

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

**CASE NO.: EL2209/2022**

In the matter between:

**ISUZU FINANCE: A PRODUCT OF WESBANK:  
A DIVISION OF FIRST RAND BANK LIMITED**

**PLAINTIFF**

and

**SILVEX 399 CC**

**1<sup>ST</sup> DEFENDANT**

**MPHUTHUMI MAQUBELA**

**2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**CENGANI -MBAKAZA AJ:**

**Introduction**

[1] This matter concerns an exception under Uniform Rule 23 of the Uniform Rules of Court which provides,

(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case maybe, the opposing party may within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it

down for hearing within 15 days after the delivery of such exception: Provided that:

- (a) where a party intends to take an exception that the pleading is vague and embarrassing such party shall, by notice, within 10 days of the receipt of the pleading afford the party delivering the pleading, an opportunity to remove the cause of complainant within 15 days of such notice; and
- (b) the party excepting shall, within 10 days from the day on which the reply to the notice referred to in paragraph(a) is received, or within 15 days of such reply is due, deliver the exception'.

[2] The defendants allege that the plaintiff's amended particulars of claim lack the necessary averments to disclose a cause of action and/ or are vague and embarrassing.

[3] The exception is opposed by the plaintiff.

#### **The summary of the amended particulars of claim**

[4] On 28 February 2019, the first defendant represented by the second defendant entered into a written sales agreement (referred to as the credit agreement) with the plaintiff. In terms of the credit agreement, the first defendant would purchase a motor vehicle with the license plate number JHY311 EC.

[5] The essential terms of the credit agreement stipulated that the total cost of the vehicle would amount to R606, 400. When including total accessories, the extras, the initiation fee and the financial charges (i.e., processing fees, interest), this would amount to a total of R944, 755.20.

[6] The parties agreed that the amount of R944,755. 20 would be paid through seventy-two instalments, with each instalment being R13,121.60 per month. The payments would commence on 28 February 2019 and continue on or before the same day of the succeeding months until the arrear amount is liquidated. In addition, the ownership of the vehicle would vest with the plaintiff until the receipt of all the amounts payable to the plaintiff.

[7] In paragraph 9 of the amended particulars of claim, the plaintiff states that the defendants failed to meet their obligations in terms of the credit agreement in that as of 26 July 2023 they were in arrears in respect of the monthly instalment in the sum of R192 029.58 with an outstanding balance of R450 048. 58. The plaintiff also asserts that the provisions of the National Credit Act 34 of 2005 (the NCA) are not applicable in terms of the credit agreement, however, they complied with the provisions of the Act by sending a notice to the first defendant under sections 129 of the Act (the section 129 notice), requesting the second defendant to make payment of the said arrears within a period of 10 (ten) days from the date of receipt of the said letter. The plaintiff acknowledges that the first notice was sent to the wrong e-mail address.

[8] The copies of the notices along with the proof of transmission and the registered communication certificates, which were sent to the defendant's correct email address, are attached as Annexes G1 to G6 in the court's file.

### **The applicable law**

[9] The basic principles governing an exception were enunciated by Makgoka J in *Living Hands (Pty) Ltd and Another v Ditz and Others*<sup>1</sup>, as follows:

"(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even on an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(i) Pleadings must be read as a whole, and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

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<sup>1</sup> (42728/2012)[2012] ZAGPJHC 218;2013(2)sa 368 (GSJ) (11 September 2012) at paragraph 15.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars."

[10] The Appellate Division in *McKenzie v Farmers' Co-operative Meat Industries Ltd* adopted the following definition of "cause of action":

' . . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[11] Generally, a pleading must comply with the provisions of Uniform Rule 18<sup>2</sup>, failing which such pleading may be considered vague and embarrassing. The exception can be taken only if the vagueness relates to the cause of action. If the averments are contradictory and not pleaded in the alternative an embarrassment may occur. Based on the proper reading of the case law, the test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows<sup>3</sup>:

(a) In each case the court is obliged to consider whether the pleading does lack particularity to an extent amounting to vagueness. If a statement is vague it can either be meaningless or capable of having more than one meaning. To simplify: the reader must be unable to distil from the statement a clear, single meaning<sup>4</sup>.

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<sup>2</sup> Rule 18(4) every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

(6) A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.

<sup>3</sup> Erasmus Uniform Rules of Court October 2023 RSD 21,2023,D1-305

<sup>4</sup> Venter and Others NNO v Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) LTD 2008 (4) SA 639 (C) paras [14] and [15] at 644G-645.

(b) If there is vagueness in this sense the court is then obligated to conduct a quantitative analysis of such embarrassment caused to the excipient by the vagueness complained of.

(c) In each case an ad hoc ruling must be made to determine whether the embarrassment is so serious as to cause prejudice to the excipients if they are compelled to plead to the pleading in the form to which they object. A point of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail.

(d) The ultimate test as to whether the exception should be upheld is whether the excipient is prejudiced.

(e) The onus is on the excipient to demonstrate both vagueness amounting to embarrassment and embarrassment amounting to prejudice<sup>5</sup>.

(f) The excipient must make out his case for embarrassment by reference to the pleadings alone<sup>6</sup>.

(g) The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness.

### **The parties 'legal submissions**

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<sup>5</sup> Venter and Others NNO v Barrit above fn. 2(at para 17)

<sup>6</sup> Deane v Deane 1955 (3) SA 86 (N) at 86F

[12] Based on the defendants' heads of argument and the oral submissions made, the grounds for the exception lie with the plaintiff's failure to comply with the provisions of the NCA, in that, there is no proof of whether the section 129 notice was sent to the defendants and how it was sent.

[13] Section 129 (1) of the NCA provides:

“(1) If the consumer is in default under a credit agreement, the credit provider-

may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payment under the agreement up to date.....”

[14] In terms of section 129(1)(b), a credit provider is barred from instituting legal proceedings against the defaulting consumer until there has been compliance with the requirements of section 129(1)(a) of the NCA.

[15] To oppose the exception, the plaintiff referred to section 4(1) of the NCA which provides:

‘(1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except-

(a) a credit agreement in terms of which the consumer is-

- (i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7 (1);.....’

[16] In addition to the summary of the amended particulars of claim as alluded to at paragraphs 4-8 of this judgment, the following extracts are also pertinent:

‘22. On the 4<sup>th</sup> of March 2019 and at East London, the Second Defendant signed an Agreement of surety ship with Plaintiff in terms whereof the Second Defendant in writing bound himself as surety *in solidum* and co-principal debtor for the punctual payment of all sums due by the First Defendant to Plaintiff.(my underlining)

23. A copy of the Surety ship Agreement (herein referred to as ‘the Surety ship Agreement’’) is annexed hereto marked annexures ‘**E1 to E6**’.

24. Express provisions of the Surety ship agreement were-

24.1 The second Defendant bound himself unto and in favour of the Plaintiff as surety *in solidum* for and co-principal debtor jointly and severally with First Defendant for due payment by first Defendant, of all monies which the First Defendant may then or from time to time thereafter owe to the Plaintiff from whatsoever cause and howsoever arising, and whether as principal debtor, guarantor, or otherwise.

24.2.....

24.3.....



24.5 Notwithstanding that the provisions of the NCA are not applicable to the Agreement and the Surety ship Agreement concluded by the First and Second Defendants; the Plaintiff complied with the provisions of the aforesaid Act as follows:(my underlining)

25.1 The plaintiff sent their first Notice in terms of Section 129 of the NCA to the Second Defendant's wrong email address namely silvex399@webmail.com calling upon the Second Defendant to make payment of the said arrears within a period of 10 (ten days) from the date of receipt thereof.

25.2 Copies of the first Notice in terms of Section 129 of the NCA, proof of transmission together with the Registered communication Certificate sent to the Second Defendant 's wrong email address are annexed hereto marked Annexure 'F1 to F6.

25.2 The Plaintiff, however sent their second Notice in terms of Section 129 of the NCA to the Second Defendant's correct address namely silvex399@webmail.co.za calling upon the Second Defendant to make payment of the said arrears within a period of 10 (ten) days from date of receipt thereof.

25.2.1 Copies of the second Notice in terms of Section 129 of the NCA, proof of transmission together with the Registered Communication Certificate sent to the Second Defendant 's correct email address are annexed hereto marked annexure '**G1 to G6**'((sic)'.....

### **The application of the law to the facts**

[17] The question pertains to whether the defendants have discharged the onus to demonstrate vagueness and embarrassment as well as whether the embarrassment (if any) amounts to prejudice<sup>7</sup>. I am also tasked to ascertain whether the defendants have established that no cause of action was disclosed. In order to fully assess these issues, I will accept as true the allegations pleaded by the plaintiff in the particulars of claim<sup>8</sup>. Moreover, I must be persuaded by the excipients that the pleading is excipiable on every interpretation that can be reasonably attached to it.

[18] The plaintiff's claim against the defendants relates to a written credit agreement, with the first defendant being a juristic person. According to the amended particulars of claim, the defendants breached the terms and conditions of the credit agreement, in that they failed to make payments on the agreed deadline which are clearly set out in the amended particulars of claim. The plaintiff contends that it complied with the provisions of the NCA despite there being no obligation to do so. Although it is unnecessary to decide whether, in terms of the credit agreement, the provisions of section 129 of the NCA are applicable or not and whether the section 129 notice was brought to the attention of the second defendant, I will accept as true that it was indeed brought to his attention. The fact that the second defendant's correct email address is [silvex399@webmail.co.za](mailto:silvex399@webmail.co.za) remains uncontroverted.

[19] The allegations of non-compliance with the NCA are intertwined with the nature of the credit agreement that exists between the parties, in that, the plaintiff

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<sup>7</sup> Venter fn2 (*supra*); see also Barnard and Another v De Klerk (2015)/2019 [2020] ZAECPHC 38 (22 October 2020)

<sup>8</sup> Living Hands case (*supra*)

avers that the credit agreement falls outside the NCA. While the written credit agreement referred to at page 22 of the index bundle is titled '**PRE-AGREEMENT STATEMENT FOR INSTALMENT SALE OUTSIDE THE NCA**', it is not the duty of this court to pronounce on whether the credit agreement falls within or outside the NCA as envisaged in terms of section 4(1) of the NCA. While it is further noted that this fact was not seriously disputed by the defendants, it is submitted that it could be re-argued during the trial proceedings. In my considered view, it would be unfair to both parties, for this court to classify and interpret the credit agreement by way of an exception.

[20] The argument positing that the plaintiff's claim is bad in law is unsustainable. The rules do not mandate that pleadings be drawn in perfect language, but the allegations of the parties should be identifiable. The plaintiff has set out the conclusive terms and conditions of the credit agreement and the defendants' breach without any ambiguity. As a consequence of the breach, the plaintiff has suffered damages outlined in the amended particulars of claim.

[21] After consideration, I find that the amended particulars of claim contain a clear and concise statement of the material facts upon which the plaintiff relies for his claim. The substance of the allegations is such that the defendants must know whether they are in breach of the terms and conditions of the credit agreement or not. I endorse the principle distilled in *Living Hands's case supra* that the minor obscurities, if any, may be cleared up by way of the request for further particulars. In conclusion, the defendants have failed to prove on a balance of probabilities that

they are embarrassed by the plaintiff's amended particulars of claim. Therefore, no prejudice could be identified.

### **Order**

[22] The exception is dismissed with costs.

**N CENGANI-MBAKAZA**

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

### **APPEARANCES:**

For the plaintiff	:	<p>DON MAREE ATTORNEYS</p> <p>Plaintiff's Attorneys</p> <p>Tecoma Street, Bearea</p> <p>EAST LONDON</p> <p><u><a href="mailto:E-mail@donmaree.co.za">E-mail@donmaree.co.za</a></u></p> <p>Ref: MD MAREE/rsz/MAT8834</p>
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For the defendants	:	<p>CINGA NOHAJI</p> <p>Defendants' Attorneys</p> <p>8 Chamberlain Road</p> <p>Bearea</p> <p>EAST LONDON</p> <p><u><a href="mailto:E-mail:info@cinganohaji.co.za">E-mail:info@cinganohaji.co.za</a></u></p>
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Ref: CN/MM/0616/XZ

Date heard : **08 February 2024**

Delivered on : **19 March 2024**