Reportable: YES / NO
Circulate to Judges: YES / NO
Circulate to Magistrates: YES / NO
Circulate to Regional Magistrates: YES /NO

**IN THE HIGH COURT OF SOUTH AFRICA**
**(NORTHERN CAPE HIGHT COURT KIMBERLEY)**

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| Case number: | **1739/2014** |
| Date heard: | **10 / 12 / 2015** |
| Date delivered: | **25 / 02 / 2016** |

In the application between:

**MAN FINANCIAL SERVICES (SA) (PTY) LTD**
**Registration No: 1997/0116864/07** Plaintiff / Respondent

and

**JURGENS JOHANNES VAN DER WESTHUIZEN**
**I.D. No: [6...]** Defendant / Excipient

*Coram:* Erasmus, AJ

## JUDGMENT

**ERASMUS, AJ**

**BACKGROUND**

[1] The respondent herein (plaintiff in this action and applicant in case number 331/2013), obtained a court order on 6

September 2013 confirming the cancellation of two lease agreements entered into between the parties in respect of account numbers [7...] and [8...]. The excipient (the respondent therein) was ordered to return certain goods which form the subject of the agreements.

[2] In respect of the lease agreement with account number [8...] the goods were never recovered. The outstanding balance on this account amounts to R712,008.79.

[3] In respect of the lease agreement with account number [7...] the goods were recovered and the respondent proceeded to sell it at public auction. The proceeds did not cover the indebtedness of the excipient and the outstanding amount in respect thereof amounts to R376,648.90.

[4] On 22 September 2014 a notice in terms of section 127(5) and (7) of the National Credit Act, No. 34 of 2005 (hereinafter referred to as the NCA) was served on the excipient in respect of the outstanding amount under account number [7...]. The excipient failed to react nor to respond to the said notice.

[5] The respondent proceeded to issue summons, claiming the respective outstanding amounts in both agreements.

[6] The excipient gave notice of exception in terms of Rule 23(1), based thereon that the plaintiff's Particulars of Claim was vague and embarrassing and, alternatively, lacked the averments necessary to sustain a cause of action. The respondent did not respond to this notice resulting in the excipient excepting to the Particulars of Claim on 3 September 2015.

[7] The first cause of complaint was directed at the notice in terms of sections 127(5) and (7) attached as annexures 'E1' and 'E2' to the Particulars of Claim, from which it appears as if it was ABSA Bank Limited that had issued the notice.

[8] The second cause of complaint was that the Particulars of Claim lacked averments as required in terms of sections 129 and 130 of the NCA.

[9] The exception contains a mere repetition of the allegations as set out in the initial notice and did not contain any prayer. An exception is a pleading and therefore it must contain a prayer.[1] At the onset of the hearing of the exception, counsel's attention was drawn to the defect in the exception. Adv. Janse van Rensburg, on behalf of the excipient, conceded that the exception did not comply with the Rule and applied for an amendment to include a prayer for the relief that the exception be upheld and the respondent be directed to comply with the provisions of sections 127(5) and (7) of the NCA, the excipient tendering costs occasioned thereby. The respondent then did not oppose the amendment and it was granted.

[10] I deal firstly with the second ground of exception based thereon that the Particulars of Claim lacked averments as required in terms of sections 129 and 130 of the NCA.

[11] Adv. Sieberhagen, on behalf of the respondent, submitted that legal proceedings had already been instituted and the court order granted under case number 331/2013 and that

[1] Pietermaitzburg City Council v Local Transportation Board 1960(1) SA 254 (N) at 256

the excipient had already complied with the provisions of section 129 of the NCA at that stage. It also appears from the contents of the court file in case number 331/2013, which had also been placed before me, that the excipient admitted compliance with section 129 of the NCA in the initial proceedings. Mr. Janse van Rensburg rightly conceded that this ground for exception had no merit and abandoned this ground.

[12] The other ground for the exception pertaining to the non-compliance with section 127 of the NCA was argued on behalf of the excipient. Section 127 is relevant to the first claim pertaining to the loan agreement with account number [7...] in respect of the machine which was recovered and sold.

[13] It is trite that exceptions serve as means to dispose of pleadings which are so vague and embarrassing that an intelligible cause of action cannot be ascertained nor issues determined between the parties without the leading of

evidence. The *onus* of showing that a pleading is excipiable rests on the excipient.[2]

[14] An exception may only be taken if the defect appears *ex facie* the pleading and for purposes of deciding the exception, the court has to take the facts alleged in the pleading as correct.[3]

[15] A pleading should be sufficiently detailed, lucid and complete. Where an exception is based on the ground that a pleading is vague and embarrassing, the Court's approach should be two-fold. I should firstly consider whether the pleading lacks particularity to the extent that it is vague and then consider whether such vagueness causes embarrassment of such a nature that the excipient is prejudiced.[4]

[16] It will be considered to be vague and embarrassing if it affects the ability of the other party to plead thereto.[5] The pleading must be read as a whole. The exception must

[2] Vogel v Kleynhans 2003(2) SA 148 at 151
[3] Marney v Watson 1978(4)SA 140 at 144
[4] Trope v South African Reserve Bank 1992(3) SA 208 (T) at 210-211
[5] Persons listed in Schedule A to the Particulars of Claim v Discovery Health, 2009 (2) ALL SA 479 T

strike at the root of the cause of action and the formulation thereof, not its legal validity. A mere averment of lack of particularity is not enough to uphold an exception.[6]

[17] When the exception is based on the premise that the pleading lacks averments necessary to sustain a cause of action, the pleadings will only be excipiable when, on every reasonable interpretation, it does not disclose a cause of action[7] and no possible evidence can be led that can disclose a cause of action.[8] It is for the excipient to persuade the Court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.[9]

[18] The exception is directed at the notice in terms of sections 127(5) and (7) dated 18 September 2014, annexures 'E1' and 'E2' to the Particulars of Claim. It refers to ABSA Bank Limited and JJ van der Westhuizen, account number [7...] in the heading thereof and reads as follows:

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6 ABSA Bank Ltd Boksburg Trasnitional Local Council 1997(2) SA 415 (W) at 418
7 McElvy v Cowan, 1980 (4) SA 525
8 Astral Operations Limited v Nambitha Distributors (Pty) Ltd; Astral Operations Limited v O'Farell N.O. & Others [2013] 4 ALL SA 598 KZD
9 Francis v Shape 2004(3) SA 230 (C) at 893

> "*We have received instructions from our client, ABSA Bank, to give you written notice in terms of section 127(5) of the National Credit Act of the following:-*
>
> *1.1 ACCOUNT NUMBER [7...]*
> *ITEM 2008 MAN PGA 2.7440 BBS-L with chassis number AAMHW9-0273 and engine number 5159120191912.*"

[19] The notice then contains the particulars and details, as envisaged in section 127(5) of the NCA, setting out the settlement value of the agreement immediately before the sale, the gross amount realised at the sale, the nett proceeds of the sale, the amount credited to the excipient on 4 April 2014 and the remaining settlement value amounting to R376,648.90 with interest thereon.

[20] Paragraph 3 of the said notice reads as follows:

> "*3. In terms of section 127(7) of the National Credit Act 34 of 2005,* ***MAN Financial Services SA (PTY) LTD*** (my emphasis) *hereby demands payment of the abovementioned amount (as per paragraph 2) with the interest therein within a period of 10 (TEN) business days from date of this letter.*"

[21] In paragraph 4 thereof the excipient is informed that should he fail to accede to the demand, legal steps will be instituted against him.

[22] Ms. Sieberhagen submitted that, when the pleading (Particulars of Claim) is read as a whole, it cannot be said that because ABSA Bank Limited was mistakenly identified as the client in the heading of the Notice, the respondent's cause of action should automatically fall away. It was submitted that paragraphs 14(12) and 14(13) of the respondent's Particulars of Claim clearly deals with how the respondent could have mistaken ABSA Bank Limited as a party to the proceedings. It was further submitted that it is clear who the credit provider is, as it is stated in paragraph 3 of the notice that MAN Financial Services (SA) (Pty) Ltd demands payment from the defendant in respect of the specific lease agreement under account number [7...].

[23] Ms. Sieberhagen further submitted that the exception was not taken for the purpose of raising a substantive question of law which may have settled the dispute between the parties nor has the excipient made out a clear case to succeed with the exception.

[24] Mr. Janse van Rensburg, on behalf of the excipient, submitted that the respondent failed to send the necessary notice as required in terms of section 127 of the NCA. ABSA Bank Limited issued the notice and it is not a party to the action instituted against the excipient. He submitted that proper notice had to be given to the excipient before the action could have been instituted. He further submitted that, in terms of section 130(3) of the NCA, the Court may only determine the action if it is satisfied that the above sections have been complied with and must make an appropriate order setting out the steps the respondent must follow for the action to be instituted.

[25] The relevant section of the NCA can be summarized as follows:

25.1 Sections 127(2) to (9) apply in respect of any goods attached in terms of that order.[10]

25.2 A credit provider may approach the Court for an order enforcing the remaining obligations of a

[10] Section 131 of the NCA

consumer under a credit agreement at any time if all relevant property has been sold pursuant to an attachment order and the nett proceeds of that sale were insufficient to discharge all the consumer's financial obligations under the agreement.[11]

25.3 In any proceedings to which sections 127 or 131 apply, a Court may determine the matter only if the court is satisfied that the procedures required by those sections have been complied with.[12]

25.4 If in any such proceedings, a Court determines that the credit provider has not complied with the relevant provisions of the NCA as referred to above, the Court must adjourn the matter before it and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.[13]

[11] Section 130(2) of the NCA
[12] Section 130(3)(a) of the NCA
[13] Section 130(4)(b)

25.5 After selling any goods that have been attached, a credit provider must credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit provider in connection with the sale of the goods and the credit provider must give the consumer notice, stating the following:[14]

25.5.1 the settlement value of the agreement immediately before the sale;

25.5.2 the gross amount realised on the sale;

25.5.3 the nett proceeds of the sale after deduction of the credit provider's permitted default charges and reasonable costs allowed; and

25.5.4 the amount credited or debited to the consumer's account.

[14] Setion 127(5) read with sub-section (7)

25.6 If an amount is credited to the consumer's account and it is less than the settlement value immediately before the sale, or an amount is debited to the consumer's account, the credit provider may demand payment from the consumer of the remaining settlement value, when issuing the notice so required by section 127(5)(b).[15]

25.7 If the consumer fails to pay any amount that has been demanded within 10 business days after receiving such notice of demand, the credit provider may commence proceedings.[16]

[26] The notice in terms of sections 127(5) and (7) complies with the prescripts of section 127 of the NCA. It appears from the heading of the notice and introductory paragraph though to have been sent on instruction of ABSA Bank Limited. If read in isolation, this may create the impression that ABSA Bank Limited is the credit provider. If the notice is read as a whole and more specifically paragraphs 1.1 and 3 thereof, it clearly states that it is MAN Financial Services

[15] Section 127(7)
[16] Section 127(8)

SA (Pty) Ltd who demands payment in respect of the outstanding amount on the lease agreement no. [7...]. The notice also contains a detailed description of the goods which formed the subject of the court order under case number 331/2013.

[27] Having considered the Particulars of Claim as a whole, I am of the view that the specific part of the notice which refers to ABSA Bank Limited does not have the effect that the Particulars of Claim lacks particularity which would render it vague to such an extent that it causes embarrassment. The exception, which is directed at the contents of the notice, does not strike at the root of the cause of action. The incorrect reference to ABSA Bank Limited in the notice does not have the effect that the excipient cannot plead to the Particulars of Claim and I fail to see how the excipient is prejudiced. I therefore find that the notice does not render the Particulars of Claim excipiable on the basis that it is vague and embarrassing.

[28] On proper reading of the notice and more specifically paragraph 3 thereof and the Particulars of Claim as a

whole, it cannot be said that on every interpretation thereof there has been non-compliance with section 127 of the NCA and that, as a result thereof, the pleading lacks averments necessary to sustain a cause of action. The exception therefore also cannot succeed on this basis.

I make the following order:

**1. The exception is dismissed.**

**2. The excipient is ordered to pay the costs of the exception.**

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**SL ERASMUS**
**ACTING JUDGE**
**NORTHERN CAPE DIVISION**

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| **<u>On behalf of the Excipient</u>:** | **Adv Janse van Rensburg oio Elliott Maris Wilmans & Hay** |
| **<u>On behalf of the Respondents</u>:** | **Adv Sieberhagen oio the Duncan & Rothman** |