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| Reportable:                        | <u>YES</u> / NO |
| Circulate to Judges:               | <u>YES</u> / NO |
| Circulate to Magistrates:          | YES / <u>NO</u> |
| Circulate to Regional Magistrates: | YES / <u>NO</u> |

**IN THE HIGH COURT OF SOUTH AFRICA  
(Northern Cape High Court, Kimberley)**

CASE NO: **1774/2012**  
DATE HEARD: **09/09/2016**  
DATE DELIVERED: **16/09/2016**

In the matter between:

**MOMENTUM GROUP LIMITED**

Plaintiff

and

**MASWIL FINANSIËLE ADVISEURS CC**  
**JOSUA DANIEL VAN DEN HEEVER**  
**BENJAMIN VAN DEN HEEVER**  
**ANDRIES JOHANNES LE GRANGE**  
**MARTHINUS JOHANNES SPANGENBERG**  
**MONICA JOHANNA LE GRANGE**  
**ANDRIES JOHANNES LE GRANGE**

1<sup>st</sup> Defendant  
2<sup>nd</sup> Defendant  
3<sup>rd</sup> Defendant  
4<sup>th</sup> Defendant  
5<sup>th</sup> Defendant  
6<sup>th</sup> Defendant  
7<sup>th</sup> Defendant

In the exception between:

**JOSUA DANIEL VAN DEN HEEVER**  
**BENJAMIN VAN DEN HEEVER**

2<sup>nd</sup> Defendant / 1<sup>st</sup> Excipient  
3<sup>rd</sup> Defendant / 2<sup>nd</sup> Excipient

and

**MOMENTUM GROUP LIMITED**

Plaintiff / Respondent

*Coram:* Olivier J

**JUDGMENT**

**Olivier J:**

- [1.] In its particulars of claim the plaintiff, Momentum Group Limited, claims repayment of commission and fees paid to the first defendant, Maswil Finansiële Adviseurs CC, and also those paid to the fourth defendant, Mr A J Le Grange, and for which the first defendant is according to the plaintiff also liable.
  
- [2.] The claim against the first defendant is, in the first place, based upon a written broker agreement between plaintiff and the first defendant and, secondly and as far as the fourth defendant's indebtedness is concerned, upon a similar contract between the plaintiff and the fourth defendant, and an allegation that the fourth defendant's obligations in terms of that agreement were subsequently taken over by the first defendant. Copies of both broker agreements have been annexed to the particulars of claim, and the particulars required by Uniform Rule 18(6) in respect of those agreements have been pleaded in the particulars of claim.
  
- [3.] The claims against the second and third defendants, respectively Mr JD Van den Heever and Mr B Van den Heever, are based upon suretyships.
  
- [4.] It is not for present purposes necessary to further elaborate on the case made out in the particulars of claim against the fourth defendant, or against the fifth to seventh defendants, respectively Mr MJ Spangenberg, Ms MJ Le Grange and another Mr AJ Le Grange.
  
- [5.] As regards the plaintiff's *locus standi* to sue the second and third defendants on the basis of the suretyships, the plaintiff pleaded that it acquired that right when the rights and obligations of the original creditor were transferred to it in terms of the provisions of section 37 of the **Long-term Insurance Act**<sup>1</sup>. Before

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<sup>1</sup> 52 of 1998

the amendment of that section by Act 45 of 2013, and indeed at all times relevant to this matter, those provisions read as follows:

*“No transaction to which a Long-term insurer is a party and which constitutes an agreement by which all or any part of the business of a Long-term insurer is transferred to another person, or by which a compromise, arrangement or amalgamation... is effected... shall have legal force without the approval of the Court.”*

[6.] The allegation of a transfer of rights and obligations has been excepted to by the second and third defendants on the grounds:

6.1 that the wording of section 37(1) implies that there must have been an agreement between the plaintiff and its alleged predecessor in title and that the plaintiff should in respect of such agreement have complied with the provisions of rule 18(6); and

6.2 that the plaintiff should in any event, and again with reference to the provisions of section 37(1), have pleaded whether the required court approval had been obtained and, if so, when and where.

[7.] The provisions of rule 18(6) read as follows:

*“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.”*

[8.] Mr Van Niekerk SC, counsel for the excipients, submitted that the plaintiff's failure to comply with the provisions of Rule 18(6) in itself renders the particulars of claim vague and embarrassing, and excipiable. In support of this submission he referred to **Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa**, 5<sup>th</sup> Edition, Volume 1, page 572, where the learned

authors state that a failure to annex a document (or portion of it) relied upon in breach of Rule 18(6) “*will lay the pleading open to exception*”.

- [9.] No reference was made to any supporting case law and the statement, in its unqualified form, appears to be incorrect. As it was put in **Venter and Others NNO v Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd**<sup>2</sup> at 645 B – C:

“[16] *In this context it must be kept in mind that compliance with rule of court 18 is a different matter to an exception. Particulars of claim may fail to comply with rule 18, thus bringing into play rule 30 via rule 18(12), without being vague and embarrassing.*

[17] *The onus remains on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. The court must decide on the particular facts of each case whether the excipient will be prejudiced if compelled to plead to the particulars of claim in the form to which he or she objects.*” (Footnote omitted)

- [10.] The mere fact of non-compliance with the requirements of Rule 18 would not in itself render a pleading vague or embarrassing, or excipiable<sup>3</sup>. The excipient would in other words still have to show<sup>4</sup> that such non-compliance renders the pleading vague and embarrassing, and indeed to such an extent as to cause prejudice<sup>5</sup>.

- [11.] I therefore do not intend spending too much time on Mr Van Niekerk’s argument that the provisions of Rule 18(6) would also apply to an agreement relied upon in making out a case that the plaintiff has *locus standi* to sue. Suffice it to say that I could not find a single case where it was held that a contract relied upon for purposes of showing *locus standi*, as opposed to showing a cause of action, would be hit by the requirements of Rule 18(6), and Mr Van Niekerk was unable to refer me to any such case.

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<sup>2</sup> 2008 (4) SA 639 (C)

<sup>3</sup> Compare **ABSA Bank Ltd v Boksburg Transitional Council (Government of the Republic of South Africa, Third Party)** 1997 (2) SA 415 (W) at 418F – H; **Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing en Andere** 2001 (2) SA 790 (T) at 796G; **First Rand Bank Limited v Jooste** 2015 JDR 0270 (GJ) paras [6] – [9]

<sup>4</sup> The onus in this regard is on the excipient: see **Venter and Others NNO v Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd**, *supra*, para [17]

<sup>5</sup> *Ibid*, para [16]; **First Rand Bank Limited v Jooste**, *supra*, para [16]

- [12.] In fact, there are strong indications that the “*contract*” envisaged in Rule 18(6) would be a contract which constitutes the cause of action or which constitutes a “*link in the chain*” of the cause of action<sup>6</sup>.
- [13.] It is in any event debatable whether it could be said, for the purposes of Rule 18(6), that the plaintiff relied upon an agreement in alleging a transfer of rights and obligations in terms of section 37 of the Act. In making the allegation of such a transfer the plaintiff made no mention of any agreement at all, neither was reference made to the requirement of such a transaction or agreement. Could it be said that the plaintiff, in alleging a transfer in terms of section 37 of the Act, relied upon a contract in any sense of the word, let alone for purposes of Rule 18(6)? In fact, had there been approval by a court, the question whether there had been such an agreement would, for purposes of this action, probably have become moot.
- [14.] In my view the existence of an agreement as envisaged in section 37(1), and of an approval thereof, would not even constitute facts (*facta probanda*) which would have to be alleged to comply with the requirement of Rule 18(4) that “*every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, ..., with sufficient particularity to enable the opposite party to reply thereto*”. The existence of such an agreement and court approval would be evidence (*facta probantia*) by means of which the plaintiff would, if the allegation of a transfer in terms of section 37(1) is challenged, have to prove such a valid and enforceable transfer<sup>7</sup>.

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<sup>6</sup> Compare **Moosa and Others NNO v Hassam and Others NNO** 2010 (2) SA 410 (KZP) para [18]; **South African Railways and Harbours v Deal Enterprises (Pty) Ltd** 1975 (3) SA 944 (W) at 953A – B; **Vorster v Herselman** 1982 (4) SA 857 (O) at 860H – 861G; **ABSA Bank Ltd v Zalvest Twenty (Pty) Ltd and Another** 2014 (2) SA 119 (WCC) para [21]; **Bantry Head Investments (Pty) Ltd and Another v Murray and Stewart (Cape Town) (Pty) Ltd** 1974 (2) SA 386 (C) at 393H; **Mzeku v Volkswagen (SA) (Pty) Ltd** 2008 JDR 0538 (E), p 8

<sup>7</sup> Compare **South African Railways and Harbours v Deal Enterprises (Pty) Ltd**, *supra*, at 947 – 948; **Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing. en Andere**, *supra*, at 797G – H and 798C – D; **Inzinger v Hofmeyr** 2010 JDR 1380 (GSJ) paras 15 and 16; **Jowell v Bramwell-Jones** 1998 (1) SA 836 (W) at 902 – 903

- [15.] Mr Van Niekerk relied heavily on the *dictum* in **Trope v South African Reserve Bank**<sup>8</sup> to the effect that the fact that an excipient is able to produce an exception-proof plea will not always be decisive in determining whether the excipient is prejudiced, and accordingly whether the pleading is to be regarded as excipiable. The scenarios referred to by the court in that matter are, however, clearly distinguishable from the facts of the present matter. The allegation of a transfer in terms of section 37(1) cannot “*be read in any number of ways*”, it does not “*(leave) one guessing as to its actual meaning*” and it is not inconsistent with any other allegation in the particulars of claim<sup>9</sup>.
- [16.] A denial of the allegation of a transfer would still leave a triable case. The allegation of a transfer could leave no doubt in the mind of the excipients, when regard is had to the provisions of section 37(1) of the Act, that, if the allegation is denied, the plaintiff would have to prove such an agreement and subsequent court approval, and accordingly the allegation of a transfer cannot lead to an “*inability to foresee how the plaintiff will play his hand at the trial and what must be done to meet it*”<sup>10</sup>.
- [17.] In fact, in **Jowell v Bramwell-Jones and Others, supra**, the opinion was expressed that even this approach would be going too far, as regards what was required to be pleaded. It was held that a pleading which is “*a rather laconic document, somewhat reserved and uncommunicative, setting forth merely the bare outline of the case, which is left to be developed in full flood at the trial*” is exactly what Rule 18(4) intended and that, “*when the lack of particularity relates to mere detail, the remedy of the defendant is to plead to the averment made and to obtain the particularity he requires*” by means of discovery/inspection or of a “*request for particulars for trial of those particulars which are strictly necessary to enable the defendant to prepare for trial*”<sup>11</sup>.

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<sup>8</sup> 1992 (3) SA 208 (T)

<sup>9</sup> **Trope v South African Reserve Bank, supra**, at 211D - E

<sup>10</sup> **Levitan v Newhaven Holliday Enterprises CC** 1991 (2) SA 297 (C) at 298H - I

<sup>11</sup> **Jowell v Bramwell-Jones and Others, supra**, at 901C to 902D

- [18.] I however express no opinion on whether the excipients would even in a request for particulars in terms of Rule 21 be entitled to particulars like those which they are now arguing should have been pleaded.
- [19.] Whether or not a court will in the exercise of its discretion uphold an exception on the basis that a pleading is vague and embarrassing will depend on the facts of each particular case<sup>12</sup>.
- [20.] I cannot see how the fact that particulars of the agreement of transfer and of the required court approval have not been pleaded, could embarrass the excipients in pleading to the factual allegation of a transfer in terms of section 37(1) of the Act, or in their preparation for the trial, and I cannot conceive of any defence they may have to the plaintiff's claim that may be compromised by this.
- [21.] In my view this part of the exception therefore cannot be upheld.
- [22.] There is even less merit in the exception and submission that the two identical deeds of suretyship do not cover future debts and that the particulars of claim should on this basis be held to be vague and embarrassing, and indeed excipiable.
- [23.] It is trite that, for such an exception to succeed, *“an excipient has the duty to persuade the court that upon every interpretation which the pleading, and in particular the document upon which it is based, can reasonable bear”* the pleading is excipiable<sup>13</sup>.

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<sup>12</sup> Compare **ABSA Bank Ltd v Boksburg Transitional Council (Government of the Republic of South Africa, Third Party)**, *supra*, at 422E; **South African Railways and Harbours v Deal Enterprises (Pty) Ltd**, *supra*, at 947D – E; **Bantry Head Investments (Pty) Ltd and Another v Murray and Stewart (Cape Town) (Pty) Ltd**, *supra*, at 398 - 399

<sup>13</sup> **Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd and Others** 2014 (2) SA 157 (GNP) para [20]; See also **Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk** 1988 (2) SA 493 (A) at 500E - F

- [24.] It is equally trite that “*the interpretation of ... a contract, is not appropriate at the exception stage unless the excipient can demonstrate that there are no possible meanings other than that contended for and that no admissible evidence... can shed light on the true meaning*”<sup>14</sup>. Mr Van Niekerk’s contention that this approach is only applied where the object of such interpretation would be to establish whether the contract is void for vagueness, is clearly wrong<sup>15</sup>.
- [25.] Notwithstanding the fact that neither of the two deeds of suretyship contains an express term that only existing debts would be covered, or that future debts would be excluded, Mr Van Niekerk argued that this is nevertheless the unambiguous and clear meaning of their contents. He referred to the fact that the language of the acknowledgement of debt in the preamble to the deeds are couched in the present tense, and to the fact that, in clause 1 of the deeds, the excipients acknowledged being familiar with all the obligations of the debtor (the first defendant) towards the creditor.
- [26.] There is no indication in the particulars of claim and in its annexures that there had, when the deeds of suretyship were executed in July 1996, been any existing indebtedness. Evidence to the effect that there had at that stage in fact been no existing indebtedness would obviously be a strong indication that the suretyships were intended to cover future debts.
- [27.] In this regard it is also interesting to note that, although the broker agreement with the first defendant was only signed in 2011, it was by agreement deemed to have been effective from August 1996, in other words from shortly after the deeds of suretyship were signed. The almost inescapable inference is that there must from August 1996 have been a similar contractual relationship between the first defendant and the plaintiff’s alleged predecessor in title, in

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<sup>14</sup> **Jowell v Bramwell-Jones and Others**, *supra*, at 866I - J

<sup>15</sup> Compare also **Sacks v Venter** 1954 (2) SA 427 (W) at 429D



other words a relationship which could have led to the first defendant becoming indebted to the creditor.

[28.] Mr Van Niekerk could not explain why, if there had been an existing indebtedness at the time of the execution of the deeds of suretyship, and if the intention had been to cover only that debt, the amount of that indebtedness had not simply been included in the deeds of suretyship.

[29.] To the contrary, clause 13.2 of the deeds provide for a certificate as proof of the amount of indebtedness of the surety as at the date of that certificate.

[30.] Mr Steyn, counsel for the plaintiff (respondent), also pointed out that in clause 16 of the two deeds the sureties assumed liability for damages claims, or other claims, which the creditor could obtain against the debtor, obviously in the future.

[31.] It is precisely in circumstances like these that the court should not on exception, and without the aid of evidence, decide upon an interpretation. Suffice it to say that, in my view, the deeds are at the very least susceptible to an interpretation that the accessory liability of the sureties would cover future debts<sup>16</sup>.

[32.] On this basis too therefore the exception cannot be upheld.

[33.] There is no reason why costs should not follow the result. In fact, Mr Van Niekerk conceded that, should it be found that the particulars of claim are not vague or embarrassing, the exception fell to be dismissed with costs.

[34.] The following order is therefore made:

**THE EXCEPTION IS DISMISSED WITH COSTS.**

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<sup>16</sup> Compare **Murray and Roberts Construction Ltd v Finat Properties (Pty) Ltd** 1991 (1) SA 508 (A)

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**C J OLIVIER  
JUDGE  
NORTHERN CAPE DIVISION**

**For the First & Second Defendants/ Excipients:  
Instructed by:**

**ADV JG VAN NIEKERK SC  
Duncan & Rothman Inc.**

**For the Plaintiff / Respondent:  
Instructed by:**

**ADV JF STEYN  
Fletcher's Attorneys**