REPUBLIC OF SOUTH AFRICA

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

CASE NO: 37622/2015

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

……………………… ………………………….
DATE SIGNATURE

In the matter between:

SASFIN BANK LIMITED **First Plaintiff**

REYNETTE PIETERS N.O **Second Plaintiff**

RONALD PIETERS N.O **Third Plaintiff**

and

DCB AUTO SPARES CLOSE CORPORATION **Defendant**

J U D G M E N T

MAHALELO, AJ:

[1] This is an exception against the plaintiffs' particulars of claim on the ground that it lacks the necessary averments to sustain a cause of action.

The plaintiffs have advanced two alternative claims designated as claim A and claim B against the defendant. The two claims are mutually exclusive and each is dependent upon the non-existence of the other. In claim A the first plaintiff instituted an action as a cessionary. The first plaintiff relies on a written invoice discounting agreement concluded between it and Motor Electrodiesel (SA) (Pty) Ltd (In Liquidation) ("*MED*"). In claim B the second and third plaintiffs instituted action in the alternative to the first plaintiff's claim. The second and third plaintiffs' claim is premised on the oral agreement concluded between the defendant and MED.

BACKROUND FACTS

[2] Prior to dealing with the complaints raised by the defendant it is necessary to briefly set out the facts in this matter and to then determine whether the grounds raised are sustainable or not. For the sake of ease reference the parties will be referred to as in the main action.

[3] On 12 February 2013, the first plaintiff and MED concluded a written invoice discounting agreement in terms of which the discounting facility was afforded to MED. The material terms of the written agreement were *inter alia* the following:

3.1 "MED would at least every two weeks offer to sell to the first plaintiff all book debts which comply with clause 5 of the discounting invoice agreement and which were owed to MED at the time of the offer. Every offer by MED to sell book debts to the first plaintiff would be irrevocable and in writing in such form as might be prescribed by the first plaintiff from time to time and subject to clause 6.3 shall be open for acceptance for a period of not less than three working days after receipt by the first plaintiff of the offer by MED. The first plaintiff would at its discretion accept or reject the offer and if the offer was accepted shall thereby purchase the book debts on all the terms and conditions of the agreement, and such book debts shall *ipso facto* have been ceded by MED to the first plaintiff (clause 2.2).

3.2 The first plaintiff's benefit to the accepted book debts would include all rights and claims of whatever nature relating to such book debts, including the right to receive payment of the amount of the book debts and all rights ancillary thereto (clause 2.6).

3.3 Upon receipt by the first plaintiff of the offer made by MED, MED would *ipso facto* and without any further act or deed be deemed to have sold, ceded, assigned, transferred and made over to and in favour of the first plaintiff all its rights in and to the accepted book debts, together with all MED's rights in and to all suretyships, guarantees or other securities of any other nature whatsoever given in MED's favour in respect of such accepted book debts, as well as all such further rights as might be necessary in order to enable the first plaintiff to enjoy the first plaintiff's benefit (clause 2.7).

3.4 The first plaintiff would (in addition to and without prejudice to any other rights it might have in terms of the invoice discounting agreement or otherwise) have the right to *inter alia*, institute proceedings in its own name for the recovery of any book debt. (clause 10.2)

3.5 In the event of MED committing a breach of any of the terms, conditions, undertakings or warranties in the invoice discounting agreement, or failing to pay any monies due to the first plaintiff on demand, or being placed (whether provisionally or finally) to any other right which it might have, forthwith to terminate the invoice discounting agreement by giving written notice to MED to that effect and would further be entitled without prejudice to any rights or remedies which it might have in terms of the invoice discounting agreement or at law. (clause16.1)

3.5.1 notwithstanding such termination, to retain and enforce against any debtor any accepted book debts which remain unpaid. (clause 16.11), or

3.5.2 to resell to MED any accepted book debts which remain unpaid as at date of termination. (clause 16.1.2)

3.6 To the extent that any book debts might not have been purchased by the first plaintiff pursuant to the invoice discounting agreement for any reason whatsoever, or having been purchased by the first plaintiff, were thereafter sold back to MED by the first plaintiff or to the extent that the first plaintiff might not have acquired ownership of a book debt intended to be purchased pursuant to the invoice discounting agreement for any reason whatsoever, MED hereby: (clause 30)

3.6.1 irrevocably cedes to the first plaintiff all its rights, title and interest in and to all book debts which were not owned by the first plaintiff (clause 30.1),

3.6.2 acknowledges that the cession would be *in securitatem debiti* and as covering security for any amount which MED might at any time thereafter owe to the first plaintiff from whatever cause arising and whether such indebtedness be a direct, indirect or contingent obligation of MED and whether such obligation to the first plaintiff arose in terms of, or pursuant to the invoice discounting agreement or otherwise in any other manner whatever (clause 30.2),

3.6.3 expressly acknowledges that the provisions of the cession would remain in operation for as long as MED remain indebted towards the first plaintiff for any amount whatever whether actual or contingent, and/or any of the book debts remain unpaid, notwithstanding any termination of the invoice discounting agreement that might have taken place at the instance of either party or by reasons of effluxion of time or any other manner whatever (clause 30.4)

3.6.4 the invoice discounting agreement (and the cession in favour of the first plaintiff) commenced on 12 February 2013" (clause 31.1)

[4] In claim B, the plaintiffs alleged that MED provided goods and/or services to the defendant from time to time alternatively for a period of time and the defendant in turn, provided goods and/or services to MED from time to time alternatively for a period of time. The defendant was a debtor to MED and MED was in turn a debtor to the defendant.

[5] On 28 May 2014 and in Cape Town, MED and the defendant concluded an oral agreement ("*the Cape Town agreement*"). The material express terms, alternatively tacit terms, further alternatively implied terms of the agreement were *inter alia* the following:

5.1 during May 2014 MED was indebted towards the defendant for goods provided and/or services rendered from time to time;

5.2 during May 2014 the defendant was indebted towards MED in an amount, which amount exceeded the indebtedness of MED towards the defendant for goods provided and/or services rendered from time to time;

5.3 MED could not make payment of the indebtedness owed towards the defendant,

5.4 MED and the defendant would set-off their respective indebtedness owed to one another, and

5.5 the defendant would pay R18,370.00 to MED (to effect the agreed set-off)

[6] On or about 4 June 2014 the defendant paid MED the amount of R18,370.00 to effect the set-off as agreed in terms of the Cape Town agreement.

[7] On 24 July 2014, MED was placed under provisional liquidation and on 4 September 2014 under final liquidation.

[8] As a result of the winding up of MED the first plaintiff elected to enforce the book debts owed to MED and ceded to it.

[9] The first plaintiff alleged that during March 2014 the defendant was indebted to MED in the amount of R489,693.80 and due to the above cession in favour of the first plaintiff (in terms of the invoice discounting agreement), the defendant was therefore indebted to the first plaintiff in the same amount.

[10] On 23 October 2015, the first plaintiff instituted action against the defendant claiming from it payment of the amount of R489,693.80 plus interest. In the alternative, the second and third plaintiffs alleged that the set-off effected between MED and the defendant in terms of the Cape Town agreement amounted to voidable preferences or undue preference, alternatively collusive disposition as MED disposed of its property to the value of R489,693.80 and is liable to be set aside in terms of section 29 and 30 of the Insolvency Act No 24 of 1936 (“the Insolvency Act”) read with section 340(1) of the Companies Act No 61 of 1973 as read with item 9 of

Schedule 5 of the Companies Act 71 of 2008. The second and third plaintiffs therefore also claimed the amount of R489,693.80 from the defendant.

[11] The defendant excepted to the plaintiffs' particulars of claim. The defendant raised three grounds of exception.

[12] The first and second grounds of exception relate to claim A. The defendant alleged that paragraph 7.4 of the plaintiffs' particulars of claim lacks the necessary averments to sustain a cause of action. The defendant contended that the first plaintiff failed to plead that MED has complied with its obligation referred to in clause 2.1 of the agreement by offering to sell to the first plaintiff any book debts which were owed to MED at the time of the offer and that any such offer to sell the book debts was accepted by the first plaintiff.

[13] The second ground of exception is to the effect that the plaintiffs have failed to allege that the debt which is alleged to have been owed by the defendant to MED, constituted "*book debts*" as contemplated in the invoice discounting agreement. The defendant alleged that the term "*book debts*" contemplated only debts which were in existence (albeit that an invoice might not yet have been issued or rendered in respect of such debt) and does not relate to any future debts. According to the defendant, the invoice discounting agreement was concluded on 12 February 2013, only debts which were in existence as at 12 February 2013 could constitute "*book debts*" which were intended to form the subject matter of the alleged cession. The defendant further contended that the amount of R489,693.80 as claimed by the plaintiffs comprised amounts which were outstanding during the period 27 February

2014 to 27 May 2014, therefore the debt which is said to have been owed by the defendant to MED was not in existence at the time of the conclusion of the cession and therefore cannot fall within the definition of "*book debts*". The defendant furthermore contended that the first plaintiff's claim which is based on the alleged cession is unsustainable in the absence of any allegation which brings the debt previously owed by the defendant to MED within the purview of the subject matter of the cession relied upon by the first plaintiff.

[14] The third ground of exception relates to claim B. The defendant contended that the plaintiffs do not allege, nor do they rely upon any agreement which purports to exclude the natural operation of a set-off. The defendant further contended that in the absence of such agreement, set-off operates automatically, *de jure.* According to the defendant, *ex facie* the particulars of claim, the purported conclusion of the Cape Town agreement was unnecessary to effect a set-off and no valid agreement could have come into existence which gave effect to a set-off and which would constitute a voidable preference, an undue preference or a collusive disposition as contemplated in in section 29 to 30 of the Insolvency Act.

APPLICABLE LEGAL PRINCIPLES

[15] The court looks at the pleadings excepted to as they stand. The object of an exception is to dispose of the case or a portion thereof in an expeditious manner. An exception founded on the contention that summons discloses no cause of action, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part.

[16] In the evaluation of this exception three preliminary observations are apposite:

Firstly, In *Colonial industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627* at 630 Benjamin J stated with regard to the general approach to exceptions that:

> "*save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed.*"

Secondly, an exception is generally not the appropriate procedure to settle questions relating to the interpretation of a contract. *Sun Packaging (Pty) Ltd v Vreunlik* 1996 (4) SA176 (A) at 186j.

Thirdly, our courts have held that a commercial document executed by the parties with a clear intention that it should be a commercial operation should not lightly be held to be ineffective. *Burroughs Machines Ltd v Chenile Corporation of SA (Pty) Ltd* 1964 (1) DA 669 (W).

[17] An exception is aimed at avoiding unnecessary evidence being led at the trial. *Barclay's National Bank Ltd v Thompson 1989* (1) SA 547 (A) at 553. The excipient bears the *onus* of proving that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. *Francis v Sharp* 2004(3) SA 230 (C) at 233. In determining whether the plaintiff's pleadings are excipiable, a court must assume the correctness of the

allegations in the pleadings. *Marney v Watson and Another* 1978 (4) SA 140 CPA at 144F.

[18] It is a basic principle that particulars of claim should be so phrased that the defendant may reasonably and fairly be required to plead thereto. It is also trite that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form, and the cause of action must appear clearly from the factual allegations made. In order to ensure that a summons is not excipiable on the ground that it does not disclose a cause of action, the plaintiff must allege the *facta probanda* (the facts which must be proved in order to disclose the cause of action) and not the *facta probantia*, (the facts or evidence which proves the *facta probanda*).

[19] In *McKenzie v Farmer's Cooperative Meat Industries Ltd* 1922 AD 16 at 23 the following definition of "*cause of action*" was accepted by the Appellate Division:

> "*… 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.*"

[20] In *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) Marais JA stated the following at page 997:

> "*[7] 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.*"

In *Frank v Premier Hangers CC* 2008 (3) SA 594 (C) Griesel J stated as follows at paragraph [11] page 600:

> "*[11] In order to succeed in its exception the plaintiff has the onus to persuade the court that, upon every interpretation which the defendant's plea and counterclaim can reasonably bear, no defence or cause of action is disclosed. Failing this, the exception ought not to be upheld.*"

THE EXCEPTION

[21] It is trite that from the nature of exception proceedings, the court must assume that the facts alleged in the relevant pleadings are correct. The excipient should therefore satisfy the court that even with such an assumption, the pleading does not disclose a cause of action. No evidence is presented in exception proceedings.

[22] In my view, the first plaintiff has pleaded the *facta probanda* to sustain a claim under the invoice discounting agreement. I also find that the exception raised in this regard does not meet the requirement that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. This relates to both grounds of exception advanced in claim A. It is

incumbent on a plaintiff to plead only a complete cause of action that identifies the issues on which the plaintiff seeks to rely, and on which evidence will be led, and which allows the defendant to plead to it. In my view, the allegations in paragraph 7.4 of the particulars of claim are sufficient to enable the defendant to plead thereto. In any event the defendant failed to state that the particulars of claim cannot be supported by any reasonable interpretation. Furthermore, no prejudice is alleged that would prevent the defendant to plead to the particulars of claim, or request for further particulars would not suffice to cure any vagueness in the event that allegations are vague. As regards the second ground of exception, conflicting interpretations may arise as to what was intended by clause 1.5.1 of the invoice discounting agreement regarding the term "*book debts*", but in my view, the questions which may arise in that regard are to be determined at the hearing of the matter and are not capable of being disposed of by way of exception. The respondent's pleadings cannot be said to be excipiable.

[23] With regard to the third ground of exception, the plaintiffs pleaded the terms of the Cape Town agreement. The validity of that agreement and the question whether that agreement may be void for vagueness do not readily fall to be decided by way of exception. See *Burroughs Machines Ltd v Chenile Corporation of SA (Pty) Ltd* and *Sun Packaging(Pty) Ltd v Vreulink supra*. The dispute surrounding the oral agreement concluded between the defendant and MED therefore cannot be resolved at this stage of the proceedings. The third ground of exception must also fail.

[24] Accordingly, the following order is made:

24.1 The exception is dismissed with costs.

____

B MAHALELO

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the Plaintiff:	Adv Van Tonder
Instructed by:	Werksmans Attorneys
Counsel for the Defendant:	Adv Van Beek
Instructed by:	Schindlers Attorneys
Date of Hearing:	4 August 2016
Date of Judgment:	5 October 2016