of evidence.

21 *Mr Hollander*, who appeared for the defendants, correctly (in my respectful view) pointed out that, if it is correct (as the case law seems to suggest) that compound interest may only be charged by express agreement or because of custom, this has to be pleaded. Standard Bank has chosen to plead its case without reference to custom, which implies that, unless it seeks leave to amend its particulars of claim again, it does not rely directly on custom. However, in the light of the now trite *Endumeni* principles of interpretation, and even more so now in the light of *University of Johannesburg*, it seems to me that banking custom would be relevant to the proper interpretation of clause 8.4 of the terms and conditions. I prefer to deal with *University of Johannesburg* in more detail when dealing with the fourth exception. But for present purposes, what is noteworthy is the Constitutional Court's emphasis on the proposition that, in the interpretive exercise, the text of a contract no longer enjoys primacy and that language, context and purpose must be given equal weight. If that is so, evidence as to banking custom would be relevant to the proper meaning of clause 8.4 and would speak to, amongst possible other things, the purpose of the clause and also the question of a commercially-sensible interpretation. Standard Bank says that it may need to lead evidence on this issue to make out its case as to the proper meaning of clause 8.4. That being so, this is not an issue which can be determined on exception.

22 For these reasons, the first exception must be dismissed.

THE SECOND EXCEPTION

23 The second exception also relates to Standard Bank's claim for R19 539 742.45 and interest of 8% arising from the Overdraft Facility Agreement. It is framed as follows:

"8. The express terms of the Overdraft Facility Agreement include, *inter alia*:

8.1. "The rate of interest on the Limit will be charged at Prime plus 1% per annum, that is, presently 11% per annum. Prime is currently 10% per annum";

8.2. "The variable interest rate applicable to this Overdraft Agreement is linked to our Prime Interest Rate by a Margin related to Prime that is determined by us and has been disclosed in the "Interest" clause in the letter"; and

8.3. "We may from time to time vary the interest rate applicable to this Overdraft Agreement if Prime fluctuates. If we do amend the interest rate, we will advise you in writing within at least 30 (thirty) Business Days after the change becomes effective."

9. The Plaintiff has failed to plead:

9.1. that there was any change in the prime interest rate, with the result that it is claiming interest at 8%;

9.2. if there were any changes in the prime interest rate, when those changes became effective; and

9.3. that it notified the First Defendant of the change within 30 Business Days after any such changes became effective.

10. In the circumstances, the First Defendant is not in a position to determine how the amount claimed from it has been calculated.

11. The aforesaid renders the Plaintiff's Particulars of Claim excipiable on the basis that they are vague and embarrassing and/or lack averments necessary to sustain a cause of action."

24 There is rhetorical force in this exception. However, in my view it is without merit. As the claim is currently pleaded, there is an allegation that it was a term of the agreement

that “[t]he rate of interest on the Limit will be charged at Prime plus 1% per annum, that is, presently 11% per annum. Prime is currently 10% per annum” coupled with a claim for 8% interest. With mere proof by Standard Bank that this clause was indeed a term of the agreement, it would be entitled to claim 8% interest. This is because it has an unqualified right to abandon any portion of its claim. In other words, even if the prime lending rate had remained at 10% throughout the term of the agreement, it would still have an election to claim 8%.

25 But, in any event, I agree with *Mr Reineke*, who appeared for Standard Bank, that Standard Bank is, in terms of the Overdraft Facilities Agreement, entitled to rely on the certificate of balance annexed to the amended particulars of claim. As I have already explained above, clause 14.11 of the amended terms and conditions provides that a “certificate signed by any of our managers, whose appointment need not be proved, will on its mere production be sufficient proof of any amount due and/or owing by you in terms of this Overdraft Agreement, unless the contrary is proved”. The certificate of balance annexed to the particulars of claim says that Bamboo Rock owes Standard Bank “the sum of R19 539 742.45 . . . together with interest currently at 08.000%”. The amended particulars of claim incorporate all of the terms and conditions and, furthermore, refer to the certificate of balance. At the exception stage, it seems to me that this is sufficient to justify the claim for 8%. Given the reference to the possibility of the “contrary” being proven, it would be open to the defendants to dispute the quantum or the interest rate. But I do not agree that the amended particulars of claim are excipiable, either because they fail to disclose a cause of action or are vague and embarrassing, on this score.

THE THIRD EXCEPTION

26 The third exception relates to the guarantee defendants. It is framed as follows:

“13. At paragraph 25 of the Particulars of Claim the Plaintiff pleads that the Plaintiff granted and made the Credit Card Facilities available to the First Defendant.

14. At paragraph 29 of the Particulars of Claim the Plaintiff pleads that interest payable by the First Defendant in respect of the Credit Card Facilities was prime plus 10.5%.

15. In respect of the Second to Fifth Respondents:

15.1. at paragraph 34 of the Particulars of Claim the Plaintiff pleads that each of the Second to Fifth Defendants concluded written guarantees in favour of the Plaintiff in respect of which each of them guaranteed and undertook as principal and independent obligations to and in favour of the Plaintiff the due, punctual and full payment of all of the debts of the First Defendant when owed to the Plaintiff in terms of the Overdraft Facility Agreement and the Credit Card Facilities;

15.2. at paragraph 37.1 of the Particulars of Claim the Plaintiff pleads that the amount which the Plaintiff would be entitled to recover under each of the aforesaid guarantees would be limited to the Relevant Guaranteed Limit together with such further amounts in respect of interest and costs as have already accrued or which will accrue until the date of payment;

15.3. at prayers 2.1, 3.1 and 4.1 respectively of the Particulars of Claim, the Plaintiff prays for judgment against each of the Second to Fifth Respondents of the value of the Relevant Guaranteed Limit in terms of the aforesaid guarantees;

and

15.4. at prayers 2.2, 3.2 and 4.2 respectively of the Particulars of Claim the Plaintiff prays for judgment against each of the Second to Fifth Respondents of interest on the amount of the value of the Relevant Guaranteed Limit at a rate of 7% per annum a *tempore morae*, the stated interest rate being subject to any changes in the prescribed rate.

16. The Plaintiff has failed to plead the basis on which it is claiming payment of interest at a rate of 7% per annum from each of the Second to Fifth Defendants, as opposed to the prime rate plus 1% in respect of the Overdraft Facility Agreement or the prime rate plus 10.5% in respect of the Credit Card Facilities.

17. The aforesaid renders the Plaintiff's Particulars of Claim excipiable on the basis that they are vague and embarrassing and/or lack averments necessary to sustain a cause of action.”

27 For similar reasons as given above in relation to the second exception, there is no merit, in my view, in the third exception. Clause 9 of the guarantees (which are annexed to the amended particulars of claim) is similar to clause 14.11 of the terms and conditions (binding on Bamboo Rock). It provides:

“A certificate under the hand of any manager or authorised signatory of the Bank shall be sufficient proof of the contents and correctness thereof and the amount of the Guarantor’s indebtedness hereunder for the purposes of provisional sentence or summary judgment or any other proceedings against such Guarantor in any competent court, and shall be valid as a liquid document for those purposes.”

28 There are four certificates of balance annexed to the amended particulars of claim. Each certificate names one of the guarantee defendants and records its (or, in the case of the fifth defendant, his) indebtedness. The principal debt differs as between some of the guarantee defendants because the second, fourth and fifth defendants guaranteed payment up to a limit of R13 million, and the third defendant guaranteed payment up to R20 million. But in the case of all four of the guarantee defendants, the certificate of balance records that interest of 7% is payable.

29 For this reason, there is clearly a cause of action disclosed in the amended particulars of claim. It takes the form of:

29.1 First, an allegation that each of the guarantee defendants concluded written guarantees in favour of the bank.

29.2 Secondly, an allegation that each of guarantee defendants agreed to clause 9 which I have reproduced above.

30 The amended particulars of claim are also not vague and embarrassing. On the simple basis of relying on the certificates of balance, they clearly explain the basis for the interest claim. It follows that this exception must be dismissed.

THE FOURTH EXCEPTION

31 The fourth exception also relates to the position of the guarantee defendants. It reads as follows:

“18. The Plaintiff claims payment from each of the Second to Fifth Defendants on the basis of the guarantees attached to the Particulars of Claim marked "G1" to "G3".

19. Clause 8.3 of each of the guarantees provides as follows:

‘8. 3 If the Guarantor:

8.3.1 fails to pay an amount payable by the Guarantor to the Bank on the date that such amount becomes payable or if the Guarantor breach [sic] any of the provisions of this Guarantee; and

8.3.2 fails to pay the amount or remedy the breach within 7 (seven) Business Days of the date of receipt of the written notice requiring the Guarantor to do so,

then the Bank shall be entitled, without notice, to claim specific performance from the Guarantor without prejudice to any other rights the Bank may have, including the right to claim damages.’

20. It is therefore a condition precedent to a claim for specific performance that the Plaintiff has given each of the Second to Fifth Defendants seven business days' notice requiring it/him to remedy any alleged breach.

21. The Plaintiff has failed to plead that it has given each of the Second to Fifth Defendants notice as aforesaid.

22. The aforesaid renders the Plaintiff's Particulars of Claim excipiable on the basis that they lack averments necessary to sustain a cause of action.”

32 During argument, Standard Bank sought to rely on the decision of *Standard Bank v Hand*.¹¹ Because the implications of this case were not fully argued, I gave the parties the opportunity to file short supplementary submissions on the case. I deal with that judgment below.

33 There is, in my view, some complexity in determining the implication of the *University of Johannesburg* decision of the Constitutional Court, which I mentioned briefly above, for the future of cause of action exceptions. I say this for the following reasons:

33.1 The decision of the SCA in *Endumeni* triggered, seemingly inadvertently, a relatively radical development in our law of contract. I had never understood *Endumeni* to intend to introduce a change to our law relating to the leading of evidence to determine the proper meaning of a contract. The famous paragraph of *Endumeni* is paragraph 18. But one must read paragraphs 18 to 26 of the judgment to get a full picture of what Wallis JA actually said. If one reads all of those paragraphs, it becomes quite clear that Wallis JA did not intend to introduce into our law of interpretation (whether of statutes or contracts) a new approach to the leading of evidence. Certainly, before *Endumeni*, the leading of evidence to determine the meaning of a contract was an exceptional approach to adopt. Absolutely nothing said in *Endumeni* in paragraphs 19 to 26 changes that.

33.2 Courts have, long before *University of Johannesburg* (or, indeed, *Endumeni*), been reluctant to admit evidence to determine the meaning of contractual terms. An exception was identified by the SCA in *Comwezi*¹² – which held that

¹¹ 2012 (3) SA 319 (GJ)

¹² *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited* 2012 JDR 1734 (SCA) at para 15

evidence as to the manner in which both parties implemented an agreement was admissible to demonstrate “how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision” – but even this was only part of the “objective determination of the meaning of the words they have used and the selection of the appropriate meaning from among those postulated by the parties”.

33.3 Despite this, the Constitutional Court in *University of Johannesburg* appears to have seen it as axiomatic that *Endumeni* opened the door to the leading of evidence to determine the meaning of contractual terms. It appears to have understood *Endumeni* to mean that parties will “invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions”.¹³

33.4 It seems to me that the Constitutional Court in *University of Johannesburg* adopted the following approach to contractual interpretation:

33.4.1 First, to determine the correct meaning of a clause in a contract, one must consider the context, language and purpose from the outset, with none of these predominating over the others.¹⁴

33.4.2 Secondly, the principle described above does not only apply in cases of ambiguity. When interpreting a contract a court must, from the outset, “consider the contract’s factual matrix, its purpose, the

¹³ See *University of Johannesburg* (supra) at paras 64 to 67

¹⁴ *University of Johannesburg* (supra) at para 65

circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.”¹⁵

33.4.3 Thirdly, in order to apply the approach described above, the parties will “invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions.”¹⁶

33.4.4 Fourthly, despite this, extrinsic evidence is not always admissible. Contractual interpretation remains a question of law and evidence to establish matters of purpose and context should be used as conservatively as possible.¹⁷

33.4.5 Fifthly, where reasonable people might disagree on the admissibility of evidence as to the context and purpose of the agreement, courts should err on the side of admitting the evidence. In this regard, there are sufficient checks on “any undue reach of such evidence” because courts would be free to disregard evidence considered not to be sufficiently weighty.¹⁸

34 One possible approach which our courts could adopt in the face of *University of Johannesburg* is simply to say that interpretive questions may now never be decided on exception because it is always at least notionally possible that evidence could be led to elucidate the meaning of contractual terms. This would be an entirely reasonable

¹⁵ *University of Johannesburg* (supra) at para 66

¹⁶ *University of Johannesburg* (supra) at para 67

¹⁷ *University of Johannesburg* (supra) at para 68

¹⁸ *University of Johannesburg* (supra) at para 68

approach to adopt, taking into account that, even before *University of Johannesburg*, courts were reluctant to decide interpretive issues on exception.¹⁹

35 But the question has to be asked: is there not some sort of duty on a party wishing to adduce such evidence, to make out a case for its admission? So, another possible approach is to say that this question must be decided on the facts of each case, taking into account the arguments advanced by the parties and the nature of the interpretive issues raised. In the light of the *University of Johannesburg*, the hurdle to overcome to succeed in a cause of action exception based on the interpretation of a contractual term will necessarily be high. As the Court put it in *Super Group Trading*,²⁰ even before *University of Johannesburg* was decided, a court on exception will have “to allow every interpretation that the contract can reasonably bear, rather than choose the most reasonable or business like interpretation in preference to others” and the excipient must show that on “every reasonable interpretation” of the contract the pleading does not disclose a cause of action. But just because the hurdle is high, does not mean that it cannot be overcome in appropriate cases.

36 In this case the whole agreement is before court and it has not been suggested by Standard Bank, either in the pleadings or in argument, that any evidence is necessary to elucidate its terms.²¹ Standard Bank made submissions on its preferred interpretation of the guarantees without suggesting that it would wish to lead evidence as to their proper meaning.

¹⁹ See *Picbel Group Voorsoong Fonds (In Liquidation) v Sommerville and Related Matters* 2013 (5) SA 496 (SCA) at para 40

²⁰ *Super Group Trading (Pty) Ltd v Premier FMCG (Pty) Ltd* 2019 JDR 0062 (GP) at para 10

²¹ See *Picbel Group* (supra) at para 40 (a decision admittedly taken before *University of Johannesburg*)

37 Unless our law has reached a point when it is simply impermissible to decide any question of interpretation on exception – a point that I do not believe has yet been reached – it has to be possible in appropriate case for courts to reach decisive outcomes on questions of law raised on exception. Crucially, this is particularly the case where the party on the other side of the exception does not identify any evidence which might be relevant to the interpretive exercise or argue that the exception should be dismissed because some sort of evidence may need to be led (as, for instance, Standard Bank did in the case of the first exception). Reasoning from the premise (which, I have made clear above, I intend to do) that there is no categorical rule against deciding interpretive issues on exception, the fact that no relevant evidence has been identified by the parties is an important consideration. Where a party on the receiving end of an exception does not adopt the position that further evidence is necessary, the Court is left to speculate about what evidence could possibly be relevant to the interpretive exercise. This is undesirable. Not only is it inconsistent with our adversarial approach to civil litigation, but it creates a situation where the court, by dismissing the exception, invites the leading of evidence in the pending trial which may have no utility whatsoever in determining the proper meaning of the contract. Or, to put it slightly differently, it invites a situation where the court dismisses the exception on the speculative basis that further evidence may be necessary, and it then turns out at trial that there is no further relevant evidence to be led.

38 In my view, there is no other interpretation of clause 8.3 of the guarantee which is plausible, other than the interpretation advanced by the defendants. Put differently: it is clear to me that, in order to ground a cause of action in terms of clause 8.3, it is necessary for Standard Bank to plead that it issued a written notice requiring the

guarantee defendant in question to pay the amount claimed within 7 days. I say this for the reasons given below.

39 Standard Bank's argument on the proper construction of this clause may be summarised as follows:

39.1 The need to issue a written notice only arises in cases of breach other than a failure to pay an amount payable by the Guarantor.

39.2 This arises from the use of the word "or" in clause 8.3.2 of the guarantee. On this construction, the notice only relates to all of the words which follow the "or" in clause 8.3.2.

39.3 This interpretation is buttressed by clause 1.1.1.2 of the guarantee, which provides that one of the obligations on the guarantor is to "pay to the Bank, on first written demand from the Bank and without delay, any and all amounts which are or may become due and payable in respect of the Debts". Standard Bank argues that this clause would be rendered redundant, if the agreement has to be interpreted to require the guarantor to be given seven days to pay (as opposed to being obliged to pay "without delay").

39.4 The *Hand* decision is authority for the proposition that "unless a clause in an agreement can be interpreted to require demand, prior to the institution of proceedings, demand for payment can be made in a summons. In addition, the clause [ie, the relevant clause in *Hand*] was interpreted as requiring a three-step process, being breach, demand, summons and then only legal action" (I quote

here from Standard Bank's supplementary submissions, filed after the hearing in this matter).

40 To dispense with the reliance on *Hand* first: even as characterised in Standard Bank's own supplementary submissions, the case is clearly distinguishable. It related to a clause which entitled Standard Bank to cancel an agreement "after due demand". So the interpretive work done by the court referred to this specific wording, which is different wording than that which arises from clause 8.3 of the guarantee.

41 So, leaving *Hand* aside, what is the correct interpretation of clause 8.3? If Standard Bank's interpretation of clause 8.3 were correct, then there is complete repetition, on the issue of a failure to pay, in clauses 8.3.1 and 8.3.2. In the supplementary heads of argument, Standard Bank says that the true interpretation of clause 8.3 is:

8.3 If the Guarantor:

8.3.1 fails to pay an amount payable by the Guarantor to the Bank on the date that such amount becomes payable and fails to pay the amount; or

8.3.2 if the Guarantor breaches any of the provisions of the Guarantee and fails to remedy the breach within 7 (seven) Business Days of the date of receipt of the written notice requiring the Guarantor to do so,

then the Bank shall be entitled, without notice, to claim specific performance from the Guarantor without prejudice to any other rights the Bank may have, including the right to claim damages." [my emphasis]

42 Leaving aside the fact that Standard Bank has to rewrite the clause, literally, to reach this outcome, the proposed rewriting by Standard Bank only serves to highlight the tautology. The sentence "fails to pay an amount payable by the Guarantor to the Bank on the date that such amount becomes payable and fails to pay the amount" is on its own terms tautologous. Why refer to the failure to pay twice?

- 43 The only plausible interpretation of clause is that clause 8.3.1 envisages two situations: (a) a failure to pay an amount payable by the Guarantor on the date that such amount becomes payable and (b) a breach by the Guarantor of any of the provisions of the guarantee agreement. Then, clause 8.3.2 envisages two kinds of failure: (a) a failure to pay the amount within 7 business days of the date of receipt of a written notice requiring the guarantor to do so and (b) a failure to remedy a breach within 7 business days of the date of receipt of a written notice requiring the guarantor to do so.
- 44 In my view, the reliance by Standard Bank on clause 1.1.1.2 of the guarantee takes the matter no further. It seems to me that one has to distinguish between the substantive obligations created by the agreement and the manner of enforcement. Although headings in contracts are not conclusive evidence of the meaning of their terms, they can assist in the interpretive exercise where there is doubt about the meaning of the body of the document.²² Clause 8.3 appears in a clause, clause 8, which is headed “Proceedings and Jurisdiction”. It is part of a roadmap created by clause 8 as a whole, as to how Standard Bank is to vindicate its rights in terms of the agreement. It creates, in the mechanism of requiring the issuing of a notice, a procedural requirement which must be fulfilled before Standard Bank may vindicate its right to claim specific performance in terms of the agreement.
- 45 Clause 1.1.1.2 appears in a clause headed “Liability and Obligations of the Guarantor”. One of the obligations of the guarantor, which arises from clause 1.1.1.2, is to “pay to the Bank, on first written demand from the Bank and without delay, any amounts which are or may become due and payable in respect of the Debts”.

²² See *Mzalisi NO v Ochogwu* 2020 (3) SA 83 (SCA) at paras 31-32

46 In the first place, I would tend to agree with *Mr Hollander* that the reference to “written demand” could be read to refer to the notice in clause 8.3. But even leaving that aside, clause 1.1.1.2 clearly imposes an obligation on the guarantor to pay amounts which are due and payable “on first written demand from the Bank and without delay”. But there is then the entirely separate question of what procedural rules must be followed before Standard Bank is entitled to claim specific performance. That issue is addressed separately in clause 8.3. The implication of these clauses, read as a whole, must be that the bank was obliged to serve a notice on the guarantee defendants giving them seven days to pay the amounts owing under the guarantees before it could proceed to sue for specific performance under the guarantees. It follows that particulars of claim which do not allege that such a notice was delivered, disclose no cause of action.

47 Given everything that I have said above, the question remains: am I obliged nevertheless to dismiss the exception on the basis that some or other evidence might be led by Standard Bank to militate against the interpretative conclusion which I have reached? As I noted above, not even Standard Bank, either in its heads of argument or in its oral submissions, suggested that it wished to lead evidence on this issue. That being the case, and given that it is quite difficult to imagine what evidence could possibly be led to change the conclusion which I have reached above, it seems to me that the answer must be no.

48 I am emboldened in my view by the remarks of Unterhalter AJA in *Coral Lagoon*,²³ when he was left to make sense of *University of Johannesburg* as it relates to the parol evidence rule. He made the point that “there are limits to the evidence that may be admitted as relevant to context and purpose. While the factual background known to the

²³ *Capitec Bank Holdings Ltd v Coral Lagoon Investments (Pty) Ltd* 2022 (1) SA 100 (SCA)

parties before the contract was concluded may be of assistance in the interpretation of the meaning of a contract, the courts' aversion to receiving evidence of the parties' prior negotiations and what they intended (outside cases of rectification) or understood the contract to mean should remain an important limitation on what may be said to be relevant to the context or purpose of the contract.”²⁴ And also that, even after *University of Johannesburg*, there is no scepticism in our law “that the words and terms used in a contract have meaning”.²⁵

49 Admittedly, in *Coral Lagoon* evidence was held to be admissible as part of the interpretive exercise. But this was in circumstances where one of the parties argued forcefully for its admission. That is not the case here and there is simply no suggestion, anywhere in the material before me, that evidence could serve to alter the meaning of clause 8.3 of the guarantee as I have described it above. It follows that the exception must succeed.

THE FIFTH EXCEPTION

50 The fifth exception relates to the credit card facilities. It is expressed as follows:

“23. At paragraph 26.2 of the Particulars of Claim the Plaintiff pleads that the Credit Card Facilities were made available to the First Defendant in terms of oral agreements concluded between the Plaintiff and the First Defendant during the period 29 January 2018 until 24 April 2019.

24. At paragraph 29.1 of the Particulars of Claim the Plaintiff pleads that “*in accordance with* normal banking practice the Plaintiff was entitled to raise interest at a rate linked to the prime rate and based on the risk profile of the First Defendant”. [emphasis added]

25. It is unclear from the Plaintiff’s Particulars of Claim whether the Plaintiff is pleading that the aforesaid term in respect of interest:

²⁴ *Coral Lagoon* (supra) at para 48

²⁵ *Coral Lagoon* (supra) at para 49

25.1. formed part of the express terms of the alleged oral agreement/s between the Plaintiff and the First Defendant; or

25.2. was an implied term of the alleged oral agreement/s between the Plaintiff and the First Defendant by way of trade usage.

26. The aforesaid renders the Plaintiff's Particulars of Claim excipiable on the basis that they are vague and embarrassing alternatively lack averments necessary to sustain a cause of action.”

51 This exception is, with respect, difficult to understand. To explain why, it is necessary for me to reproduce the whole of paragraph 29 of the amended particulars of claim, and not just paragraph 29.1. Paragraph 29 of the particulars of claim reads as follows:

29. The amounts lent and advanced to the First Defendant as aforesaid are payable on demand to the Plaintiff and:

29.1 in accordance with normal banking practice the Plaintiff was entitled to raise interest at a rate linked to the prime rate and based on the risk profile of the First Defendant;

29.2. in accordance with the aforesaid, the Plaintiff raised interest at the prime rate plus a margin of 10.50% and the interest rates pleaded as aforesaid is subject to any changes in the prime rate;

29.3. the First Defendant tacitly accepted the interest rates charged by the Plaintiff in that it was reflected on the statements sent to the First Defendant from time to time and the First Defendant notwithstanding this made no serious objection to the interest so raised and/or continued to avail itself of the Credit Card Facilities.

52 It seems quite clear to me that Standard Bank's claim is that it was a tacit term of the agreements concluded between the parties in respect to the credit cards that interest would be charged at the rates ultimately charged. Whether it can prove this is, of course, a matter for trial. But I cannot see how the claim can be characterised as vague, much less failing to disclose a cause of action.

53 It follows that the fifth exception must be dismissed.

THE SIXTH EXCEPTION

54 The last exception relates to the issue of default in terms of the Overdraft Facility Agreement. It reads as follows:

“28. At paragraph 13.5 of the Particulars of Claim the Plaintiff pleads that a default in terms of the overdraft facility agreement would occur if there is, in the Plaintiff's reasonable opinion, a material deterioration in the First Defendant's financial position.

29. At paragraph 18 of the Particulars of Claim the Plaintiff pleads:

"The Plaintiff is further of the reasonable opinion of the reasonable [sic] that there was a material deterioration in the financial position of the First Defendant, not only for the reasons that the Plaintiff was generally not satisfied with the conduct on the overdraft account in that the deposits made to the overdraft account compared to the drawings therefrom indicated that the First Defendant was experiencing reduced trading capabilities, which reduced trading capabilities did not justify the Initial Limited remaining in place." [sic]

30. The Plaintiff could not reasonably form an opinion that there was a material deterioration in the First Defendant's financial position by simply comparing the deposits made into the overdraft account and the drawings therefrom.

31. In addition, a simple comparison of the deposits into and drawings from the overdraft account, without anything further, could never lead to a reasonable opinion that the First Defendant was experiencing reduced trading capabilities.

32. The aforesaid renders the Plaintiff's Particulars of Claim excipiable on the basis that they are vague and embarrassing alternatively lack averments necessary to sustain a cause of action.”

55 I cannot, with great respect to the defendants, see how I can determine this issue on exception. Standard Bank has pleaded the basis on which it formed a view that there was a material deterioration of Bamboo Rock's financial position. It has said that it formed this view because it was concerned about the activity on the overdraft account. It will have to lead evidence to substantiate that, as a matter of fact, this is how it came to its conclusion that Bamboo Rock was in financial difficulty and will also have to justify its contention that this was a reasonable view to have reached. But these are all

issues which either directly rely on the leading of evidence, or are (in the case of the objective enquiry into reasonableness) inextricably linked with evidentiary matters – ie, they take the form of a legal conclusion to be reached from established facts.²⁶ At this stage, the nature of Standard Bank’s claim in this regard is clear (albeit that paragraph 18 of the amended particulars of claim is hardly a paragon of English usage) and the defendants are well-placed to plead to it. And when it comes to the alternative suggestion that the particulars of claim disclose no cause of action, it is simply not possible to conclude that, on every construction of paragraph 18 of the amended particulars of claim, no proper basis for the view formed by Standard Bank is alleged.

56 It follows that the sixth exception must be dismissed.

SUMMARY AND ORDER

57 It follows from what I have said above that the first to third, fifth and sixth exceptions must be dismissed and the fourth exception upheld. On the question of costs, Standard Bank has been substantially successful in pure numerical terms, but the upholding of the fourth exception is a significant victory for the defendants because it is a cause of action exception which goes to the root of the claim against the guarantee defendants. In the circumstances, I consider the application as a whole to be a draw, which makes it appropriate that I make no order as to costs.

58 I accordingly make the following order:

1. The first, second, third, fifth and sixth exceptions are dismissed.

2. The fourth exception is upheld.

²⁶ See *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 60

3. **The plaintiff is given leave to amend its particulars of claim by notice of amendment given within 20 days of the date of this order.**

4. **There is no order as to costs.**

**ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 17 February 2023.

APPEARANCES:

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Counsel for the plaintiff: M Reineke

Date of hearing: 25 November 2022

Date of judgment: 17 February 2023