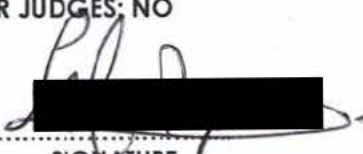




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
18/09/2025	
DATE	SIGNATURE

CASE NO: 40966/2021

In the matter between:

PHILLIP RUDOLPH BOTHA NEL

EXCIPIENT

and

WILLEM FREDERICK BOTHA

RESPONDENT

In Re:

WILLEM FREDERICK BOTHA

PLAINTIFF

And

PHILLIP RUDOLPH BOTHA NEL

DEFENDANT

JUDGEMENT

MOLOPA-SETHOSA J

[1] The Plaintiff issued summons against the defendant on 17 August 2021 for the following orders set out in the Plaintiff's Particulars of claim:

'1. Payment of R4,877,847,33 (FOUR MILLION, EIGHT HUNDRED AND SEVENTY-SEVEN THOUSAND, EIGHT HUNDRED AND FORTY-SEVEN RAND AND THIRTY-THREE CENTS);

2. Payment of interest on the aforesaid amount at a rate of 10% per annum from 2 August 2021 until date of final payment;

3. Costs of suit;

4. Further and/or alternative relief.'

[2] The defendant excepted to the plaintiff's amended particulars of claim on the grounds that it is vague and embarrassing and/or that it lacks averments which are necessary to sustain a cause of action.

[3] The basis of the plaintiff's claim is that:

[3.1] The plaintiff and a group of companies entered into a written agreement ("the agreement").

[3.2] In terms of the agreement:

[3.2.1] The group of companies acknowledged that the plaintiff had lent and advanced the sum of R7,506,341.44 ('the loan amount') to the group of companies;

[3.2.2] The group of companies would repay the loan amount over a period of 36 months and make payment of a monthly instalment of R242,208.52, provided that the full outstanding balance of the loan amount would be due and payable at the end of the loan term.

[3.3] The written agreement also contained a provision in terms of which the defendant bound himself as surety and co-principal debtor in favour of the plaintiff for repayment of 50% of the loan amount in the event of the group of companies failing to comply with its obligations in terms of the written agreement.

[3.4] The group of companies failed to comply with its obligations in terms of the written agreement by failing to make payment of any of the instalments provided for therein.

[3.5] A reconciliation statement reflects the outstanding amount due by the group of companies as at 1 August 2021 to be R9,755,694.67.

[4] The plaintiff contends that as a consequence of the group of companies' default, the plaintiff is entitled to claim payment from the

defendant of 50% of the aforesaid amount, which is the R4,877,847,33 claimed in the particulars of claim.

[5] The defendant excepted to the plaintiff's amended particulars of claim. The plaintiff has opposed the application.

[6] The defendant contends that the plaintiff's amended particulars of claim are excipiable on the basis thereof that same does not disclose a cause of action, alternatively that the amended particulars of claim are vague and embarrassing.

[7] The defendant goes on to elaborate in what respect are the amended particulars of claim excipiable. This is contained in the defendant's notice of exception dated 30 November 2021.

[8] The defendant contends that the plaintiff's particulars of claim are vague and embarrassing because paragraph 6.3 of the particulars of claim states that the "*group of companies would repay the loan amount...*" whilst the acknowledgement of debt, (referring to the written agreement aforesaid), states that the group of companies "*must*" repay the amount.

[9] The defendant further contends that it is not evident from the agreement, on what basis the group of companies acknowledged their indebtedness to the Plaintiff.

[10] The defendant contends that each company can only be indebted to the plaintiff in the amount specifically advanced to the said company.

[11] The defendant further contends that the agreement does not disclose whether the companies would be jointly or jointly and severally

liable to the plaintiff; and the defendant contends that on this basis, the agreement contains no valid *causa debiti*.

[12] In the context of the particulars of claim and the manner in which the word “*would*” is used by the Plaintiff in paragraph 6.3, there is no functional or practical difference between that word [i.e. “*would*”] and the word “*must*” used in annexure ‘POC1’ [the agreement/AOD as defendant refers to it]. Both words have the effect of conveying that the group of companies, i.e. Boneltha (Pty) Ltd, North Shore Trading 127 (Pty) Ltd, At 812 (Pty) Ltd, Enkwanati 88 (Pty) Ltd and Imani Restaurant (Pty) Ltd were collectively obliged to repay the loan amount to the plaintiff. The defendant’s objection is exceedingly technical and is clearly without merit.

[13] It is not correct that it is not evident from the agreement on what basis the group of companies acknowledged their indebtedness to the plaintiff. The agreement stipulates clearly that the plaintiff lent and advanced the loan amount to the group of companies. Thus, *ex facie* the particulars of claim and the annexures, the basis for the group of companies’ indebtedness was a loan by the plaintiff to the group of companies. The defendant is thus not correct that the agreement does not reflect a basis for the indebtedness.

[14] The defendant’s contention that each company can only be indebted for the specific amounts advanced to the said company by the plaintiff can also not be correct. There is no indication, *ex facie* the amended particulars of claim or its annexures, that the plaintiff loaned individual amounts to each of the companies. *Ex facie* annexure ‘POC1’, the amount of R7 506 341.44 seems to have been loaned to the group of companies,

collectively; and it is specifically stated, as one of the terms of the agreement that “*the group of companies will be liable to effect the monthly instalment jointly and severally...*”.

[15] The particulars of claim and the agreement clearly reflect that the group of companies acknowledge that the loan amount was lent and advanced to them, as a group, by the plaintiff; not individually.

[16] The defendant complains of an issue which does not arise on the amended pleadings.

[17] On the contention that the agreement does not disclose whether the companies would be jointly or jointly and severally liable to the plaintiff, *ex facie* the agreement, each of the companies accepted liability to the plaintiff for repayment of the loan amount. Each company is therefore liable to the plaintiff for the full amount. And, as already mentioned above, the agreement has actually recorded that “*the group of companies will be liable to effect the monthly instalment jointly and severally...*”. This can be read to mean that the companies would be jointly and severally liable to the plaintiff.

[18] As to the *causa debiti*, the defendant essentially argues that because each company’s individual indebtedness is not specified, the agreement (which it calls an acknowledgement of debt) does not reflect a valid *causa debiti* and is therefore invalid.

[19] The defendant’s aforesaid argument is premised on the erroneous assumption that each of the companies are liable for an individual amount. *Ex facie* the pleadings, this is not so; each of the companies

accepted liability to the Plaintiff as a group, jointly and severally with the others, for repayment of the loan amount as reflected in annexure 'POC1'. There is therefore no individual indebtedness to speak of.

[20] It is trite that an acknowledgement of debt (as the defendant refers to the agreement), which contains an undertaking to pay, gives rise to an obligation to pay, which may found a new cause of action. In *Adams v SA Motor Industry Employers Association*¹ Jansen JA stated as follows:

"Before us both counsel argued, in effect, on the basis that the acknowledgment of debt created a new cause of action to pay the balance of the purchase price and that thereafter, at least up to the time of the cession, this obligation co-existed with the original obligation under the deed of sale to pay such balance. As will be seen, this assumption was fully justified.

There is ample authority to the effect that an acknowledgment of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor; and it does not matter whether the acknowledgment is by way of an admission of the correctness of an account or otherwise. (Cf Divine Gates & Co Ltd v Beinkinstadt & Co 1932 AD 256; Somah Sachs (Wholesale) Ltd v Muller & Phipps SA (Pty) Ltd 1945 TPD 284; D Mahomed Adam (Edms) Bpk v Raubenheimer 1966 (3) SA 646 (T).)"

¹ 1981 (3) SA 1189 (A) at 1198A

[21] The agreement thus creates an obligation in respect of the group of companies to make payment of the loan amount to the plaintiff. This obligation founds a cause of action which entitles the plaintiff to sue on the agreement. There can therefore be no uncertainty, *ex facie* the pleadings, regarding the liability of the group of companies. There can also be no doubt that the *causa debiti* is the loan by the plaintiff to the group of companies.

[22] The legal principles relevant to an exception that a pleading does not disclose a cause of action can be summarised as follows:² Where an exception is taken, the court must look at the pleading excepted to as it stands, no facts outside those stated in the pleading can be brought into issue, except in the case of inconsistency, no reference may be made to any other document.

[23] In order to succeed, an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence is disclosed; failing this, the exception ought not to be upheld;

[24] The court should endeavour to look benevolently instead of over-critically at a pleading; 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.

² D.E. Van Loggerenberg, *Erasmus: Superior Court Practice*, Juta: Online Publication at RS 1, 2016, D1-294 and the authorities there cited.

[25] The legal principles relevant to an exception that a pleading is vague and embarrassing can be summarised as follows:³ An exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action: it goes to the entire cause of action, which must be demonstrated to be vague and embarrassing.

[26] An exception that a pleading is vague or embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged, *Trope v South African Reserve Bank*⁴. The effect of this is that the exception can be taken only if the vagueness relates to the cause of action. If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of.

[27] In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form to which he or she objects.

[28] The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced. The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. The defendant has not shown any in this regard.

³ D.E. Van Loggerenberg, *Erasmus: Superior Court Practice*, Juta: Online Publication at RS 1, 2016, D1-298-301 and the authorities cited.

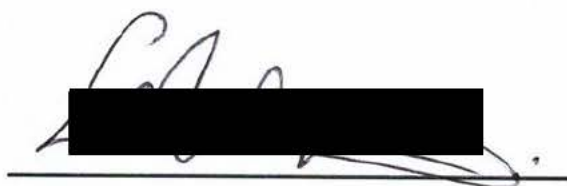
⁴ 1992 (3) SA 208 (T)

[29] In my considered view the terms of the agreement, set out in 'POC1' are clear and are capable of being understood by the defendant, who was the representative of the group of companies alluded to above, and who signed on behalf of the said group of companies, as well as *"Surety and co-principal debtor for 50% of the amounts due and payable to and in favour of Mr WF Botha for the debts of the companies"*.

[30] Having regard to the plaintiff's amended particulars of claim as they stand, I cannot find any plausible reason why the defendant would not be able to plead thereto. The defendant's exception lacks merit. The defendant will be able to plead to the amended particulars of claim, and all issues between the parties are to be fully ventilated by the parties at trial. For the reasons alluded to above, the exception ought to fail

[31] In the result I make the following order:

1 The exception is dismissed with costs.



L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

Attorneys for the Plaintiff:

Counsel for the Plaintiff:

Jennings Incorporated

Adv: N G Louw

Attorneys for the Defendant/Excipient:

Counsel for the Defendant/Excipient:

Groenewald attorneys

Adv: D Prinsloo