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 DIVISION, KIMBERLEY

Case No: 187/2022

In the matter between:

DANIEL CHRISTIAN GOUWS	1st Excipient
MARIA LORDES GOUWS	2nd Excipient
SHAUN ARMAND GOUWS	3rd Excipient
ANDREW GERHARDUS GOUWS	4th Excipient
CHRISTOPHER DANIEL GOUWS	5th Excipient

and

THE SPAR GROUP LIMITED	Respondent

In Re:

THE SPAR GROUP LIMITED	Plaintiff

and

DANIEL CHRISTIAN GOUWS	1st Defendant

MARIA LORDES GOUWS	2nd Defendant
SHAUN ARMAND GOUWS	3rd Defendant
ANDREW GERHARDUS GOUWS	4th Defendant
CHRISTOPHER DANIEL GOUWS	5th Defendant

Coram: Lever J

JUDGMENT

Lever J:

1. The respondent/plaintiff (plaintiff) instituted an action in this matter claiming relief against the excipients/defendants (defendants) in their capacities as sureties for the principal debtor. The principal debtor relevant to this matter is an entity named Henque 3675 CC. The principal debtor was a franchisee of the plaintiff. The defendants bound themselves as sureties for the obligations of the principal debtor to the plaintiff.

2. The principal debtor provided three notarial bonds which were registered over its movables. The said registered notarial bonds are annexed to the Particulars of Claim as annexures "J", "K" and "L" respectively.

3. On 23 October 2015, and in this court, the plaintiff obtained an order perfecting each of the relevant notarial bonds. A copy of the said Order is annexed to the Particulars of Claim as annexure "M" (the perfection Order).

4. Subsequent to the perfection Order, the plaintiff took possession of the relevant assets. Then, purportedly in terms of the said perfection Order as read with the relevant notarial bonds, the plaintiff proceeded to run the business described as River City SPAR and River City TOPS at the corner of Park and Scott Streets, Upington. In the process of running this business, the said business was granted credit by the plaintiff for, *inter alia,* the SUPERSPAR warehouse account, seasonal account, and the drop shipment account as well as the TOPS warehouse and drop shipment accounts.

5. Further, the plaintiff, also purportedly acting under the terms of the perfection Order as read with the relevant notarial bonds, opened a bank account in the plaintiff's name, with overdraft facilities, for the purpose of covering the necessary expenses in running the relevant business.

6. The plaintiff claimed that the principal debtor was liable to pay for these 'necessary expenses' related to the various warehouse accounts, drop shipment accounts, and the said overdraft facility. Furthermore, that the sureties by virtue of the suretyship agreement were liable to stand good for the respective amounts due by the principal debtor.

7. The plaintiff then sold the relevant business, as it was authorised to do in terms of the notarial bonds, and together with a credit owed by the SPAR Traders Guild, set off the purchase price against the debts due in respect of the various deliveries of goods and the outstanding balance

of the overdraft. This left a nett amount due by the principal debtor of R9,523,016.51 (nine million five hundred and twenty-three thousand and sixteen Rand and fifty-one cents). This is the amount the plaintiff claims from the five defendants as sureties, jointly and severally, the one paying the others to be absolved.

8. The defendants have excepted to this claim as being vague and embarrassing or lacking the averments necessary to sustain a cause of action. The plaintiff was given an opportunity to remove the various causes of complaint. The plaintiff did not do so, and the defendants filed their exception on 3 February 2023. Then the plaintiff filed a Notice of Intention to amend dated 19 July 2023. The defendants objected to the proposed amendments on 2 August 2023.

9. It was agreed at the hearing hereof that I would not determine the proposed amendments and that should I uphold any of the exceptions, the plaintiff will then be afforded an opportunity to move an amendment of its Particulars of Claim in accordance with any finding I might make in regard to the exceptions. The proposed amendments will only be discussed to the extent that they are interwoven with the arguments raised regarding the exceptions.

10. Mr Schreuder SC, who appeared for the defendants/excipients, indicated that he was not pursuing the exceptions relating to the non-

joinder of the principal debtor and the Guild, and certain other exceptions apart from the one indicated below.

11. The nub of the exception that remained is that the plaintiff did not set out a basis for continuing to trade after the perfection of the relevant notarial bonds in the manner that it conducted such trade. Further, that being so, the plaintiff had not pleaded or established a factual basis that allowed it to open and operate an overdraft facility for necessary expenses in continuing to trade after the perfection Order.

12. Mr Schreuder argued this issue on the basis that the Particulars of Claim did not set out a cause of action allowing the plaintiff/respondent to continue to trade as it did, and open the aforesaid overdraft facility in the plaintiff's own name, and ultimately hold the sureties liable to cover what amounts to a net loss resulting from the sale of the business, the outstanding amount on the said overdraft, the outstanding amounts of certain accounts which the plaintiff/respondent incurred after the perfection of the notarial bonds concerned, and the passing of certain credits in favour of the principal debtor.

13. Even though the said exception set out in the alternative that the relevant allegations were also vague and embarrassing, this was not argued on behalf of the excipients/defendants. Accordingly, I shall only deal with this issue on the basis on which it was argued.

14. A very useful summary of some of the general principles applicable to evaluating exceptions has been set out by Makgoka J in the matter of *Living Hands (Pty) Ltd & Another v Ditz & Others*[1], which reads as follows:

> "[15] Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:
>
> (a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
>
> (b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.
>
> (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.
>
> (d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
>
> (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
>
> (f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

[1] 2013 (2) SA 368 (GSJ).

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars." (references omitted)

15. The above summary by Makgoka J was quoted with approval by Maier-Frawley J who expanded on the said principles in the case of *Merb (Pty) Ltd & Others v Matthews & Others*[2], as follows:

"9. Exceptions are also not to be dealt with in an over-technical manner, and as such, a court looks benevolently instead of over-critically at a pleading.

10. An excipient must satisfy the court that it would be *seriously prejudiced* if the offending pleading were allowed to stand, and an excipient is required to make out a very clear, strong case before the exception can succeed.

11. Courts have been reluctant to decide exceptions in respect of fact bound issues.

12. Where an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed. It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (facta probanda). The facta probanda necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence that is necessary to prove each fact (being the facta probantia) but every fact which is necessary to be proved.

13. An exception to a pleading on the ground that it is vague and embarrassing requires a two-fold consideration: i) whether the pleading lacks particularity to the extent that it is vague; and (ii) whether the vagueness causes embarrassment of such a nature that

[2] (2020/15069) [2021] ZAGPJHC 693 (16 November 2021).

the excipient is prejudiced in the sense that he/she cannot plead or properly prepare for trial. The excipient must demonstrate that the pleading is ambiguous, meaningless, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness, which vagueness causes embarrassment to the excipient." (references omitted)

16. The principles set out above apply to both exceptions which are based on the pleadings being 'vague and embarrassing' and those where it is alleged the pleading concerned does not disclose a cause of action or a defence. In the present case, only those principles applicable to an exception based on a contention that the Particulars of Claim do not disclose a cause of action will be applied.

17. As set out above, the principal debtor passed three notarial bonds in favour of the plaintiff. These notarial bonds were perfected by the plaintiff on 23 October 2015.

18. The plaintiff in its claim relies upon the terms of the notarial bonds as read with the order perfecting its security under the said notarial bonds for its claim to be entitled to run the business of the principal debtor after the perfection of the said notarial bonds.

19. Two of the said notarial bonds are silent on this question and the third one deals with this issue in some detail. Mr Schreuder relies upon a particular interpretation of these provisions to sustain the

excipients/defendants exception that the respondent/plaintiff has not pleaded facts to sustain its cause of action.

20. The relevant passage of the notarial bond that deals with this issue reads as follows:

"3.13.2 forthwith on its own or if needs be through any appropriate Sheriff of the High Court of South Africa, to enter upon and to attach and/or otherwise take physical possession and control of the assets and/or by itself and/or through its employees and/or through any nominee/s from time to time appointed by the Mortgagee, and to possess, and to manage and/or control the assets whilst at the same time (without in so doing taking over any business being conducted by the Mortgagor as a going concern in whole or in part unless should be specially agreed to in writing duly signed on behalf of the Mortgagee) allowing the Mortgagor and/or it employees acting in their capacities as employees of the Mortgagor and in their employment with the Mortgagor (and not as employees of the Mortgagee) to continue with the conduct, on behalf of the Mortgagor, of any business wherein such assets are used and/or applied, and while at the same time allowing the Mortgagor to utilise the assets in the continued conduct of such business by the Mortgagor, but under such management, possession and control exercised by the Mortgagee or on behalf of the Mortgagee by a representative/s and or employee/s of the Mortgagee, and to hold and continue with such possession, and any such management and/or control, for as long as the Mortgagee may deem fit in its sole and absolute discretion;" (My emphasis)

21. Mr Schreuder for the excipients/defendants relied on the portion of the above passage that reads: "(without in so doing taking over any

business being conducted by the Mortgagor as a going concern in whole or in part unless should be specially agreed to in writing duly signed on behalf of the Mortgagee)". On the strength of this passage, Mr Schreuder argued that the respondent/plaintiff had to run and manage the affairs of the business as the business of the principal debtor, that being the case, the respondent/plaintiff was not entitled to open an overdraft account in the plaintiff's own name and apply it to the business of the principal debtor and thereafter hold the excipients/defendants liable as sureties for the debt arising therefrom.

22. Mr Olivier for the respondent/plaintiff met this argument by asserting that the excipients/defendants were conflating the *facta probanda* with the *facta probantia.* Mr Olivier contended that the respondent/plaintiff had pleaded the necessary facts to establish its claim under the provisions of the relevant notarial bond. Furthermore, whether the respondent/plaintiff had, indeed agreed to in writing and duly signed on its behalf, taken over the principal debtor's business as a going concern or waived that requirement was not part of the *facta probanda* but in fact part of the *facta probantia*.

23. The respondent/plaintiff is afforded wide- and far-reaching discretion under the notarial bond. The relevant passages have to be interpreted in the context of the principal debtor providing security for its debts and in the context of the provisions of the notarial bond in its entirety.

24. In my view, Mr Olivier is correct, the excipients/defendants are conflating the *facta probanda* and the *facta probantia*. The respondent/plaintiff has pleaded enough to establish its case for the purpose of the exception. Remembering that for the purpose of the exception based on the plaintiff being alleged to have failed to plead facts to sustain its cause of action, this court accepts as correct the contentions pleaded by the respondent/plaintiff. The excipients/defendants are accordingly entitled to raise these aspects again in the plea it might file in the main action. The issues will then be determined on the facts that are established at the trial.

25. In all these circumstances, the exception raised and argued by the excipients/defendants stands to be dismissed.

26. Turning now to the question of costs. Under the ordinary rule, costs would follow the event. In my view, this is an appropriate case where costs should follow the event. The excipients/defendants are to pay the respondent/plaintiff's taxed or agreed party-and-party costs. I believe that it would be appropriate that these costs should be taxed on scale "B". The excipients/defendants are jointly and severally liable to pay these costs. The one paying the others to be absolved.

In the circumstances, the following order is made:

1) The exception is dismissed.
2) The costs relating to such exception are to be paid by the excipients/defendants. Such costs are to be taxed or assessed on scale "B". The excipients/defendants are jointly and severally liable to pay such costs. The one paying the others to be absolved.

[redacted]

L. G. Lever
Judge
Northern Cape Division, Kimberley

Representation:

For the Plaintiff/Respondent:	Adv JL Olivier
Instructed by:	Van De Wall Inc.
For the Excipients/Defendants:	Adv HC Schreuder (SC)
Instructed by:	Haarhoffs Attorneys
Date of Hearing:	18 August 2023
Date of Judgment:	15 November 2024