

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022/8449

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
_____	_____
DATE	SIGNATURE

In the matter between:

**ABSA BANK LIMITED**

Plaintiff / Respondent

and

**MARK MORRIS FARBER**

Defendant / Excipient

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**JUDGMENT**

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D T v R DU PLESSIS AJ

[1] The defendant/excipient raised two exceptions to Claim C of the plaintiff's particulars of claim. The first is that the manner in which the suspensive conditions of a mortgage loan agreement were fulfilled should have been pleaded as it fundamental to the plaintiff's cause of action and forms part of the *facta probanda*; and the second relates to four suretyships that are on the

face thereof for an indebtedness subject to the National Credit Act 34 of 2005 whereas the principal debt based on the mortgage loan agreement is not.

[2] I will refer to the parties as in the action in order to avoid confusion.

*First ground*

[3] The suspensive conditions to the mortgage loan agreement are the following:

“2.3 Subject to the provisions of this agreement, the granting of this loan is subject to the following conditions:

2.3.1 The registration in our favour of a covering mortgage bond in an amount of R4 500 000.00 plus an additional amount of R900 000.00 over the property.

2.3.2 The undermentioned amount being retained as retention monies which will only be paid out of the work in question has been carried out to our satisfaction. Retention amount R1.00.

2.3.3 You completing and signing a debit order instruction, unless another payment arrangement acceptable to us has been made.

2.3.4 The property to be mortgaged is to be insured for not less than the full asset value (replacement value) of the property as it may change from time to time period the current full estimated value is R11 400 000.00.”

[4] In paragraph 40 of the particulars of claim, the plaintiff alleged as follows:

“The conditions of loan having been complied with, the Plaintiff lent and advanced the loan amount to 25 Centre Property in compliance with the terms of the Mortgage Loan Agreement.”

[5] The defendant’s complaint is that the plaintiff failed to plead how and in what manner the conditions in 2.3.2 to 2.3.4 were fulfilled. In terms of the notice of exception, the allegations in paragraph 40 of the particulars of claim do not set out the necessary allegations in regard to the fulfilment of the suspensive conditions. This was repeated in the heads of argument of defendant’s

counsel. Adv Hollander, who appeared for the defendant, also argued that the plaintiff must plead fulfilment of the relevant conditions in the manner stipulated in such clauses and that it has failed to do so. For that reason, the particulars of claim lack averments necessary to sustain a cause of action.

[6] Adv Alli, who appeared for the plaintiff, argued that the exact manner in which the conditions were fulfilled does not have to be pleaded as it constitutes evidence. He referred to the matter of *McKelvey v Cowan NO*<sup>1</sup> in which the following was stated:

“It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.”

[7] Both parties referred me to various other matters dealing with the principles applicable to exceptions. I wish to refer to the most important of those.

[8] In *Tembani and Others v President of the Republic of South Africa and Another*<sup>2</sup> the following was stated:

“Whilst exceptions provide a useful mechanism ‘to weed out cases without legal merit’, it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where 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. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. 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.”

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<sup>1</sup> 1980 (4) SA 525 (Z) at 526D-E.

<sup>2</sup> [2022] ZASCA 70; 2023 (1) SA 432 (SCA) at para 14.

[9] In *Pretorius and Another v Transport Pension Fund and Others*<sup>3</sup> the following was stated:

“In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.”

[10] In *Vermeulen v Goose Valley Investments (Pty) Ltd*<sup>4</sup> the following was said:

“It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim *is* (not may be) bad in law.”

[11] In applying these principles to this matter, it is clear that the plaintiff in fact alleged fulfilment of the suspensive conditions. Paragraph 40 of the particulars of claim may be cryptic but evidence can be led to prove the allegation that “the conditions of the loan hav(ing)e been complied with”. If such evidence is led on behalf of the plaintiff, the cause of action as pleaded would be disclosed.

[12] The material facts necessary for the plaintiff’s case for purposes of this ground of the exception are that the suspensive conditions have been fulfilled. This was alleged. The manner in which the conditions were fulfilled is a matter for evidence, it is part of the *facta probantia*. Adv Hollander accepted that the usual manner in which fulfilment of conditions is pleaded is just to allege that they have been fulfilled. There is nothing peculiar about these

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<sup>3</sup> [2018] ZACC 10; 2019 (2) SA 37 (CC); 2018 (7) BCLR 838 (CC) at para 15.

<sup>4</sup> [2001] ZASCA 53; 2001 (3) SA 986 (SCA) at para 7.

conditions that would result in the plaintiff having to deviate from such usual manner and to also plead the manner in which they were fulfilled. There is no authority for such a proposition.

- [13] On a benevolent interpretation of the particulars of claim, I am therefore satisfied that the particulars of claim contain sufficient averments to sustain the cause of action pleaded. The exception should therefore fail on this ground.

*Second ground*

- [14] The second ground for the exception is based on suretyship agreements that the defendant had signed on behalf of the principal debtor. In paragraph 43 of the particulars of claim, the allegation is made that the defendant signed six different suretyships on various dates in favour of the plaintiff for the indebtedness of the principal debtor. All six suretyships are attached to the particulars of claim as annexures “AB10” to “AB15”.

- [15] The suretyships annexed as “AB12” to “AB15” are, in their own terms, in respect of credit agreement(s) entered into with the principal debtor in accordance with the National Credit Act. As the mortgage loan agreement on which the present claim is based does not fall within the ambit of the National Credit Act (this is expressly pleaded in paragraph 50 of the particulars of claim), those suretyships cannot be applicable to this claim.

- [16] This was accepted by Adv Alli. He argued, however, that an exception based on only some of the suretyships will have no practical effect as the remaining suretyships cover the indebtedness of the defendant for the claim based on the mortgage loan agreement. The particulars of claim will still stand in respect of such remaining suretyships.

- [17] Adv Hollander argued that the particulars of claim should be set aside in regard to the suretyships annexed as “AB12” to “AB15” thereto. This is so as the plaintiff can never rely on those suretyships for its cause of action against

the defendant. The particulars of claim do not sustain a cause of action on those suretyships.

[18] As set out in the authorities referred to above, the primary purpose of an exception is to weed out bad claims at an early stage. An overly technical approach should however be avoided. The main question is whether the allegations are sufficient to sustain a cause of action.

[19] Although the four suretyships that the defendant complained about are evidently not applicable to Claim C, there is in fact a cause of action based on the remaining suretyships. The particulars of claim can therefore not be set aside in respect of Claim C. In my view it will be an overly technical approach to set aside Claim C only in respect of some of the suretyships that were attached. I do not think that is the purpose of an exception based on an allegation that the pleading lacks averments to sustain a cause of action.

[20] In any event, an exception cannot be taken against part of a pleading unless such part is self-sustained.<sup>5</sup> The suretyships complained about are not self-sustained, they form part of the general allegations regarding the defendant's liability based on all the suretyships that he signed.

[21] For these reasons, the second ground for the exception should also fail. I accordingly make the following order:

“The defendant's exception is dismissed with costs.”

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**D T v R DU PLESSIS**

Acting Judge of The High Court

Johannesburg

Date of Hearing: 31 January 2024

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<sup>5</sup> *International Combustion Africa Ltd v Billy's Transport* 1981 (1) SA 599 (W).

Date of Judgment:

X February 2024

Counsel for Excipient/Defendant:

Adv L Hollander

Instructed By:

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Counsel for Respondent/Plaintiff:

Adv N Alli

Instructed By:

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