

SOUTH AFRICA / JUDGMENT

Sterrenberg v Firststrand Bank Limited (1732/2021) [2023]

ZANWHC 37 (6 April 2023)

[2023] ZANWHC 37

COURT

North West High Court, Mafikeng

BEFORE

Reddy

CASE / FILE NUMBER

1732/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE
NO: 1732/2021

Reportable:	YES / NO Circulate
to Judges:	YES / NO Circulate to Magistrates: YES / NO Circulate
to Regional Magistrates:	YES / NO In
the matter between:	CAREL JOHANNES STERRENBURG EXCIPIENT AND FIRSTSTRAND BANK LIMITED RESPONDENT IN

RE: FIRSTRAND
BANK LIMITED PLAINTIFF
CAREL
JOHANNES STERRENBURG DEFENDANT
DATE

OF HEARING: 15 NOVEMBER 2022
DATE

OF JUDGMENT: 06 APRIL 2023

JUDGMENT

Reddy AJ

Introduction

- [1] This is an opposed interlocutory application wherein the excipient contends that the respondent's particulars of claim does not disclose a cause of action. In essence, it is argued that there is a defect in the pleading. Such defect, so it is contended, cannot be cured even if the most benevolent approach to its interpretation is allowed. I propose to follow the designation of the parties as cited in this application for purposes of convenience.
- [2] The excipient (defendant) has excepted to the respondent's (plaintiff's) particulars of claim on the grounds that they lack essential averments necessary to sustain a cause of action, in that they fail to allege compliance with crucial provisions of the National Credit Act 43 of 2005 ("the NCA").

Background facts

- [3] On or about the 21 June 2019 at Vryburg, the respondent duly represented and the excipient in his personal capacity, who was married out of community of property, entered into a Mortgage Loan Agreement. It was agreed that the respondent lend the excipient, at the latter's special instance and request an amount of R900-000-00, subject to specified terms and conditions. The loan was to be secured by mortgage bond over immovable property.
- [4] The excipient purchased an immovable property described as Section NO 5, Isabella's Square, Vryburg, with a duly registered bond. The excipient defaulted in the payment of his monthly instalments, resulting in the full amount outstanding becoming due and payable. The respondent pleads due compliance with the provisions of the NCA.
- [5] The excipient is indebted to the respondent in the sum of R977 962.68 together with variable interest as at 31 August 2021.

The Exceptions

- [6] The exceptions are set out as follows:

The first ground

1.1 In terms of paragraph 5 of the particulars of claim it is pleaded that the parties concluded a credit agreement which agreement was entered into after 1 June 2007;

1.2 Pleadings relating to credit agreements to which the National Credit Act (hereinafter referred to as (“the Act”) applies must contain inter alia the following allegations:

1.2.1 A credit assessment was conducted in accordance with section 81 of the Act; A pre-agreement statement and quotation as required by the Act was furnished;

1.2.2 The material terms and conditions of the credit agreement comply with the requirements of the Act.

1.3 The plaintiff fails to make the aforesaid allegations in their particulars of claim and/or summons which failure renders the pleadings excipiable

1.4 The plaintiff fails to make out a complete cause of action in terms of the provisions of the Act.

The Second Ground

2.1 In terms of paragraph 5 of the particulars of claim the plaintiff relies on a written credit agreement which agreement is attached to the particulars of claim and marked as annexure “A”;

2.2 In terms of clause 4.26.3 of annexure “A” should the Defendant fail to remedy any breach agreement with 10(ten) business days from day of delivery from the date of a written notice from the plaintiff calling on the defendant to remedy the breach, the defendant will be in default of the agreement;

2.3 If the defendant is in default of the agreement, the plaintiff may take the steps as set out in part C of Chapter 6 of the Act;

2.4 According to the terms of the written agreement the plaintiff may proceed with the process set out in clause 4.26.5.1 of the agreement after a written notice was delivered to the defendant calling to remedy the breach;

2.5 The plaintiff fails to plea that written notice was given to the defendant calling on the defendant to remedy the breach within 10(ten) days;

2.6 The plaintiff fails to plea all the required terms in their particulars of claim to make out a proper cause of action in respect of their claim.

The plaintiff fails to plea all the required terms in their particulars of claim to make out a proper cause of action in their respect claim.

[7] During argument Advocate Fitzroy abandoned the second exception. It therefore follows axiomatically, that the first cause for complaint remained.

The Law

[8] The general rule regarding pleadings is that pleadings must be drafted in a lucid, logical and intelligible manner. The cause of action or defence must appear clearly from the factual allegations made. (Harms, Civil Procedure in the Supreme Court at 263-264).

[9] In respect of pleadings, Rule 18(4) of the Uniform Rules of Court provides:

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer, as the case may be with sufficient particularity to enable the opposite party to plead.”

[10] Beck's Theory and Principles of Pleadings in Civil Actions, 5th Edition provides as follows:

“Pleadings should state facts and facts only....That is to say they should not contain statements of either law or the evidence required to establish the facts. Only material facts –and no others- need be alleged.”

[11] In Southernpoort Developments (Pty) Ltd v Transnet LTD 2003

(5) SA 655 (W), the court formulated the test on exceptions as follows:

“In order for an exception to succeed, the excipient must establish that the pleadings is excipiable on every interpretation that can be reasonable attached to it. A charitable test is used on exception especially in deciding whether a cause of action is established and the pleader is entitled to a benevolent interpretation. The Court should look at a pleading with a magnifying glass of too high power. The pleadings must be read as a whole, no paragraph can be read in isolation.” (See Also McKelvey v Cowan NO 1980 (4) SA 525 (Z) at 526D-E; Quinlan v McGregor 1960 (4) SA 383 (D) at 393F-G 5 ABSA Bank Ltd v Boksburg Transitional Local Council 1997 (2) SA 415 (W) at 422A 6 1998 (1) SA 836 at 902J – 903B 7)

[12] In Frank v Premier Hangers CC 2008 (3) SA 594 (C) Griesel J stated as follows at para [11] on page 600:

“[11] In order to succeed in its exception, the plaintiff has the onus to persuade the court that, upon every interpretation which the defendant's plea and counterclaim can reasonably bear, no defence or cause of action is disclosed. Failing this, the exception ought not to be upheld.”

[13] In Vermeulen v Goose Valley Investments (Pty) Ltd 2001 (3) SA 986 (SCA) Marais JA stated as follows at para [7] at page 997:

“[7] It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law.”

Submissions

by excipient

[14] Advocate Fitzroy argues that pleadings relating to credit agreements to which the NCA applies must contain inter alia:

- (i) That a credit assessment was concluded in accordance with section 81 of the NCA;
- (ii) That a pre-agreement statement and quotation as required by the NCA was furnished;
- (iii) That that material terms and conditions of the credit agreement comply with requirements of the NCA.

[15] To reinforce this contention, it was submitted that from a reading of the provisions of section 130(1) to (3), it is clear that a credit provider who wishes to approach the court to enforce either a credit agreement or the remaining obligations of a consumer in terms of a credit agreement, will have to make a significant number of procedural allegations to satisfy the court of compliance with the NCA. In underpinning these submissions, reference was made to section 83, 92, and 93. Adv Fitzroy for the excipient concluded that as the respondent has not pleaded these essential averments in terms of the NCA, there is no cause of action.

Respondent's

submissions

[16] Adv Ellis for the respondent contended that section 81(4) of the NCA, speaks to reckless credit, which is an accepted defence and must be pleaded. The contention was that the NCA does not require a credit provider to allege and prove that the credit agreement was not granted recklessly in the absence of an allegation to the contrary. A defence of reckless credit must accordingly be pleaded by a defendant and a plaintiff has a right to reply thereto. In terms of the provisions of the mortgage loan agreement which is annexed to the particulars of claim, there can be no reasonable suspicion that credit was granted recklessly. As such, the exception should be dismissed with costs.

Discussion

[17] Rule 18(6) of the Uniform Rules of this Court provides as far as it may find application that: -

“A party who in his pleadings 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 pleadings shall be annexed to the pleadings.”

[18] The following salient paragraphs extracted from the particulars of claim (Agreement) speak to compliance with Rule 18(6):

“[1]The plaintiff is FIRST RAND BANK LIMITED trading inter alia as FIRST HOME LOANS (formerly FIRST NATIONAL BANK OF SOUTHERN AFRICA LIMITED) a company have a share capital duly formed and incorporated as such in accordance with the laws of the Republic of South Africa, registered as a general bank in accordance with the deposit Taking Institutions Act, carrying on business from inter alia its Home Loans Centre at 1 Enterprise Road, Fairland, Randburg Gauteng Province;

[5] On or about 21 June 2019 at Vryburg, the plaintiff (represented by its duly authorised representative, alternatively employee,

alternatively agent) and the Defendant personally entered into a Home Loan Agreement, a copy of which is annexed hereto as “A”

and the content thereof is incorporated herein as specifically repeated;

[6] In terms of the agreement the Plaintiff agreed to lend the Defendant, at the latter’s special instance and request, the sum of R900 000 00(Nine hundred Thousand Rand Only) subject to the terms and conditions in the loan agreement (Annexure “A”);

[7] The Defendant agreed to pay the variable interest to the Plaintiff on the amount referred to above at a rate of 1.40% above the Plaintiff’s Prime Lending Rate per annum, as adjusted from time to time. The abovementioned loan is secured by mortgage bond over immovable property....”

[19] Annexure “A”, specifically denotes that the Mortgage Loan Agreement will be governed by the NCA, if applicable. It is against this backdrop, I turn to consider the remaining exception.

A credit assessment was not done

[20] This averment is meritless. Clause 5.10 of the Mortgage Loan Agreement dispenses with this complaint wherein the following is recorded:

“5.10 The Customer hereby confirms that he/she has disclosed to the Lender, all the relevant information relating to existing credit agreements, suretyships and current credit applications submitted to any other credit provider.”

A pre-agreement statement and quotation as required by the NCA was furnished

[21] This contention is bad in law. Clause 5.1 of the Mortgage Loan Agreement dismisses this, which reads:

“5.1 The customer confirms that he/she has received and accepted a quotation and has received, read and understood the terms and conditions contained in this Agreement.”

That the material terms and conditions of the credit agreement do not comply with the requirements of NCA

[22] The contention that the material term and conditions of the credit agreement comply with the requirements of the NCA is simply opportunistic. This is best reposed to in Jowell v Bramwell-Jones and Others 1998 [1] SA 836 W at 905E-H, where the following was stated:

“I must first ask whether the exception goes to the heart of the claim and, if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet...”

[23] In my view, the pleadings in its current form adheres to the essential requirements as encompassed in the NCA for the predication of a cause of action. For that reason, there is proper adherence to the NCA. The position is succinctly stated in *Secretary for Finance v Esselmann* 1988 [1] SA 594 SWA at 597G-H as follows: -

“A pleading should not contain matter irrelevant to the claim. The facts whereon a plaintiff relies should be concisely stated in his particulars of claim and these facts only, and no other, should be pleaded. However, for the sake of clarity it is sometimes necessary to plead history. The pleader should do this with caution. Unless such history is clearly severed from the cause of action the pleading may be rendered vague and embarrassing.”

A conflation of two legal concepts lends credence to the interchangeable use of the term *facta probanda* with *facta probantia*.

[24] This is an incorrect interpretation. In the commentary by Herbstein & Van Winsen: *THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA*, 5th Edition at page 565 with reference to the case of *North West Salt Co Ltd v Electrolytic Alkali Co Ltd*

(1913) 3 KB 422 at 425, where the following was stated:

“If a party relies on a fact, and will fail in his claim or defence unless at the trial that fact is proved, that fact will be a

‘material fact’ or ‘factum probandum.’ However, where the fact relied on is such that if the party fails to prove it at the trial he may nevertheless succeed on his claim or defence, that fact will in general not be a material fact, but only evidence of a material fact. Facts of this kind are known as ‘facta probantia’, and should not be pleaded.” (See *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 108D-E, *Shill v Milner* 1937 AD 101 at 105 and *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972(1) SA 26(A) at 44D - 45E, *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173.”

[25] An unearthing of the Mortgage Loan Agreement, which is specifically read into the particulars of claim, makes short shift of the perceived non-adherence to the NCA. The applicable terms of the contract read as follows:

“5.2 The customer has read, understood and agrees to be bound by the terms and conditions of this Agreement and the Bond to be registered over the property. The customer undertakes to sign all such documents as may be required to secure the Lender and pay all costs, charges and fees in connection with this Agreement and the Bond to be registered over the Property.

5.15 The Customer certifies that to the best of his/her knowledge and belief, the information herein provided to the Lender is true accurate and complete. The Customer further certifies that his/her marital and /or legal status has not changed and further that his/her financial status has not deteriorated since the date on which he/she submitted his/her application to the Lender. The Customer undertakes to notify the Lender in writing should his/her financial, marital and /or legal status change during the term of this agreement.

5.16 The Customer acknowledges that should he/she furnish the Lender with incorrect or false information he/she may be denied the protection of the Act.

5.17 Customer declares that he/she is able to afford the repayments as set out in this Agreement.”

[26] Resultantly, the exception falls to be dismissed.

Costs

[27] There is no basis to deviate from the usual order as far as costs are concerned.

Order

[28] Resultantly, the following order is made:

(i) The exception is dismissed with costs.

A REDDY

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA NORTH WEST DIVISION, MAHIKENG

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