



**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE DIVISION, CAPE TOWN**

**[REPORTABLE]**

**Case Number: 1843/2022**

In the matter between:

**GAMAL ABDEL WAHAB E MOSELHY SALEH**

Plaintiff

and

**SOUTH AFRICAN RESERVE BANK**

First Defendant

**MINISTER OF FINANCE**

Second Defendant

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**JUDGMENT**

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**Andrews AJ**

**Introduction**

[1] This is an opposed interlocutory application instituted by the First Defendant who raises an exception against the Plaintiff's Particulars of Claim on the basis that it lacks the necessary averments to sustain a cause of action.

**Background Facts**

[2] The Plaintiff received a Forfeiture Notice from the First Defendant ("SARB") dated 03 August 2022, in terms of Regulation 22B of the Exchange Control

Regulations of 1961 ("ECR").<sup>1</sup> The Plaintiff was advised in terms of the copy "Staatskoerant" attached thereto, dated 2 August 2022, that amounts of R1 011 862.59 and R77 431.92 held at First Rand Bank Limited and ABSA Bank Limited, respectively, had been forfeited to the State and would be disposed of by deposit to the National Reserve Fund.<sup>2</sup>

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<sup>1</sup> Index: Annexure "MGS 1", page 12,

***'Notice and Order of Forfeiture in terms of the provision of Regulation 22B of the Exchange Control Regulations, 1961...***

*In compliance with the provisions of Exchange Control Regulation 22B (3)(b), kindly find attached hereto a copy of the Notice and Order of Forfeiture (Notice No. 1193 of 2022), published in Government Gazette number 47181 on 2022-08-02.*

*Kindly note that in terms of the Exchange Control Regulation 22D, any person who feels aggrieved by a decision under Exchange Control Regulation 22B to forfeit monies to the State, may, at any time, but not later than 90 days from the date of the publication of the Notice and Order of Forfeiture in question, institute an action in a competent court for the setting aside of such decision.'*

<sup>2</sup> Index: Staatskoerant, 2 Augustus, No. 47181, pages 13 - 14.

***'Notice and Order of Forfeiture***

*Notice of Forfeiture to the State of money in terms of the provisions of Exchange Control Regulation 22B made under Section 9 of the Currency and Exchanges Act, 1933...in respect of:*

***Mr Gamal Abdel Wahab El. Moselhy Saleh***

*....*

*of:*

*...*

***Be pleased to take notice that:***

- 1. The Minister of Finance has, by virtue of the provisions of Exchange Control Regulation 22E delegated all the functions and/or powers conferred upon the Treasury by the provisions of the Exchange Control Regulations [with the exception of the functions and/or powers conferred upon the Treasury by Exchange Control Regulations 3(5) and (8), 20 and 22 but which exception does not include the functions and/or powers under Exchange Control Regulations 22A, 22B, 22C and 22D], and assigned the duties imposed thereunder on the Treasury, to, inter alia, the Governor or the Deputy Governor of the South African Reserve Bank.*

[3] On or about 28 October 2022 the Plaintiff instituted action against the Defendants. According to the Particulars of Claim, the Plaintiff alleged that the decision as set out in paragraph 2 above, individually and collectively is wrongful and unlawful, and in violation of Plaintiff's proprietary and/or other rights to the monies forfeited to the State. Additionally, it is averred that in accordance with ECR 22D(b), the impugned decision(s) fall to be set aside on grounds set out in section 9(2)(d)(i) and/or (iii) of the Currency Exchanges Act, 1933.

[4] In further amplification, the Plaintiff averred that the decision to freeze Plaintiff's bank accounts, and subsequently declare funds forfeited to the State is premised on the wrong allegation and/or erroneous belief, and/or suspicion that Plaintiff trading as G A W E M, contravened the provisions of the Exchange Control requirements in that he is alleged to have, in and during the period 24 November 2014 to 16 February 2016, made advance payments in excess of R1m to foreign suppliers in respect of which goods to the value of approximately R74 000.00 was, in turn, not cleared through Customs and/or not within the period prescribed by law. The advance payments, according to the Plaintiff was made by Jamal and Brothers CC, a juristic

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2. *By virtue of the functions, powers and/or duties vested in me, in my capacity as the Deputy Governor of the South African Reserve Bank, in terms of the delegation and assignment of the functions, powers and/or duties referred to in 1 above, I hereby give notice of a decision to forfeit to the State the following money and I hereby declare and forfeit to the State the following money, namely:*
    - 2.1 *the amount of R1 011 862.59 being capital standing to the credit of Mr Gamal Abdel Wahab El. Moselhy Saleh, in account number..., held with FirstRand Bank Limited, together with any interest thereon and/or other accrual thereto.*
    - 2.2 *The amount of R77 431.92 being capital standing to the credit of Mr Gamal Abdel Wahab El. Moselhy Saleh, in account number..., held with Absa Bank Limited, together with any interest thereon and/or other accrual thereto.*
  3. *The date upon which the money specified in 2 above is hereby forfeited to the State is the date upon which this Notice of Forfeiture is published in this Gazette.*
  4. *The money specified in 2 above shall be disposed of by deposit to the National Revenue Fund.*
  5. *This Notice also constitute a written order, as contemplated in Exchange Control Regulation 22B, in term of which the money specified in 2 above is hereby forfeited to the State...*<sup>2</sup>



entity separate and distinct from Plaintiff, which entity has no rights or claims to any of the monies declared forfeited to the State. The Plaintiff furthermore alleged that it cannot, as a matter of fact and/or in law be held liable under the ECR for any violation thereof which may have been committed by Jamal Brothers CC.

[5] The Plaintiff is seeking the following relief against the First and/or Second Defendant as amended include the following:

- (a) An order under Exchange Control Regulation 22D(b) setting aside the decision to declare Plaintiff's monies forfeited to the State;
- (b) An order directing First Defendant to repay to Plaintiff the aggregate sum of R1 089 294.51 plus interest at the prescribed legal rate *a tempora morae* to date of payment, both days included. And/or, an order directing the First Defendant to take all necessary steps to recover the aforementioned sum of R1 089 294.51 plus interest from the National Revenue Fund under the administrative control and/or authority of the Second Defendant;
- (c) Costs of suit on Attorney-client scale if this action is defended;
- (d) Such further and/or alternative relief as this Court deems fit.

### **Grounds of Exception**

[6] The First Defendant takes exception to the Plaintiff's Particulars of Claim on the grounds that it lacks the necessary averments to sustain a cause of action. The grounds of exception are set out in the Notice of Exception can be abridged as follows:<sup>3</sup>

- (a) The Plaintiff has failed to describe GAWEM properly or at all, and cited the incorrect registration number for Jamal and Brothers Fashions CC, the incorrect number being 2006/025108/23.
- (b) The Particulars of Claim lack a cause of action because in terms of section 22A of the ECR, the Treasury may attach any money or goods which are reasonably suspected to constitute a contravention, or which money or goods would not have been obtained had there not been a contravention, or by any person who has benefited or been enriched as a result of such contravention, or in possession of any person.

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<sup>3</sup> Excipient's Heads of Argument, para 10, pages 8 – 9.

- (c) The Plaintiff is the sole member of Jamal and Brothers Fashions CC. The attempt by the Plaintiff to rely on the separate juristic personality of Jamal and Brothers Fashions CC is bad in law because the ECR extend beyond the person suspected of the contravention to include those who benefitted from the contravention or those who are in possession of the funds.

- [7] The relief sought by the Excipient include that:
- (a) The First Defendant's exception(s) is/are upheld;
  - (b) The Plaintiff's claim is dismissed;
  - (c) Further and/or alternative relief; and
  - (d) Costs of the exception on the scale as between attorney and client.

#### **Plaintiff's grounds of opposition**

- [8] The salient grounds upon which Plaintiff submitted that the exception falls to be dismissed include *inter alia* that the:
- (a) exception fails to comply with Rule 23(3) in that the notice does not "clearly and concisely" state the grounds on which the Particulars of Claim is excipiable;
  - (b) causes of action as pleaded are recognised in law and
  - (c) exception taken is bad in law on the merits.

#### **Issues for determination**

- [9] The issues for determination can be summarised as follows:
- (a) Whether there has been compliance with Rule 23(3);
  - (b) Whether the Excipient is permitted to anchor its exception on points of law and
  - (c) Whether the Particulars of Claim make the necessary averments to sustain the Plaintiff's causes of action?

#### **Legal Principles**

- [10] The test for an exception is firmly established in our law. It is trite that exceptions are raised in an attempt to avoid the leading of unnecessary evidence at the hearing

of the action.<sup>4</sup> An overview of the applicable general principles distilled from case law is succinctly set out in ***Living Hands (Pty) Ltd NO and Another v Ditz and Others***<sup>5</sup>, where Makgoka J, encapsulated the general principles applicable to exceptions.

*[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<sup>6</sup>.*

*(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.<sup>7</sup>*

*(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.<sup>8</sup>*

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<sup>4</sup> *Number Two Piggeries (Pty) Ltd v City of Tshwane Metropolitan Municipality In re: City of Tshwane Metropolitan Municipality v Number Two Piggeries (Pty) Ltd* (2081/2021) [2022] ZAGPPHC 274 (21 April 2022)

<sup>5</sup> *[6] The law pertaining to exceptions is trite. The aim of exception procedures is to avoid the leading of unnecessary evidence and to dispose of a case wholly or in part in an expeditious and cost effective manner...*

<sup>6</sup> (42728/2012) [2012] ZAGPJHC 218; 2013 (2) SA 368 (GSJ) (11 September 2012) at para 15; See also *Merb (Pty) Ltd and Others v Matthews* 2021 ZAGP JHC 693 (16 November 2021), at para 8; *Number Two Piggeries (Pty) Ltd v City of Tshwane Metropolitan Municipality In re: City of Tshwane Metropolitan Municipality v Number Two Piggeries (Pty) Ltd* (2081/2021) [2022] ZAGPPHC 274 (21 April 2022) paras 6 – 12

<sup>7</sup> *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* (2) 1976 (1) SA 100 (W).

<sup>8</sup> *Van der Westhuizen v Le Roux* 1947 (3) SA 385 (C) at 390.

<sup>9</sup> *Fairoaks Investments Holdings (Pty) Ltd v Oliver* 2008 (4) SA 302 (SCA) at para [12].



(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.*<sup>9</sup>

(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.*<sup>10</sup>

(g) *Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.*<sup>11</sup>

## **Legal Framework**

[11] Rule 23(3) states that:

*'Whenever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated'*

[12] The Plaintiff identified the subsequent shortcomings in the Notice of Exception by the First Defendant<sup>12</sup>:

- (a) No mention is made of the *facta probanda* to be pleaded for a claim based on ECR 22D(b) read with ECR 22B, nor for a claim based on unjust enrichment, in other words, the Excipient failed to identify what facts were not pleaded;
- (b) The Notice of Exception does not specify which essential factual averments are lacking to sustain a claim based on ECR 22D(b) read with ECR 22B, nor for a claim based on unjust enrichment, in other words, that the Excipient failed to make the submission that they pleaded insufficient facts;
- (c) The Notice of Exception is essentially a restatement of what is pleaded;

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<sup>9</sup> *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at para 3 where Harms JA distils the general approach to exceptions as follows:

*'Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that cuts through the tissue of which the exception is compounded and exposes its vulnerability.'*

See also *Erasmus Superior Court Practice*, Second Edition (Juta), D1-294 [SERVICE 4, 2017], *H v Fetal Assessment Centre* 2015 (2) SA 193 at 1998B.

<sup>10</sup> *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902 J.

<sup>11</sup> *Jowell* (supra) at 900 J; See also *Purdon v Muller* 1961 (2) SA 211 (A) at 214 e – 215.

<sup>12</sup> Index: First Defendant's Exception, paras 1 - 3, pages 20 - 21.

- (d) The Excipient failed to cite any authority that supports the submission that the *facta probanda* and *facta probantia* is irrelevant;
- (e) The Plaintiff highlighted that the grounds on which the Excipient roots its Exception is based on points of law.<sup>13</sup> The Plaintiff contended that the Excipient was required to present a factual challenge to the Particulars of Claim.

[13] It was argued that the non-compliance with the prescriptive provisions of Rule 23(3) will be fatal to an exception unless condonation is applied for and granted. In this regard, it was contended that the Excipient did not make any application for condonation as envisaged in ***Evergrand Trading (Pty) Ltd***<sup>14</sup>.

[14] It is trite that the Excipient is to specify why it avers that the facts pleaded by the Plaintiff are insufficient. The Excipient therefore bears the onus to make out a clear case before it would be allowed to succeed. In other words, could the facts pleaded by the Plaintiff result in a judgment being granted against the Defendant as enunciated in ***First National Bank of Southern Africa Ltd v Perry NO and Others***<sup>15</sup> where the following was held:

*'It is trite 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 other document upon which his or her cause of action may be based, the claim is (not may be) bad in law. "An exception sets out why the excipient says that the facts pleaded by a plaintiff are insufficient. Only if the facts pleaded by plaintiff could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed. Only those facts alleged in the particulars of claim and any other facts agreed to by the parties can be taken into account".'*

[15] The Excipient, contended that its Exception was succinct and to the point, and that the Plaintiff ought to have filed an irregular step notice, which was not done. It is trite that in terms of Rule 30 of the Uniform Rules of Court, a party to a cause in which any other party has taken an irregular step may apply for the Court to set aside such

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<sup>13</sup> Index: First Defendant's Exception, para 4, pages 21 - 23.

<sup>14</sup> (54068/2020) [2022] ZAGPPHC 739 (3 October 2022) para 57.

<sup>15</sup> [2001] 3 All SA 331 para 6.



step. The Excipient made this submission without having raised it in the Notice of Exception. As a result, I consider it unnecessary to address this point in the course of this judgement.

[16] The question therefore to be answered is whether the Excipient has explicitly and concisely stated the grounds upon which the exception is founded. I am mindful that in matters where the exception is based on an absence of a cause of action, the court is beholden to deal with the exception sensibly and reasonably, not in an over-technical manner as set out in the guidelines formulated in ***Number Two Piggeries (Pty) Ltd v City of Tshwane Metropolitan Municipality In re: City of Tshwane Metropolitan Municipality v Number Two Piggeries (Pty) Ltd***<sup>16</sup>. The court is required to evaluate, whether upon reading of the pleadings in its entirety the claim has been formulated in a manner that allows the Defendant to ascertain clearly what the case against it is and should enable the Defendant to plead to it.<sup>17</sup>

[17] A substantial portion of the Excipient's Notice of Exception seems to be a paraphrased restatement of the key allegations found in the Plaintiff's Particulars of Claim, specifically paragraphs 4.1 to 4.5, in order to support the claim that the Particulars of Claim do not contain the necessary averments to maintain a cause of action in accordance with ECR 22D(b) read with ECR 22B.<sup>18</sup> The Excipient has framed the Notice in a manner that seeks to set out the legislative framework of the ECR in an endeavour to illustrate the basis for which it alleges that the Plaintiff's claim lacks a cause of action. It is manifest that upon a plain reading of paragraphs 4.2 and 4.4 of the Exception, that the interpretation of the import and legal effect of Regulations 22A and 22C of the ECR is recorded as dealt with in paragraphs 4.1 and 4.3.

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<sup>16</sup> (2081/2021) [2022] ZAGPPHC 274 (21 April 2022), para 12 'If the exception is based on an absence of a cause of action the court should deal with the exception sensibly and not in an over-technical manner. Although one should not be overly technical and read the pleading as a whole the claim should be formulated in a way that allows the defendant to ascertain clearly what the case against it is and should enable the defendant to plead to it.'

<sup>17</sup> *Number Two Piggeries (Pty) Ltd (supra)* at para 12.

<sup>18</sup> Index: Exception, pages 20 – 23.

[18] The authorities reaffirm the trite legal principle that interpretation of statutes is a matter of law and not fact, and as such that responsibility rests with the courts to determine.<sup>19</sup> It is an established legal principle, that conclusions of law need not be pleaded.<sup>20</sup> The contents of paragraphs 4.2, 4.4 of the Exception and paragraph 4.5 of the Exception which reads:

*'The attempt by the Plaintiff to rely on the separate juristic personality of Jamal and Brothers Fashion CC is not only bad in law because the Exchange Control Regulations extend beyond the person suspected of the contravention to include those who benefitted from the contravention, or those who are simply in possession of the funds, but also the plaintiff is the sole member of Jamal and Brothers Fashion CC. A copy of a CIPC dated 6 December 2022 is attached marked annexure "E1".'*

viewed in isolation, may appear to be non-compliant with the prescripts of Rule 23(3), as secondary allegations are encapsulated in support, which ordinarily ought to be matters for evidence as conclusions of law need not be pleaded. However, it is evident that these secondary submissions are made, in my view, to carry the points of law upon which the exception is grounded; which cannot be made in a vacuum as will be demonstrated later in this judgment. This court is cognizant that pleadings must be

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<sup>19</sup> *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para 39.

<sup>20</sup> The approach to an exception was considered by McCreath J in the decision of *Trope v South African Reserve Bank* 192 (3) SA 208(T) at 211, which was cited with approval by Heher J in the decision of *Jowell v Bramwell Jones and Others* 1998 (1) SA 836 (W), where the court laid out the following general principles regarding exceptions:

*"(a) minor blemishes are irrelevant;*  
*(b) pleadings must be read as a whole; no paragraph can be read in isolation;*  
*(c) a distinction must be drawn between the facta probanda, or primary factual allegations which every plaintiff must make, and the facta probantia, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence;*  
*(d) only facts need be pleaded; conclusions of law need not be pleaded;*  
*(e) bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them. implied allegations and the pleading must be so read: cf Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 (4) SA 37 1 (D) at 377, 3798. 3790- -H.' at 9021 – 9030"*



read as a whole and that no paragraph is to be read in isolation. Caution has been expressed regarding an excessively technical approach that renders the exception procedure ineffective and should be avoided. The contextual framework to support the averment that the Plaintiff's claim lacks a cause of action, appears to have informed the manner in which the Excipient has chosen to couch the Notice of Exception. However, the style chosen by the Excipient, does not, in my view, render the Notice of Exception to be defective when applying the approach envisaged in the guiding principles on exceptions.

[19] It is important to mention, however, that the Excipient seeks to reference the CIPC printout that constitutes extraneous evidence, which is not envisaged in Rule 23(3).<sup>21</sup> In my view, this annexure does not advance the case of the Excipient for the purposes of the exception as the Court is to have regard to the pleadings as it stands. The said attachment is a matter of evidence and may be introduced at a later stage. It is trite that where an exception is taken the court will look only to the pleadings excepted as it stands and not to facts outside those stated in it.<sup>22</sup> Therefore, the veracity of the allegations made in the impugned pleadings is to be accepted. Put simply, the court is called upon to adjudicate and assess the facts as per the pleadings. Consequently, the CIPC printout falls to be struck out and will be ignored for the purposes of this application.

[20] It was argued that a different consideration is applied in respect of an exception raised on a Plaintiff's Particulars of Claim *vis-a-vis* a Plea. Where a pleader raises a point of law that can be destructive of the case then a special plea can be raised. *In casu* no plea has yet been filed. The Plaintiff argued that the door is effectively not closed on the Excipient if the objectionable grounds are sustainable, as recourse may be had by way of raising a special plea, which could potentially be dispositive of the matter. If the grounds are sustainable, then the recourse is to raise a plea or a special plea.

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<sup>21</sup> Index, CIPC, Annexure "E1", page 26.

<sup>22</sup> In *Baliso v FirstRand Bank Ltd t/a Wesbank*<sup>22</sup>, it was held that '[w]here an exception is taken a court looks only to the pleadings excepted to as it stands, not to facts outside those stated in it'.



[21] Whilst it is so that a special plea may be raised, the question to be answered at this stage is whether Particulars of Claim, as it stands, has been formulated in such a way as to enable the Excipient to plead to it.

### **Introduction of new grounds**

[22] It is a fundamental legal principle that deficiencies in the Notice of Exception cannot be cured by way of amplification at the hearing, and neither can it raise any new ground of exception in its Heads of Argument which was not raised in its formal Notice of Exception. The court is also precluded from evaluating the Heads of Argument in regard to factual admissions that are not supported by the pleadings. It is furthermore trite, that the Excipient cannot expand its grounds of exception through submissions in Heads of Argument.

[23] The Plaintiff argued that the Excipient introduced a new ground in the Heads of Argument that was not pleaded, extending it beyond the realm of Rule 23(3). The Excipient in its Heads of Arguments make the following submission:

*'While it is not conceded that the plaintiff did not partake in a contravention of the Regulations, the plaintiff has in any event not pleaded that the money concerned was acquired by him bona fide for reasonable consideration as a result of a transaction in the ordinary course of business'*<sup>23</sup>

[24] The question to be answered is whether this point is contained in the Notice of Exception or does it extended beyond the realm of Rule 23(3) if regard is had to paragraph 4.2 of the Notice of Exception wherein the following is stated:

*'4.2 This means that an attachment can take place regardless of wrongdoing by a specified person or entity and the mere possession of the funds concerned would be sufficient where there is a reasonable suspicion of a contravention of the Exchange Control Regulations, just as is the case at hand, among other things (this is not a concession that the plaintiff did not partake in the contravention of the Exchange Control Regulations)...'*<sup>24</sup>

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<sup>23</sup> First Defendant's / Excipient's Heads of Argument, para 13, page 13.

<sup>24</sup> Index: First Defendant's Exception, para 4.2. page 22.

[25] It is apparent that the portion not contained in the Notice of Exception is the following:

*"that the money concerned was acquired by him bona fide for reasonable consideration as a result of a transaction in the ordinary course of business".<sup>25</sup>*

[26] The pivotal consideration is whether this constitutes an expansion of the grounds or should it be regarded as an amplification of the ground contained in para 4.2. In light of the conclusion to which I have come, I am not persuaded that this averment constitutes a new ground, or expansion of the ground pleaded. Though it is trite that grounds are to be concisely set forth, I am of the view, that same amounts to amplification as the Plaintiff alleges that he seeks relief based on two causes of action pleaded namely:

- (a) relief under the ECR; alternatively,
- (b) at common law based on unjustified enrichment which will be dealt with later in this judgment.

[27] The Plaintiff argued that the Excipient's reliance on the principle of subsidiarity, which was introduced in the Heads of Argument, is not a recognised ground of exception. This contention extends beyond the grounds of exception specified in the Notice of Exception. The Excipient explained that the subsidiarity principle was invoked because of the submissions made by Plaintiff in Heads of Argument pertaining to unjust enrichment. The Excipient challenges the Plaintiff's alternative common law claim in terms of the principle of subsidiarity on the basis that if there is a legislative or statutory remedy or mechanism provided, a litigant cannot rely on the common law remedy. It is the Excipient's view, that the Plaintiff is essentially relying on this remedy on the premise that if it is not successful with the statutory remedy, the court is called upon to read in that the Plaintiff has a common law remedy.

[28] In ***My Vote Counts NPC v Speaker of the National Assembly and Others***<sup>26</sup> provides guidelines on the court's approach to the principle of subsidiarity:

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<sup>25</sup> Excipient's Heads of Argument, para 13.

<sup>26</sup> (CCT121/14) [2015] ZACC 31 (30 September 2015) at para 54.



*'The principle of subsidiarity is a well-established doctrine within this Court's jurisprudence. The essence of the principle was captured by O'Regan J in Mazibuko, where she held that—*

*"where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution."*<sup>27</sup>

[29] The judgment of **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs**<sup>28</sup> as referenced in an article '*Adjudicative subsidiarity, the "horizontality simpliciter" approach and personality rights: Outlining an integrated and constitutional reading strategy to the law of personality*', endorses the approach that '*expressly enacted legislation "cannot be thoughtlessly circumvented" to establish a cause of action in terms of the common law or customary law.*'<sup>29</sup>

[30] As indicated previously, the Excipient is confined to the pleaded grounds of exception as the substance of the exception was amplified in the Excipients Heads of Argument. The legal principle pertaining to subsidiarity was not specifically mentioned but could be implied because the Excipient raises a point of law to support its contention that no cause of action has been pleaded. This court acknowledges that the Excipient is required to provide clear and concise justifications for exempting Particulars of Claim, and that these assertions should establish factual grounds.

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<sup>27</sup> *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 73. See also *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC), where Jafta J stated:

"[W]here legislation has been passed to give effect to a right in the Bill of Rights, a litigant is not permitted to rely directly on the Constitution for its cause of action."

<sup>28</sup> 2004 7 BCLR 687 (CC).

<sup>29</sup> Visser CJ '*Adjudicative subsidiarity, the "horizontality simpliciter" approach and personality rights: Outlining an integrated and constitutional reading strategy to the law of personality*' 2022 De Jure Law Journal, pages 129 – 130:

'Building upon the first substantive proposition, the second substantive proposition, as originating from the judgment of *Bato Star Fishing (Pty) v Minister of Environmental Affairs*, develops this line of reasoning further by determining that such expressly enacted legislation "cannot be thoughtlessly circumvented" to establish a cause of action in terms of the common law or customary law'



However, the Excipient merely outlines the statutory provisions that support the Excipient's choice to publish the declaration of forfeiture. The law is clear that where legislation has been enacted to give effect to that right, a litigant should rely on that legislation. This court is attentive not to go outside the legislative provisions upon which the Plaintiff places reliance. It is trite that in dealing with an exception, pleadings are to be looked at as a whole. Therefore, I am of the view that subsidiarity principle is a consideration to be ventilated at the trial, if regard is had to the legislative framework upon which the Plaintiff places reliance read together with the quoted authorities on point.

[31] Counsel for the Excipient argued in her address that the court should contemplate the provision of alternative relief. Counsel for the Plaintiff argued that no alternative relief exists and that alternative relief in the case of an exception is not permitted in law and is a deviation of the trite rules governing exceptions which is to either uphold the exception on the grounds of no cause of action or dismiss the exception and direct that the Defendant files its plea.

[32] It is trite that an Excipient is obliged to confine his complaint to the stated grounds of its exception.<sup>30</sup> The Excipient has to stand or fall by the exception as formulated in its notice filed.<sup>31</sup> An exception which lacks a prayer is bad, but the court has the power to order an amendment to make good the defect, provided no prejudice or injustice is thereby caused to the Respondent.<sup>32</sup> In applying the entrenched legal principles, I am not inclined to consider any alternative relief that was not pleaded with particular particularity, as the Excipient does not state what alternative relief should or could be granted by the Court. Doing so would be contrary to the established legal

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<sup>30</sup> *TSI Communications CC v Omega M Projects* (2022/13169)[2023]ZAGPJHC 1081 (27 September 2023) at para 7.

<sup>31</sup> *Inkin v Borehole Drillers* 1949 (2) SA 366 (A) at 373; *Alphina Investments Ltd v Blacher* 2008 (5) SA 479 (C) at 483D; *TSI Communications CC and Omega M Projects* (Case no. 13169/2022) [2023] ZAGPPHC (27 September 2023) para 7 'The trite principle of our law is that an excipient is obliged to confine his complaint to the stated grounds of his exception.'

<sup>32</sup> *Erasmus HJ 'Superior Court Practice'* 2<sup>nd</sup> Ed. Vol 2(Juta) Rule 23, D1-309.

principles regarding exceptions; more especially as the key consideration is that of prejudice.<sup>33</sup>

[33] In addition, Counsel for the Plaintiff also challenged the submission made on behalf of the Excipient during argument that the Plaintiff has not challenged the constitutionality of the Regulations. This too, was not pleaded in the Notice of Exception. Consequently, this Court, will for the purposes of this judgment not deal with these submissions as it was not raised as a ground of exception in the Notice of Exception.

[34] It was argued that the Plaintiff's submission in its Heads of Argument that "[t]he factual averment raised by First Defendant's Counsel in her heads at par 13 may be raised as a defence in a Plea, namely, that the money declared forfeited was not acquired bona fide", are to be regarded as a concession of the taint.<sup>34</sup> The Plaintiff however contended that this is not an admission. In this regard, the Plaintiff illuminated the wording in the Particulars of Claim namely:

*'18.3 Plaintiff cannot, as a matter of fact and/or law, be held liable under the Exchange Control Regulations for any violation thereof which may (my emphasis) have been committed by Jamal and Brothers CC'*<sup>35</sup>

[35] It is prudent to reiterate that the court shall consider only the pleadings excepted as it stands. Heads of Argument are not pleadings. In any event, it is not incumbent on the court dealing with an exception to analyse any defences raised.

### **The Exchange Control Legislation**

[36] The Constitutional Court in ***South African Reserve Bank and Another v Shuttleworth and Another***<sup>36</sup> explains the purpose and historic origin of the ECR. The

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<sup>33</sup> *Living Hands (Pty)Ltd v Ditz* 2013(2) SA368 (GSJ) at 394 D-E; *University of the Free State v Afriforum* 2017(4) SA283 (SCA) at 296E-F.

<sup>34</sup> Plaintiff's Heads of Argument, para 65, page 15.

<sup>35</sup> Index: Particulars of Claim, para 18.3, page 9.

<sup>36</sup> 2015 (5) SA 146 (CC) at paras 53 – 54.



matter of ***Yan Ling International Trade CC v South African Reserve Bank***<sup>37</sup> is instructive with regards to the ECR. It is the Plaintiff's contention that an Exception

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*'Here we are dealing with exchange control legislation. Its avowed purpose was to curb or regulate the export of capital from the country. The very historic origins of the Act, in 1933, were in the midst of the 1929 Great Depression, pointing to a necessity to curb outflows of capital. The Regulations were then passed in the aftermath of the economic crises following the Sharpeville shootings in 1960. The domestic economy had to be shielded from capital flight. Regulation 10's very heading is "Restriction on Export of Capital". The measures were introduced and kept to shore up the country's balance of payments position. The plain dominant purpose of the measure was to regulate and discourage the export of capital and to protect the domestic economy.*

*This dominant purpose may also be gleaned from the uncontested evidence of the then Director-General of Treasury, Mr Kganyago. He explained that the exchange control system is designed to regulate capital outflows from the country. The fickle nature of the international financial environment required the exchange control system to allow for swift responses to economic changes. Exchange control provided a framework for the repatriation of foreign currency acquired by South African residents into the South African banking system. The controls protected the South African economy against the ebb and flow of capital. One of these controls, which we are here dealing with specifically, served to prohibit the export of capital from the Republic (unless certain conditions were complied with).'*

<sup>37</sup> [2023] ZAGPPHC 79 (13 February 2023) at paras 3 -5.

*'By way of background, the Respondent is the central bank of South Africa and was established in terms of section 9 of the Currency and Banking Act, 31 of 1920. It is recognised in section 223 of the Constitution of the Republic of South Africa ("the Constitution") and is governed by the Constitution and South African Reserve Bank Act, 89 of 1990 ("the SARB Act").*

*Section 3 of the SARB Act details the Respondent's legislative objectives, and it enjoins it to do the following:*

*"In the exercise of its powers and the performance of its duties the Bank shall pursue as its primary objectives monetary stability and balanced economic growth in the Republic, and in order to achieve those objectives the Bank shall influence the total monetary demand in the economy through the exercise of control over the money supply and over the availability of credit".*

*The primary object of the Respondent, which is set out in section 224(1) of the Constitution, "is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic". Exchange controls are government-imposed limitations on the purchase and sale of foreign currencies. They are used to ensure the stability of an economy and prevent exchange rate volatility.'*



cannot be looked at through the lens of the law. It is therefore apposite to consider the substance of the exception within the context of the ECR as the primary ground on which the Excipient roots its exception is based on points of law.

[37] It is trite that the purposes of an exception is to raise a substantive question of law which may have the effect of potentially settling the dispute between the parties.<sup>38</sup> The Court was referred to the relevant provisions encapsulated in Section 9(1) to 9(2)(c)<sup>39</sup>; 9(2)(d)(i)(aa) to (cc) read with 9(2)(d)(iii)(aa) to (cc)<sup>40</sup> of the Currency

<sup>38</sup> *Van der Westhuizen v Le Roux* 1947 (3) SA 385 (C) at 390; see also *Merb (Pty) Ltd v Matthews (supra)*, where Mairer-Frawley quoted with approval from Makgoka J's decision in *Living Hands (supra)* as follows: '8...(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...art

<sup>39</sup> '(1) The Governor-General may make regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges.

(2)(a) Such regulations may provide that the Governor-General may apply any sanctions therein set forth which he thinks fit to impose, whether civil or criminal.

(b) Any regulation contemplated in paragraph (a) may provide for –

(i) The blocking, attachment and obtaining of interdicts for a period referred to in paragraph (g) by the Treasury and the forfeiture and disposal by the Treasury of any money or goods referred to or defined in the regulations or determined in terms of the regulations or any money or goods into which such money or good have been transformed by any person, and –

...

(cc) by which the offender, suspected offender or any other person has been benefitted or enriched as a result of such offence or suspected offence:

Provided that, in the case of any person other than the offender or suspected offender, no such money or goods shall be blocked, attached, interdicted, forfeited and disposed of if such money or goods were acquired by such person bona fide for reasonable consideration as a result of a transaction in the ordinary course of business and not in contravention of the regulations; and

(ii) in general, any matter with the State President deems necessary for the fulfilment of the objectives and purposes referred to in subparagraph (i), including the blocking, attachment, interdicting, forfeiture and disposal referred to in subparagraph (i) by the Treasury of any other money or goods belonging to the offender, suspected offender or any other person in order to recover an amount equal to the value of the money or goods recoverable in terms of the regulations referred to in subparagraph (i), but which can for any reason not be so recovered.

(c) Any regulation contemplated in paragraph (a) may authorise any person who is vested with any power or who shall fulfil any duty in terms of the regulation, to delegate such power or to assign such duty, as the case may be, to any other person.'

<sup>40</sup> '(d) Any regulation contemplated in paragraph (a) shall provide—

(i) that any person who feels aggrieved by any decision made or action taken by any person in the exercise of his powers under a regulation referred to in paragraph (b) which has the effect of blocking, attaching or interdicting any money or goods, may lodge an application in a competent court for the revision of such decision or action or for any

Exchanges Act<sup>41</sup>, as amended, to demonstrate that the Plaintiff can as a matter of law be held liable by merely being in possession of the funds which are tainted. It was argued that even in instances where money is not tainted, funds can be recuperated by way of attachment of funds. The Excipient submitted that it was incumbent upon the Plaintiff to make the averment that the money is not tainted in light of the fact that the Plaintiff is challenging forfeiture. In amplification, the Excipient submitted that it was peremptory for the Plaintiff to have done so because it is a requirement that flows from the ECR.

[38] The Excipient further contended that the Plaintiff has failed to plead that the money concerned was acquired by him *bona fide* for reasonable consideration as a result of a transaction in the ordinary course of business as required in Section 9(2)(b)(i)(cc) of the Currency and Exchanges Act. Section 9(2)(d)(i)(aa) to (cc) read with 9(2)(d)(iii) (aa) to (cc) of the Currency and Exchanges Act sets out the basis upon which an aggrieved person may challenge a forfeiture notice.

[39] The Plaintiff argued that Regulation 22D provides a remedy in the ECR for a person aggrieved by the attachment or forfeiture of funds and challenges the forfeiture

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*other relief, and the court shall not set aside such decision or action or grant such other relief unless it is satisfied—*

- (aa) that the person who made such decision or took such action did not act in accordance with the relevant provisions of the regulation; or*
  - (bb) that such person did not have reasonable grounds to make such decision or to take such action; or*
  - (cc) that such grounds for the making of such decision or the taking of such action no longer exist;*
- (ii) that the Treasury shall cause a notice to be published in the Gazette of any decision to forfeit and dispose of any money or goods blocked, attached or interdicted in terms of the regulations referred to in paragraph (b), and that a notice of such decision shall be sent simultaneously with publication thereof in the Gazette by registered mail to any person who is, according to the Treasury, affected by such decision or, if no address of such person is available, that such notice shall be so sent to the last known address of such person; and*
- (iii) that any person who feels aggrieved by any decision to forfeit and dispose of such money or goods may, within a period prescribed by the regulations, which shall not be less than 90 days after the date of the notice published in the Gazette and referred to in subparagraph (ii), institute legal proceedings in a competent court for the setting aside of such decision, and the court shall not set aside such decision unless it is satisfied—*
- (aa) that the person who made such decision did not act in accordance with the relevant provisions of the regulation; or*
  - (bb) that such person did not have grounds to make such decision; or*
  - (cc) that the grounds for the making of such decision no longer exist.'*

<sup>41</sup> Act 9 of 1933.



of the money on the basis of the provision of Regulation 22D(d). The Plaintiff contended that the minimum factual requirements have been satisfied, and as such, he is entitled to the relief specified in Regulation 22D(b), which stipulates the following:

***22D. Review of, or institution of actions in connection with, attachment and forfeiture of certain money or goods, and certain orders.*** - Any person who feels himself aggrieved by the attachment of any money or goods under paragraph (a) of regulation 22A (1) or the issue or making of an order under the provisions of paragraph (b) or (c) of regulation 22A or sub-regulation (2) of regulation 22C or any condition imposed thereunder may:

(a) ...

(b) in the case or a decision under regulation 22B (1) or 22B (1), read with regulation 22C (3), to forfeit to the State such money or goods, at any time but not later than ninety days after the date of publication of the said notice institute an action in a competent court for the setting aside of any such decision,

and any such court may set aside any such attachment or order or decision, as the case may be, on the grounds set out in the provisions of paragraph (d) (i) or (iii) of section 9 (2) of the Act.'

[40] The Excipient contended that the court should not be delayed by a trial in the fullness of time as there is no cause of action. It would therefore be prudent to dissect the Particulars of Claim in order to establish whether a cause of action has been disclosed on the law and whether the facts pleaded by the Plaintiff bear out the law upon which reliance are placed.

#### **Has a cause of action been disclosed?**

[41] The primary ground of exception relied upon by the Excipient pertains to the averment that the Particulars of Claim lack a cause of action.<sup>42</sup> The Plaintiff submitted that the Particulars of Claim pleads two distinct causes of action to sustain his claim for repayment of R1 089 294.51. The Excipient's contention is that the facts as pleaded in the Particulars of Claim is not sufficient as it does not bear out a cause of action in terms of the Regulations.

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<sup>42</sup> Index: First Defendant's Exception, para 5, page 23.



[42] The accepted legal principle is that a litigant is required to plead material facts that are necessary to support his right to judgment. The question remains whether all the *facta probanda* have been pleaded. It is however, possible that pleading material facts is inadequate to sustain a cause of action. Furthermore, if a litigant bases its cause of action on legislative provisions, it is limited to relying on the mandatory prescripts of the statute. Should this be the case, would this preclude the Plaintiff from advocating for an alternative common law remedy, as is the situation *in casu*, thus requiring a deviation from the principle of subsidiarity?<sup>43</sup>

[43] It is trite that a Defendant must know the case he needs to meet and plead to it. If regard is had to the test on an exception this court is to determine whether on all possible readings of the facts, no cause of action may be made out. It is trite, as previously stated that it is for the Excipient to satisfy the court that the conclusion of law from which the Plaintiff contends cannot be supported on every interpretation that can be put upon the facts.<sup>44</sup>

[44] The matter of **McKenzie v Farmers' Co-operative Meat Industries Ltd**<sup>45</sup> clearly defined meaning of a "cause of action".

*...every fact which 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*

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<sup>43</sup> Uniform Rule 18(4) 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 to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto." ; See also, *Alphedie Investments (Pty)Ltd v Greentops (Pty)Ltd* 1975 (1) SA 161 (T) at 161H; *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838E-F.

<sup>44</sup> *Theunissen v Transvaalse Lewende Hawe Koop Beperk* 1988 (2) SA 493 (A); *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817; *TSI Communications CC v Omega M Projects* (2022/13169)[2023]ZAGPJHC 1081 (27 September 2023) at paras 3 – 4; *H v Fetal Assessment Centre* 2015 (2) SA 93 (CC) at 199B

*'The test on an exception is whether, on all possible readings of the facts, no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law from which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.'*

<sup>45</sup> *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

*piece of evidence which is necessary to prove its fact, but every fact which is necessary to prove.'*

[45] It has been said that a charitable test is used on exception, especially in deciding whether a cause of action is established. The pleader is entitled to a benevolent interpretation.<sup>46</sup> Furthermore, the court should not look at a pleading "*with a magnifying glass of too high power.*"<sup>47</sup> Although the approach on exception should not be overly technical and that regard is to be had to the pleadings, which should be read as a whole; it is pellucid that the claim should be formulated in a way that allows the Defendant to ascertain clearly what the case against it is to enable the Defendant to plead on it as elucidated in **Number Two Piggeries (Pty) Ltd v City of Tshwane Metropolitan Municipality In re: City of Tshwane Metropolitan Municipality v Number Two Piggeries (Pty) Ltd**<sup>48</sup>.

[46] The Excipient contended that Section 22A of the ECR permits the Treasury to attach any money or goods which on reasonable grounds is suspected to constitute a contravention, or which money or goods would have been obtained had there not been a contravention, or by any person who has benefited or been enriched as a result of such contravention, or in possession of any person.<sup>49</sup>

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<sup>46</sup> *First National Bank Southern Africa v Perry NO and Others (supra)* at 972 I – J; *Britz v Coetzee* 1967 (3) SA 570 (T) at 571A-B 'While the court should endeavour to look benevolently instead of over-critically at a pleading, it should, however, not push that benevolence to the length of upholding a summons, which as it stands discloses no cause of action, by altering its language, by reading into it what is not there, and ignoring what is, and by thus making for the plaintiff a cause of action which he has not himself put up.'

<sup>47</sup> *Kahn v Stuart and Others* 1942 CPD 386 at 391.

<sup>48</sup> See fn 1 *Number Two Piggeries (Pty) Ltd v City of Tshwane Metropolitan Municipality In re: City of Tshwane Metropolitan Municipality v Number Two Piggeries (Pty) Ltd (ibid)*, para 12.

<sup>49</sup> Section 22A states as follows:

**'Attachment of certain money and goods, and blocking of certain accounts.** – (1) Subject to the provisions of the proviso to sub-paragraph (i) of paragraph (b) of section 9 (2) of the Act, the Treasury may in such manner as it may deem fit:

(a) attach:

(i) any money or goods, notwithstanding the person in whose possession it is, in respect of which a contravention of any provision of these regulations has been committed or in respect of which an act or omission has been committed which the Treasury on



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- reasonable grounds suspects to constitute any such contravention, or, in the case of such money or any part thereof which has been deposited in any account, an equal amount of money which is kept in credit in that account, and shall, in the case of money attached, deposit such money in an account opened by the Treasury with an authorised dealer for such purpose, and may, in the case of goods attached, leave such goods, subject to an order issued or made under paragraph (c), in the possession of the person in whose possession such goods have been found or shall otherwise keep or cause it to be kept in custody in such manner and at such place as it may deem fit;*
- (ii) *any money or goods, notwithstanding the person in whose possession it is –*
- (aa) which the Treasury on reasonable grounds suspects to be involved in a contravention of any provision of these regulations or in a failure to comply with any such provision, or which the Treasury on reasonable grounds suspects to be involved in any act or omission which the Treasury so suspects to constitute a contravention of any such provision or a failure to comply with any such provision;*
- (bb) which have been obtained by any person or are due to him, whether by virtue of any personal right or otherwise, and which would not have been obtained by him or would not have been due to him if any such contravention or failure or any such act or omission had not been committed;*
- (cc) by which any person has been benefited or enriched as a result of any such contravention or failure or any such act or omission,*
- or, in the case of such money or any part thereof which has been deposited in any account, an equal amount of money which is held in credit in that account, and shall, in the case of money attached, deposit such money in an account referred to in subparagraph (i), and may, in the case of goods attached, leave such goods, subject to an order issued or made under paragraph (c), in the possession of the person in whose possession such goods have been found or shall otherwise keep or cause it to be kept in custody in such manner and at such place as it may deem fit;*
- (iii) *any money or goods, notwithstanding the person in whose possession it may be, into which money or goods referred to in subparagraph (i) or (ii) have been transformed, including any personal right obtained with money or goods referred to in subparagraph (i) or (ii), or, in the case of such money or any part thereof which has been deposited into any account, an equal amount of money which is held in credit in that account and shall, in the case of money attached, deposit such money in an account referred to in subparagraph (i), and may, in the case of goods attached, leave such goods, subject to an order issued or made under paragraph (c), in the possession of the person concerned in whose possession such goods have been found or shall otherwise keep or cause it to be kept in custody in such manner and at such place as it may deem fit;*
- (iv) *any money which is held in a blocked account referred to in regulation 4 and which the Treasury on reasonable grounds suspects to be money –*

[47] Additionally, the Excipient argued that an attachment, based on the provisions of Section 22A of the ECR, can take place regardless of wrongdoing by a specified person or entity. The Excipient submitted that it was incumbent upon the Plaintiff to make the averment that the money is not tainted in light of the fact that the Plaintiff is challenging forfeiture, which is a peremptory requirement that flows from the ECR. This beggars the question as to whether the absence of the averment regarding the taint of the funds renders the Plaintiff's Particulars of Claim excipiable.

[48] The matter of ***Singh v South African Reserve Bank***<sup>50</sup> clarifies situations in which SARB suspects that a person has contravened the provisions of the Regulations. Regulations 22A and 22C of the ECR permits the SARB to issue a so called "blocking order" which prevents that person from withdrawing funds from an impugned bank account. The court explicated in ***Singh*** (*supra*) that Regulation 22A allows for the issue of a blocking order in respect of funds tainted by the contravention,

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- (aa) *in respect of which a contravention or act or omission referred to in subparagraph (i) has been committed;*
  - (bb) *which has been involved in a contravention or failure or act or omission referred to in subparagraph (ii)(aa);*
  - (cc) *which has been obtained by any person or is due to him as referred to in subparagraph (ii)(bb);*
  - (dd) *by which any person has been benefited or enriched as referred to in subparagraph (ii)(cc);*
  - (b) *if the Treasury on reasonable grounds suspects that money referred to in paragraph (a) has been deposited in any account and if it has not been attached under the said paragraph (a), issue or make an order in such manner as it may deem fit in or by - 24 - which any person is prohibited to withdraw or cause to be withdrawn, without the permission of the Treasury and in accordance with such conditions (if any) as may be imposed by the Treasury, any money in that account or not more than an amount determined by the Treasury, or to appropriate in any manner any credit or balance in that account, notwithstanding who may be the holder thereof;*
  - (c) *in the case of goods referred to in paragraph (a) which have been left in the possession of the person concerned, issue or make an order in such manner as it may deem fit in or by which any person is prohibited to deal, without the permission of the Treasury and in accordance with such conditions (if any) as may be imposed by the Treasury, in any manner determined by the Treasury with the goods attached or any part thereof.*

<sup>50</sup> [2023] ZAGPPHC 112; 2020/35964 (20 February 2023).



while Regulation 22C applies to a blocking order in respect of funds which are as yet untainted:

*'[16] It is common cause that in terms of regulation 22A and/or regulation 22C the SARB is empowered to issue what is known as a 'blocking order' in terms of which any person can be prohibited from withdrawing or causing to be withdrawn any funds standing to the credit of that individual's account. The decision to issue a blocking order is issued where there are reasonable grounds to suspect that a person may have contravened the regulations. Further, in terms of regulation 22B, the funds blocked may be forfeited to the State.*

*[17] In terms of regulation 22A the SARB can issue a blocking order relating to tainted funds and in terms of regulation 22C untainted funds can be blocked.'*

[49] It follows that the mere possession of funds would be sufficient where there is a reasonable suspicion of a contravention of the ECR. It is trite that the ECR extend beyond the person suspected of the contravention and includes those who benefited as well as those who are in possession of the funds. The matter of **Francis George Hill Family Trust v SA Reserve Bank**<sup>51</sup> is instructive on this point where the court held:

*'It is apparent from the aforesaid provisions that the person in whose possession monies are found need not himself have committed any contravention of the regulations or have been involved, or be suspected of having been involved, in any such contravention.*

*It is the money which is to be attached in respect whereof a contravention of any provision of the regulations must have been committed, or in respect whereof some act or omission has been committed which is suspected to constitute such a contravention. Or it may be money which is suspected to have been involved in any such contravention, or suspected to have been involved in any act or omission which is suspected to constitute any such contravention. It is therefore the money which must be "tainted".*

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<sup>51</sup> 1990 (3) SA 704 at pages 710G – H, read with 711D.

*It is apparent from the foregoing provision that even money which is not involved or suspected of having been involved in a contravention of the relevant regulations may be attached, if it is required to enable the Treasury to recoup the difference between the amount attached under reg 22A and the amount actually involved or suspected to have been involved in the contravention or suspected contravention of the latter regulations.'*

[50] Money which are not tainted may be used to recuperate the difference between funds attached and the amount actually involved. It is however apposite to note that this is not the facts of this case as there was no decision by SARB to recover a shortfall.

[51] The judicial relief being relied upon by the Plaintiff is based on Regulation 22D(b) of the ECR. In amplification, it was illuminated that the Plaintiff was informed of his right to institute such a claim within 90 days as per MSG1 attached to the Particulars of Claim dated 3 August 2022.<sup>52</sup> The Plaintiff expressly pleaded reliance on Regulation 22D in the Particulars of Claim wherein the following averment is made:

*'17. In accordance with Exchange Control Regulation 22D(b), the impugned decision(s) fall to be set aside on grounds set out in section 9(2)(d)(i) and/or (iii) of the Currency Exchanges Act, 1933.'*<sup>53</sup>

[52] The Plaintiff further submitted that the conclusion of law has also been pleaded:

*'19. In the premises, Plaintiff is entitled to judgment setting aside the impugned decision(s) and an order directing First and/or Second Defendant to pay Plaintiff the sums forfeited to the State as per paragraphs 2.1 and 2.2 of the Notice marked MGS1, together with interest thereon at the prescribed legal rate as from the date on which the funds concerned are withdrawn from Plaintiff's Absa Bank and First National Bank respectively for purposes of payment to the National Revenue Fund.'*<sup>54</sup>

[53] In ***Trope v South African Reserve Bank and Two Other Cases***<sup>55</sup> it was stated:

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<sup>52</sup> Index: Exception, page 12.

<sup>53</sup> Index: Particulars of Claim, para 17, page 8.

<sup>54</sup> Index: Particulars of Claim, para 19, page 10.

<sup>55</sup> 1992 (3) SA 208 (T).



*'A bare reference to a statute or set of regulations, without specifying the particular section or regulation on which reliance is placed or the facts which enable the section or regulation to be identified cannot in my view suffice, and that must be so whether the statute or regulation on which reliance is placed are the only facts relied upon to fix the defendant with liability or whether they are but one of the factors to be considered in conjunction with any other facts on which reliance is placed.'*<sup>56</sup>

[54] As previously stated the Plaintiff has averred, that his claim is predicated on Regulation 22D(b) and that Regulation 22A as well as Regulation 22C respectively are irrelevant in the context of this matter. The Plaintiff submitted that no reliance is placed or pleaded on Regulation 22A and 22C respectively; and more particularly the Plaintiff is not challenging the blocking of the accounts. Although the Plaintiff submitted that he does not challenge the blocking of the funds, the relief sought relates to the decision to declare the Plaintiff's monies forfeited and the repayment of the funds which were forfeited.

[55] The empowering provision is encapsulated in the Notice, namely Regulation 22B made under Section 9 of the Currency and Exchanges Act. The Plaintiff has placed reliance on Regulation 22B as is borne out by the Particulars of Claim:

*'5. On or about 2 August 2022, the First and/or Second Defendant, represented by its delegate, being the Deputy Governor of the First Defendant, acting pursuant to powers granted by the provisions of Exchange Control Regulations 22B made under section 9 of the Currency and Exchanges Act 9 of 1933 as amended, published or caused to be published in Government Gazette No. 47181 a general notice and order of forfeiture to the State if money owned by the Plaintiff.'*

[56] Regulation 22B deals with the forfeiture and disposal of money or goods in respect of which orders have been issued or made. The Notice in the Government Gazette clearly was issued by the Treasury in keeping with Regulation 22B in respect of which the Plaintiff was informed about the forfeiture to the state of the money

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<sup>56</sup> Page 211E-G.

referred to in paragraph (a), (b) or (c) of Regulation 22A (1). The Plaintiff, in challenging the forfeiture, makes the averment that he was the depositor of the funds and is entitled to the benefits of ownership of the funds and submitted that the decision was unlawful and in violation of the Plaintiff's proprietary rights to the money forfeited to the State.

[57] The authorities are clear that a person can as a matter of law be held liable under the Regulations, by merely being in possession of the funds which are tainted. It is furthermore manifest, in terms of the Regulations, that money can be attached even if a person is innocent. The guiding principle which is of seminal importance is that it is the money that must be tainted, not just the hands in which the money is held. Moreover, it is irrelevant whether the bank accounts were in existence, the Regulations permit funds from another source to be attached.

[58] In my view, the Plaintiff's reliance on Regulation 22D in isolation is a narrow approach and fails to consider what was stated in *Trope (supra)*<sup>57</sup> that a bare reference to a statute or set of regulations, without specifying the particular section or regulation on which reliance is placed or the facts which enable the section or regulation to be identified cannot suffice. Even if reliance is placed on Regulation 22B, no reference to the particular section or subsection is made. It is evident that the provisions are interrelated and as such Regulation 22B deals with the Notice and also refers to the provisions set out *inter alia* in Regulations 22A (1)(a), (b) or (c); Regulation 22C (2) and (3). The legislative provisions are not being challenged, only its applicability.

[59] To answer the question whether Particulars of Claim, as it stands, has been sufficiently formulated to enable the Excipient to plead to it; I am therefore of the view that the facts as pleaded by the Plaintiff do not bear out the law as earlier demonstrated. This void in the Particulars of Claim, in my view, cannot be regarded as a minor blemish that can be cured by Further Particulars as the pleader is to plead with particular particularity.

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<sup>57</sup> At para 9.



[60] I am therefore of the considered view that the Plaintiff has failed to plead the necessary and essential averments as required in the Regulations to sustain a cause of action based on the legislative provisions relied upon. The Plaintiff has failed to deal with the peremptory requirement that the money was acquired by the Plaintiff for reasonable consideration as a result of a transaction in the ordinary course of business as envisaged in Section 9(2)(b)(cc).

[61] Even if I am wrong, the Plaintiff contended that the impugned decision falls to be set aside on grounds set out in Section 9(2)(d)(i) and/or (iii) of the Currency and Exchanges Act, 1933. It is however evident that Section 9(2)(d)(iii) of the Currency and Exchanges Act stipulates that "*the court **shall not** set aside such decision unless it is satisfied –... **that the person who made such decision did not act in accordance with the relevant provisions of the regulation or ...that such person did not have grounds to make such decisions** (my emphasis)" The failure by the Plaintiff to make the peremptory assertions when it is specifically pleaded that the impugned decision falls to be set aside on grounds set out in Section 9(2)(d)(i) and/or (iii) of the Currency and Exchanges Act as pleaded, renders the Plaintiff's Particulars of Claim excipiable on this basis alone as there has been non-compliance with the statutory provision invoked by the Plaintiff.*

#### **Alternative Relief common law relief**

[62] The Plaintiff made the following averments in the Particulars of Claim:

- '13. *The action to which this Particulars of Claim relates and its Combined Summons is an "action contemplated by Exchange Control Regulation 22D(b).*
14. *...*
15. *The decisions referred to in para 12 above, individually and collectively, are wrongful and unlawful, and in violation of Plaintiff's proprietary and/or other rights to the monies forfeited to the State.*
16. *And/or alternatively, the decision to declare Plaintiff's monies forfeited to the State and/or the forfeiture itself constitutes unjust enrichment of the State by way of a deposit in the National Revenue Fund at the expense of the Plaintiff who is impoverished by reason of the loss of the monies standing to his credit in the two bank*

*accounts mentioned in MGS1 at paragraphs 2.1 and 2.2 in circumstances where the State's enrichment is unjustified in fact and/or in law.*<sup>58</sup>

[63] The Excipient contended that the Plaintiff has already approached the Court with regards to the remedies distilled in the Exchange Control Regulations and has pinned its colours to the mast, proverbially speaking, and as such cannot isolate paragraph 16 of the Particulars of Claim, as the claim is rooted in statutory enrichment to the benefit of the Reserve Bank. Additionally, the Excipient contended that the alternative claim of unjust enrichment is merely an afterthought intended to compensate for the shortcomings on the main action. It is the Excipient's contention that the Plaintiff is creating an artificial distinction that there is a common law claim.

[64] The Plaintiff conceded that the express prayer for the alternative relief is absent but submitted that he is entitled to plead a claim and amend his Particulars of Claim. Moreover, it was argued that further and/or alternative relief could be granted for the unjust enrichment claim as an averment necessary for that claim was pleaded. The Plaintiff however mooted that it is not a ground, or basis for the Excipient to contend that a cause of action was not pleaded. The Plaintiff argued in this regard that the applicable legal principle is that a court is to accept all the facts pleaded as correct.<sup>59</sup> The Plaintiff contended that the Excipient has failed to identify all the possible readings of the facts that there is no cause of action and as such, submitted that the Plaintiff is entitled to the unjust enrichment claim upon which the Plaintiff's alternative claim is rooted, which common law remedy is recognised in our law. It was argued that it is for the trial court to determine whether the Plaintiff pleaded sufficient facts for unjust enrichment.

[65] It is trite that a party stands or falls by what has been pleaded. The matter of ***Number Two Piggeries (supra)*** deals with the failure to plead an averment in the alternative:

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<sup>58</sup> Index: Exception, Particulars of Claim, paras 13, 15 – 16, page 8.

<sup>59</sup> *Merb (Pty) Ltd v Matthews* 2021 ZAGPJHC 693 (16 November 2021), para 8 '(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...'



*'It follows that averments in the pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading'*<sup>60</sup>

[66] The Notice of Exception did not challenge the alternative claim for unjust enrichment. It is pellucid that there is no relief sought by the Plaintiff in the alternative, despite the Plaintiff's amendment to its pleadings subsequent to the filing by the excipient of the Notice of Exception in December 2022. The Plaintiff has conceded this deficiency in the pleadings. It is apparent that this deficiency in Plaintiff's Particulars of Claim cannot be cured by a simple averment that the forfeiture itself constitutes unjust enrichment of the State. More particularly, its claim does not seek such relief.

[67] Moreover, the earlier question posed namely, whether the Plaintiff would be precluded from pleading an alternative common law remedy would culminate in a departure from the principle of subsidiarity, and would be a matter for consideration for the trial court as it extends beyond the scope of this exception as was earlier stated.

### **Discussion**

[68] It is trite is that an exception can be taken where pleadings are vague and embarrassing or lacks averments which are necessary to sustain an action or defence.<sup>61</sup> The failure to seek relief in the alternative renders the Particulars of Claim excipiable on the basis that it is vague and embarrassing. The question to be answered is therefore whether this court could deal with the ground of vagueness and embarrassing if it was not specifically pleaded, bearing in mind, as earlier mentioned that an Excipient is obliged to confine his complaint to the stated grounds of its exception.

[69] The Excipient illuminated what it termed, as an obvious ambivalence or contradiction in the Particulars of Claim where it is stated that the *"Plaintiff is the*

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<sup>60</sup> At para 8

<sup>61</sup> Rule 23 of Uniform Rules of Court, See also *Children's Resource Centre Trust and Others v Pioneer Food Pty Ltd and Others* 2013 (2) SA 213 (SCA) at para 36.

depositor of the funds held in the two banking accounts..."<sup>62</sup> Plaintiff goes on state that the "Plaintiff is entitled to the benefits of ownership of the funds held in the two banking accounts..."<sup>63</sup> Later the Plaintiff avers:

*'The advance payment(s) referred to by the First Defendant as disclosed to Plaintiff during the investigation by First Defendant and referred to in para 18.1 above was not made by the Plaintiff but by Jamal Brothers Fashions CC (registration no. 2006/002518/23), a juristic entity separate and distinct from Plaintiff, which entity has not rights or claims to any of the monies declared forfeited to the State as per the Notice in MGS1'*<sup>64</sup>

[70] The Excipient submitted that the Plaintiff incorrectly avers that he cannot as a matter of fact and/or law be held liable under the ECR for any violation which have been committed by Jamal and Brothers CC.<sup>65</sup> The Plaintiff contended that the Excipient's reference to this being the high watermark of the Excipient's claim is dispelled by the case authorities relied upon by the Excipient as it can at best be regarded as vague and embarrassing and not that there is no cause of action disclosed.<sup>66</sup>

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<sup>62</sup> Index: Exception Paragraph 9 of the Plaintiff's Particulars of Claim, page 7.

<sup>63</sup> Index: Exception Paragraph 10 of the Plaintiff's Particulars of Claim, page 7.

<sup>64</sup> Index: Particulars of Claim, paras 18.1 – 18.3. page 9.

<sup>65</sup> Index: Exception, Particulars of Claim, para 18.3, page 9.

<sup>66</sup> *Number Two Piggeries (Pty) Ltd v City of Tshwane Metropolitan Municipality In re: City of Tshwane Metropolitan Municipality v Number Two Piggeries (Pty) Ltd (ibid) para 8:*

*'In Trope v South African Reserve Bank the following was said about an exception relying on the allegation that the pleading was vague and embarrassing:*

*"An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced (Quinlan v MacGregor 1960 (4) SA 383 (D) at 393 E – H). As to whether there is prejudice, the ability of the excipient to produce an exception-proof plea is not the only, nor indeed the most important, test – see the remarks of Conradie J in Levitan v Newhaven Holiday Enterprises CC 1991 (2) SA 297 (C) at 298G – H. If that were the only test, the object of pleadings to enable parties to come to trial prepared to meet each other's case and not to be taken by surprise may well be defeated. Thus, it may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise, to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing – see Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152F – G and the authorities there*



[71] The Plaintiff conceded that there is indeed a problem with the pleadings by virtue of the following submission:

*'Despite the above, at best this court may opine that the absence of an express averment of the kind mentioned in para 13 of the heads filed by First Defendant's Counsel renders the POC vague and embarrassing. However, since this is not a ground raised in the exception, it is of no moment here.'*<sup>67</sup>

[72] Although the court indicated that alternative relief would not be considered which was not pleaded with particular particularity, it is apparent that there appears to be other deficiencies in the Plaintiff's Particulars of Claim that may render the pleadings as it stands to be vague and embarrassing. Ordinarily an exception could be raised on the grounds of it being vague and embarrassing. This court cannot however consider these grounds as it does not form the basis of the exception *in casu* and is enjoined to deal with the grounds of exception as pleaded. To do so would be prejudicial and a misapplication of the legal principles on exception. The door has not been shut as there are other legal remedies available to the Plaintiff to deal with the highlighted deficiencies.

## **Conclusion**

[73] As demonstrated earlier, the Plaintiff had to bear out a cause of action in terms of the Regulations as relief is sought in terms of ECR. This court is mindful that the defences raised is not to be evaluated at the stage of an exception. The overarching consideration ultimately is whether Particulars of Claim, as it stands, has been formulated in such a way as to enable the Excipient to plead to it.

[74] The exception is distilled in the referenced legislation which are interrelated and sufficiently supported by case law. It is manifest that the facts as pleaded by the Plaintiff does not align with the applicable law upon which reliance is placed. Regard is to be had to the purport, object and entire context within which the Plaintiff has

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*cited. It follows that averments in the pleading which are contradictory, and which are not pleaded in the alternative are patently vague and embarrassing; one can but be left guessing as to the actual meaning (if any) conveyed by the pleading."*

<sup>67</sup> Plaintiff's Heads of Argument, para 66, page 15.

pleaded. Therefore, in considering the pleadings in its entirety I am not persuaded that the Particulars of Claim contains the averments necessary to sustain his cause of action under ECR 22D(b) read with ECR 22B and Section 9(2)(d)(i) and (iii) as is it currently pleaded. In the circumstances, on a plain reading of the law, I am not satisfied that the Plaintiff has disclosed a cause of action on the law as the Particulars of Claim as it stands, has not be formulated in such a way as to enable the Excipient to plead to it insofar as the main relief is concerned.

[75] I pause here to mention that this court is mindful that the purpose of an exception is to weed out matters without legal merit. The merits or demerits of this matter cannot be considered at the stage of exception and I make no findings in this regard, based on the pleadings as it stands.

[76] Furthermore, I am of the view that a dismissal of the action at this stage would be premature with concomitant far-reaching consequences. There appears to be a number of issues that require thorough ventilation in a trial in due course. This view is furthermore predicated on the relief sought as it is currently framed, which includes the setting aside of the decision to declare funds forfeited, the publication of the forfeiture and the publication of such declaration as envisaged by ECR 22D(b), which is interwoven with the second prayer for the recovery of the funds which is under the administrative control and/or authority of the Second Defendant. Moreover, it is for the trial court to decide whether the common law alternative relief for unjust enrichment is sustainable and/or whether the expressly enacted legislative or statutory remedy or mechanism provided may be circumvented to establish a cause of action in terms of the common law.

[77] The onus rests on the Excipient to show that the pleading is excipiable on every possible interpretation that can reasonably be attached to it. I am satisfied that the Excipient has discharged the onus and that the exception falls to be upheld on the main relief sought. In order to ameliorate any prejudice to the Respondent, the court will, in the exercise of its discretion, grant the respondent leave to amend its Particulars of Claim.



## **Costs**

[78] The Excipient contended that costs on an attorney and client scale is warranted as SARB had to incur significant costs in defending a matter where the Plaintiff failed to have regard to the ECR, the Currency Exchanges Act and the jurisprudence in this regard. It was argued that SARB has been significantly prejudiced.

[79] The Excipient's approach in dealing with this exception has necessitated that considerations falling outside the notice of exception and the introduction of new grounds had to be ventilated at the hearing in an attempt to cure deficiencies in the notice of Exception. As earlier stated, the court was precluded from evaluating the Heads of Argument in regard to the admissions that are not supported by the pleadings.

[80] The court in the exercise of its discretion invoked the powers afforded to it by upholding the exception in a manner that is not prejudicial to the Respondent thereby ensuring that no injustice is caused.

[81] Ordinarily, costs follow the result. It is trite that the matter of costs remains in the unfettered discretion of the court.

[82] Therefore in the exercising my judicial discretion, under the circumstances of this particular case, I am of the view that it would be just and equitable that each party pays their own costs.

## **Order**

[83] In the result, the Court, after hearing the submission on behalf of the respective parties and having considered the documents filed on record makes the following orders:

- (a) The First Defendants exception is upheld.
- (b) The Plaintiff is afforded the opportunity to amend its Particulars of Claim within 20 days of the granting of this order in terms of Rule 28.

(c) The parties are directed to each pay their own costs of the exception.



**P ANDREWS**

Acting Judge of the High Court of  
South Africa, Western Cape Division,  
Cape Town



**APPEARANCES:**

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Counsel for the First Defendant:

Advocate T Govender

Instructed by:

Macrobert Incorporated

*Heard on* 01 November 2023

*Delivered* 26 January 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email.