IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEAL CASE NO: A127/2024
GP CASE NO: 42362/2021

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

In the Full Court Appeal of:

A[...] M[...] Appellant
(Plaintiff in the Court *a quo*)

and

H[...] M[...] First Respondent
(First Defendant / Excipient in the Court *a* quo)

H[...] M[...] N.O.
(In his capacity as Trustee of the
A[...] Trust: IT 8998/07) Second Respondent
(Second Defendant / Excipient in the Court *a quo*)

A[...] M[...] N.O.
(In her capacity as Trustee of the
A[...] Trust: IT8998/07) Third Respondent
(Third Defendant in the Court *a quo*)

THE STANDARD BANK OF SOUTH AFRICA LIMITED Fourth Respondent
(Fourth Defendant in the Court *a quo*)

THE MASTER OF THE HIGH COURT: PRETORIA Fifth Respondent
(Fifth Defendant in the Court *a quo*)

FULL COURT JUDGMENT

THE COURT:

[1] This appeal serves before the Full Court with leave having been granted by the Court *a quo* on 9 April 2024.

[2] The appeal is against the whole of the judgment and order delivered by Acting Justice Bokako under case number GP Number 42362/2021 on 31 August 2023. The Court *a quo* upheld paragraphs 1 to 6 of an exception raised against the appellant's particulars of claim in the Court *a quo*.

BACKGROUND FACTS

[3] The appellant and the first respondent were married and in the course of the marriage a Family Trust, the A[...] Trust with Trust No. IT8998/07 was established on 12 July 2007. The appellant, the first respondent and the late Jan Andreas Rautenbach were duly authorised to act as the trustees of the A[...] Trust in terms of Section 6 of the Trust Property Control Act, No.57 of 1988.

[4] The marriage faltered and the appellant and the first respondent entered into a settlement agreement in respect of their anticipated divorce on 18 December 2015. The appellant and the first respondent were divorced in 2016 under case number 1258/2016 in this Division and the settlement agreement was made an order of court.

[5] Mr Jan Andreas Rautenbach, the third trustee, passed away on 5 April 2018.

[6] On 24 August 2021 the appellant sued the first to fifth respondents setting out claims for maintenance, contempt of court, specific performance of the settlement agreement and and alternatives thereto including a claim for damages.

[7] On 6 December 2021 the first and second defendant filed a notice of exception to the last two claims, which exception was upheld by the Court *a quo* on 31 August 2023.

[8] The causes of complaint raised by the first and second defendants in the exception only relate to the plaintiff's third claim, the alternatives to the plaintiff's third claim and the plaintiff's fourth claim.

[9] The first and second defendants in the Court *a quo* excepted to the plaintiff's particulars of claim on the basis that the particulars of claim disclose no cause of action against the first and second defendants. The exception was not based on vagueness and embarrassment.

[10] In light of the aforesaid it is not necessary to set out the claims in the particulars of claim related to the first claim (maintenance) and the second claim (contempt).

[11] The A[...] Trust is the registered owner of two immovable properties, namely:

11.1 […] R[…] Street, S[…] 1[…], M[…], Gauteng ("the M[…] property"); and

11.2 Unit 8[…], Scheme S[…] Number 2[…] with Title Deed No. S[…], located at 1[…] S[…], Z[…] E[…], KZN ("the Z[…] property").

[12] In terms of the settlement agreement these properties were to be transferred to the plaintiff. However, this had not taken place, giving rise to the third claim in the particulars of claim.

[13] In the particulars of claim it was pleaded regarding the Trust:

13.1 That it is the registered owner of the two aforesaid immovable properties;

13.2 That the plaintiff, the first defendant and Mr Jan Andreas Rautenbach are the trustees;

13.3 That the plaintiff and the first defendant undertook in the settlement agreement to take a joint Trust decision to transfer the M[...] property into the name of the plaintiff (clause 5.3 of the settlement);

13.4 That the plaintiff and the first defendant undertook to jointly take a Trust decision by the Trust to transfer the Z[...] property into the name of the plaintiff.

[14] The plaintiff contends that the first defendant failed to give effect to clause 5 of the settlement agreement relating to the two aforesaid properties. The plaintiff consequently claimed specific performance, with an alternative of damages.

[15] In paragraph 14.2 of the particulars of claim the following is pleaded:

"14.2 In light of the aforesaid the plaintiff prays for an order of specific performance against the first and second defendants that:

14.2.1 The first and second defendants be ordered to take all necessary steps to take the joint decision with the plaintiff in her capacity as the third defendant to transfer the M[...] property and the Z[...] property to the plaintiff within 7 days after the granting of the order;

14.2.2 The first, second and third defendants take all necessary steps to effect the transfer of the M[...] property and the Z[...] property to the plaintiff, and within 2 months after the granting of this order."

[16] The alternative for damages is based on the court declining specific performance. The market value of the M[...] property was pleaded to be R9 000 000.00 and the Z[...] property R4 800 000.00. It was also pleaded that the outstanding bond amount relating to the Z[...] property, owed to Standard Bank, is the amount of R2 484 588.97. The damages claim therefore totalled R11 315 411.03.

[17] As a further alternative the plaintiff pleads an oral agreement concluded in January 2012 at Pretoria, when the Trust acquired the Z[...] property. The terms of the agreement are that the plaintiff and the first defendant would be responsible for the bond payments and monthly instalments payable to Standard Bank, payment of monthly levies, utilities and insurance. Any amount paid by either the plaintiff or the first defendant would be reflected in their loan accounts in the Trust for the benefit of the payer, and that the loan account would be repayable on demand.

[18] The plaintiff pleads that she paid R1 888 426.31 in respect of the bond, paid levies in respect of the Z[...] property of R270 105.12 and paid utilities of R161 803.26 and insurance of R305 012.80. The Trust is therefore indebted to the plaintiff in the amount of R2 625 347.50, comprising the total of the aforesaid, which amount the plaintiff demanded from the Trust.

[19] As a further alternative the amount of R2 625 347.50 is claimed on the basis of enrichment, the plaintiff contending that those expenses were incurred in the *bona fide* but mistaken belief that the Z[...] property would be transferred to the plaintiff in terms of the settlement agreement.

[20] In Claim 4, the plaintiff claims against the Trust in terms of a suretyship concluded on 25 January 2012 at Pretoria, in terms of which the plaintiff and the first defendant bound themselves as sureties and co-principal debtors for the Trust for the liabilities of the Trust to Standard Bank.

[21] The plaintiff claims that she made payment to Standard Bank in the amount of R1 888 426.31, thereby extinguishing the debt of the Trust to Standard Bank in that amount, which amount she claims back from the Trust.

THE CONTENTIONS OF THE PARTIES IN THE COURT *A QUO*

First ground of exception

[22] The first ground of exception was that *ex facie* a settlement, the Trust is not a party to the agreement, therefore the plaintiff has failed to disclose a cause of action against the Trust.

[23] The plaintiff contends that, in the introduction of paragraph 8 of the particulars of claim, the plaintiff pleaded express, alternatively tacit, alternatively implied terms of the settlement agreement, expressly averring in paragraph 7.2 that the agreement was reached between the plaintiff and the first defendant, both acting personally and in their capacities as trustees of the A[...] Trust. It was further contended that exception is not the appropriate stage at which to settle questions of interpretation of the contract.

Second ground of exception

[24] The second ground of exception relates to the alternative cause of action in paragraph 14.4 of the particulars of claim, where the plaintiff pleads an oral agreement for payment of expenses pertaining to the Z[...] property.

[25] In the exception the first and second defendants contend that the plaintiff failed to plead what the terms of the alleged verbal agreement were in concluding that the plaintiff is entitled to full payment of the alleged payments from the Trust, or that the alleged terms continue to apply (paragraph 6 of the exception).

[26] The excipients further contend that the plaintiff has not pleaded that it was a term of the 2012 oral agreement that the Z[...] property would be transferred into the name of the plaintiff at some future date. It is only in terms of the settlement agreement that the plaintiff would acquire ownership of the Z[...] property, after fulfilment of a suspensive condition provided for in clause 5.5 (paragraph 8 of the exception).

[27] The fourth ground of exception expands on this issue and alleges a failure to plead compliance with a suspensive condition. As the fourth ground of exception is interwoven with the second, it is not dealt with separately.

[28] The clause in question provides that the M[...] and Z[...] properties will be transferred by Couzyn Hertzog & Horak within 3 months after signature of the agreement. The contention on behalf of the plaintiff, in response to the second

ground of exception, was that the plaintiff does not claim transfer of the M[...] and Z[...] properties in terms of the alternative claim but claims payment in terms of the oral agreement.

[29] The excipient contended that the plaintiff did not make averments necessary to overcome or comply with the “suspensive condition”.

[30] Plaintiff denied that it was a suspensive condition but contended that the interpretation of the agreement should stand over for trial.

Third ground of exception

[31] The third ground of exception was that Rautenbach, the third trustee, was not cited as a party to the proceedings.

[32] The plaintiff’s response was that he had passed away and that his trusteeship terminated on his death.

Fifth ground of exception

[33] The fifth ground of exception was that the plaintiff did not disclose a cause of action against the Trust as principal debtor in terms of the suretyship agreement.

[34] The plaintiff’s response was that clause 14.4 of the particulars of claim sets out the terms of the oral agreement, in terms of which expenses paid in respect of the Z[...] property would be reflected in the loan account of the Trust, which would be repayable on demand. In paragraph 14.4.11 of the particulars of claim the plaintiff pleads that demand is made in terms of the summons.

Sixth ground of exception

[35] The exception provides that the plaintiff failed to attach **“KLM”** as referred in clause 6.2 of the settlement agreement, rendering the pleadings excipiable.

[36] The plaintiff's response is that **Annexure KLM** refers to a list of movable assets which the plaintiff would retain, and which were present in the M[...] property. As the plaintiff does not claim any relief pertaining to the M[...] property, the annexure is not required in terms of Rule 18(6) for purposes of pleading.

THE JUDGMENT A QUO

[37] In the judgment the Court *a quo* expressly stated that she does not intend dealing with all the grounds of exception but will focus on the crux of the relief sought against the assets owned by the Trust. The Court found that, as a first step, the plaintiff should have joined the Trust to the proceedings (paragraph 7 of the judgment). The Court found that the Trust had a direct and substantial interest in the relief sought and should have been joined (paragraph 14). The Court concludes in paragraph 16:

> *"16. To put matters into perspective, the plaintiff's third and fourth claim is centred around the Trust which is not a party to these proceedings. Having sketched the above, the plaintiff's claim is excipiable."*

[38] The Court found that the third trustee should have been cited. Having discussed only the issue of joinder and having found the Trust not to be a party to the proceedings, the Court proceeded to uphold all six grounds of exception (Order, paragraph 17 - CaseLines 0-8).

DISCUSSION

[39] The parties advance similar arguments before this Court to those that were raised before the Court *a quo*. It is trite that the power of a court of appeal to intervene is triggered by the identification of a misdirection by the Court *a quo*.

[40] In this case the Court *a quo* made a fundamental misdirection by finding that the Trust was not a party to the proceedings.

[41] During the hearing, counsel for the excipients contended that the Court *a quo* misunderstood the complaint regarding the Trust. The crux of the complaint was that Mr Rautenbach was not a party to the settlement agreement and therefore no valid agreement was concluded between the parties and the Trust. This is not the point raised on the papers before us.The first ground of exception referred to above illustrates this. In particular, it is not the basis upon which the Court *a quo* upheld the exception.

[42] The particulars of claim make it clear that the plaintiff instituted action against the first defendant and against the Trust, citing the remaining trustees at the time of institution of the action.

[43] Although Mr Rautenbach was also an appointed trustee, he had passed away by the time the action was instituted in the Court *a quo*. The death of a trustee results in the vacation of the office of trustee.In **Du Plessis v Van Niekerk** 2018 (6) SA 2018 (FB) at paragraph [30]) Daffue, J stated:

> *"[30] … The term 'vacation of office' may be regarded as more problematic, but in my view it is not. The authors in Honoré deal from 225 and further with five eventualities. The death of a trustee is an obvious eventuality, as are the vacation of office by a trustee appointed ex officio, the revocation of a constitution under which the trustee was appointed and the termination of the trust. …"*

[44] The Court *a quo* therefore erred in not discerning that the Trust was already a cited party in the proceedings that served before her. As this was the sole basis of the judgment of the Court *a quo*, this Court does not have the benefit of the Court *a quo*'s reasoning in respect of the other grounds of exception. This is in itself an oversight by the Court *a quo*, particularly as she upheld the exception on all six grounds that were raised. The absence of a reasoned judgment for the upholding of all six grounds of exception complicates an assessment of the order appealed against on appeal.

[45] None of the grounds of exception that were raised should have been upheld.

[46] Insofar as the excipients contend that the settlement agreement (**Annexure B1** to the particulars of claim) is an agreement only between the plaintiff and the first defendant and does not constitute evidence of an agreement between those parties and the Trust, the premise of the submission is one of interpretation. While *ex facie* the written agreement, the Trust is not expressly cited as a party, the pleadings pertaining to the agreement make it clear that the parties acted in their personal and representative capacities. So, for example, in clause 5 of the settlement agreement, reference is made to a joint decision as trustees.

[47] It will rarely be appropriate to resolve an issue of interpretation of a written agreement at exception stage. This particularly so when the issues arising from the exception involve facts not yet before the court. In this instance it is apparent that evidence may impact the interpretation. It is therefore inappropriate to interpret the agreement at the exception stage in order to determine the correctness of the pleadings (see **Francis v Sharp** 2004 (3) SA 230 (C) at page 237).

[48] It will be for the Trial Court to assess evidence in order to determine whether the Trust was in fact a party to the settlement agreement or not. The primary ground of exception, the sole basis on which the Court *a quo* upheld the exception, is therefore fundamentally flawed.The trust was pleaded as a party to the proceedings. Whether that is so is for the trial court to determine.

[49] The second ground of exception relates to the plaintiff's entitlement to payment of disbursements from the Trust. It is alleged that insufficient allegations were made to make the Trust liable. This is incorrect. The plaintiff is calling up her loan account which is payable on demand. The loan account consists of the amounts that were disbursed on behalf of the Trust pertaining to the Z[...] property.

[50] The allegation by the excipients that the terms in clause 5.5 of the agreement constitutes a suspensive condition is also flawed. It is no more than a term of the agreement. The oral agreement concluded in 2012 was not an agreement aimed at effecting transfer of the property. It reflects an agreement on how the parties would deal with expenses incurred by them in respect of Trust liabilities pertaining to the Z[...] property.

[51] The third ground of exception relates to the citation of the deceased trustee. This has been dealt with above.

[52] The fourth ground of exception is based on the excipient's interpretation of clause 5.5 as constituting a suspensive condition. As this is again an issue of interpretation, the exception stage is not the time when these issues need to be finally determined. However, on the face of it, there is nothing suspensive about the terms of clause 5.5. Compliance with the time period was premised upon all the parties complying with their obligations in terms of the agreement. The plaintiff's claim is based on non-compliance by the first defendant in his capacity as trustee to take decisions that were meant to be taken in terms of the settlement agreement.

[53] This ground must therefore fail.

[54] The fifth ground relates to the claim based on the suretyship annexed as **Annexure I** to the particulars of claim. In terms thereof, the plaintiff and the first defendant bound themselves as sureties for the payment of the debts of the Trust in favour of Standard Bank. The excipient contends that it is not pleaded that Standard Bank had made demand on the plaintiff for payment. It is contended that she has no right of action against the Trust for payments of amounts alleged to be made by her to the Trust in terms of her obligation as surety.

[55] The excipient misconstrues the particulars of claim. The plaintiff contends that she made payments to Standard Bank on behalf of the Trust and not to the Trust. She recovers such disbursements by calling up her loan account.

[56] The position in law has not been decided finally whether a demand by the creditor is a prerequisite for a liability of a surety in terms of a suretyship.

[57] In **LAWSA, Suretyship** paragraph 303 the following is stated:

> *"Where one co-surety has paid only part of the principal debt the position is anything but clear. Two questions arise in such a case: Firstly, whether the paying co-surety is entitled to any contribution at all before he or she has paid*

the whole debt, and secondly, if he or she is entitled to a contribution whether that contribution should be in respect of the full amount paid by him or her or only in respect of the excess over what would be his or her proportionate share of the debt. In ***Lever v Buhrmann*** *it was clearly the view of the court that a co-surety who has paid more than his proportionate share of the principal debt (although not the whole debt) has a right of action against his co-sureties, that the question whether he has a right to contribution in respect of the full amount paid or only in respect of the excess of that amount over his proportionate share of the debt was not touched upon. In* ***Nosworthy v Yorke*** *the question whether a co-surety can recover a contribution before he has paid the whole debt was expressly left undecided. In* ***Hoyer v Martin*** *the court held that in the case of a continuing suretyship a surety who was paid the whole of the principal debt outstanding at a particular time may claim a contribution from a co-surety, even though the principal debtor may thereafter incur further debts for which the sureties will be liable. In* ***Noakes v Whiteing****, however, Davies J inclined strong into the view that until the creditor has been paid in full, a co-surety who has paid more than his proportionate share of the debt is not entitled to recover a contribution from another co-surety, but this part of the judgment was arbiter. In the latest judicial pronouncement of the matter Van Zijl JP held in effect in* ***ASA Investments (Pty) Ltd v Smit*** *that a co-surety who becomes co-surety by reason of his having entered into a separate deed of suretyship cannot be sued by fellow co-surety for his proportionate share until the latter has paid the full debt which was guaranteed by the sureties.*

The ***ASA Investments*** *case is strongly criticised by Caney, who argues that on equitable grounds a co-surety who has paid part of the principal debt should be allowed to recover a proportionate share of what he or she has paid (not merely of the excess of what he or she has paid over his or her proportionate share) from each of his or her co-sureties. There is certainly force in Caney's argument: On the other hand, he or she dismisses perhaps too lightly the objection of the courts to the multiplicity of actions and the 'tortuous and expensive procedure' that may result if sureties were allowed to start litigating amongst them before the creditor has been paid in full."*

[58] In this instance the claim is not against the co-surety but against the principal debtor. A surety has a right of recourse against the principal debtor for payments made as surety to extinguish the liability of the debtor **pro tanto** as against the creditor (see **ABSA Bank v Scharrighuisen** 2000(2) SA 998 (C) at par [12] and [28]).

[59] This ground of exception therefore fails.

[60] The sixth ground of exception relates to the failure to annex **Annexure KLM** to the particulars of claim. That annexure is a schedule of movables, which are irrelevant to the pleadings. No relief is claimed in respect of movable assets, being the list contained in **Annexure KLM**.

[61] At best, even if pleadings did cover the content of **Annexure KLM**, the failure to annex **Annexure KLN** would render the pleadings vague and embarrassing. That, however, is not the exception raised before us. If the excipients had correctly identified this ground as one rendering the pleadings vague and embarrassing, the plaintiffs would have had an opportunity of responding to a rule 23(1) notice to cure the cause of complaint by annexing the annexure in question. However, the excipients went straight for the jugular, on an issue not relevant to the pleadings. This exception must fail.

[62] In the premises there are no grounds upon which the judgment of the Court *a quo* could be upheld.

[63] The issue of costs arises. In particular, the question arises whether the Trust should be burdened with the costs in circumstances where the first defendant (first respondent in the appeal) has failed to comply with the terms of the settlement agreement. The settlement agreement is not merely an undertaking to sign a Trust resolution in respect of the transfer of properties. It is an agreement that has been made an order of court. Non-compliance with an order of court in such circumstances is a relevant factor in determining liability for costs. In this instance, such liability lies with the first respondent (first excipient and first defendant *a quo*).

[64] In the premises the following order is made:

ORDER:

1. The appeal is upheld with costs.

2. The judgment and order of the Court *a quo* is set aside and is replaced with the following:

"The exception is dismissed with costs, such costs to be paid by the first defendant on Scale B."

LABUSCHAGNE J
Judge of the High Court

BAM J: I concur
JUDGE OF THE HIGH COURT

MBONGWE J: I concur
JUDGE OF THE HIGH COURT