IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 3807/2013

In the matter between:

JNJ COFFINS CC	1st Applicant
JACQUES VAN RENSBURG	2nd Applicant
NADINE VAN RENSBURG	3rd Applicant

and

CG CASKET & COFFIN MANUFACTURERS	Respondent

HEARD ON:	14 FEBRUARY 2014
JUDGMENT BY:	MOTLOUNG, AJ
DELIVERED ON:	24 APRIL 2014

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[1] This is an exception to the plaintiff's particulars of claim. The excipient is the second defendant in an action instituted by the plaintiff against him and two other defendants. Plaintiff is cited as respondent herein and the second defendant as excipient. The parties will be referred to herein as in the action.

[2] The plaintiff is CG Casket & Coffin Manufacturers, a close corporation incorporated as such in terms of the law of South

Africa, with principal place of business at 31 Morewood Road, Hammersdale, KwaZulu-Natal.

[3] The first defendant is JNJ Coffins CC, a close corporation incorporated as such within the laws of South Africa, with principal place of business as 2 Laer Street, Heilbron, Free State, with registered address at 33 Eerste Street, Heilbron, Free State.

[4] The second defendant is Jacques van Rensburg, an adult male business person, with principal place of business at 2 Laer Street, Heilbron.

[5] The third defendant is Nadine van Rensburg, an adult female business woman married in community of property to the second defendant and residing at 2 Laer Street, Heilbron.

[6] The plaintiff sues the first defendant for damages for breach of contract based on the written Credit Application Agreement. The claim is for R2 150 126,22. The second and third defendants stood surety for the first defendant and are sued jointly and severally, the one paying the other to be absolved.

[7] The second defendant excepts to the particulars of claim on the basis that they lack averments necessary to sustain an action. They do not comply with Rule 18(6) of the Uniform Rules on pleadings generally.

[8] The pleading to which the exception is taken, is found on page 6, paragraph 5 of the particulars of claim, which is set out as follows:-

> "On or about 31 October 2011, and at Heilbron, Free State, the plaintiff and 1st defendant entered into a written Credit Application Agreement (the 'Credit Agreement') with the 1st defendant for a business account and credit facility in respect of the 1st defendant. The Credit Agreement is annexed hereto marked 'A'."

[9] On page 17 of the indexed documents is Annexure "A", titled "Credit Application for Business Account".

[10] On page 18 is a document purporting to be a deed of surityship and forms part of Annexure "A".

[11] The exception was taken in the following terms:

> "**GELIEWE KENNIS TE NEEM** dat Applikante van voorneme is om op 'n datum en tyd gereël te word met die Griffier van die Agbare Hof eksepsie aan te teken teen Respondent se besonderhede van vordering en wel op die basis dat dit bewerings mis wat nodig isom 'n skuldoorsaak uit te maak en/of te staaf en wel op die volgende gronde:
>
> 1. Respondent beweer dat 'n skriftelike kredietooreenkoms (Aanhangsel 'A') met Eerste Applikant gesluit is en dat die ooreenkoms die geheel van die ooreenkoms tussen Respondent en Eerste Applikant verteenwoordig.

2. Verder beweer Respondent dat Eerste Applikant kontrakbreuk gepleeg het aangesien Eerste Applikant versuim het om Respondent betyds soos ooreengekom te betaal en dat die versnellingsklousules in die kredietaansoek dus in werking getree het.

3. Nêrens beweer Respondent dat hy die kredietaansoek aanvaar het en dat hy die aanvaarding en terme daarvan aan Eerste Applikant gekommunikeer het nie.

4. Klousule 11.1 van die kredietaansoek maak uitdruklik daarvoor voorsiening dat Respondent ‘n sogenaamde ‘confirmation letter’ aan Eerste Applikant sal stuur nadat Respondent die kredietaansoek ‘approve’ (goedgekeur) het en dat die betalingsterme daarin uiteengesit sal word.

5. Die skriftelike ‘letter of approval’ met die betalingsterme daarin uiteengesit, is wesenlik om ‘n skuldoorsaak op die kredietaansoek uit te maak en moes aangeheg word by die besonderhede van vordering (hofreël 18(6)) en die terme moes gepleit word wat Respondent versuim het om te doen.

6. Die borgakte (‘C’) waarop die Respondent steun vir sy vordering teen Tweede en Derde Applikante is wesenlik defektief en strydig met die gebiedende bepalings van die Wet deurdat dit nie aantoon wie die skuldeiser is nie maar aantoon dat Tweede en Derde Applikante hulle verbind ‘jointly and severally in favour of each of the companies listed in Schedule A hereto, which schedule shall be regarded as specifically incorporated herein (hereinafter called the

creditors) as sureties for and co-principal debtors in solidum with JNJ Coffins CC.'

7. Die maatskappye gelys in skedule A word nie geïdentifiseer nie en word skedule A ook nie aangeheg nie.

8. Boonop verbind Tweede en Derde Applikante hulle blykens die borgskap as skuldenaars saam met die Respondent, welke onbestaanbaar is vir 'n geldige borgstelling.

Namens Eerste, Tweede en Derde Applikante sal derhalwe versoek word dat die Respondent se besonderhede van vordering met koste deurgehaal word, alternatiewelik dat verlof aan Respondent verleen word om sy stukke te wysig binne 14 dae na uitspraak by gebreke waaraan verlof aan Applikante verleen word om die Agbare Hof op dieselfde stukke te nader vir deurhaling van die Respondent se besonderhede van vordering. Applikante sal versoek dat Respondent gelas word om die koste van die eksepsie te betaal."

[12] *Prima facie* it appears to the court that the exception is well taken on the following basis:-

[13] Advocate De Wet argued that paragraph 5of the particulars of claim does not comply with Rule 18(6) of the Uniform Rules. The Rule provides that:-

"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."

[14] On page 17 of the indexed papers is the purported contract, which is titled "Credit Application for Business Account". This is accompanied by a purported "Suretyship" signed by the excipient for a sum of R2,5 million.

[15] At paragraph 11 of annexure "A" titled payment, it lists terms of payment of the amount owing. Counsel argued that clause 11.1 thereof states that

> "that payment is made to be according to the payment terms contained in the company's confirmation of credit letter, which the customer shall receive on approval of any credit facility by the company".

[16] Clause 22.1 of annexure "A" provides that

> "This contract represents the entire agreement between the company and the customer and shall govern all future contractual relationships between the company and the customer and shall be applicable to all debts which the customer may owe to the company prior to the customer's signature hereto."

[17] He further argues that the Suretyship, annexure "C", has not been signed by the plaintiff and does not amount to proper suretyship and therefore of no force and effect.

Section 6 of the General Law Amendment Act 50 of 1956 provides that:

> "No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety: Provided that nothing in this section contained shall affect the liability of the signer of an aval under the laws relating to negotiable instruments."

[18] Annexure "C" states that the second defendant hereby binds themselves, jointly and severally in favour of each of the companies listed in schedule "A" hereto. Mr De Wet argues that no such companies can be identified in schedule "A".

[19] For the above submission he relies on **Fourlamel (Pty) Ltd v Maddison** 1977 (1) SA 333 (A), where Miller JA, writing the majority judgments, said on page 338:

> "Accordingly, although the two events may occur at the same time, a contract of suretyship does not come into being until an agreement has been manifested by both parties. In the light of the section such manifestation of an agreement would have to relate to terms embodied in writing which formally includes all the essential terms."

[20] Advocate Hattingh, for the respondent, argued that if evidence can be led which can disclose a cause of action or defence alleged in a pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible

evidence led on the pleadings can disclose a cause of action or defence.

He relies on **McKelvey v Cowan NO** 1980 (4) SA 525 (Z) where the court held that, it is a first principle in matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action.

Further in **Vermeulen v Goose Valley Investments (Pty) Ltd** 2001 (3) SA 986 (SCA) at para [14], it was held by the court that, the exception grounded upon the alleged inadequacy of the description of the *res vendita* should not have been upheld by the Court *a quo*.

[21] He further submitted that the test is whether the trial court could (not should) reasonably imply the term alleged. The court should not look too critically at a pleading unless the excipient can satisfy the court that there is a real point of law or real embarrassment.

He relies on **Lanificio Varam SA v Masurel Fils (Pty) Ltd** 1952 (4) SA 655 (A) where the court held that a term could be implied in the contract.

[22] He submits that the second defendant relies on a particular interpretation of clauses in the agreement to sustain the contention that averments are lacking. He submits that the plaintiff relies on the acceptance of delivery of goods on 30 day credit terms and the acquiescence by the defendants. This was the consummation of the contract under the doctrine of quasi mutual assent.

In **Pillay and Another v Shaik and Others** 2009 (4) SA 74 (SCA) the court held at para [50] that in the absence of a statute which prescribed writing signed by the parties or their authorised representatives as an essential requisite for the creation of a contractual obligation, an agreement between parties which satisfied all the other requirements for contractual validity would be held not to have given rise to contractual obligations only if there was a pre-existing contract between the parties which prescribed compliance with a formality or formalities before a binding contract could come into existence.

[23] On the issue of suretyship he submits that annexure "C" merely amplifies what is contained in the Deed of Suretyship in the Credit Agreement. Clause 9 of the Deed of Suretyship identifies in whose favour the surety is made.

[24] My finding in this matter are as follows:-

(i) On averments lacking to sustain an action;

The second defendant's submission that it does not comply with the requirement of Rule 18(6) is that paragraph 5 is not a contract as set out on the face of the document, but an application for credit. This hinges on it being approved by the credit grantor and does not come into being by meeting of the minds. It is trite law that to ascertain that a contract has been reached, there must be an offer and acceptance of that offer.

See: **Watermeyer v Murray** 1911 AD 61 at 70.

[25] To compound the problem of the respondent, the credit application is only signed by the second defendant, suggesting that the plaintiff did not accept.

Still, how a credit application can pass for an agreement is not certain. The argument by the plaintiff that this can be cured by evidence does not hold water. The plaintiff pointed to the case of **Pillay**, *supra*, as answering the issues raised by the second defendant. However, the facts are distinguishable in that even if the signature of one party is not appended, this document will still be an application for credit, and that it still has to be approved. It could succeed or fail for a number of reasons and approval will not be granted as such. It looks more like the luck of a draw than parties agreeing to a set of facts.

I find that the pleading is excipiable and the principle of quasi mutual consent is not applicable, more so as it has to be specifically pleaded.

[26] On whether the Deed of Suretyship is valid as set out in the papers, the second defendant relied on statute or non-compliance with the provisions of section 6 of Act 50 of 1956. The plaintiff's submission that page 18 paragraph 3 contains the Deed of Suretyship is thin. The parties have not been clearly identified. I find that the pleading is excipiable on this basis as well.

[27] In the premises the two exceptions raised by the second defendant as excipient are upheld.

ORDER

[28] Consequently the following orders are made:

1. The two exceptions are upheld with costs.
2. The plaintiff is given 14 (fourteen) days to amend its papers.

S.E. MOTLOUNG, AJ

On behalf of second defendant (excipient):	Adv P.J.T. de Wet
Instructed by:	Symington & De Kok BLOEMFONTEIN
On behalf of plaintiff (respondent):	Adv C. Hattingh
Instructed by:	Wessel & Hattingh Inc PIETERMARITZBURG c/o Phatshoane Henney Attorneys Symington & De Kok BLOEMFONTEIN (Ref. MV/SJ/WES312/0001)

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