IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 39269/2021

Reportable: **NO**

Circulate to Judges: **NO**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates: **NO**

In the *interlocutory* matter (exception) between:-

RIYADH DOOLA Excipient

I.D: 7[....]

and

BMW FINANCIAL SERVICES (SOUTH AFRICA) (PTY) LIMITED Respondent

In re:

BMW FINANCIAL SERVICES (SOUTH AFRICA) (PTY) LIMITED Plaintiff

and

RIYADH DOOLA Defendant

I.D: 7[....]

This judgment is handed down electronically by distribution to the parties e-mail addresses as indicated in the respective practice notes. The date of hand down is deemed to be 22 October 2025

JUDGMENT

Reid J:

Introduction

[1] This is an exception against amended particulars of claim of the plaintiff in the main proceedings (respondent in this interlocutory application) being BMW Financial Services South Africa (Pty) Ltd ("BMW").

[2] BMW has instituted action against the excipient/defendant (referred to as the excipient) on 6 August 2021, and the parties have since been in prolix litigation. The main action is for damages resulting from non-payment in the amount of R1,020,039.13 (One Million Twenty Thousand and Thirty Nine Rand and Thirteen Cents) for the sale of a 2019 BMW 440i Gran Coupé motor vehicle.

[3] The excipient failed to file heads of argument within the time period specified in the Practice Directives of this Court. The heads of argument was only filed on 4 August 2025 at 08h12, which is the day that the matter was heard. Due to the failure to comply with the Practice Directives, the excipient's heads of argument is subsequently not before Court.

Material factual background

[4] On 13 February 2019 the principal debtor in the main action, Northend Showroom CC concluded a written instalment sale agreement with BMW, and the excipient concluded a written personal suretyship agreement with BMW. The principal debtor Northend Showroom CC has been placed under voluntary liquidation which was finalised in 2020.

[5] BMW successfully claimed repossession of the motor vehicle on or about 3 October 2019, through the liquidator of the principal debtor Northend Showroom CC (in liquidation). The vehicle was repossessed.

[6] The exception is brought on the basis that the summons discloses no cause of action in that the breach procedure stipulated in the contract has not been set out in detail. The argument is thus that the shortfall and damages claimed from the excipient are not set out in the particulars of claim in a manner which is clear and concise.

[7] The exception reads as follows:

1. *The agreement upon which the plaintiff relies is an alleged instalment sale agreement entered into between the Plaintiff and Northend Showroom CC (in liquidation), attached to the plaintiffs particulars of claim as Annexure "A".*

2. *In terms of paragraph 6.6.1 of the particulars of claim, the plaintiff pleads as follows:*

   "6.6.1 In the event of default by NORTHEND SHOWROOM CC with its obligations in terms of the Agreement, the plaintiff would be entitled, without prejudice to any other rights that it may have in law, to cancel and/or terminate the agreement, and claim from NORTHEND SHOWROOM CC the full amount that would have been paid, had NORTHEND SHOWROOM CC

fulfilled all obligations due in terms of the agreement. To this end, the plaintiff would be entitled to:

6.6.1.1 to claim return and repossession of the goods;

6.6.1.2 to sell the goods;

6.6.1.3 in addition to the aforementioned, claim damages."

3. *In paragraph 18 of the plaintiff's particulars of claim the plaintiff pleads that the agreement was cancelled and/or terminated due to the defendant's alleged breach, alternatively the agreement is cancelled by the particulars of claim.*

4. *The plaintiff claimed repossession of the motor vehicle on or about 3 October 2019, through the liquidator of the principal debtor Northend Showroom CC (in liquidation). The plaintiff authorised the liquidator to act on their instruction and to take repossession of the vehicle and to realise the value of the vehicle for the benefit of the plaintiff as a secured creditor the liquidated estate of Northend Showroom CC in liquidation). Annexed hereto marked "RD1" and "RD2" respectively is the Plaintiff's claim that was submitted to the Liquidator and the Liquidator's Agent's receipt confirming collection of the vehicle.*

5. *The plaintiff commenced with the execution process against the principal debtor, Northend Showroom CC (In liquidation) on 3 October 2019 and cannot claim the same amount from the principal debtor and the surety.*

6. *The plaintiff failed to make the necessary averments to*

sustain a cause of action against the defendant based on the claimed amount of R1,020,039.13."

[8] In short, the excipient argues that the contract entered into with BMW, makes provision in the instance of a breach, to <u>firstly</u> return the motor vehicle, <u>then</u> to sell the motor vehicle and <u>thereafter</u> claim the remaining amount outstanding from the excipient. The excipient signed as surety.

[9] The respondent argues that it can elect how to execute the breach procedure in terms of the contract.

[10] Despite being *dominus litis* in this interlocutory application, the excipient failed to set down the application and it was duly set down by BMW. The excipient failed to prosecute the exception, did not file heads of argument and did not set down the exception for hearing. On face value, BMW is taking all the steps necessary to bring the litigation to finality.

Legal principles

[11] Exceptions is dealt with in terms of Rule 23 of the Uniform Rules of Court, which reads as follows:

> ***"23 Exceptions and applications to strike out***
>
> *(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception…"*

[12] The test for exceptions has been confirmed in *Southernpoort Developments (Pty) Ltd v Transnet* 2003 (5) SA 665 (W) as follows:

12.1. For the exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it.

12.2. A charitable test is used on exception, especially in deciding whether a cause of action is established, and pleader is entitled to a benevolent interpretation.

12.3. The Court shall not look "with a magnifying glass of too high power".

12.4. The pleadings must be read as a whole; no paragraph can be read in isolation.

[13] A useful summary of principles applicable to exceptions in general was set out in *Nel and Others NNO v McArthur and Others* 2003 (4) SA 142 (T) wherein it was held that another general principles that apply is that, in order for an exception to succeed, it must be excipiable on every interpretation that can reasonably be attached to it. Also see *First National Bank of Southern Africa Ltd v Perry N.O. and Others* 2001 (3) SA 960 (SCA) at 965D.

[14] Further, a charitable test is used on exception in deciding whether a cause of action is established. The pleader is entitled to a benevolent interpretation. The pleadings must be read as a whole; no paragraph can be read in isolation. See: *First National Bank of Southern Africa Ltd v Perry N.O. and Others* (supra at 9711-J). Conclusions of law and matters that form part of evidence that will be led, need not to be pleaded.

Analysis

[15] This Court has to determine whether the excipient has made out a case

to uphold the exception on the following ground underpinning the exception: The Respondent failed to follow the breach procedure as pleaded in the particulars of claim and is not resorting to what was pleaded in the particulars of claim by cancellation of the agreement, claims damages and not specific performance of the agreement.

[16] The main ground of exception raised by the excipient is based thereon that BMW failed to follow the breach procedure as pleaded in the particulars of claim, which is BMW argues to be incorrect. BMW opposes the application on the basis that BMW issued summons based on a suretyship agreement to disclose a cause of action *(facta probanda)* and is entitled to recover the damages portion of the claim from the excipient.

[17] The second leg of the exception raised by the excipient is that BMW cancelled the agreement and claims damages which does not form specific performance of the agreement. It is submitted on behalf of BMW that the second ground is based on incorrect averments considering that BMW had an election to either claim for specific performance or to cancel the agreement and to claim damages.

[18] It is the case of BMW that the excipient bound himself for all debts and obligations which Northend Showroom CC (in liquidation) may have in the past owed or in the future owe to BMW and was entitled to cancel the instalment sale agreement and to claim damages from the excipient.

Conclusion

[19] Upon a plain reading of the particulars of claim, the claim is based upon a personal suretyship agreement because of a shortfall amount outstanding on an instalment sale agreement.

[20] In the present proceedings BMW contends that a written instalment

sale agreement was concluded between Northend Showroom (in liquidation) and BMW, which document is attached to the particulars of claim as Annexure: "A"." The personal suretyship agreement (Annexure: "E" to the particulars of claim) stands distinct and separately from the instalment sale agreement.

[21] It is submitted by BMW that, upon consideration of the pleaded case holistically, the claim is structured as follows:

21.1. First a claim based against the excipient as surety considering that Northend Showroom CC (in liquidation) was placed under voluntary liquidation; and

21.2. Second the excipient entered into the personal suretyship agreement in terms whereof he bound himself as surety and co-principal debtor for monies lent and advanced to Northend Showroom CC (in liquidation) for all debts and obligations of whatsoever nature and howsoever arising.

[22] I hold the view that the precise nature of prescribed pleading that the excipient expects from BMW, does not go to the heart of the claim. As set out in paragraph [8] above, the excipient is excepting against the fact that the remainder of the amount, after the value of the BMW vehicle has been deducted from the total amount of R1,020,039.13, is the basis of the claim against the excipient.

[23] The specific allegations that the excipient intends to have included in the particulars of claim, and the nature of this exception, is evidence that is to be led at the trial.

[24] Upon consideration of the nature of the claim the excipient is in a position to plead to the particulars of claim and I find that he suffers no prejudice as a consequence of what is alleged, or not alleged, in the

particulars of claim.

[25] The particulars of claim discloses the cause of action that BMW claims against the excipient.

[26] In the premise, the exception is bound to fail.

Costs

[27] The general principle is that the successful party is entitled to have its costs paid by the unsuccessful party. I find no reason to deviate from this principle.

[28] In clause 3.9 of the suretyship agreement, provision is made for costs on a scale as between attorney and own client. The excipient is contractually bound to pay a punitive fee for non-compliance of the agreement.

[29] Based on the above, I find that the excipient should pay the costs of BMW Financial Services on a scale as between attorney and own client.

Order

[30] In the premise, the above order is made:

(i) The exception is dismissed.

(ii) The excipient is to file its plea within 20 days of this order in terms of Rule 22 of the Uniform Rules of Court.

(iii) The excipient is to pay the costs of the respondent on a scale as between attorney and own client.

FMM REID

JUDGE OF THE HIGH COURT

GAUGENG DIVISION PRETORIA

DATE RESERVED: **4 AUGUST 2025**

DATE OF JUDGMENT: **22 OCTOBER 2025**

APPEARANCES:

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