

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-065348

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
10 June 2025	
DATE	SIGNATURE

In the matter between:

EGOLI SPORTS (PTY) LTD

First Excipient

COLDSTREAM MANAGEMENT COMPANY (PTY) LTD

Second Excipient

KIMESH CHETTY

Third Excipient

and

GLOBAL SPORTS BETTING (PTY) LTD

Respondent

In re:

Case Number: 2024-065348

In the matter between:

GLOBAL SPORTS BETTING (PTY) LTD

Plaintiff

and

EGOLI SPORTS (PTY) LTD

First Defendant

COLDSTREAM MANAGEMENT COMPANY (PTY) LTD

Second Defendant

KIMESH CHETTY

Third Defendant

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date and time for hand-down is deemed to be 10h00 on 10 June 2025.*

Flynote: Civil Procedure — Pleadings — Exception — No cause of action disclosed — Contractual and delictual claims indistinctly pleaded — Lack of contractual nexus and legal duty — Exception upheld.

JUDGMENT

PG LOUW, AJ

Introduction

[1] The first to third defendants delivered an exception to the plaintiff's particulars of claim on the basis that it fails to disclose a cause of action.

Particulars of claim

[2] The plaintiff relies on a written service level agreement ("the service level agreement") concluded in October 2018 between the plaintiff and the first and second defendants, represented by the third defendant. In terms of the service level agreement, the first and second defendants undertook to provide management services to the plaintiff, namely facilitating the operation and management of bookmaker licences.

[3] The plaintiff pleads that the "defendants committed various unlawful alternatively negligent actions which caused substantial damages to the plaintiff." According to the plaintiff, "the defendants intentionally alternatively, unlawfully failed to make" certain payments to the South African Revenue Service, the City of Johannesburg and other third parties.

[4] The plaintiff further pleads that in "an attempt to hide the non-payment of the above amounts, the defendant devised a fraudulent scheme in which it would account for these payments to the plaintiff, by utilizing fraudulent invoices and or fraudulent proof of payments." The plaintiff refers to "the defendant" (singular) and "the defendants" (plural) throughout the particulars of claim without specifying which of the defendants is actually referred to.

[5] The plaintiff further pleads that the third defendant, while employed by the first and second defendants, perpetrated acts of theft.

[6] According to the plaintiff, it suffered damages in the amount of R10 689 904.45 as the result of the "above contractual and fiduciary malpractice."

[7] The plaintiff further pleads that during or about February 2024, the plaintiff concluded an oral agreement with the first and second defendants, represented by the third defendant ("the oral agreement"), in terms of which the first and second defendants undertook to sell various licences to the plaintiff *in lieu* of payment of the alleged damages.

[8] The plaintiff pleads that, in terms of the oral agreement, the defendants (without specifying which of them) accepted liability for the damages incurred by the plaintiff. However, despite the oral agreement, during March and/or April 2024 the defendants "approached the Gauteng Gambling Board and started the regularity process of advertising and transferring the above licences to unknown Third Parties". The particulars of claim concludes as follows:

"38. As a result, the 1st and 2nd defendants are continuing to cause the plaintiff damages.

39. The plaintiff has ascertained that the 1st and 2nd defendants have no tangible assets to attach in order to settle the damages caused by the malfeasance of the defendants.

40. As a result, the plaintiff specially pleads that the licences are the only assets owned by the 1st and 2nd defendants which are capable of settling, in part, the damages suffered by the plaintiff."

[9] The plaintiff claims judgment against the first, second and third defendants, jointly and severally, the one paying the other to absolved for:

- (a) Specific performance in terms of the oral agreement;
- (b) Alternatively, payment of the amount of R10 689 904.45;
- (c) Interest at the prescribed rate;
- (d) Costs on the scale as between attorney and client; and
- (e) Further and/or alternative relief.

Exception

[10] The defendants rely on four grounds of exception.

[11] The upshot of the first ground of exception is that, in relying on contractual "malpractice", there is no contractual nexus, in terms of the service level agreement, between the plaintiff and the second and/or third defendant.

[12] The second ground of exception is that, insofar as the plaintiff's pleaded "fiduciary malpractice" and related unlawful actions are construed as a delictual claim, no legal duty is alleged to have been owed by any of the defendants to the plaintiff, and thus no conduct is rendered unlawful.

[13] The third ground of exception also pertains to a possible delictual claim. The defendants contend that the conduct relied upon by the plaintiff does not constitute omissions in respect of which Aquilian liability lies.

[14] The fourth ground of exception is that, insofar as the *facta probanda* (of the defendants' conduct) relate to the failure to pay amounts owing by the plaintiff to third parties, such failure cannot constitute actionable damages in law. In their heads of argument, the defendants explain that a failure to pay third parties has no effect on the plaintiff's patrimony; if the funds were not withdrawn from the plaintiff's account to discharge the debt, there is no change in patrimony.

General principles applicable to exceptions

[15] An exception should be dealt with sensibly and not in an over-technical manner.¹ As such, the court looks benevolently instead of over-critically at a pleading.²

[16] In order to succeed with an exception on the basis that no cause of action is disclosed, a defendant must persuade the court that, upon every interpretation which the particulars of claim and the document on which it is based can reasonably bear, no cause of action is disclosed; failing which the exception ought not to be upheld.³ It is "only if the court can conclude that it is impossible to recognise the claim, irrespective of the facts as they might emerge at the trial, that the exception can and should be upheld".⁴

[17] The main purpose of an exception on the basis that no cause of action is disclosed in the particulars of claim is to avoid leading unnecessary evidence at trial.⁵ Exceptions provide a useful mechanism "to weed out cases without legal merit".⁶

Evaluation of the exception

[18] As I understand the particulars of claim, the plaintiff's first cause of action is based on the service level agreement, and the second cause of action on the oral agreement. Both agreements were concluded between the plaintiff and the first and second defendants. The third defendant is not a party to either agreement relied upon by the plaintiff.

[19] The plaintiff seeks relief against the third defendant on the basis that he, as one of the "defendants", breached the service level agreement and acted unlawfully in

¹ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* ("Telematrix") [2005] ZASCA 73; 2006 (1) SA 461 (SCA) at para 3.

² *Merb (Pty) Ltd and Others v Matthews and Others* [2021] ZAGPJHC 693 at para 9; *First National Bank of Southern Africa Ltd v Perry NO and Others* ("Perry") [2001] ZASCA 37; 2001 (3) SA 960 (SCA) at 972I.

³ *Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E-F; *Perry* n 2 above at para 6. See also *Van Loggerenberg* at D1 Rule 23-25.

⁴ *Tembani and Others v President of the Republic of South Africa and Another* [2022] ZASCA 70; 2023 (1) SA 432 (SCA) at para 16; *Shopfitters Studio (Pty) Ltd v Dynamic Design Upholstery (Pty) Ltd* [2022] ZAGPPHC 926 at para 10.

⁵ *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553H.

⁶ See *Telematrix* above n 1 at para 3. See also *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (2) BCLR 127 (CC) at para 10.

certain respects. However, the third defendant was not a party to the service level agreement and therefore owed no obligations thereunder.

[20] Insofar as the cause of action based on the oral agreement is concerned, the plaintiff pleads that the “[d]efendants admitted civil liability for the damages incurred by the Plaintiff”. However, the third defendant was not a party to the oral agreement. The plaintiff further pleads that it is the first and second defendants who are continuing to cause the plaintiff damages. Nothing is alleged in this regard against the third defendant.

[21] In the circumstances, the first ground of exception should be upheld, at least to the extent that no cause of action is made out against the third defendant. For the reasons already stated, I am of the view that no cause of action is disclosed in respect of the third defendant.

[22] During argument, counsel for the defendants correctly conceded that the particulars of claim need to be amended to include the third defendant as a party to the service level agreement and the oral agreement, respectively.

[23] The second and third grounds of appeal proceed on the premise that the plaintiff’s claim sounds in delict. The defendants are correct that no legal duty is alleged to have rested upon any of the defendants *vis-à-vis* the plaintiff that would render their conduct unlawful. The plaintiff does not allege a breach of a statutory duty or a common-law right.

[24] In my view, if the plaintiff’s claim is delictual in nature — more specifically, one under the *Lex Aquilia* — it must be pleaded that the defendants owed a legal duty of care to the plaintiff, or that the facts exist from which such a duty can be inferred, and that the defendants breached that duty.⁷ The plaintiff has failed to do so.

[25] In the circumstances the second and third grounds of exception should also succeed.

⁷ *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 378C-H.

[26] The fourth ground of exception is directed at the defendants' alleged failure to make certain payments to third parties on behalf of the plaintiff. It is not clear from the particulars of claim on what basis such failure resulted in the damages allegedly suffered by the plaintiff. I agree with the defendants that this failure, on its own, has no effect on the plaintiff's patrimony. No basis for the alleged damages is pleaded. In the circumstances, the fourth ground of exception should also succeed.

[27] In the event that the exception is upheld, the defendants seek an order that the action be dismissed *ipso facto* if the plaintiff fails to amend the particulars of claim within 20 days of the date of the order. I am not inclined to grant such an order. Should the plaintiff fail to amend the particulars of claim, the defendants have recourse to the machinery provided for in the Uniform Rules of Court.

Costs

[28] Insofar as the issue of costs is concerned, there is no reason why costs should not follow the result in the exception.

[29] The defendants insist on costs on scale C, while the plaintiff contends that costs should be awarded on scale B.

[30] Although the issues for determination in the exception are not complex, the quantum involved in the matter is substantial. There is no reason why the defendants should be out of pocket. In my view, the appropriate scale of costs is scale C.

Order

[31] In the premises the following order is granted:

1. The defendants' exception dated 7 August 2024 is upheld, with costs on scale C.
2. The plaintiff is afforded an opportunity to amend its particulars of claim within 20 days from date of this order.



PG LOUW
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	11 March 2025
Date of judgment:	10 June 2025

Appearances

Counsel for plaintiff:

Adv J C Carstens

Instructed by:

Shaban Clark Coetzee Attorneys

Counsel for defendants:

Adv H P van Nieuwenhuizen

Instructed by:

M Soni Inc.