

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



(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised

Date: 21/01/2025


A Maier-Frawley

CASE NO: 2024/020746

In the matter between:

EKXELLENT RECRUITMENT SOLUTIONS

Excipient/Defendant

and

SIBANYE STILLWATER

Plaintiff

J U D G M E N T

MAIER-FRAWLEY J:

1. The plaintiff claims damages arising from an alleged breach of contract by the defendant. *Ex facie* the Particulars of Claim, the Plaintiff avers as follows:
 - (i) That Defendant entered into an agreement with Plaintiff in May 2014 in terms whereof Plaintiff provided labour services to the defendant by providing Operators for the defendant..
 - (ii) That it was a term of the agreement "that during termination of services that *'in the event of termination of the agreement for*

convenience of anyone of the parties, or on the expiry of this agreement, the parties may negotiate a once off placement fee should Lonmin wish to employ any of the seconded persons' "

- (iii) That the defendant breached terms of the agreement by not paying the placement fee to Plaintiff, despite having sent numerous requests for the Defendant to honour terms of the agreement. and
 - (iv) That the Defendant's conduct has caused damages to Plaintiff in the amount of R 2 000 000. calculated at 10% of the annual package for the fourteen (14) employees, for which amount the defendant is indebted to the plaintiff."
2. The defendant has raised an exception against the plaintiff's particulars of claim on grounds that the particulars do not disclose a cause of action and in addition, are also vague and embarrassing.
 3. The legal principles governing exceptions have been articulated in several cases, of which I mention but a few as relevant to these proceedings:
 4. In *Vermeulen v Goose Valley Investments (Pty) Ltd*, [2001] 3 All SA 350 (A) at para 7. Marais JA stated as follows:

"It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it can be shown that ex facie the allegations

made by the plaintiff and any other document upon which his cause of action may be based, the claim is (not may be) bad in law. . . .”.

5. In *Living Hands (Pty) Ltd NO & Another v Ditz & Others* 2013 (2) SA 368 (GSJ) at 374 G, Makgoka J conveniently summarized the principles governing exceptions, as follows:

“(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.

(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.

(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.

(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.

(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.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.”

6. In *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 913B-G the court stated that:

“...The Plaintiff is required to furnish an outline of its case. This does not mean that the Defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until explored by evidence. Provided the defendant is given a clear idea of the material facts

which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements”.

7. In *Venter and Others NNO v. Barritt Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd*, 2008 (4) SA 639 (C) at para 14, the court . referred to the phrase – vague and embarrassing – as follows:

“Generally, the information in a declaration or particulars of claim need only be sufficient for the defendants to plead thereto. The exception stage is not the time for the defendants to complain that he does not have enough information to prepare for trial or may be taken by surprise at the trial. That comes later in the (often long and cumbersome) journey to the doors of the court, after, inter alia, discovery of documents and requests for trial particulars had been made.”

8. I turn now to deal with the grounds of exception relied upon by the defendant.
9. First ground: *Non-compliance with rule 18 in that plaintiff failed to state whether the contract is a written and/or oral agreement and failed to aver where and by whom it was concluded.*
10. In *ABSA Bank Ltd v Jenzen, Kevin Glynn; ABSA Bank Ltd v Grobbelaar, James* Case No. 2014/877 (GLD). Sutherland J considered

whether non-compliance with Rule 18(6) could found an exception. He concluded, with reference to the judgment by Rogers J (Traverso DJP concurring) in *Absa Bank Ltd v Zalfest Twenty (Pty) Ltd & ano* 2014 (2) SA 119 (WCC), that such a complaint cannot constitute the substance of an exception. I am in respectful agreement with the learned judge's conclusion or put differently, I cannot find that it is wrong.

11. I am accordingly not persuaded that this ground has merit.
12. Second ground: *Plaintiffs Particulars of Claim is vague and embarrassing in that it lacks the necessary averments in respect of the number of employees allegedly provided to Defendant; the names of the alleged persons provided to Defendant; the salaries of the alleged employees provided to the Defendant; and the occupation of the alleged employees provided to the Defendant.*
13. I am not either persuaded that this ground either holds water as it is essentially a complaint about non-compliance with Rule 18. The particulars sought can be requested for purposes of trial in due course and their absence will not preclude the defendant from filing a plea at this stage. In any event, the plaintiff's claim is in regard to 14 employees as will become apparent from what is stated below.
14. A party wishing to claim damages resulting from a breach of contract must allege (and prove) (a) the contract & terms relied on; (b) breach of contract; (c) that the claimant has suffered damages; (d) a causal link between the

breach and damages; and (e) that the loss was not too remote (See Amler's Precedent of Pleadings, 8th ed at 117-118)

15. The plaintiff has averred that upon termination of its services in the event of termination of the agreement or expiry thereof, "*the parties may negotiate a once off placement fee should **Lonmin** wish to employ any of the seconded persons*" The plaintiff also avers that "During 2019 Defendant took fourteen (14) operators from Plaintiff and employed them permanently", and that "the defendant breached the agreement by not paying the placement fee to the Plaintiff. As a result, the plaintiff suffered damages in the amount of R 2 000 000. calculated at 10% of the annual package for the fourteen (14) employees, for which amount the defendant is indebted to the plaintiff."
16. What is plainly absent from the plaintiff's pleading, *ex facie* the particulars of claim, are averments to support a causal link between the alleged breach and damages claimed. There is no allegation that the plaintiff's services were terminated, including the basis for the termination, or that the parties negotiated and agreed upon a placement fee upon termination, such as to oblige the defendant to pay same. Absent such a causal link, the particulars lack averments to sustain the cause of action relied upon. This flaw touches upon the defendant's third ground of exception, which is this:
17. Third ground: "*Plaintiff, in paragraph 7 of its Particulars of Claim, avers that the party to the agreement is **Lonmin** (being a different legal entity) whilst Sibanye Stillwater Limited is cited as the Defendant, which averment is not*

only ambiguous but also contradicts the relationship between Plaintiff and Defendant.”

18. Where and how an entity named ‘Lonman’ fits into the picture is wholly unknown. What is known *ex facie* the plaintiff’s pleading is that the entity ‘Lonmin’ is not a party to the contract relied on by the plaintiff for its claim against the defendant. But that is not the only problem. The contractual term relied on for the defendant’s breach is that on termination of plaintiff’s services (whether for convenience, by mutual agreement, or expiry of the contract) is that ‘*the parties [i.e. plaintiff and defendant] may negotiate a once off placement fee should **Lonmin** wish to employ any of the seconded persons*’. There is no allegation in the Particulars of Claim that the contract was terminated or that it expired, nor that the parties negotiated a once off placement fee or that ‘Lonmin’ permanently employed the employees seconded to the defendant by the plaintiff. This becomes material, given that damages claimed from the defendant are calculated in respect of 14 employees, however, sans any allegation that the 14 employees have been permanently employed and by whom they were so employed. Put simply: and there is nothing to ground the conclusion that the defendant’s conduct has caused damages to the plaintiff.

19. Fourth ground: *Plaintiff, in paragraphs 11 and 12 of its Particulars of Claim, avers that an amount of R2 000 000.00 (Two Million Rand) is owing to Plaintiff by Defendant. Plaintiffs allegation of the alleged damages suffered, lacks the calculations as to exactly how the amount of R2 000 000.00 (Two*

Million Rand) was arrived at, thereby makes it impossible for Defendant to file a Plea in respect of the averments made in these paragraphs.

20. What has been said in relation to the second and third complaints discussed above is relevant to this ground.. This fourth complaint is again, in essence, a complaint of non-compliance with Rule 18. However, it impacts upon the substantive requirement in law that the loss be not too remote – if the damages flow naturally and generally form the kind of breach relied on then they are not too remote, but, that will depend, in the circumstances of this case, on what placement fee was negotiated and whether non-payment of the placement fee in whatever the agreed amount would result in the plaintiff suffering damages – being damages contemplated by the parties as a probable result of the breach.
21. For the reasons given, I am persuaded that the particulars of claim as presently formulated lack averments to sustain a cause of action.
22. In instances where substantial exceptions against Particulars of Claim are upheld on the basis that the pleadings concerned are bad in law, an invariable rule of practice has been adopted by our Courts, to order that the pleadings be set aside to allow the party whose pleadings is struck down an opportunity to amend.¹.

¹ See, for instance, *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602C-D – as well as *Ocean Echo Prop 327 CC v Old Mutual Life Assurance Co (SA) Ltd* 2018 (3) SA 405 (SCA) para [8]; *Constantaras v BCE Foodservices Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) paras [30] – [31]; *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A) at 269G-I.

23. As for costs, these should follow the result.
24. In the circumstances it is ordered that:
- a. The Defendant's exception is upheld.
 - b. The plaintiff's Particulars of claim is struck out.
 - b. The Plaintiff is given leave to deliver its amended Particulars of Claim within 10 (ten) days from the date of this order.
 - c. The Plaintiff is to pay the cost of this exception, such costs to include the costs of counsel where so employed, on a scale as between party and party in accordance with scale C.



**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 20/01/2025
Judgment delivered 21/01/2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 21 January 2025.

APPEARANCES:

Counsel for Excipient/defendant:	Adv PI Oosthehuizen
Instructed by:	Truter, Crous, Wiggill & Vos Incorporated c/o Couzyns Inc
For Plaintiff:	No appearance
Plaintiff's Attorneys:	Magingxa Attorneys c/o Tengwa Attorneys