



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

Case No.: 12223/2024

In the matter between:

**BARLOWORLD MOTOR RETAIL SOUTH AFRICA
A DIVISION OF BARLOWORLD SOUTH AFRICA (PTY) LTD** Plaintiff

and

**BADGER HOLDINGS SOUTH AFRICA (PTY) LTD
(PREVIOUSLY KNOWN AS
AFRICAN INDEPENDENT BROKERS (PTY) LTD** First Defendant

DOTSURE LIMITED Second Defendant

JUDGMENT DELIVERED ELECTRONICALLY ON 25 JUNE 2025

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The plaintiff (“Barloworld”) has raised five exceptions against the special pleas and plea of the second defendant (“Dotsure”), on the grounds that they are vague and embarrassing and that they lack the averments necessary to sustain a cause of action.

[2] Barloworld had instituted action proceedings against the first defendant (“AIB”) and Dotsure, seeking contractual relief on the following three alternative bases:

- a. A written agreement concluded between Barloworld and Dotsure on 24 January 2011, which was subsequently ceded by Dotsure to AIB by means of a written cession agreement dated 4 April 2012;
- b. Alternatively, a tacit agreement concluded between Barloworld and AIB on 4 April 2012, effectively on the same terms as the written agreement;
- c. In the further alternative, the appointment of AIB by Dotsure as its agent to perform its obligations arising from the written agreement.

[3] Dotsure delivered six special pleas and a plea on the merits. Before turning to the five exceptions, it is well to set out the applicable legal principles.

B. APPLICABLE LAW

[4] In terms of Uniform Rule 18(4) “[e]very pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for its claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

[5] Uniform Rule 23(1) provides that an exception may be taken against a pleading on the grounds that it is vague and embarrassing or lacks averments which are necessary to sustain an action.

[6] 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.¹

[7] 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.

[8] Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars. If the alleged excipiability is merely arguable or can be cured by the furnishing of particulars then it is appropriate to dismiss the exception.

[9] An exception to a legally unsustainable cause of action is designed to dispose of the case in whole or in part by obtaining a decision on a point of law and thereby avoid the leading of unnecessary evidence at the trial.²

[10] An excipient must persuade the court that upon every interpretation of the pleading in question, together with any document upon which it is based, the pleading is excipiable.³ The particulars of claim or plea must be taken as a whole⁴ and read benevolently.⁵

[11] Our courts are generally loath to decide on exception questions concerning an interpretation of a contract⁶, or disputes concerning the terms of agreements which are disputed, ambiguous or uncertain.⁷

¹ *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ).

² *Marais v Steyn and Another* 1974 (3) SA 479 (T) at 486H-487G. *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F-I.

³ *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) para 6; *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817F; *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500D; *South African National Parks v Ras* 2002 (2) SA 537 (C) at 542B-E; *YB v SB and Others NNO* 2016 (1) SA 47 (WCC) para 12.

⁴ *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) at 149F.

⁵ *First National Bank of Southern Africa Ltd v Perry NO supra* at 972I; *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) at 149F

⁶ *Francis v Sharp and Others* 2004 (3) SA 230 (C) at 237F; *Picbel Groep Voorsorgfonds (in liquidation) v Somerville, and related matters* 2013 (5) SA 496 (SCA) at paras 26-27.

[12] An excipient alleging that a pleading is vague and embarrassing must make out a very clear, strong case before (s)he should be allowed to succeed,⁸ including serious prejudice⁹, which may include that the opposing party is unable to plead in response thereto.¹⁰

[13] In *Trope*¹¹ the following was stated:

“An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration. The first is whether the pleading lacks particularity to the extent that it is vague. The second is whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. As to whether there is prejudice, the ability of the excipient to produce an exception proof plea is not the only, or indeed the most important, test. If that were the only test the object of pleadings to enable parties to come to trial, prepare to meet other’s case and not be taken by surprise may well be defeated... .”¹²

[14] In *Jowell v Bramwell-Jones and Others* the court noted as follows:

“ . . . (T)he 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 actually explored by evidence. Provided the defendant is given a clear idea of the

⁷ *Sun Packaging (Pty) Ltd v Vreulink* [1996] ZASCA 73; 1996 (4) SA 176 (A) at 186J ; *Francis v Sharpe & Others* 2004 (3) SA 230 (C) at 237F.

⁸ *Francis v Sharp and Others* 2004 (3) SA 230 (C) at 237D-I; *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A-C.

⁹ *Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) para 54; *Francis v Sharp supra* at 240E.

¹⁰ *Lockhat and Others v Minister of the Interior* 1960 (3) SA 765 (D) at 777D-E.

¹¹ *Trope v South African Reserve Bank* 1992 (3) SA 208 (T).

¹² At 221A-E.

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

[15] The alleged vagueness must furthermore go to the “*root of the matter*” or “*the whole cause of action*”.¹³ It is not enough that a particular paragraph is purportedly unclear, or is capable of more than one meaning.

[16] Particulars of claim are “*embarrassing*” if it is impossible for the reader to determine what the actual meaning (if any) is conveyed by the pleading¹⁴ (i.e., if “*it cannot be gathered from it what ground is relied on*” by the pleader).¹⁵

C. THE EXCEPTIONS

[17] In the first ground of exception Barloworld states that the second special plea, headed “*Unlawful Contract is Unenforceable*”, is vague and embarrassing and that it is prejudiced in that it does not know what case it must present to meet the second special plea.

[18] The complaint is that, whereas paragraph 2.1 of the second special plea opens with: “*To the extent that Barloworld seeks to enforce a new or revived agreement with effect from 1 June 2021*”, paragraph 2.10 thereof starts with: “*Accordingly, if the Court finds that the agreement or its provisions remained valid and enforceable after termination on 31 May 2021, the agreement or the relevant provisions are unlawful, invalid and unenforceable*”. Barloworld states that the two statements are contradictory and it is not clear whether Dotsure is referring to a new or revived agreement with effect from 1 June 2021, or the original agreement which remained valid and enforceable after 31 May 2021. Barloworld states that it neither relies on the provisions of the agreement which Dotsure claims are unlawful; nor upon a new agreement which was revived with

¹³ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 899F; *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co. Ltd* 1944 AD 444 at 454.

¹⁴ See *Trope v South African Reserve Bank (TPD)* *supra* at 211E.

¹⁵ *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) para 12.

effect from 1 June 2021; nor does it contend that those provisions survived termination, save for those mentioned at paragraph 5.9.4 of the particulars of claim.

[19] As Dotsure correctly points out, if Barloworld relies on none of the versions that it says are contradictory, there can be no prejudice to it. If anything, it is an indication that the exception is academic.

[20] The issue, in my view turns on the basis upon which Barloworld's claim as a whole is based. From its particulars of claim, it is clear that Barloworld relies on at least a partially revived agreement. That is apparent from paragraph 21 of the particulars where Barloworld pleads that certain provisions of the agreement or tacit agreement survived termination. This is what is expressly reflected in both paragraphs 2.1 and 2.10 of the special plea, where they refer to a revived agreement, as well as provisions which allegedly remained valid and enforceable after termination. In other words, the wording of paragraphs 2.1 and 2.10 arises as an interpretation of the particulars, and accordingly, the alleged contradiction does not exist. If the interpretation is said to be incorrect or is contested, that is matter for argument in due course. If the interpretation is unclear, that is an issue which may be clarified by means of a request for further particulars.

[21] Dotsure points to yet another possible interpretation of the particulars of claim, namely that on the day of termination of the agreement, the parties reached a further agreement to the effect that certain terms would survive the cessation of the agreement or tacit agreement. This interpretation is based mainly on paragraph 12.2 of the particulars where the following is stated:

“The parties, represented as aforesaid, orally agreed that following the termination of the Agreement alternatively the Tacit Agreement, each parties (sic) obligations in terms of the Agreement alternatively the Tacit Agreement would cease, save for any obligations that the Agreement alternatively the Tacit Agreement contemplated would survive termination.”

[22] It is indeed possible to interpret paragraph 12.2 as providing for a new, oral agreement, as contended by Dotsure. Whilst Barloworld may not agree with either interpretation put forward by Dotsure, I also observe that the particulars do not themselves specify what the legal basis is for the claim that is said to exist beyond the termination of the agreement or tacit agreement. In either event, the issue resolves itself into one of interpreting the agreement relied upon by Barloworld, and whichever interpretation is correct is not for determination at this stage. As the case law indicates, it is not desirable to decide such an issue on exception.

[23] The parties' arguments also illustrate that the exception is a matter for argument. That this is so is illustrated by the opening words of both paragraphs 2.1 and 2.10 of the special pleas, where the following is stated: *"To the extent that [the plaintiff] seeks to..."*, and *"...if the Court finds that the agreement or its provisions remained valid..."* As Dotsure points out, it is open to Barloworld to request further particulars in order to obtain clarity or particularity as to the meaning of the alleged contradictory paragraphs. The exception is accordingly not upheld.

[24] Similar observations may be made in respect of the second ground of exception which relates to the same special plea. The exception takes issue with Dotsure's paragraph 2.6, which states as follows:

"Unless Barloworld was an insurer under the Insurance Act the joint venture pleaded in paragraphs 5.2 and 5.4 to 5.7 and the business arrangement pleaded in paragraph 5.9 of the particulars of claim would require Dotsure to conduct an insurance business on behalf of Barloworld and therefore unlawful in terms of section 5(4) of the Insurance Act."

[25] Similar to the first exception, Barloworld emphasises that the second special plea is premised either on a new or revived agreement with effect from 1 June 2021, or the original agreement which remained valid after 31 May 2021, and that it relies on

neither. Nor, according to Barloworld, does Dotsure plead that the paragraphs specified in the second special plea above survived termination of the agreement. As a result, it states that it cannot ascertain, and Dotsure does not plead, why the alleged unlawfulness of the clauses specified in the second special plea renders unlawful an agreement which does not incorporate those clauses. It states that the special plea is vague and embarrassing and it would be prejudiced in that it does not know what case it must present in order to meet it.

[26] It bears emphasising that Barloworld pleads at paragraph 21 of the particulars of claim that certain clauses survived termination of the agreement. One of those paragraphs is 5.9.4, which is included in Dotsure's special plea. At least insofar as that paragraph is concerned, the confusion complained about by Barloworld should not arise.

[27] Secondly, stripped to its core, the second ground of exception amounts to stating that the clauses referred to in Dotsure's special plea are irrelevant to Barloworld's case, and that Dotsure's reliance thereon is misconceived. That is a matter for argument, and possibly means the issues raised in the special plea are academic, in which event, there can be no prejudice visited upon Barloworld.

[28] Thirdly, at the heart of this exception there is once again an interpretative disagreement between the parties. Dotsure argues that the specific provisions that Barloworld states survived termination of the agreement or tacit agreement cannot exist independently of specifically, the provisions mentioned in its paragraph 2.6 (and its paragraph 2.8), hence its special plea. As already pointed out, it is not appropriate to decide uphold an exception based on interpretative contentions.

[29] Finally, to the extent that the exception is based on lack of clarity, an issue which is raised in the plaintiff's heads of argument, the remedy provided in terms of the uniform rules is to request further particulars. For all these reasons, the second exception is not upheld.

[30] The third ground of exception is also directed against the second special plea. As adverted above, Dotsure pleads that *“unless [Barloworld] was an insurer under the Insurance Act the joint venture arrangement required Dotsure to conduct an insurance business on behalf of Barloworld, and was unlawful”*. Barloworld complains that Dotsure does not plead that it (Barloworld) was not registered in terms of the Insurance Act or in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAISA), and as a result the special plea fails to disclose a defence.

[31] To this Dotsure retorts that it is Barloworld which failed to plead averments necessary for its continued or revived agreement to be valid, namely that it is registered in terms of those statutes. It states that it did not have to expressly plead or prove a negative, and that is implied in its special plea that Barloworld is not so licensed or registered.

[32] It is correct that Dotsure has not pleaded that Barloworld was not registered in terms of the Insurance Act or in terms of the FAISA. That is a conclusion that one has to infer from its special plea. The question is whether that renders the special plea excipiable. When applying a generous interpretation of the pleading and taking into account every interpretation thereof as counselled by the case law, it is implicit from the context and the text that the special plea pleads that Barloworld is not registered in terms of the statutes. There is no other meaning to be inferred from the special plea. I am also mindful that Dotsure has pleaded the legal averments necessary to sustain the special plea. It is the factual averment that is not expressly pleaded, and the averment lies within the peculiar knowledge of Barloworld. In that context, if the facts do not support the special plea, it is open to Barloworld to plead the correct facts in replication, and the special plea will have been without merit.

[33] The second part of the third ground of exception is that it is vague and embarrassing because Barloworld claims it is left to speculate why Dotsure contends that the payment of proceeds of insurance business or commission derived therefrom would be unlawful in terms of the two statutes. In my view, this is a legal issue to be

decided in due course, and, in effect Barloworld wants Dotsure to substantiate its legal argument. Here too, Barloworld can request further particulars if it so wishes.

[34] In the fourth ground of exception, Barloworld claims that Dotsure seeks to simultaneously vitiate and enforce the same agreement because, whilst pleading that the agreement relied upon by Barloworld was terminated, it also seeks a costs order on an attorney and client scale “*as provided in clause 23.7 of the agreement*”. Barloworld states that these are mutually destructive contentions which render the special plea vague and embarrassing, and it would be prejudiced in not knowing the basis upon which the attorney and client scale costs order is sought.

[35] As Dotsure correctly points out, an order of costs lies within the discretion of the Court, and although it seeks those costs, that may completely change, depending on the ultimate order of the Court. That applies regardless of Barloworld’s view of whether the costs order is warranted. It is unfathomable how this plea can possibly be ground for prejudice which prevents Barloworld from pleading. The pleaded costs do not require Barloworld to plead in a certain way, or to lead evidence unnecessarily. It is open to Barloworld to simply deny that the costs order is warranted, or to point out that it is not supported by Dotsure’s other averments.

[36] Furthermore, the complaint raised by Barloworld, that the punitive costs order sought is contradictory to the contention that the agreement was terminated, is a matter for argument. That argument includes a determination regarding which clauses of the agreement, if any, survived the termination of 31 May 2021. It does not amount to a ground for an exception based vague and embarrassing grounds, given that Dotsure has identified the clause upon which it relies for seeking the costs order, namely clause 23.7.

[37] The fifth ground of exception concerns paragraphs 9, 10, 11.1 and 11.2 of the plea on the merits. The complaint is that Dotsure, on the one hand, denies the cession and on the other, pleads as if there was a cession; and the denial of the agreement of

cession is contrary to the wording of that agreement. As a result, Barloworld pleads that the plea is vague and embarrassing because the allegations contradict the admitted wording, and it cannot ascertain the basis upon which Dotsure admits the agreement but denies it at the same time, and it would be prejudiced in that it does not know what case it is required to meet regarding the denial of the cession.

[38] In the plea Dotsure expressly states, at paragraphs 10.2 and 11.2, that it relies on clause 2.1 of the cession for its denial that all the rights and obligations were ceded to AIB. It explains that clause 2.1 is the key clause which encapsulates the content of the cession and assignment.

[39] Clause 2.1 of the cession agreement, headed “*Cession*”, provides as follows:

“Oakhurst [now Dotsure] hereby grants to AIB, with full power of substitution, the power and authority to set up and maintain such Call centre in its name or in AIB's own name and to service such clients insofar as their insurance requirements are concerned. For creating and maintain (sic) such Call centre AIB shall be entitled to earn such commission as is agreed between the parties in writing from time to time.”

[40] Barloworld does not agree with the interpretation of Dotsure that this clause embodies the full gamut of the cession, and prefers instead to rely on clauses 1.1 and 1.3, which provide as follows:

“1.1 Oakhurst and AIB have entered into an agreement in terms of which Oakhurst cedes its rights and obligations in respect of a Joint Venture Agreement entered into with [Barloworld] and [Oakhurst] to AIB in order to enable AIB to set up a Call Centre at its principal place of business.

...

1.3 Oakhurst further undertook to attend to the servicing of such Clients in so far as the sale, underwriting, administration, client care and claims aspect

relative to the aforesaid insurance products are concerned. Oakhurst hereby cedes, assigns and transfers to and in favour of AIB all of its rights, title and interests in the aforesaid.”

[41] The issue is self-evidently one relating to different contentions of the interpretation of the agreement, which is not appropriate for resolution at this stage. I have not found any contradiction presented by the plea in this regard, and have found no basis to conclude that it is vague and embarrassing.

[42] For all the above reasons, the exception is not upheld. There is furthermore no reasons why costs should not follow the result. I have noted that both sides that participated in these proceedings employed two counsel, although the plaintiff’s senior counsel did not appear at the hearing. I am accordingly of the view that costs of two counsel are warranted.

D. ORDER

[43] In the circumstances, the following order is made:

- (a) The plaintiff’s exception is dismissed with costs, including costs of two two counsel, taxed on Scale C.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

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