



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

Reportable/Not Reportable

Case no: 22755/23

In the matter between:

**SABI RIVER SHARE BLOCK (PTY) LTD
T/A SABI RIVER SUN RESORT**

Plaintiff

and

GOLF DATA HOLDINGS (PTY) LTD

Defendant

Neutral citation: *Sabi River Share Block (Pty) Ltd t/a Sabi River Sun Resort v Golf Data Holdings (Pty) Ltd* (Case no 22755/23) [2025] ZAWCHC (21 JULY 2025)

Coram: NJOKWENI AJ

Heard: 7 May 2025

Delivered: 21 July 2025

Summary: exception – vague and embarrassing – lack averments necessary to sustain a cause of action – uniform rule 30 – irregular step – noncompliance with rule 18 – attorney deposing to founding affidavit – *inadmissible opinion evidence* – *rule 30 application* – *abuse of process* – *punitive costs*.

JUDGMENT

Njokweni AJ

Introduction

[1] This is an opposed interlocutory application in terms of uniform rules 23 and 30.¹ For convenience, I shall refer to the parties as cited in the main action. Thus, I shall refer to the applicant as plaintiff and respondent as defendant.

[2] The application comprises:

- (a) An exception to the plaintiff's amended particulars of claim on the basis that it fails to disclose a cause of action, alternatively, that the amended particulars of claim is vague and embarrassing to the extent that the defendant is prejudiced to plead thereto; and
- (b) An application in terms of Rule 30, on the grounds that the amended particulars of claim do not comply with the provisions of uniform rules 18(4), 18(6), and 18(10) (*"the Rule 30 application"*).

Factual Background

[3] To adjudicate this application, it is apposite to briefly sketch out the factual background relevant to this application, and I do this below.

[4] On 13 December 2023, the plaintiff instituted an action against the defendant claiming damages in the amounts of R6 430 530.90 and R7 880 249.17.

¹ Uniform rules, read with uniform rule 6(11). In turn, uniform rule 6(11) provides: "Notwithstanding the foregoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge." Accordingly, in this judgment wherever I refer to a rule or rules, unless specified otherwise, I mean the uniform rules of Court.

[5] The defendant filed an exception to the plaintiff's particulars of claim and simultaneously brought an application in terms of Rule 30, alleging non-compliance with Rule 18.

[6] Pursuant to an agreement between the parties, the defendant withdrew both the exception and the Rule 30 application, with the plaintiff tendering the defendant's costs. Thereafter, on 20 May 2024, the plaintiff amended its particulars of claim, which amendment forms the subject of the current proceedings.

[7] Notably, in the amended particulars of claim, the plaintiff reduced its claims to R2 527 058.68 and R5 353 087.68.

[8] On 4 June 2024, the defendant delivered a notice in terms of Rule 30(2)(b), calling upon the plaintiff to remove various causes of complaint from the amended particulars of claim, citing the plaintiff's non-compliance with relevant provisions of Rule 18.

[9] The plaintiff failed to respond, and on 2 July 2024, the defendant launched a Rule 30 application seeking to have the amended particulars of claim set aside as an irregular step.

[10] In addition, the defendant served a notice in terms of Rule 23(1), notifying the plaintiff of at least six proposed exceptions. The plaintiff again failed to respond.

[11] During July 2024, the defendant delivered its notice of exception, which in substance was the actual exception ("the Exception"), together with the Rule 30 application, and which forms the subject matter of the present proceedings. Later in this judgment I shall deal with this notice of exception which is headed "**Defendant's Notice of Exception**". The defendant contends that the amended particulars of claim falls to be set aside either based on the exception or pursuant to the Rule 30 application.

[12] The plaintiff claims contractual damages arising from the defendant's alleged breach of the agreement between the parties.

Relevant Facts

Plaintiff's claim in brief

[13] Plaintiff contends that the defendant holds itself out to be the premier golf course and landscaping service provider in Southern Africa, supplying everything from design and construction to maintenance, with thirty years of experience in the industry being known as the 'go-to' brand for world class golf and landscaping requirements.

[14] In the main action, the plaintiff claims more than R7.8 million in damages from the defendant for breach of contract. The breaches are premised upon the defendant having effected the contractual works using materials which were not fit and suitable for the purpose of the works, alternatively, that the works which it effected were defective. [My emphasis]

Amended particulars of claim

[15] The plaintiff's case as pleaded in the amended particulars of claim ("POC") is summarised below.

The existence of the agreement and representation of the parties

[16] The parties concluded the agreement during a four-month period between November 2019 and about February 2020 duly represented by Mr. Ray Jeffray of the plaintiff and Mr. Robbie Marshall of the defendant.

The agreement was partly in writing and partly oral

[17] The agreement was partly in writing and partly oral. The relevant written parts of the agreement are attached to the POC.

The terms of the agreement

[18] The express, alternatively tacit and further alternatively implied terms of the agreement, which inter alia include the extent of the works to be effected by the defendant at the plaintiff's Sabi River Resort Golf Club ("**the course**"), as well as the contract sum to be paid to the defendant upon completion of the works are pleaded in the POC. In short, the defendant undertook to perform certain "works" at the course. The scope of the works were:

- (a) the upgrading of all greens; and
- (b) the alteration and redesign of the Course's 18 holes. The specific changes to each of the 18 holes are set out in detail.

Plaintiff's performance

[19] The plaintiff paid the contract sum to the defendant after it completed the works.

Defendant's material breach

[20] Although the defendant duly executed the works, it nonetheless breached the agreement on the following grounds:

- (a) The materials used by the defendant were not fit for purpose; and
- (b) The works performed were defective.

Damages

[21] The nature and amount of general and special contractual damages claimed by the plaintiff are pleaded.

Demand and liability

[22] The plaintiff's demand and the defendant's liability is also pleaded.

Prayers

[23] The prayers sought against the defendant are succinctly pleaded.

The Exception

[24] The defendant has taken an exception to the plaintiff's POC. The defendant's exception is based on a plethora of grounds, but defendant persisted only with six grounds on the heads of argument and during oral submission at the hearing. They are formulated on the basis that the POC failed to disclose a cause of action ("*the no cause of action exception*"), alternatively that the POC is vague and embarrassing ("*the vague and embarrassing exception*").

[25] I shall firstly list the grounds of exception based on the attack that the POC lacks necessary averments to sustain a cause of action and after, list grounds of exception on the basis that the POC is vague and embarrassing.

Defendant's Exception (no cause of action exception)

First ground

[26] The defendant contends that the POC lacks necessary allegations to sustain a claim for special damages because of inconsistency between pleaded terms and written parts of the agreement attached to the POC.

Second ground

[27] The way the plaintiff has formulated its claims for special damages is not recognised in law as constituting valid claims for contractual damages.

Defendant's Exception (vague and embarrassing)

Third ground

[28] The pleaded terms of the agreement are inconsistent with the written components thereof, as contained in the annexures to the POC.

Fourth ground

[29] The POC contains contradictions regarding the defendant's alleged compliance with, and breach of, the agreement.

Fifth ground

[30] The POC fails to adequately link the alleged breaches of the agreement to the defendant's contractual obligations, specifically as defined under "the works".

Sixth ground

[31] Certain paragraphs of the POC are internally contradictory in respect of the issue of causation.

Legal Principles Relating to Exceptions

No cause of action exception

[32] Rule 23(1) provides that where a pleading lacks averments that are necessary to sustain an action, the opposing party may deliver an exception thereto.

[33] In **McKenzie**² the following definition of "cause of action" was adopted by the appellate division:

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

² McKenzie v Farmers' Co-Operative Meat Industries Limited 1922 (AD) 16, at 23.

[34] In deciding an exception, the court must take all the plaintiff's allegations at face value. The allegations of fact in the particulars of claim must be accepted as true and correct.³ [My emphasis]

[35] In **Jowell**,⁴ Heher J stated the following general principles relating to pleadings in the context of exceptions:

*"It is therefore incumbent upon a plaintiff only to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely, and on which evidence will be led, in intelligible and lucid form and which allows the defendant to plead to it. The attacks mounted by the defendants that their particulars of claim are vague, and embarrassing cannot be found on the mere averment that they are lacking in particularity."*⁵

*'... 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;*⁶

*'The object, of course, of all pleadings is that a succinct statement of grounds upon which a claim is made or resisted shall be set forth shortly and concisely; where a statement is vague, it is either meaningless, or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on, and therefore it is also something which is insufficient in law to support in whole or in part the action or defence'*⁷ [My emphasis]

[36] In **Pretorius and Another v Transport Pension Fund and Others**⁸ the following was stated:

³ *Stewart v Botha* 2008 (6) SA 310 (SCA) at para 4; *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) at 755;

⁴ *Jowell v Bramwell-Jones & Others* 1998 (1) SA 836 (W).

⁵ At 902H.

⁶ At 903A-B.

⁷ At 899E.

⁸ *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC) at para 15.

*“In deciding an exception, a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading **cannot be supported on every interpretation that can be put on the facts**. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.” [My emphasis]*

[37] *In Tembani and Others v President of the Republic of South Africa and Another*⁹ the court held as follows:

*“Whilst exceptions provide a useful mechanism ‘to weed out cases without legal merit’, it is nonetheless necessary that they be dealt with sensibly. **It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent**. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.” [My emphasis]*

Application of the Law to Relevant Facts

[38] Having set out the relevant background facts and the applicable law on exceptions, it is now apposite to apply the law to the facts relevant to this application.

⁹ Tembani and Others v President of the Republic of South Africa and Another 2023 (1) SA 432 (SCA) at para 14.

[39] Firstly, I deal with each ground of exception and the submissions made by both plaintiff and defendant in relation thereto. Secondly, I shall apply the op cit legal principles to a specific ground of exception taken and decide if such a ground is sustainable or not. If not, I shall dismiss the relevant ground of exception. Conversely, if a ground of exception is well taken, I shall uphold it.

Defendant's Exception (no cause of action)

First ground

[40] The POC lacks the necessary allegations to sustain a claim for special damages because of inconsistency between pleaded terms and written parts of the agreement attached to the POC.

[41] In the POC, the plaintiff clearly pleads that it has suffered damages in the amount of R7 880 145.96 and pleads the way such amount is made up and arrived at. In addition, it specifically pleads that the said damages arose directly because of the defendant's breach, alternatively it was reasonably foreseeable and within their contemplation that given the pleaded breach of the terms of the agreement, the plaintiff would suffer damages pleaded in the POC.

[42] Whether the plaintiff has made out a case for special or general damages or for both is a matter for trial court to decide after evaluating evidence led before it. At this stage, it is not necessary for the court to make that enquiry.

[43] Rule 23(3) requires that when an exception is taken, the grounds upon which the exception is founded shall be "clearly and concisely" stated. This ground of exception falls short of that requirement. As identified by the plaintiff, the defendant has identified at least twenty (20) separate causes of complaint based on which it concludes that the particulars lack averments necessary to sustain the action or are vague and embarrassing. They are not clearly and concisely stated, with a lot of them also containing a forward slash "/", which indicates that the complaint is either

one or the other. However, it is not for the plaintiff or this Court to guess which one it is. In **Vermeulen v Goose Valley Investments** it was held¹⁰ that it:

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

[44] In respect of the many complaints, the defendant has failed to identify whether each one results in the particulars not containing averments necessary to sustain the action for breach of contract, or whether it results in the pleading (as a whole) being vague and embarrassing. One is simply left guessing and that alone means this first ground of exception is bad in law.

[45] In **Merb (Pty) Ltd v Matthews**¹¹ the following useful summary of some of the general principles applicable to exceptions is made by Maier-Frawley J:

*‘[8] These were conveniently summarised by Makgoka J in **Living Hands**¹² as follows:*

“Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

*...(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***

¹⁰ Vermeulen v Goose Valley Investments [2001] 3 All SA 350 (A) at paragraph [7]. See also *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] 4 All SA 346 (SCA) at paragraph [3]; *Taitz Cellular (Pty) Ltd t/a Blue Cellular v Chadez Enterprises (Pty) Ltd* (unreported, GJ case no 29643/2021 dated 3 August 2022) at paragraph 12.

¹¹ *Merb (Pty) Ltd v Matthews*, unreported, GJ case no 2020/15069 dated 16 November 2021. See also *Du Toit NO v Steinhoff International Holdings (Pty) Limited* and a related matter [2020] 1 All SA 142 (WCC) at paragraphs [27]–[34].

¹² *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 374G. See also *Shoprite Checkers (Pty) Ltd v Premier of the Western Cape Province* (unreported, WCC case no 17531/2022 dated 1 December 2023) at paragraphs [8]–[9].

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.”

[9] Exceptions are also not to be dealt with in an over-technical manner, and as such, **a court looks benevolently instead of over-critically at a pleading.**

[10] An excipient must satisfy the court that it **would be seriously prejudiced** if the offending pleading were allowed to stand, and an excipient is required to make out a very clear, strong case before the exception can succeed.

[11] Courts have been reluctant to decide exceptions in respect of fact bound issues.

[12] Where an exception is raised on the ground that a pleading lacks averment necessary to sustain a cause of action, the excipient is required to show **that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed.** It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (*facta probanda*). The *facta probanda* necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the *facta probantia*) but every fact which is necessary to be proved...”’

[48] In *casu*, the POC contains every fact which would be necessary for the plaintiff to prove, if traversed, to support its right to judgment (*facta probanda*) and

evidence which is necessary to prove each fact (*being the facta probantia*). In the result, this ground of exception must fail.

Second ground of exception

[46] The defendant contends that the plaintiff has pleaded an incorrect measure of damages in that the plaintiff claims for loss of revenue and not for loss of profit.

[47] What is required of the plaintiff is to plead its case with sufficient particularity to enable the defendant to plead. Whether the plaintiff is entitled to loss of revenue or loss of profit is for the trial court to decide.

[48] 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. 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. Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.¹³

[49] In ***Jowell v Bramwell Jones***¹⁴ it was held that secondary allegations upon which the plaintiff can rely in support of the primary factual allegations are matters for particulars for trial, and even then, are limited.

[50] The plaintiff has pleaded its damages with sufficient particularity to enable the defendant thereto to plead. In the result, this second ground of exception should fail.

[51] Before I deal with the grounds of exception based on the complaint that the POC is vague and embarrassing, I deemed it appropriate to revert (as I do) to what I earlier raised in the introduction to this judgment that the exception that was delivered by the defendant under the heading “**Notice of Exception**”¹⁵.

¹³ See fn11 *supra*, Living Hands.

¹⁴ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 898.

¹⁵ Paragraph 14 *supra*.

[52] In an exception based on the ground that the pleading is vague and embarrassing, a notice of exception to remove cause of complaint is required before delivery of the exception. The heading of the Notice of Exception in terms of rule 23(1)(a)¹⁶ on the tramline should read

“Notice of exception or Notice of removal of cause of complaint” but the exception should be headed **“Exception”**. This is to avoid confusion when the exception is adjudicated and more so, the subrule¹⁷ says so. In *casu*, the excipient delivered a notice of exception requesting the plaintiff to remove the cause of complaints raised therein. Later, the excipient delivered a **“Notice of Exception”** but when I read the content of the latter mentioned notice, I realised that this was the actual exception that was delivered. I then requested clarity from the parties as to whether I should accept the said notice as the actual exception that was delivered as envisaged in subrule 23(1)(b). The reply was in the affirmative, and indeed I considered it as such. I did so because, on closer reading of the content of what was headed **“Notice of Exception”**, I realised that in essence it was the exception that was being delivered by the defendant. So, in the interest of justice I preferred substance over form. I now turn to the grounds raised to attack the POC as vague and embarrassing.

The Vague and Embarrassing Exception

Third ground

[53] The defendant contends that there is inconsistency between pleaded terms of the agreement and written parts of the agreement in annexures to the POC. This attack is pleaded:

¹⁶ Rule 23(1)(a) Uniform rules of Court. Also see Van Loggerenberg: Erasmus Superior Court Practice (Vol 2) [service 20, 2022 at D1-310C] under the heading **“May apply to the registrar to set it down...”**.

¹⁷ Subrule 23(1)(b) provides:

“the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph (a) is received, or within 15 days from which such reply is due, **deliver the exception.**”

(a) Paragraph 5 of the POC sets out the material express, alternatively tacit, alternatively implied terms of the agreement.

However, the plaintiff fails to specify which of these terms were agreed to orally and which were reduced to writing.

(b) The extent of the works described in paragraph 5.1 of the POC relating to each of the 18 holes constitutes an almost verbatim reproduction of the content contained in annexure “POC1”. Significantly, the scope of works set out in “POC1” differs from that recorded in annexure “POC2”. A comparison of the pleaded terms with the contents of “POC2” reveals material inconsistencies regarding the extent of the works to be undertaken.

(c) As a result, the defendant is unable to ascertain, from the POC read with the annexures, the precise ambit of its alleged contractual obligations. It is accordingly submitted that the defendant is embarrassed in pleading thereto due to the internal inconsistency and lack of clarity as to the scope of the agreement.

Contract sum pleaded inconsistent with annexure “POC1:

[54] In paragraph 5.5 of the POC, the plaintiff alleges that the contract sum is R6 430 530.90, which is said to be made up and calculated as follows:

- (a) R2 189 594.20 in respect of ‘Phase 1’, being the works in respect of holes 10 to 18;
- (b) R2 802 171.30 in respect of ‘Phase 2’, being the works in respect of holes 1 to 9;
- (c) R300 000 as a provisional sum for irrigation;
- (d) R100 000 as a provisional sum for additional grassing;
- (e) R200 000 as a provisional sum for any contingencies; and
- (f) R838 764.90, being the Value Added Tax in respect of the aforesaid amounts.”

[55] However, it was contended that the contract sum contemplated in annexure “POC1” is the sum of R5 690 612.68 comprising of:

(a)	Phase 1: first 9 holes	R2 802 171.30
(b)	Phase 1: second 9 holes	R2 189 594.20
(c)	Green Sprigs supplied by club	
	Total (excluding VAT)	R4 991 765.51

[56] Accordingly, it was argued that there are material discrepancies between the contract sum pleaded in the amount of R6 430 530.90 and the contract sum reflected in annexure “POC1”. No explanation is provided for these inconsistencies. This difficulty is further compounded by the plaintiff’s failure to plead the material facts indicating when, where, and by whom the additional amounts— absent from annexure “POC1”—were agreed upon.

[57] It was submitted that, considering the discrepancies between the pleaded contract sum and the amount reflected in annexure “POC1”, the defendant is embarrassed in pleading to paragraph 5.5 of the POC. Put differently, the defendant is unable to discern the case it is required to meet in relation to the contract sum.

[58] It was further submitted that the POC sets out the material express, alternatively tacit, alternatively implied terms of the agreement. However, the plaintiff fails to specify which of these terms were agreed to orally and which were reduced to writing.

[59] It was further submitted that the defendant is unable to ascertain, from the POC read with the annexures, the precise ambit of its alleged contractual obligations. In the result, it submitted that the defendant is embarrassed in pleading to the POC due to the internal inconsistency and lack of clarity as to the scope of the agreement.

[60] In the defendant’s counsel’s written submissions, it is argued that the extent of the works described in the POC relating to each of the 18 holes constitutes an ***almost verbatim*** reproduction of the content contained in annexure “POC1” [my emphasis]. What is immediately apparent from the above is that the pleaded terms in the POC are not the same as those contained in annexure “POC1”.

[61] The documents which constitutes written parts of the agreement are specifically pleaded and separated from the oral part of the agreement. There is no inconsistency as alleged and pleaded under this ground of exception.

[62] Accordingly, this ground too must fail.

Fourth ground

[63] The defendant contends and argues that the contract sum pleaded in the POC is inconsistent with the contract sum contemplated in annexure “POC1”.

[64] The thrust of the defendant’s complaint appears to be housed in the founding affidavit in which the deponent, Mr. Hertzberg, asserts that in the POC, the damages claimed are not pleaded in such a manner or with sufficient particularity to enable the defendant to reasonably assess the quantum thereof.

[65] However, the contrary is true, in that the nature and separate amounts of the damages claimed by the plaintiff have been identified by it in detail in the POC. This is so because, in the founding affidavit, M has been able to restate the nature, amount and particulars of the damages claimed to the cent.

[66] Accordingly, if there is any discrepancy in the amount of damages claimed (which I could not find), the defendant in its plea can either deny or confess and avoid the allegations relating to the exact amount of damages claimed. Moreover, the defendant can adduce evidence at trial to disprove the nature and extent of the damages claimed by the plaintiff.

[67] Accordingly, this ground of exception is without merit and must also fail.

Fifth ground

[68] The defendant contends:

(a) In the POC, the plaintiff alleges that “the works were duly effected by the defendant” but in the same POC the plaintiff contends that the defendant breached the agreement in various respects.

(b) These allegations are inherently contradictory and create uncertainty as to whether the works were properly performed or defective, thereby rendering the pleading vague and embarrassing.

[69] The defendant quoted the definition of “Duly” as defined in the Oxford Advanced Learner’s Dictionary as: (a) *“in a correct, proper or expected manner; and (b) at the expected and proper time.”*

[70] In the result, it is contended for the defendant that the allegations contained in the POC are inconsistent, and the defendant is embarrassed in pleading thereto.

[71] It is trite that an exception should be dealt with sensibly and not in an over-technical manner. The plaintiff’s claim is clearly formulated in the POC in that it is based on breach of the agreement by the defendant. The breaches are premised upon the defendant having effected the contractual works using materials which are not fit and suitable for the purpose of the works, alternatively, that the works which it effected were defective.

[72] Accordingly, the use of the word “duly” in the POC does not amount to an admission that the work effected by the defendant was perfectly done. This ground of exception is over technical and is bad in law.¹⁸ The purpose of an exception is to weed out claims that should not proceed to trial because a cognisable claim or defence has not been made out on the pleadings, or to prevent a claim or defence being persisted with on pleadings that are vague and embarrassing. An over technical exception defeats this purpose.

[73] Accordingly, for these reasons this ground of exception must fail.

Sixth ground of exception

¹⁸ *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraphs [10]–[11].

[74] The defendant under this ground of exception contends:

- (a) The POC is contradictory insofar as it relates to the issue of causality.
- (b) The plaintiff alleges that, “as a direct result of the defendant’s breach,” it suffered damages - this being a formulation typically associated with general damages that flow naturally and generally from a breach of contract. Elsewhere in the POC plaintiff introduces a claim for both general and special damages, asserting that the damages suffered were foreseeable and within the contemplation of the parties at the time of contracting.

[75] In the result, it is argued for the defendant that these allegations are internally inconsistent and create ambiguity as to the nature of the damages being claimed. As a result, the defendant is prejudiced in pleading thereto, as it is unable to determine the precise case it is required to meet with respect to the issue of causality.

[76] To prove a claim for damages for breach of contract, the causation which must be alleged is between the breaches and the damages and not the terms of the agreement and the damages.¹⁹

[77] The plaintiff has pleaded the way the defendant breached the agreement and causation of damage as a result thereof in the POC. On this basis alone, this ground of exception is bad in law.

[78] Accordingly, this sixth ground of exception must suffer the same fate as the other five grounds of exception discussed above.

[79] For reasons given above, the POC contains sufficient particularity to able the defendant to plead thereto. The POC neither lacks averments necessary to sustain a cause of action nor is it vague and embarrassing to the extent that the defendant is prejudiced thereby to plead thereto.

¹⁹ (see p. 118, para (d) of **Harms Amler’s Precedents of Pleadings (8th Edition)**).

[80] Quite to the contrary, the POC is a decent model of a pleading for a claim founded on breach of contract.

[81] In view of the foregoing, I find that the exception is not well taken but was taken as a dilatory tactic to frustrate the finalisation of adjudication of the plaintiff's claim.

[82] I now turn to the rule 30 application.

Rule 30 Application

Irregular step

[83] The defendant seeks to set aside the POC as an irregular step as contemplated by Rule 30 for failing to comply with Rules 18(4), (6) and (10).

in limine point

Plaintiff's submissions

[84] The plaintiff has raised a point in *limine*, and it is apposite that I deal with it first. This so because, it is dispositive of the rule 30 application if it is upheld by this Court. The point raised is that there is no admissible evidence contained in the defendant's founding affidavit in respect of the rule 30 application, in that the affidavits of Robbie Marshall (who represented defendant when the partly written and partly oral agreement upon which plaintiff's claim is founded) were never delivered. In the result, it is submitted for plaintiff that:

- (a) No admissible evidence has been put up by Mr. Robbie Marshall (Marshall) of the defendant (or any of its other duly authorised representatives) in support of the defendant's rule 30 application. Instead, the only affidavit which has been filed in support of the application (and, most significantly, the question of prejudice) is that of its attorney, Mr. Hertzberg.

(b) For the reasons which follow, his affidavit establishes nothing and falls short of what is required.

(c) In the only pleading currently filed of record, the representatives of the plaintiff and defendant who were party to the contract in issue are identified as being Jeffray of the plaintiff and Marshall of the defendant. Although Jeffray of the plaintiff has deposed to the affidavits filed by the plaintiff in the application, Marshall has chosen not to do so. Instead, all we have is the *irrelevant opinion* of Mr. Hertzberg.

(d) In this regard, it is to be remembered that an affidavit filed in support of an application is a sworn assurance of fact known to the person who states it (***Goodwood Municipality v Rabie 1954 (2) SA 404 (C) at 406B-C***), and it is trite that allegations in support of an application can only be made by way of admissible evidence contained in an affidavit by that person (***Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (W) at 323F-324E***).

(e) And, in the present context, it is trite that proof of prejudice is a prerequisite to success in an application terms of rule 30(1) (*cf. Erasmus Superior Court Practice at 30-4 fn 7 and the authorities there cited.*) Further, the defendant must make factual allegations about the particulars of claim which give rise to the legal assertion that they in some manner fall foul of rule 18. That is not Mr. Hertzberg's job. As stated by the Court in the matter of ***Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd 2016 (1) SA 78 (GJ)*** at para [7]:

"The role of legal representatives has two key aspects. First is the supervision, organisation and presentation of evidence of the witnesses and secondly, the formulation and presentation of argument in support of a litigant's case. The diligent observation of those roles facilitates the role of the judicial officer, which is to arrive at a reasoned determination of the issues in dispute, in favour of one or other of the parties. Where practitioners neglect their roles, it leads to the protracted conduct of the litigation in an ill-disciplined manner, the introduction of inadmissible evidence and the confusion of fact and argument, with the attendant increase in costs and delay in its finalisation, inimical to both expedition and economy." (my underlining)

(f) Clearly these principles have simply been ignored by Mr. Hertzberg and the defendant.

(g) Therefore, to succeed with the present application, it was of critical importance for Marshall to file the founding affidavit to explain to the Court how the defendant has been (and will continue to be) prejudiced by irregularities which Mr. Hertzberg alleges to exist. However, there is no such affidavit, nor is there any such evidence.

(h) Instead, the only affidavit which has been filed is that of the defendant's attorney, Mr. Hertzberg. Simply put, that is not good enough. He has no personal knowledge of the agreement which underlies the dispute, nor the terms thereof, nor the way the agreement was implemented, and so forth.

(i) Therefore, there is no factual or legal basis upon which Mr. Hertzberg can either complain or establish for this Court on the facts that what the plaintiff has alleged in its particulars constitute irregularities which cause prejudice to the defendant.

(j) Afterall, he is neither a representative (in the sense of him not being an officer or director or employee of the defendant or duly appointed representative in execution of the agreement between the plaintiff and defendant) of the defendant nor party to the litigation. He is nothing but the attorney who gets paid fees for the services which he renders.

(k) And, with respect, Mr. Hertzberg's opinion as to whether the defendant has suffered prejudice because of an alleged procedural irregularity is nothing but irrelevant, inadmissible opinion evidence.

(l) There is little doubt that the reason why Marshall never filed the founding affidavit is because he knows exactly what the agreement was that resulted in the defendant being paid R6 430 530.90 pursuant to completing the works and does not wish to have to explain in cross-examination at trial why these dilatory proceedings were pursued by the defendant in the first place.

(m) In the circumstances, with the defendant's rule 30 application premised solely upon the inadmissible opinion evidence of attorney Mr. Hertzberg, it is fatally defective and falls to be dismissed on that ground alone.

Defendant's submissions

[85] The defendant classifies the in limine point basically as one that impugns the competency and appropriateness of Mr Alon Mr. Hertzberg, as the defendant's attorney to have deposed to the founding affidavit in support of the rule 30 application. In reply thereto, it is submitted for the defendant that:

- (a) Mr. Hertzberg is the defendant's attorney of record.
- (b) In the founding affidavit, Mr. Hertzberg avers that the facts contained therein are true and correct and fall within his personal knowledge. He further states that:

"As this Affidavit deals primarily with legal/procedural matters, it is appropriate for me to depose hereto on behalf of Defendant."

- (c) The defendant is severely prejudiced by the POC not complying with the rules as set out in the various eight complaints contained in the rule 30 application.
- (d) It is therefore submitted that the technical objection raised against Mr. Hertzberg's *authority* to depose to the founding affidavit is without merit.

Analysis and discussion

[86] The crisp legal point taken by the plaintiff is that the facts averred by Mr. Hertzberg in the founding affidavit are nothing else but his opinion as to whether the defendant has suffered prejudice because of an alleged procedural irregularity. This is so because, according to the plaintiff, Mr. Hertzberg, as the defendant's attorney, has no personal knowledge of the agreement which underlies the dispute, nor the terms thereof, nor the way the agreement was implemented, and so forth.

[87] Therefore, it is further argued for the plaintiff that there is no factual or legal basis upon which Mr. Hertzberg can neither complain nor establish for this Court on the facts that the plaintiff has alleged in its particulars constitute irregularities which cause prejudice to the defendant. It is argued for the plaintiff that it is nothing but irrelevant, inadmissible opinion evidence.

[88] The defendant on one hand classifies the legal challenge to be on the competency and appropriateness of Mr. Hertzberg, as the defendant's attorney, to depose to the founding affidavit, and on the other, classifies the legal challenge to be on the authority of Mr. Hertzberg to depose to the founding affidavit. As stated above, the attack is grounded on Mr. Hertzberg's alleged lack of personal knowledge of the agreement which underlies the dispute, the terms thereof and, the way the agreement was implemented. Accordingly, it is evident that the defendant has misconstrued the point in *limine* completely. This must be so because, the defendant's submissions deal with Mr. Hertzberg's lack of authority to depose to the founding affidavit for the defendant. It is trite that Mr. Hertzberg does not require such authority.

[89] In the matter of ***PM v MM and Another***,²⁰ the appellant sought a rescission of judgment. The founding affidavit in support of the application was deposed to by the appellant's attorney who averred that an administrative error in her office had resulted in the rescission application being incorrectly diarised. On appeal, the Supreme Court of Appeal ("SCA") held that the court *a quo* had conflated three distinct concepts: (a) the legal standing of the party seeking rescission of judgment; (b) the basis upon which an individual may depose to an affidavit; and (c) the authority to represent a party.

[90] In respect of (a), the SCA found that the parties had the requisite locus standi. As to (b), the Court held that a deponent to an affidavit is a witness who, under oath, sets out facts within his or her personal knowledge. An attorney who deposes to an affidavit is no different from any other witness giving oral testimony under oath or affirmation regarding facts within their personal knowledge. Therefore, an attorney deposing to an affidavit does not require authorisation from the client to do so.

[91] Regarding (c), the SCA found that, given the attorney's authority to act on behalf of the appellant, no further authorisation was required to depose to the founding affidavit.

²⁰ PM v MM and Another 2022 (3) SA 403 (SCA).

[92] In **Masako v Masako & Another**²¹, a unanimous decision, per Honourable Madam Justice Mabindla-Boqwana JA, held that the following dictum in **Ganes and Another v Telecom Namibia Ltd**²² provides a complete answer to this question. The SCA held:

‘ . . . it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705C - J.)’

[93] In **Masako**²³, Ms. Moduka²⁴ alleged that her reason for deposing to the founding affidavit was that the facts that gave rise to the need for a rescission application lay squarely within her knowledge as the attorney who was dealing with the matter. The SCA held:

“[11]...It stands to reason that a deponent to an affidavit is a witness who states under oath facts that lie within her personal knowledge. She swears or affirms to the truthfulness of such statements. She is no different from a

²¹ **Masako v Masako & Another (Masako,)** (724/2020) [2021] ZASCA 168 (3 December 2021).

²² **Ganes and Another v Telecom Namibia Ltd** 2004 (3) SA 615 (SCA); (2004) 25 ILJ 995 (SCA); [2004] 2 All SA 609 (SCA) para 19.

²³ *op cit*, fn17 *supra*.

²⁴ An attorney for the appellant (applicant in Court a quo).

witness who testifies orally, on oath or affirmation, regarding events within her knowledge. Thus, when Ms. Moduka deposed to the founding affidavit, she needed no authorisation from her client.

[12] As to the last issue, the appellant clearly indicated that she had given Ms. Moduka instructions to act on her behalf in all proceedings. Ms. Moduka stated that she was the attorney who had been instructed by the appellant to oppose the main application and had accordingly been involved in the matter from its inception. She went further in the replying affidavit, and said that her mandate had never been questioned by the first respondent and that her instructions came from 'a person who had been affected by the order that was granted and [she] was not acting on the frolic of [her] own . . .

[13] In any event, in terms of rule 52(2)(a)²⁵ of the Magistrates' Court Rules, an attorney does not need to allege that they are authorised to act for a party. A party wishing to challenge an attorney's authority to represent a party may do so in terms of the procedure outlined in that rule. The first respondent brought no such challenge. Accordingly, there was no reason for the regional court and the high court to find that Ms. Moduka lacked authority. For those reasons, the decision of the high court falls to be set aside...".

[94] In *casu*, Mr. Hertzberg stated in the founding affidavit he is the defendant's attorney of record, and stated further that the facts contained therein are true and correct and fall within his personal knowledge.

[95] In the replying affidavit, Mr. Hertzberg stated that apart from the self-evident prejudice; in considering and advising the defendant on pleading to the rule 18 non-compliant particulars of claim, he took instructions from defendant regarding same and the prejudice to it. He could depose to the founding affidavit and can still depose to further affidavits (to the extent necessary) for the defendant in support of the rule 30 application.

²⁵ Rule 52(2)(a) of the Magistrates' Court Rules provides: 'It shall not be necessary for any person to file a power of attorney to act, but the authority of any person acting for a party may be challenged on notice by the other party within 10 days of such party becoming aware that such person is so acting or with the leave of the court on good cause shown at any time before judgment.' This is equivalent to Rule 7(1) in the Uniform Rules of Court.

[96] For those reasons, the point in *limine* falls to be dismissed. This leads to the determination of the various grounds upon which the POC is challenged as an irregular step or proceeding in terms of rule 30.

Complaint A

Non-compliance with Rule 18(4) and (6)

Defendant submissions

[97] In the POC, the plaintiff pleads that the agreement relied upon was partly written and partly oral and was allegedly concluded during the period between November 2019 and approximately February 2020.

[98] It is contended that the precise date on which the agreement was concluded is not apparent *ex facie* the POC or from the written components of the agreement as annexed thereto. Furthermore, the POC lacks a clear and concise statement of the material facts upon which the plaintiff relies, as required by Rule 18(4). In particular, the plaintiff has failed to plead with sufficient particularity which terms of the agreement were agreed to orally, which were reduced to writing, the dates on which each component was agreed upon, and the sequence in which these components came together to form the alleged complete agreement.

[99] The uncertainty regarding the date of conclusion of the agreement is material.

[100] In the result, the defendant submitted that the POC fails to comply with rule 18(4), read with rule 18(6), and that the POC constitutes an irregular step.

Plaintiff's submissions

[101] The plaintiff's counsel submitted that in the POC, plaintiff pleads:

(a) the agreement concluded between the parties (duly represented) was partly oral and partly written, with the written portion being the documents annexed thereto.

(b) As to what the documents are, is a question of fact which can only be determined by the Court at the conclusion of the trial after it has heard all the evidence from both Jeffray and Marshall. For the moment, as stated above, the Court must accept the allegations made by the plaintiff as being true and correct in that:

(1) the particulars is the only pleading which contain allegations as to what the documents are; and (2) it is trite that applications in terms of rule 30 concern only irregularities of form and therefore cannot be relied on to address matters of substance.²⁶

(c) As to what the documents mean is a question of law which can only be determined by the Court.²⁷

(d) Mr. Hertzberg's allegation in the founding affidavit that "without more" the documents are not the written portion of the agreement is so vague that it is simply meaningless.

(e) In the POC plaintiff pleads that the agreement was concluded by the parties (represented by Jeffray and Marshall) between November 2019 and February 2020 in Hazyview, Mpumalanga. Its position on the matter could not be clearer and in making such allegations, it has complied with what is required in rule 18(6).

(f) For those reasons, the plaintiff submitted that Complaint A should be rejected.

[102] I am persuaded by submissions by plaintiff's counsel that there is no merit to complaint A and therefore this complaint falls to be dismissed.

Complaint B

Defendant's submissions

²⁶ Erasmus Superior Court Practice at 30-1 fn 2 and the authorities there cited.

²⁷ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para [18].

[103] It is submitted for the defendant that:

- (a) the damages claimed in the POC are not pleaded with sufficient particularity to enable the defendant to reasonably assess the quantum thereof, as required by Rule 18(10).
- (b) The plaintiff has adopted an approach of alleging globular amounts without furnishing the necessary details or breakdowns to allow the defendant to meaningfully evaluate the basis of the claims.
- (c) A bare allegation by a plaintiff regarding the quantum of damages does not amount to compliance with Rule 18(10), particularly in circumstances where the plaintiff does not allege that the figures are estimates and where, on the contrary, it appears that the damages were calculated to exact amounts.²⁸
- (d) It is therefore submitted that the plaintiff's approach falls short of the requirements of Rule 18(10).

Plaintiff's submissions

[104] Plaintiff inter alia submitted that:

- (a) The nature and extent of damages claimed by the plaintiff have been identified by it in detail in the POC.
- (b) That much is also obvious because without much trouble, in the founding affidavit, Mr. Hertzberg has been able to restate the nature, amount and particulars of the damages claimed by the plaintiff to the cent.

[105] I agree with the plaintiff's counsel that the defendant's ability to reasonably assess the "quantum" of the damages claimed is self-evident. In the circumstances, this complaint B is without merit and falls to be dismissed.

Complaint C

²⁸ *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen* 1992 (4) SA 466 (W) at 467D

Prejudice

Defendant's submissions

[106] It was submitted for the defendant that once it is established that the POC does not comply with Rule 18, prejudice is *prima facie* established.²⁹ In ***Sasol Industries Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen***³⁰ it was held that it is no answer for a plaintiff to say that the defendant has sufficient information to plead. If the defendant invokes Rule 30 because he was not given sufficient particularity the court should come to the defendant's assistance.³¹

[107] It was submitted that in *casu*, prejudice suffered by the defendant is self-evident, in that the way the POC is formulated renders it impossible for the defendant to ascertain the case it is required to meet.

[108] For those reasons, it is submitted that the plaintiff's non-compliance with Rule 18 undermines the very purpose of pleadings, namely, to define the issues between the parties and to the Court, and to enable the defendant to respond meaningfully and with clarity.

[109] In conclusion the defendant submitted that the POC fails to comply with the provisions of Rule 18 and stands to be set aside as an irregular step in terms of Rule 30, with costs. The plaintiff should be granted leave to amend its particulars of claim to remedy the defects.

Plaintiff's submissions

[110] The plaintiff has pleaded the facts which underlie its claim for breach of contract in the clearest of terms and in the manner required to sustain such a claim.

²⁹ *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a LH Marthinusen* 1992 (4) SA 466 (W) at 470H-I

³⁰ *Supra*.

³¹ At 471A.

It is also self-evident from a reading of Mr. Hertzberg's affidavit that the defendant can reasonably assess the quantum of the damages claim it faces.

[111] Lastly, with prejudice being something which the defendant has to prove, and which may be rebutted by the plaintiff (as is the case here), it is telling that in spite of Marshall having written the letter which he did to the plaintiff on 29 September 2022 regarding the solution he proposed "to get the greens to the standard we all intended", it is his attorney who complains to the Court that he does not know (or cannot understand) the case pleaded by the plaintiff, whereas the one who concluded the agreement and implemented it to earn the defendant more than R6 million has elected to remain on the sidelines and say nothing.

[112] Other than the obvious flaws in the rule 30 application detailed above, there is clearly no prejudice suffered by the defendant because of what the plaintiff has pleaded. This application is nothing but a transparent attempt by the defendant to avoid having to answer allegations about the damage which it caused to the plaintiff's golf course.

[113] For the reasons given above it is submitted that:

- (a) the plaintiff's amended particulars are not irregular in any of the respects alleged;
- (b) the defendant has failed to establish that it will suffer substantial prejudice or any prejudice if it is required to plead thereto;
- (c) the present application is nothing but an ill-conceived, unreasonable and vexatious attempt by the defendant to avoid or delay having to plead its side of the story;
- (d) the application should be dismissed; and
- (e) the plaintiff should not be left out of pocket given that it has had to incur unnecessary legal costs in considering both the defendant's rule 30 notice, as well as opposing this motion.

Conclusion

[114] Save for defendant's submissions apropos the point *in limine* raised by the plaintiff, and for the reasons stated above in this judgment, I find that the complaints advanced by the defendant in both the exception and the rule 30 application are baseless and there is no prejudice to speak of. The application is nothing but a stratagem to delay the date upon which the defendant will be obliged to file its plea.

[115] Accordingly, the application is an abuse of this Court's process which has resulted in the plaintiff incurring unnecessary and significant costs. A considerable time has been spent on this matter navigating voluminous set of papers which resulted in a waste of scarce and stretched judicial resources which could have been spent on matters which really deserve this Court's attention.

Costs

[116] As for the costs, the following principles bear mentioning. As stated by Harms DP (as he then was) in the matter of **Cadac (Pty) Ltd v Weber-Stephen Products Co.**³² inter alia held "Litigation is not a game".

[117] The purpose of a costs award is to indemnify the successful party for the expenses it has been unjustly compelled to incur in defending litigation³³, which is very much the case here.

[118] In the same vein, as Van Niekerk J pointed out in **Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd**³⁴, a party must pay such costs as have been unnecessarily incurred because of it taking wholly unnecessary steps.

[119] An attorney and client costs award is where the court wishes to strongly express its displeasure about the conduct of the losing party and, by making such an award, it ensures that the successful party is indemnified in respect of all the reasonable costs of the litigation.³⁵

³² Cadac (Pty) Ltd v Weber-Stephen Products Co. 2011 (3) SA 570 (SCA) para [10].

³³ Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 at 488.

³⁴ Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd 1996 (3) SA 692 (C) at 701C.

³⁵ Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A) at 22B-C.

Accordingly, I make the following order.

1. The plaintiff's point in *limine* is dismissed.
2. The exception is dismissed.
3. The rule 30 application is dismissed.
4. The defendant is directed to file its plea to the amended plaintiff's particulars of claim within 10 days of the granting of this order.
5. The defendant, shall pay plaintiff's costs (regarding both the exception and rule 30 application) except the costs relating to the point in *limine*, on the High Court Scale as between attorney and client scale, with such costs to include the costs of counsel as taxed on scale C.

NJOKWENI AJ
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv RJ Howie
Instructed by: David Shapiro & Associates

For the defendant: Adv JW Jonker
Instructed by: AD Mr. Hertzberg Attorneys