

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 43859/2021

1. REPORTABLE: YES/NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED: YES/NO

DATE: 25 January 2024

SIGNATURE:

A handwritten signature in black ink, appearing to be 'G. Forrester', written over a circular stamp or mark.

In the matter between:

GEORGE FORRESTER FRIEND SCHOEMAN

Excipient

and

FIRSTRAND BANK LIMITED

Respondent

In re:

FIRSTRAND BANK LIMITED

Plaintiff

and

JUDGMENT

BASSON AJ

Introduction:

1. This matter concerns an exception based on the second proviso of Uniform Rule of Court 23(1) (the “Rules/Rule”) on the basis that Plaintiff’s Particulars of Claim discloses no cause of action.
2. To the parties will be referred as in the Summons.

The exception/s:

3. Plaintiff summonsed Defendant for the cancellation of an Instalment Sale Agreement concluded during or about 9 February 2017, the return of a Mercedes-Benz ML 320 CDI A/T (the “Vehicle”) and ancillary relief consequent upon Defendant reneging on its payment obligations. A quotation detailing the costs of the transaction, a Debit Order Authorisation and Plaintiff’s standard terms and conditions for Instalment Sale Agreement were attached to the Particulars of Claim as Annexure “A1”. I will throughout refer to “Annexure A1” as the “Agreement” unless reference is made to a specific document thereof. .
4. Defendant contends that the Particulars of Claim does not disclose a cause of action because the written Agreement upon which Plaintiff based its claim was

not signed by either of the parties and that the Agreement requires a signature. Therefore, also it is contended, because the agreement does not contain a signature, the Agreement does not constitute a written agreement.

5. Defendant filed two sets of heads of argument on respectively 9 March 2023 and 30 March 2023. Defendant in the 30 March 2023 Heads of Argument argues that paragraph 20 of the *Terms and Conditions for an Instalment Agreement (Variable Rate)* of Annexure “A1” supports his contention that the Agreement requires a signature and that, because this is absent, there is no written agreement.
6. I disagree for those reasons more fully set out below. Sub- paragraph 20.1 simply provides that

“By signing this Agreement you acknowledge and confirm that:”

whereafter the rest of paragraph 20 addresses a plethora of other incidental contractual issues such as, for example, acknowledgements and confirmations regarding changes to Defendant’s legal standing, VAT registration, administration orders, being declared mentally unfit et cetera, et cetera. Defendant argues that the use of the word “signing” (in subparagraph 20.1), read with paragraph 22.6, (which makes provision for changes to and cancellation of the Agreement) provides that:

“This is the whole Agreement and no changes or cancellations will be valid unless it is in writing and signed by both parties or is voice-locked by us and subsequently reduced to writing.”

7. The Agreement is an ordinary private commercial Agreement. It contains no explicit provisions regarding the manner or how the Agreement should be signed. It is also not subject to any of the exceptions referred to in section 12(a) of the Electronic Communications and Transactions Act, 25 of 2002 (“the Act”) such as, for example agreements for the sale of immovable property, wills, bills of exchange and stamp duties.
8. Defendant did not, in the heads of argument or in court address this aspect or the mode in which the Agreement had to be signed or which type of signature (but for manuscript) would have been sufficient.

Plaintiff’s case:

9. Plaintiff case is simple. It alleges that:
 - 6.1 it and Defendant concluded a written agreement on 9 July 2017 in terms whereof Defendant was financed for the purchase of the vehicle and of which it remained the owner until fully paid. These allegations are supported by Annexures “A1” to “A2” and “B” attached to the Particulars of Claim;
 - 6.2 it complied with its obligations:
 - 6.3 Defendant breached the agreement by failing to make full and punctual payment of the monthly instalments;
 - 6.4 it was, at the time of issue of summons in arrears with his payments.; and
 - 6.5 that there was compliance with all the provisions of the National Credit Act (“NCA”).

10. In exception proceedings I have to accept the facts, as pleaded by a Plaintiff, as correct. The court in **Marney v Watson**¹ held that: "*For (the) purposes of the exception the facts pleaded must be accepted as correct.*" This position was again confirmed by Van Reenen J in **Voget v Kleynhans**, holding that the only exception to this rule would be if the factual averments are so "*palpably untrue or so improbable that they cannot be accepted*"². Nothing to this effect was raised, nor could I find anything untrue or improbable in the Particulars. I therefore have to accept the correctness of the factual averments alleged in the pleadings.
11. It is trite that an exception may only be taken when the defect objected against appears *ex facie* the pleading itself.³ It is evident from the Particulars of Claim that Annexure "A1" does not reflect any manuscript signatures. Does not reflect where the Agreement was concluded, nor is there any manuscript signature appended to any of the documents in Annexure "A1". Each page of Annexure "A1" however contains an encryption on each page thereof which reflects the first name and surname of Defendant, an account number and a date and time stamp reflecting when the agreement was entered into. This encryption, in my view is the watermark which indicates the electronic signature of Defendant. I will come back to this aspect below.

¹ 1978 (4) SA 140 (C) at 144; See also **Government Employees Medical Scheme v Mazibuko** (2018/40674) [2019]ZAGPPHC 136 (9 May 2019)par [4] and [5].

² 2003 (2) SA 148 (C) at 151H. See also **Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others** 1990 (4) SA 749 (N) at 754J - 755B

³ **Klokow v Sullivan** 2006 (1) SA 259 (SCA) at 265.

12. It is trite that the onus is on excipient to convince the court that, upon every possible interpretation the pleading can reasonably bear, no cause of action is disclosed⁴ or that it is so vague and embarrassing that it cannot be expected of a Defendant to plead thereto.

The exception of non-compliance with Uniform Rule of Court 18(6):

13. Before dealing with the merits of the exception, it is necessary to briefly deal with the following paragraphs of the Agreement, including the encryption:

3The quotation/cost portion of the Agreement reflects the full names of both Plaintiff and Defendant, their domicilium addresses and the commencement date , 9 February 2017;

13.2 The Terms and Conditions:

13.2.1 in paragraph 3.3 provides that:

“should you have entered into this Agreement electronically, you are advised that according to law, the agreement is deemed to have been entered into at your registered business premises.”;
and

13.2.2 in paragraph 22.6 that:

“This is the whole Agreement and no changes or cancellations will be valid unless it is in writing and signed by both parties or is voice-logged by us and subsequently reduced to writing.

(My emphasis)

⁴ *Klokow supra; Trustees, BIR Fund v Break Through Investments CC 2008 (1) SA 67 (SCA) at 71.*

14. The following encryption (or watermark)

by GEORGE SCHOEMAN

Account number 85258194211

2017/02/09 03:48:18"

is reflected on each page of the Agreement:

15. It reflects the first name of Defendant, his surname and the account number (reflected in the Debit Order Authorisation portion) with a time date stamp reflecting the time of the day on which the signature was appended to the Agreement.
16. Defendant's 9 March 2023 Heads of Argument Defendant repeats the exception initially raised, but therein sought to introduce a second exception of which no notice was given based on non-compliance with Rule 18(6) namely in that the Particulars of Claim does not disclose where the agreement was concluded. For this reason, so defendant contends, the Particulars of Claim is vague and embarrassing and therefore excipiable.
17. Rule 23(1) provides that an exception may be taken within the period allowed for filing any subsequent pleading. It is apparent from the notices filed that the Defendant was initially barred from pleading in terms of a Notice of Bar dated 21 October 2021. The Bar was thereafter, by agreement, uplifted on 19 December 2022 on the agreement that Defendant will file his plea by no later than 30 January 2023.

18. It is trite that a true exception, based on the second proviso of Rule 23(1), can be filed on the last day that any subsequent pleading is due. This includes the last day (30 January 2023) Plaintiff and Defendant agreed upon. The initial exception (that no cause of action is disclosed) was timeously filed on 30 January 2023.
19. The reference to the second “exception” introduced in the 9 March 2023 Heads of Argument, was not an exception. It could, at best have been a notice based on vagueness and embarrassment, if timeously given.
20. Rule 23(1)(a) proscribes that where a party intends to take an exception that the pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice (which was never done) and shall only thereafter, within 10 days from the date on which a reply to the notice referred to in subparagraph (a) is received or within 15 days from which such replies due, deliver an exception.
21. It is apparent that by 30 January 2023, the proverbial horse has bolted. Defendant could no longer avail himself of the provisions of Rule 23(1)(a). Despite this, it was simply introduced/incorporated in Defendant’s Heads of Argument. It is trite practice that, if a party wishes to take a further exception, notice thereof should formally be given. Failing this, and if out of time, an application for condonation should be brought fully explaining why it was not timeously brought.

22. Plaintiff did not object to the Rule 18(6) “exception” but rather, in its heads of argument expounded on the issue that the Agreement was signed electronically and advanced evidence, explaining the procedural aspects pertaining to the signature and conclusion of the Agreement. The question is therefore whether Plaintiff, by not objecting to the introduction of the Rule 18(6) exception tacitly accepted and acquiesced to the introduction thereof.
23. A more apposite procedure for defendant to have followed would have been to avail himself of the provisions of Rule 18(12) which provides that non-compliance with Rule 18 is irregular and is susceptible to an application in terms of Rule 30. This was however not done. The time therefore has in any event come and gone.
24. The Rule 18(6) exception was therefore not properly before me nor did Defendant’s counsel seriously pursue this aspect during argument. There was no application for condonation or any explanation why it was not timeously and correctly raised. Despite the fact that I hold the view that this aspect was not properly before me I will, in light of the fact that Plaintiff did not take umbrage with this aspect, accept that there was acquiescence and decide the issue.
25. In doing so I do not intend to unnecessarily embroider on the intricacies of the process regarding exceptions based on vagueness and embarrassment save to mention that this remedy is based on separate and distinct complaints than that of a true exception⁵ and require different adjudication.

⁵ **Jowell v Bramwell-Jones** 1998 (1) SA 836 (W) at 902D–H; **Hill NO v Strauss** (unreported, GJ case no 13523/2020 dated 2 July 2021), paragraph [19].

26. Even had the Rule 18(6) exception been taken timeously (which Defendant could do⁶), it would not have availed Defendant. The reason is that an exception based on vagueness and embarrassment can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded. In turn, such an exception will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged.⁷ Defendant would therefore not have passed muster.
27. I say this for the following reasons. On a consideration of whether the Particulars lacked particularity to such extent as amounting to vagueness, the answer is no. The vagueness should, for example, be either meaningless or capable of more than one meaning to such extend that the reader, simply put, would have been unable to distil from the statement a clear, single meaning,⁸
28. But even if the answer to this question is yes, I am obliged to undertake a quantitative analysis of such embarrassment (as the excipient can show is caused to him by the vagueness complained of) and in each case make an ad hoc ruling as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects.⁹

⁶ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 902D–H

⁷ *Jowell v Bramwell-Jones* supra at 902F–G; *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T).

⁸ *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 644B.

⁹ *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 421J–422A; *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch*

29. Not all matters are the same. Facts differ. A point may, in one case, be of the utmost importance and the omission thereof may give rise to vagueness and embarrassment, but the same point may, in another case, be only a minor detail. The ultimate test however as to whether or not an exception should be upheld is whether the excipient is prejudiced.¹⁰ This aspect involves a factual enquiry during which the question of degree, influenced by the nature of the allegations, the contents, the nature of the claim and the relationship between the parties become important.¹¹
30. As already stated: the onus to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice is on the excipient who must make out his case for embarrassment with reference to the pleadings only.¹²
31. A vague summons amounting to embarrassment will for example be where it is not clear whether the plaintiff sues in contract or in delict, or if it is not clear upon which of two possible delictual bases he sues, or what the contract is on which he relies, or whether he sues on a written contract or a subsequent oral contract, or if it can be read in any one of a number of different ways, or if there is more than one claim and the relief claimed in respect of each is not separately

¹⁰ ***Investments 2 (Pty) Ltd*** 2008 (4) SA 639 (C) at 645C–D; ***Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)*** 2010 (1) SA 627 (C) at 630B. ***Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)*** supra at 630B.

¹¹ ***Lovell v Lovell*** (unreported, GP case no 24583/2009 dated 22 September 2022) at paragraph [20] and the authorities there referred to.

¹² ***Deane v Deane*** 1955 (3) SA 86 (N) at 87F; ***Lockhat v Minister of the Interior*** 1960 (3) SA 765 (D) at 777B.

set out. The remissness of pleading “Where” the Agreement was concluded, by no stretch of the imagination falls into one of the above categories to render the Particulars of Claim vague and embarrassing.

32. Taking the considerations expressed in *Lovell* (footnote 11 above) such as the degree and nature of the allegations, the contents of the Particulars of Claim read with the Agreement, the nature of the claim and the relationship between the parties into consideration, Defendant must quite obviously have acutely been aware that the Agreement was concluded electronically. No signatures (in the traditional sense in manuscript form) was appended to the Agreement. I have no doubt that Defendant had full knowledge of the nature of the claim and the background to the dispute. In fact, he took possession of the vehicle (Plaintiff claims for the return of the vehicle) and paid certain instalments if regard be had to the Certificate of Balance (Annexure “B”). It begs the question why the Defendant would have taken possession and paid instalments if the Agreement was, according to him not signed. The watermark signature imprinted on the Agreement is clearly an electronic signature which reflects that that the Agreement was entered into by Defendant with Account Number 852581942119 on 2 February 2017 at 03:48:18. To argue otherwise would be disingenuous.

33. It should also be noted that paragraph 3 of the Agreement (the “Cooling-off period”) in paragraph 3.1 expressly afforded Defendant five (5) business days after signing the Agreement to terminate the agreement and return the vehicle. Defendant quite obviously did not.

34. Subparagraph 3.3 expressly provides that if the Agreement was concluded electronically it, according to law, is deemed to have been entered into at the Plaintiff's registered business address which address is clearly set out in the quotation portion of Annexure "A1". In my view, all the factors considered, the protestation of "where" the Agreement was concluded, is superfluous.
35. The existence of the written Agreement is common cause and is not attacked. This is admitted by Defendant in his Heads of Argument. As it stands, on a factual basis, having regard to the question of degree of vagueness influenced by the nature of the allegations, the contents, the nature of the claim and the relationship between the parties, it is evident that the aspect of where the agreement was concluded, is evident from the Annexure "A1". The annexures should be read with the Particulars of Claim in order to decide whether the pleading is so vague that Defendant cannot be expected to plea thereto and that this will prejudice him.
36. I am not convinced that Defendant succeeded to show that the alleged vagueness amounted to embarrassment and that the embarrassment amounted to prejudice. Evidence on this aspect will not be unnecessary and can be lead at the trial.
37. I find this exception to be without merit. In the result, for what it's worth, it is dismissed.

Lack of averments to sustain a cause of action:

38. In dealing with this aspect, it is necessary to examine in somewhat more detail the historical background regarding the terminology of the principle of a “*cause of action*”.

39. Rule 18(4) requires every pleading to contain a clear and concise statement of the material facts upon which the pleader relies for his claim. Rule 20(2) further requires a declaration or Particulars of Claim to:

“*set forth the nature of the claim*” and “*the conclusions of law which the plaintiff shall be entitled to deduce from the facts stated therein*”.

The second proviso of Rule 23(1) warrants an exception if a pleading:

“*lacks averments which are necessary to sustain an action*”.

40. The erstwhile Appeal Court in ***Vermeulen v Goose Valley Investments***¹³ held that it

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

41. The court in ***McKenzie v Farmers’ Co-operative Meat Industries Ltd***¹⁴ defined a “cause of action” as:

¹³ [2001] 3 All SA 350 (A) par [7].

¹⁴ 1922 AD 16 at 23, quoted in, *inter alia*, ***Evins v Shield Insurance Co Ltd*** 1980 (2) SA 814 (A) at 838E–F; *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 656–7 per Ogilvie-Thompson JA.

“. . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

42. This relates to material facts with due regard to the distinction between the *facta probanda* and the *facta probantia*. Care must therefore be taken to distinguish the facts which must be proved in order to disclose a cause of action (the *facta probanda*) from the facts which prove them (the *facta probantia*).¹⁵
43. The court in ***Macrae v Sentraboer (Koöperatief) Bpk***¹⁶ stated that in order to ensure that a summons is not excipiable on the ground that it does not disclose a cause of action, the plaintiff:
- “moet toesien dat die wesentliche feite (dit wil sê die *facta probanda* en nie die *facta probantia* of getuienis ter bewys van die *facta probanda* nie) van sy eis met voldoende duidelikheid en volledigheid uiteengesit word dat, indien die bestaan van sodanige feite aanvaar word, dit sy regsconklusie staaf en hom in regte sou moet laat slaag t a v die regshulp of uitspraak wat hy aanvra”.
44. What the *facta probanda* in each particular case are, is essentially a matter of substantive law, and not of procedure.¹⁷ A Particulars of Claim which relies

¹⁵ ***Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation*** 2020 (1) SA 327 (CC) at paragraph [52]; ***Hill NO v Strauss*** (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraphs [17] and [19]; ***Nedbank Limited v Muskat*** (unreported, GP case no 22207/21 dated 19 April 2022) at paragraph [15].

¹⁶ 1981 (4) SA 239 (T) at 245D

¹⁷ ***Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd*** 1975 (1) SA 161 (T) at 161H.

upon an allegation that cannot be proved by admissible evidence discloses no cause of action and is excipiable. Conversely as was stated in **McKelvey v Cowan NO**¹⁸

“It is a first principle in dealing with 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 pleadings can disclose a cause of action if an allegation can be proved by admissible evidence.

45. In this matter it is common cause that a written agreement (Annexure “A1”) exists. Defendant’s only umbrage is that it does not contain a signature and peculiarly that it, for this reason:

“..... *does not constitute a written agreement as pleaded*”.

Defendants exception, read with paragraph 5 of his Heads of Argument is confusing. Defendant on the one hands admits that it is trite that a written agreement does not have to be signed in order for it to be valid and enforceable and that evidence can be led regarding consensus and that that such an agreement was as capable of being described as a written contract as one which was signed by both parties. The fact is a print script of the Agreement bearing a watermark was attached to the Particulars of Claim. It is not fictional to be described as a written agreement only once it is signed.

¹⁸ 1980 (4) SA 525 (Z) at 526. **Tongaat Hulett Sugar South Africa Limited v Mayola** (unreported, KZP case no 7694/2020P dated 18 August 2022) at paragraph [12].

46. Defendant, in an effort to add impetus to his argument, sought reliance on snippets and portions of the Agreement in an endeavour to substantiate his argument. The argument is that paragraphs 3.1, 3.2, 3.3, 18.3, 20 and 22.6 of the Agreement is proof that there had to be a signature appended to the agreement in order for it to be a written agreement. These assertions need briefly be examined.

Paragraphs 3.1 and 3.2:

47. Paragraph 3.1 provides that Defendant can terminate the agreement if he did not enter into the Agreement at Plaintiff's registered business premises within five (5) business days by delivering a notice to this effect by hand, fax, email or registered mail, advising of the decision to terminate the Agreement whilst paragraph 3.2 deals with costs or restoring the Goods to a saleable condition et cetera.

48. Defendant seems to lose sight of the provisions of paragraph 3.3 with which I will deal below. Fact is, there is no indication in this paragraph that there had to be a signature for a written agreement to exist. The reliance on these paragraphs is therefore without merit.

Paragraph 3.3:

49. This paragraph confirms the legal position regarding agreements concluded electronically and simply provides that in such event, it is deemed that the Agreement has been concluded at Plaintiff's registered address.

50. Again, there is not the slightest hint that it had to be signed. It rather deals with the deeming provision provided for in legislation and substantiate the fact that an electronic signature rather than a manuscript signature is apposite. The reliance on this paragraph is also without merit.

Paragraph 18.3:

51. Paragraph 18.3 provides for written notification should Defendant change his address or other contact details. It makes no provision that the Agreement should be signed but only makes provision for the procedure and the manner to be followed if there is a change in Defendant's contact details. Any reliance on this paragraph is therefore also without merit..

Paragraphs 20 and 22.6:

52. I have already in paragraphs 5, 6, and 7 of this judgment briefly referred to the relevant wording of these paragraphs.

53. I do not intend to unnecessarily further embroider on the wording of these paragraphs save to mention that I could nowhere in the Agreement find any reference thereto that the agreement had to be signed in manuscript and that electronic signatures are excluded. To the contrary, paragraph 3.3 in my view confirms that an electronic signature was used. I will again refer to this when I deal with the provisions of section 13 of the Act.

54. The wording of paragraph 22.6 is equally clear. It and expressly makes provision therefor that any changes to or cancellation of the Agreement, must

be in writing. Nothing more, nothing less. The conclusion of an agreement, where no formalities is prescribed regarding the signature thereof, is starkly different from provisions dealing with the cancellation of, or changes to an agreement in respect of which it is expressly provided that it should be in writing and signed by both parties. To elevate the reference to written changes and cancellation of the Agreement which must be signed by both parties in this paragraph to sustain the argument that this can be equated to a requirement for the conclusion of the Agreement and the manuscript signature thereof, would border on the absurd.

The interpretation of contracts:

55. Before I finally rule on this issue, I briefly referred to the principles applicable to the construction and interpretation of contracts.
56. It has now become trite in our law that, when interpreting contracts, text, context and purpose is paramount.
57. Wallis JA (writing for the full bench) expressed the present state of law relating to the construction or interpretation of documents ***Natal Joint Municipal Pension Fund v Endumeni Municipality***¹⁹ as follows:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or

¹⁹ 2012 (4) SA 593 (SCA) at 603F – 604D (footnotes omitted).

provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

(Emphasis added)

58. The same learn it judge when rendering judgment in ***Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk***²⁰ amplified that:

“Whilst the starting point remains the words of the document ... The process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible

²⁰ 2014 (2) SA 494 (SCA) par 10-12.

context, including the circumstances in which the document came into being ... Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.

59. The learned judge, in ***Bothma-Batho***²¹ approvingly referred to the following passage in the English case of *Society of Lloyd's v Robinson*²² :

"Loyalty to the text of a commercial contract, instrument or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words are therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language."

(Emphasis added)

- 60 Unterhalter AJ, (as he then was) in ***Betterbridge (Pty) Ltd v Masilo and others NNO***²³, summarised this approach as

"a unitary endeavour requiring the consideration of text, context and purpose". (Emphasis added)

²¹ *Bothma-Batho Transport supra*, footnote 7, paragraph [12].

²² [1999] 1 ALL ER (Comm) 545 at 551.

²³ 2015 (2) SA 396 (GNP) para 8.

the importance of context was emphasised by Lewis JA in **Novartis SA (Pty) Ltd v Maphill Trading (Pty) Ltd**²⁴ the following as follows:

“.... A court must examine all the facts – the context – in order to determine what the parties intended. And it does do that whether or not the words in the contract are ambiguous or lack clarity. Words without context mean nothing.”

61. As stated, the law as set out in Endumeni has now become trite.²⁵ It finally crystallised by in **Auction Alliance v Wade Park**²⁶ when Majiedt JA (as he then was) sounded the following caution with regard to interpretation:

“The approach to the interpretation of documents is by now firmly established in our law. It is not sufficient to merely regurgitate the relevant principles and to site the leading authorities without actually applying them. It must be evident from the interpretive process itself that the principles have been applied. Merely paying lip service to them undermines the entire exercise.” (Emphasis added)

²⁴ 2016 (1) SA 518 at 526I – 527B.

²⁵ See, *inter-alia*, *Democratic Alliance v African National Congress and another* 2015 (2) SA 232 (CC); *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Others* 2015 (5) SA 370 (CC); *Democratic Alliance v Speaker, National Assembly and others* 2016 (3) SA 487 (CC); *AMCU and Another versus Minister of Social Development* 2017 (3 SA 570 (CC); *Areva NP Incorporated in France v Eskom Holdings SOC Ltd and another* 2017 (6) SA 621 (CC); *Dramatic Asset Management (Pty) Ltd versus Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC); *Gongqase and others versus Minister of Agriculture and others* 2018 (5) SA 104 (SCA); *Pan African Mineral Development CO (Pty) Ltd and Others v Aquila Steel (SA) (Pty) Ltd* 2018 (5) SA 124 (SCA); *Commissioner, South African Revenue Service v Executives, Estate Ellerine* 2019 (1) SA 111 (SCA); *Shaw and others versus Mackintosh and another* 2019 (1) SA 398 (SCA); *De Bruyn and others versus Karsten* 2019 (1) SA 403 (SCA).

²⁶ (3424/16) [2018] ZASCA 28 (23 March 2018), para [19].

62 It is necessary to remind ourselves that when parties enter into a contractual relationship, they are free impose restrictions or incorporate provisions in the agreement to meet their specific requirement, as long as it complies with legal and/or relevant legislative provisions. The parties were therefore free to agree that the Agreement will be of no force and effect unless reduced to writing and signed by both parties and then prescribed the manner in which the agreement should be signed namely in manuscript or electronically. There is no such provision in the Agreement. The only reference to reduction to writing and signature by both parties is to be found in paragraph 22.6 dealing with changes and cancellations. The present dispute does not relate to either of these.

63 Contracts involving true *consensus*, after a process of bargaining and the manuscript signature thereof is becoming a comparative rarity. Obtaining a manuscript signature from each customer in modern society, given the electronic facilities at our disposal, has become less and less prevalent.

64. The Act's main objective is to

“enable and facilitate electronic communications and transactions in the public interest”²⁷

whilst distinguishing between electronic signatures and advanced electronic signatures..

65. An advanced electronic signature results from a process accredited by the .za Domain Name Authority by the Directorate General of the Department of

²⁷ Section 2(1) of the Act.

Communications who acts as the South African Accreditation Authority. This only happens after due process in terms of section 37 of the Act. The process requires a technical implication to achieve much stricter verification requirements whilst the signature must be created using electronic signature creation data over which only the signer has or should have control.

66. The Agreement between Plaintiff and Defendant is an ordinary commercial transaction in respect of which none of the prescriptive legislative provisions such as for *inter-alia* agreements concluded in terms of the Alienation of Land Act or the making of a Will finds application. It can hardly be conceived that Plaintiff would have insisted thereon that Defendant append an advanced electronic signature.

67. An electronic signature involves a much less strict procedure. It contains data attached to, incorporated in, or logistically associated with other data and which is intended by the user to serve as a signature. Such signature can take various forms. Electronic signatures therefore have the same presumption of enforceability as a handwritten or manuscript signature. If an electronic signature is required by the parties to an electronic transaction such requirement is met in relation to a data message if a method is used to identify the person to indicate the person's approval of the information communicated. Having regard to all the relevant circumstances at the time the method was used, the method is accepted as reliable as was appropriate for the purposes for which the information was communicated.

68. An electronic signature is not without legal force and effect simply because it is in electronic form. Even where an electronic signature is not required, section 13(5) of the Act provides that an expression of intent or other statement is not without legal force and effect merely on the grounds that it is in the form of a data message or is not evidenced by electronic signature but is evidenced by other means from which such person's intent or other statement can be inferred (such as taking the vehicle into possession and making monthly payments).
69. I have no doubt that the agreement was electronically signed by the Defendant and constitutes a proper written agreement as pleaded by the Plaintiff. On a proper reading of the Agreement with the annexures (as a unitary exercise) considering the purpose of the agreement (the lending of money to the Defendant to acquire the vehicle and to retain a retention thereover until all monies were paid) the text on which Plaintiff relies (and this includes the sub paragraphs Defendant based his argument on) read in context with the whole agreement and the documents constituting annexure "A1", the Agreement attached to the summons constitutes a written agreement.
70. Any aspects that need clarity can be augmented and amplified by the leading of oral evidence at trial. After all, the purpose of an exception is to avoid the leading of unnecessary evidence during trial. This is not the case here.
71. I therefore find that there is no merit in the exception raised by Defendant (and this includes the belated "exception" in terms of Rule 18(6) and that it must fail.

Costs:

72. I have carefully considered the aspect of costs and especially whether the costs of the exception should be costs in the cause.
73. Taking all aspects into consideration I am of the view that this would not be an appropriate order. Defendant should pay the costs of the exception.
74. In the circumstances I make the following order:
1. The exception is dismissed.
 2. The excipient is ordered to pay the costs of the exception.



**JGW BASSON
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA**

**DATE OF HEARING:
16 May 2023**

**DATE OF JUDGMENT:
25 January 2024**

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