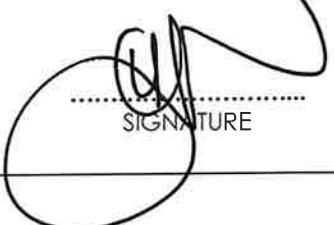




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 36753/2019

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED: NO</u>
[24 August 2021]  SIGNATURE	

In the matter between:

ACCELERATE PROPERTY FUND LIMITED

Excipient/Plaintiff

and

**OCWEN AUTO REFINISHES CC
t/a TOPSPEED**

First Defendant/First Respondent

GRAHAM HENRY PETER DAVEY

Second Defendant/Second Respondent

J U D G M E N T:

This Judgment was delivered electronically to the parties' legal representatives on 24 August 2021, and the deemed date of the handing down of the Judgment is accordingly 24 August 2021. The Judgment will also be uploaded to Caselines.

NEL AJ

- [1] This is an opposed Exception in terms of which the Plaintiff, as Plaintiff, has raised fourteen grounds of complaint in respect of the contents of the Defendants' amended Claim in Reconvention.
- [2] The parties will be referred to in this Judgment, as in the pleadings, in order to avoid any confusion.

BACKGROUND

- [3] The Plaintiff's claim as against the Defendants is based on a Lease Agreement which the Plaintiff alleges was breached by the Defendants, and then terminated by the Plaintiff.
- [4] The Plaintiff alleges that the Lease Agreement was concluded between the First Defendant and Highveld Syndication No. 16 Limited on or about 2 November 2011, and terminated by the effluxion of time on 30 November 2017.
- [5] The Plaintiff allegedly purchased the immovable property to which the Lease Agreement relates, from Highveld Syndication No. 16 Limited, and the rights and obligations of the Lease Agreement were transferred to the Plaintiff.
- [6] The claim as against the Second Defendant is based on a written Deed of Suretyship, in terms of which the Second Defendant undertook to fulfil the obligations of the First Defendant to the Plaintiff, as surety and co-principal debtor.
- [7] The Plaintiff claims that the First Defendant breached the terms of the Lease Agreement by not making payment of its rental obligations timeously, and

accordingly the Plaintiff claims, *inter alia*, payment of arrear rental (R282 247.43) and the ejectment of the First Defendant.

[8] It appears from the Defendants' Claim in Reconvention that the First Defendant vacated the leased premises at the end of October 2019.

[9] The Defendants filed a Special Plea, a Plea, and a Claim in Reconvention in response to the Plaintiff's Particulars of Claim.

[10] The Plaintiff raised various grounds of complaint against the Claim in Reconvention, which resulted in the Defendants effecting amendments to the Claim in Reconvention on 10 March 2020.

[11] The Plaintiff contends that the amended Counterclaim remains excipiable and the Plaintiff launched an Exception, after providing the Defendants with an opportunity to remove the grounds of complaint.

[12] The Plaintiff's counsel summarised the fourteen grounds of complaint as being the following:

[12.1] The Defendants have not set out the necessary allegations for a claim for enrichment against the Plaintiff, having regard to the fact that the Plaintiff was not the party to the original Lease Agreement.

[12.2] The Defendants' allegations that there was a variation of the terms of the Lease Agreement are nonsensical.

[12.3] The Defendants' claim is premised upon the reduction of the size of the Leased Premises from 1 March 2017, however the Defendants claim repayment of amounts as from 2012.

- [12.4] The amounts referred to in words and numbers do not accord with one another.
- [12.5] The Defendants have set out no cause of action, alternatively the allegations are vague and embarrassing insofar as it is uncertain as to whether their claim is premised upon some form of agreement, and if so, when, where and how such agreement was entered into.
- [12.6] The calculation of the amounts referred to by the Defendants' is unclear and nonsensical.
- [12.7] the Defendants make different allegations as to the amounts due in different paragraphs and the amounts claimed have no basis in mathematical calculation or the terms of the agreement as pleaded by the Defendants.
- [12.8] The annexures to the Claim in Reconvention do not add up to the totals and as such the Plaintiff is unable to ascertain how the amount claimed is arrived at.
- [12.9] The Defendants' claim in respect of the communal area is nonsensical and/or sets out no cause of action.
- [12.10] The Defendants' claim for the deposit with interest is without foundation having regard to the terms of the Lease Agreement and the provisions of the Consumer Protection Act.

[12.11] There is no basis or foundation upon which the Consumer Protection Act is applicable to “*the current situation*” and as such the Defendants set out no cause of action, alternatively their claim is vague and embarrassing.

[12.12] There is no foundation upon which the Consumer Protection Act is applicable in circumstances where there has not been an agreement between the parties.

[12.13] The Defendants’ claim for unlawful termination is without foundation having regard to the month-to-month tenancy which must be common cause.

[12.14] The Defendants allege and claim relief under and in terms of the Consumer Protection Act not provided for in terms of the Consumer Protection Act.

THE LEGAL PRINCIPLES APPLICABLE TO EXCEPTIONS

[13] For the purposes of considering an Exception, the Court regards the factual allegations made in the pleading being considered as being factually correct.¹

[14] In considering the Exception the Court has regard only to the pleading in respect of which the complaints are raised, as no extraneous facts may be adduced by the Plaintiff in order to prove that the pleading is excipiable.²

¹ *Marney v Watson & Another* 1978 (4) SA 140 (C) at 144F-G.

² *Viljoen v Federated Trust Limited* 1971 (1) SA 750 (O) at 754F-G.

- [15] The purpose of pleadings is to bring clearly to the notice of the Court and to the opposing party in an action the issues upon which reliance is to be placed.³
- [16] An exception based on the ground that the pleading complained of discloses no cause of action requires the Plaintiff to persuade the Court that upon every possible interpretation of the pleading no cause of action arises.⁴
- [17] In order to sustain a cause of action, a party must set out a clear and concise statement of the material facts upon which it relies for its claim with sufficient particularity to enable the other party to understand the case it has to meet and to reply thereto.⁵
- [18] The material facts which a plaintiff is required to set out in support of its claim must allege every fact which it would be necessary to prove in order to be granted judgment, in order to be regarded as a complete cause of action.⁶
- [19] If a pleading lacks an essential material fact without which there would be no foundation in law for the claim being made, the pleading is bad in law on the basis that it does not disclose a cause of action, and it would be excipiable.⁷
- [20] A litigant is therefore required to plead a complete cause of action which identifies the issues upon which the litigant seeks to rely, and on which evidence will be led, in an intelligible and lucid format.⁸

³ *Durbach v Fairway Hotel (Pty) Ltd* 1949 (3) SA 1081 (SR) at 1082; *Minister of Agriculture and Land Affairs & Another v De Klerk & Others* 2014 (1) SA 212 (SCA) at para [39].

⁴ *Wetback Contracts (Pty) Ltd v Top Fix Scaffolding (Pty) Ltd* [2021] JOL49384 (GP) at para [7].

⁵ *Minister of Safety and Security v Slabbert* [2010] 2 All SA 471 (SCA) at para [11].

⁶ *Evans v Shield Insurance Company Ltd* 1980 (2) SA 814 (A) at 838D-F.

⁷ *Baliso v Firststrand Bank Limited t/a Wesbank* 2017 (1) SA 292 (CC) at 303D-E.

⁸ *Trope v SARS & Another* 1992 (3) SA 208 (T) at 216G-H; *KOTH Property Consultants CC v Lepele-Nkupi Local Municipality* 2006 (2) SA 25 (T) at para [18.]; *Jowell v Brümme Jones* 1998 (1) SA 836 (W) at 899.

- [21] An exception suggesting that a pleading is vague and embarrassing attacks the formulation of the action or defence and not its legal validity.⁹
- [22] An excipient raising a ground of complaint relating to certain portions of the pleading complained of being vague and embarrassing, must demonstrate to the Court that the excipient would be seriously prejudiced if the offending allegations are not expunged.¹⁰
- [23] It is trite that a pleading is vague and embarrassing when there is some defect or incompleteness in the manner it is set out which results in embarrassment to the opposing party.
- [24] The prejudice to a litigant faced with a pleading which is allegedly vague and embarrassing must ultimately lie in an inability to properly prepare to meet the opponent's case. The excipient must show vagueness amounting to embarrassment, and in turn embarrassment amounting to prejudice.¹¹
- [25] A pleading will be regarded as being vague and embarrassing when there is confusion as to the nature of the cause of action the party relies on, or if it can be read in a number of different ways.¹²
- [26] A party is not entitled to argue that the opposing party knows what case it has to meet.

⁹ *Wetback Contracts (Pty) Ltd, supra*, at para [8].

¹⁰ *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A-D; *Francis v Sharp & Others* [2003] 2 All SA 201 (C) at 202.

¹¹ *Gallagher Group Limited & Another v IO Tech Manufacturing (Pty) Ltd & Others* [2014] (2) SA 157 (GNP) at paras [54] and [55].

¹² *Wilson v SAR & H* 1981 (3) SA 1016 (C) at 1018A.

- [27] The pleading complained of must be read as a whole, and paragraphs should not be considered separately or in isolation.
- [28] Whether or not a litigant is entitled to the relief claimed is not an issue that is determined at the exception stage.

THE CLAIM IN RECONVENTION

- [29] The various claims set out in the amended Claim in Reconvention arise from the conclusion of the written Lease Agreement concluded between the First Defendant and Highveld Syndication No. 16 Limited.
- [30] The Defendants raise four separate claims, based on undue enrichment, the failure to repay the Security Deposit and interest thereon, the unlawful termination of a lease agreement and the violation of the Consumer Protection Act, and a claim for consequential damages.
- [31] The specific allegations made in the amended Claim in Reconvention are dealt with below, in considering the various grounds of exception.
- [32] The amended Claim in Reconvention is difficult to follow, is confusing and requires assumptions to be made, in order to understand the nature of the claims of the Defendants.
- [33] I have considered each of the grounds of exception individually, having regard to the principle that the pleadings must be read as a whole, rather than considering the individual paragraphs or allegations in isolation.

FIRST GROUND OF EXCEPTION

- [34] The first ground of exception raised comprises a number of complaints which can essentially be summarised as a failure on the part of the Defendants to plead the necessary allegations in order to sustain a claim for undue enrichment.
- [35] It appears from the amended Claim in Reconvention that the Defendants' claim based on undue enrichment arises from the Plaintiff unilaterally reducing the area being rented by the First Defendant from the Plaintiff, and the Plaintiff letting the portion taken from the First Defendant to a third party.
- [36] The Defendants' claim that despite the reduction in the rental area available to the First Defendant, the Plaintiff continued to charge the First Defendant the full amount for the larger area rented, calculated prior to the reduction in size.
- [37] The Defendants allege that by claiming and receiving rental payments from the First Defendant for an area that was no longer available to the First Defendant, the Plaintiff had been unjustifiably enriched in respect of overcharges, in excess of what the Plaintiff was legally entitled to charge the First Defendant.
- [38] The Defendants allege that based on the calculation of what should be charged for the reduced rental area, the Plaintiff overcharged the First Defendant in respect of the communal area, and that the Plaintiff was accordingly also unjustifiably enriched by such payment.
- [39] Whilst the claim for undue enrichment as set out in the Claim in Reconvention could never be classified as a model of clarity, the allegations made provide

an indication of the case the Plaintiff is required to meet in respect of the alleged overpayments made by the First Defendant to the Plaintiff, as a result of which the Plaintiff was enriched and the First Defendant was impoverished.

[40] The Defendants have certainly not set out all of the formal requirements, as established by the common law over time, for a claim based on unjustified enrichment, but the intention of the Defendants' claim can be discerned from the allegations made.

[41] If the first ground of exception raised was the only ground of exception raised, I would not have upheld such ground of exception.

[42] However, taking into account the other grounds of complaint raised in respect of the claim for unjustified enrichment, and reading the pleadings relating to such claim as a whole, the allegations are vague and embarrassing.

[43] In considering the claim in its entirety, the Defendants have not set out a proper cause of action for a claim for undue enrichment, and the allegations are vague and embarrassing to the extent that it causes embarrassment and prejudice to the Plaintiff.

[44] The Plaintiff is not able to plead to the claim based on unjustified enrichment.

[45] In the circumstances, the first ground of exception is upheld.

THE SECOND GROUND OF EXCEPTION

[46] The second ground of exception raised by the Plaintiff relates to the allegation made by the Defendants that the Plaintiff unilaterally

“varied” the terms of the Lease Agreement by reducing the Defendants’ rental area.

[47] The Plaintiff also complains that the Plaintiff is unable to understand the relevance of the allegation in paragraph 16.1 of the Claim in Reconvention.

[48] The Defendants allege in paragraph 16.1 of the Claim in Reconvention that:

“The Plaintiff’s unilateral variation of the terms of the Lease Agreement by reducing the Defendants’ rented area referred to herein, is contrary to a non-variation clause in clause 22 of the Lease Agreement referred to herein; which states that: ‘The Lease constitutes the whole agreement between the parties ... any agreement to vary this contract shall be in writing and signed by the parties.’”

[49] It appears that the Defendants are alleging that the Plaintiff “varied” the terms of the Lease Agreement by unilaterally reducing the rental space available to the Defendants, in breach of what was set out in the written Lease Agreement.

[50] It appears that the Defendants’ reference to a variation is intended to be a reference to the conduct of the Plaintiff, rather than suggesting there was a written variation of the Lease Agreement itself.

[51] The allegations made by the Defendants are, however, confusing and capable of more than one meaning, and requires that assumptions should be made as to the intention of the Defendants. The allegations are accordingly vague and embarrassing in that the Plaintiff cannot plead thereto and would be prejudiced in attempting to plead thereto.

[52] In the circumstances the second ground of exception is upheld.

THE THIRD GROUND OF EXCEPTION

- [53] The third ground of exception raised by the Plaintiff is that the Defendants allege that the rental area was reduced as from 1 March 2017, but that the Defendants allege that the First Defendant was overcharged as from 1 January 2012.
- [54] The complaint is that the Defendants have not set out any basis or grounds upon which the claim for overcharging relates to the period from January 2012 to 1 March 2017, despite which the Defendants claim a reduction in rental for the entire period as from January 2012 to 31 October 2019.
- [55] The various allegations contained in paragraphs 16.6 to 17.3, of the Claim in Reconvention insofar as there are references to 1 January 2012 and 1 January 2017, are confusing, and it is certainly not clear on what basis the Defendants claim the amount of R1 174 260.89.
- [56] The allegations are vague and embarrassing, and certainly prejudicial to the Plaintiff in that it is not possible to understand what case the Plaintiff is required to meet, or to plead to such allegations.
- [57] In the circumstances, the third exception is upheld.

THE FOURTH GROUND OF EXCEPTION

- [58] The fourth ground of exception relates to the various differing amounts set out in paragraph 16 of the Claim in Reconvention.
- [59] The Defendants refer to various different amounts in paragraph 16 of the Claim in Reconvention, which amounts appear to relate to the same cause of

action, but there is no explanation as to how the various amounts are calculated, or why various amounts are raised in different paragraphs in respect of what appears to be the same claim.

[60] The allegations made by the Defendants in such regard are clearly vague and embarrassing, and prejudicial to the Plaintiff, in that the Plaintiff does not know what case it has to meet and is unable to plead to the various contradictory amounts claimed.

[61] In the circumstances the fourth exception is upheld.

THE FIFTH GROUND OF EXCEPTION

[62] The fifth ground of exception raised relates to an alleged agreement between the Defendants and "*Fred Rothman*" in terms of which it was agreed that there was an overcharge or miscalculation of rent amounting to R748 848.43, whilst the Defendants also allege in paragraph 16.8 of the Claim in Reconvention that the total indebtedness of the Plaintiff to the Defendants was R2 746 710.76.

[63] The Plaintiff complains that the Defendants do not allege whether the second amount was agreed upon or how such amount has been calculated.

[64] The Plaintiff also complains that it is not clear who Rothman represented, on what authority he may have acted, what the nature of the agreement was, and whether the Defendants rely upon the agreement for its claim or some other cause or basis.

[65] The Defendants have alleged that:

“On or about 15 August 2018 in a meeting with the Plaintiff’s Agent Fred Rothman, the parties agreed to refund ... ”

- [66] In the circumstances it is clear that the Defendants contend that Fred Rothman was the representative of the Plaintiff, and was acting as the agent of the Plaintiff.
- [67] The remaining allegations contained in paragraphs 16.6 to 16.9 of the Claim in Reconvention are however confusing and clearly vague and embarrassing. It is not possible to determine how the amounts referred to arose, what amounts are being claimed, or on what basis the amounts are being claimed.
- [68] The allegations made by the Defendant are clearly vague and embarrassing and prejudicial to the Plaintiff, in that the Plaintiff does not understand the case it has to meet, and cannot plead to such allegations.
- [69] In the circumstances the fifth exception is upheld.

THE SIXTH GROUND OF EXCEPTION

- [70] The sixth ground of exception raised relates to the allegations in paragraph 16.6 of the Claim in Reconvention to the effect that the Plaintiff agreed to refund an amount of R748 848.43 to the First Defendant. The complaint is that the Defendants thereafter allege that the Plaintiff refunded an amount of R970 754.00, but that the Defendants allege in paragraph 16.8 of the Claim in Reconvention that the total debt amounted to R2 746 710.76 without indicating how such amount was calculated.
- [71] The Plaintiff points out that the Defendants rely upon calculations in the annexures to the Claim in Reconvention, but that the calculations in the

annexures are calculated as from 2014, and not from either the year 2012 or 2017 as alleged in the Claim in Reconvention.

[72] The Plaintiff complains that the Plaintiff is unable to ascertain as to what period the reduction of rental relates to, how the amount is calculated, or how the agreement came about.

[73] As set out above, in considering the fifth ground of exception, the allegations contained in paragraphs 16.6 to 16.8 and the annexures to the Claim in Reconvention are contradictory and confusing, and are accordingly vague and embarrassing.

[74] The allegations made in such paragraphs are prejudicial to the Plaintiff, in that the Plaintiff does not know what case it has to meet and cannot plead thereto.

[75] In the circumstances the sixth exception is upheld.

THE SEVENTH GROUND OF EXCEPTION

[76] The seventh ground of exception raised by the Plaintiff relates to the various amounts referred to in paragraphs 16 and 17, and the annexures to the Claim in Reconvention, and points out the differences between the various amounts, the fact that no proper basis is set out for the amounts referred to, that no proper calculation is set out for the amounts referred to, and that the Plaintiff is unable to determine what was allegedly overpaid in that the Defendant has failed to set out exactly what the various amounts relate to, how the amounts are calculated and to whom the amounts were paid.

- [77] The seventh ground of exception is related to the fifth and sixth grounds of exception.
- [78] The Plaintiff contends that the entire calculation of the Defendants' claim in respect to arrear amounts is premised on incorrect amounts which render the claim vague and embarrassing.
- [79] The Defendants have set out various amounts in paragraphs 16 and 17 and the annexures, which purportedly reflect the calculation of the amounts set out in paragraphs 16 and 17.
- [80] The amounts are not only confusing, but are set out in such a manner that it is not possible to calculate how the amounts set out in the paragraphs have been calculated, or the basis for the claiming of the various contradictory amounts.
- [81] The allegations are vague and embarrassing and prejudicial, as the Plaintiff cannot plead to such allegations.
- [82] In the circumstances the seventh exception is upheld.

THE EIGHTH GROUND OF EXCEPTION

- [83] The eighth ground of exception is similar to the seventh ground of exception in that it is based on a complaint relating to the amounts set out in the Claim in Reconvention, which amounts cannot be calculated and do not accord with what is set out in the annexures.

- [84] The Plaintiff points out that the calculations, relying even on the Defendants' version are incorrect, and would in effect result in the Defendant not having any claim, as no amounts are owing on such calculations.
- [85] As already set out above, the amounts and calculations set out in paragraphs 16 and 17, and the annexures are confusing, and are clearly vague and embarrassing.
- [86] In attempting to determine whether the Plaintiff's complaint was justified, I have considered the calculations, but was unable to understand how the calculations apply to the claims.
- [87] The Plaintiff is accordingly prejudiced in that it cannot plead to the allegations, and cannot determine the precise amount being claimed, or how such amount has been calculated.
- [88] In the circumstances, the eighth exception is upheld.

THE NINTH GROUND OF EXCEPTION

- [89] The ninth ground of exception raised is that the Defendants' Claim in Reconvention includes a claim in respect of the communal area.
- [90] The Plaintiff alleges that the amount claimed is not properly formulated or calculated, and that the agreement that the Defendants rely on do not provide for the Defendants to have any use of the communal areas.
- [91] The Plaintiffs accordingly contend that the Defendants' Claim in Reconvention in respect of the claim for repayment relating to the communal area is vague

and embarrassing, alternatively sets out no cause of action, as it is not possible to determine what the amount claimed by the Defendants relates to.

[92] The allegations in the Claim in Reconvention in respect of the communal area are certainly confusing, in that the Defendants allege that in terms of the Lease Agreement they were entitled to reasonable use of the communal area, but as the area utilised by the First Defendant was a basement area there was no access to the communal area.

[93] The Defendants then allege that the Plaintiff was not entitled to charge and demand an amount totalling R3 522 791.67 from the First Defendant, without setting out on what basis the Plaintiff was not entitled to charge and demand such amount from the First Defendant, or how such amount has been calculated.

[94] The allegations set out in paragraph 17.1, 17.2 and 17.3 are not only confusing, but clearly vague and embarrassing to the extent of prejudicing the Plaintiff.

[95] In the circumstances the ninth exception is upheld.

THE TENTH GROUND OF EXCEPTION

[96] The tenth ground of exception relates to the Defendants' claim for repayment of a security deposit together with interest thereon.

[97] The Plaintiff's complaint relates to the terms of the Lease Agreement relied on by the Defendants, which do not make provision for the deposit amount to be interest bearing, the calculation of the interest claimed by the Defendants, the

percentage utilised for calculating the interest, and the failure by the Defendants to allege that it has complied with all of its obligations in terms of the Lease, which would entitle the First Defendant to the repayment of its security deposit.

[98] In the Claim in Reconvention the claim for the security deposit is set out at paragraph 18.

[99] The Defendants contend that the security deposit has not been repaid, and that they are entitled not only to the security deposit, but also the interest relevant to the security deposit.

[100] The Defendants set out various calculations of the interest that should be paid to the Defendants, and also rely on the National Consumer Protection Act.

[101] The calculations of the amounts of interest claimed are contradictory and confusing, and there is no explanation as to the basis for using the different percentages claimed.

[102] Whilst the claim for repayment of the security deposit is clear, the claim for interest is clearly vague and embarrassing.

[103] Whilst the Defendants have set out a cause of action for the claim in respect of the security deposit, regardless of whether such claim is correct or not, the allegations relating to interest are clearly vague and embarrassing, and it is not possible to separate those portions of paragraph 18 that set out a cause of action for the claim for the refundable security deposit, from the portions relating to interest, as it would render the remaining contents of paragraph 18 entirely nonsensical.

[104] During argument, Defendants' counsel conceded that the Defendants did not have a claim for interest.

[105] The allegations relating to the claim for interest are clearly vague and embarrassing and prejudicial to the Plaintiff.

[106] In the circumstances, the tenth exception is upheld.

THE ELEVENTH GROUND OF EXCEPTION

[107] The eleventh ground of exception relates to the claims contained in paragraphs 20 to 22 of the Claim in Reconvention.

[108] The Plaintiff's complaint is that the Consumer Protection Act is not applicable to the Defendants, that it is not clear whether a Lease Agreement was in fact concluded between the Plaintiff and the Defendants, and on what basis the Plaintiff was not entitled to give the First Defendant a month's notice, as the Plaintiff contends that a month-to-month tenancy was in place as between the parties.

[109] The claims as set out in paragraphs 20 to 22 of the Claim in Reconvention relate to the Defendants' claim that a new Lease Agreement was concluded, but was unlawfully terminated and was terminated in violation of the Consumer Protection Act.

[110] The Defendants allege that a new Lease Agreement was offered to the Defendants by the Plaintiff, but the Defendants were not prepared to accept the terms, and sought to negotiate different terms of a new Lease Agreement.

- [111] The Defendants plead that the Plaintiff refused to negotiate in the manner as required by the Defendants, and allege that the Plaintiff's action was "*unlawful, unfair, unreasonable and unconscionable and violates ... the Consumer Protection Act*".
- [112] The Defendants also plead that the terms of the original Lease Agreement were unfair and unjust, and that the Defendants were not obliged to abide by the terms of such a Lease Agreement.
- [113] The Defendants furthermore plead that the protection afforded by the Consumer Protection Act applied to the Defendants, and the Plaintiff's termination of the Lease Agreement was wrongful and unlawful.
- [114] The Defendants however also plead that the original Lease Agreement terminated on 30 November 2017, and do not suggest that any new Lease Agreement was concluded, but rather that the Plaintiff was obliged to accept the terms for a new Lease Agreement, as proposed by the Defendants.
- [115] The Defendants have not set out on what Lease Agreement it relies, and if it is the Lease Agreement that expired by the effluxion of time, why the Defendants were entitled to rely on the terms of such agreement.
- [116] The Defendants have also failed to set out the allegations which would justify or indicate that they are entitled to rely on the provisions of the Consumer Protection Act, and that they fall within the various definitions of the Consumer Protection Act.
- [117] The Defendants' claims as set out at paragraphs 20 to 22 of the Claim in Reconvention are confusing and not understood.

[118] The allegations set out in such paragraphs are accordingly vague and embarrassing, and the Plaintiff cannot plead to such allegations.

[119] In the circumstances the eleventh ground of exception is upheld.

THE TWELFTH GROUND OF EXCEPTION

[120] The twelfth ground of exception raised is that the Defendants' claim, which relies on the Consumer Protection Act is based on the allegations that the Plaintiff was obliged to contract with the First Defendant on the terms as specified by the First Defendant, and the Plaintiff's failure to do so was in breach of the Consumer Protection Act, as the First Defendant could determine what terms were reasonable.

[121] The Plaintiff contends that the Consumer Protection Act cannot be interpreted in such a manner, and the Consumer Protection Act cannot be applicable where agreement is not reached and there is no basis or grounds upon which the Plaintiff is obliged to enter into an agreement on terms it is not agreeable to.

[122] The allegations relating to an obligation on the part of the Plaintiff to contract with the First Defendant, on the basis that the Defendants had already lodged a complaint with the National Consumer Commission lacks all of the necessary averments for a proper cause of action.

[123] The provisions of the Consumer Protection Act clearly do not oblige a party to conclude an agreement with another party, on grounds that are acceptable only to one party.

[124] In the circumstances the allegations made relating to an obligation to conclude a further Lease Agreement are clearly vague and embarrassing, and no cause of action is disclosed in such regard.

[125] In the circumstances, the Plaintiff cannot plead to the allegations, and is clearly prejudiced.

[126] In the circumstances the twelfth exception is upheld.

THE THIRTEENTH GROUND OF EXCEPTION

[127] The thirteenth ground of exception also relates to the claim for unlawful termination of the Lease Agreement.

[128] The Plaintiff complains that the Defendants allege that the Lease Agreement terminated on 30 November 2017, that it was not renewed, that the tenancy arrangement accordingly ran on a month-to-month basis, and that the parties were unable to agree upon terms, that the Defendants allege that they were not obliged to comply with the Lease Agreement which already terminated by the effluxion of time, but that the Plaintiff's termination of the Lease on 1 October 2019 by giving one month's notice was unreasonable and therefore invalid.

[129] The Plaintiff complains that the Defendants have not set out a cause of action to prohibit the Plaintiff from terminating the agreement or to claim that the termination of the agreement is invalid.

[130] Whilst I could find no allegation in the Claim in Reconvention to the effect that the Defendants conceded that the rental arrangement was a monthly tenancy,

the Defendants have not set out any cause of action entitling the Defendants to contend that the termination of the Lease Agreement was prohibited or unlawful.

[131] The allegations relating to the invalidity of the termination of the agreement are accordingly vague and embarrassing, and the Plaintiff is unable to plead meaningfully to such allegations.

[132] In the circumstances the thirteenth exception is upheld.

THE FOURTEENTH GROUND OF EXCEPTION

[133] The basis for the fourteenth ground of exception is that the Consumer Protection Act, as relied on by the Defendants, does not provide for the remedies as sought by the Defendants, and that the Defendants have not set out any cause of action justifying on what basis the Defendants are entitled to consequential losses.

[134] The Defendants' third claim, which relates to consequential damages, is set out at paragraphs 23 to 27 of the Claim in Reconvention.

[135] The Defendants essentially allege that as a result of the violation of the provisions of the Consumer Protection Act by the Plaintiff, the conduct of the Plaintiff in demoting the Lease Agreement to a month-to-month tenancy, and the termination of the Lease Agreement in circumstances where the Plaintiff is financially indebted to the Defendants, entitles the Defendants to claim consequential damages for the suspension, and relocation costs of its business.

- [136] Whilst Section 52(3) of the Consumer Protection Act empowers a Court to make any appropriate order, the Defendants have not set out a cause of action for any consequential damages based either on the Consumer Protection Act, or the common law.
- [137] In the circumstances, the claim for consequential damages does not set out a valid cause of action, and is also vague and embarrassing, amounting to prejudice to the Plaintiff.
- [138] In the circumstances the fourteenth exception is upheld.

DELIBERATION

- [139] Defendants' counsel urged me not to uphold the Exception, and argued (as also set out in the Defendants' Heads of Argument) that proper causes of action have been set out in respect of all three claims raised by the Defendants.
- [140] Defendants' counsel also argued that because the Plaintiff was able to "*plead*" to the allegations in the Claim in Reconvention, as set out in the Notice of Exception, illustrates that the Defendants have set out proper causes of action.
- [141] Defendants' counsel also submitted that the Court should adopt a holistic approach when considering the Exception and must read the pleadings as a whole in order to determine whether the pleadings are capable of sustaining the necessary causes of action.

[142] Defendants' counsel also pointed out that the Court must consider whether there is a possibility that evidence might be deduced by the Defendants at the trial which would resolve any uncertainties and disputed facts.

[143] In regard to the difficulties raised by the Plaintiff in calculating the enrichment amounts claimed, it was submitted by the Defendants' counsel that it was not necessary to specify the precise amounts claimed, as the Defendants are entitled to a fair and reasonable value. It was submitted that all a party needs to do in the pleadings is claim that amounts are due to it, and then lead evidence at the trial to show what a fair and reasonable "value" would be.

[144] It was accordingly submitted on behalf of the Defendants that the Exception should accordingly be dismissed.

[145] The Plaintiff submitted that the Exception should be upheld, and that the Claim in Reconvention should be struck-out.

[146] I considered all of the arguments and submissions of both the Plaintiff's counsel and the Defendants' counsel in determining the various exceptions raised.

[147] As already set out above, in dealing with the various exceptions, I have indeed adopted a holistic approach, and have considered the pleadings as a whole, in finding that the grounds of exception are valid, and should be upheld.

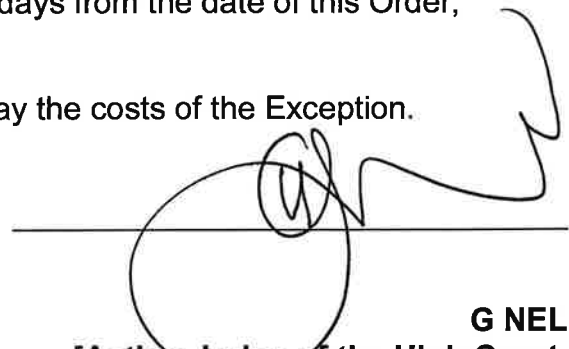
[148] In the circumstances, I make the following order:

[148.1] The Exception is upheld;

[148.2] The Defendants' amended Claim in Reconvention is set aside;

[148.3] The Defendants are granted leave to file an amended Claim in Reconvention, within 30 days from the date of this Order;

[148.4] The Defendants are to pay the costs of the Exception.



G NEL
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date of Judgment: 24 August 2021

APPEARANCES

For the Excipient: Adv. J G Dobie
Instructed by: Reaan Swanepoel Attorneys

For the Respondents: Adv M T Goodman
Instructed by Adv M T Goodman is practising as an advocate with a Trust Account