

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 20928/22

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE **12/08/2025**

SIGNATURE **N V KHUMALO J**

In the matter between:

SAYELO (PTY) LTD

PLAINTIFF/RESPONDENT

and

THE GEMINI TRUST

EXCIPIENTS/
1ST DEFENDANT

CHRIS CHRISTODOULOU NO

2ND DEFENDANT

THORA CHRISTODOULOU NO

3RD DEFENDANT

NICKY TOMMEI NO

4TH DEFENDANT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 12 August 2025

JUDGMENT

Khumalo N V J

Introduction

[1] In this Application the 1st Defendant, that is Gemini Trust and its Trustees, the 2nd to the 4th Defendants except to the particulars of claim in an action instituted against them by the Plaintiff, Sayelo (Pty) Ltd on the ground that the particulars fail to disclose a cause of action.

Legal framework

[2] Prior to delving into the gist of the contention, it is imperative to mention the ground rules in relation to an exception that a pleading does not disclose a cause of action. It is a well-established approach that such an exception imply that the court is to look at the pleading excepted as it stands,¹ take as true the allegations pleaded by the Plaintiff to assess whether they disclose a cause of action.²

[3] It therefore is the condition that in order to succeed, the excipient has to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence is disclosed, failing this, the exception is not to be upheld.³

[4] In so far as there can be an onus on either party on a pure question of law, it rests upon the excipient who alleges that a summons discloses no cause of action or that a plea discloses no defence; to convince the court that the pleading is excipiable on every interpretation that can reasonably be attached to it; the pleading must be looked at as a whole.⁴

¹ *Salzman v Holmes* 1914 AD 152 at 156; *Minister of Safety and Security v Hamilton* 2001 (3) SA 50;

² *Oceana Consolidated Co Ltd v The Government* 1907 TS 786 at 788; *Stols v Garlick & Bousfield Incorporated* 2012 (4) SA 415 (KZP) at 421H; *Drummond Cable Concepts and Advance Net Pty Ltd* 2020 (1) SA 546 GJ at paragraph [7] *Naidoo v Dube Tradeport Corp* 2022 (3) SA 390 (SCA) at paragraph [18]

³ *Theunissen v Transvaalse Lewendehawe Koop Bpk* 1988 (2) SA 493 (A) at 500E to 500F

⁴ *Pretorius v Transport Pension Fund* 2019 (2) SA 37 CC at 44F-G, *Nel & Others NNO v McArthur* 2003 (4) SA 142 (T) at 149 F

[5] An excipient should then make out a very clear strong case before he should be allowed to succeed, save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties,

[6] Accordingly an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial. If it does not have that effect, the exception should not be entertained.⁵ The object of an exception is therefore not only to dispose of the case or a portion thereof in an expeditious manner, but also to protect a party against an embarrassment which is so serious as to merit the costs even of an exception.⁶

[7] The Plaintiff, Sayelo (Pty) Ltd, leases premises owned by Gemini Trust, the 1st Defendant situated at Shop 1[...] B[...] V[...] Shopping Centre, The Reeds (“the shop”), in terms of a 5 year lease agreement the Plaintiff concluded with the latter’s trustees, the 2nd to the 4th Defendants on 27 Jun 2019. The lease commenced on 1 July 2019. The Plaintiff conducts a laundry business from the shop and is claiming from the Defendants an amount of R500 000.00 for damages/loss it allegedly suffered, as a result of a fire that broke out at the premises.

[8] In its particulars the Plaintiff pleaded the conclusion of the lease agreement and that “the terms thereof are incorporated as if specifically pleaded”. Further that,

[8.1] On or about 9 July 2020 a fire broke out at the shopping centre which spread and caused damage to the Plaintiff’s shop,

Breach

[8.2] For the period between July 2020 and December 2021, the Plaintiff was not able to use the shop for the purpose it was leased for and did not

⁵ Erasmus Superior Court Practice-D296-297

⁶ *Ghallagher Group Limited v IO Tech Manufacturing Pty Ltd* 2014 (2) SA 157 (GNP) at 161C-D; *Pretorius supra* at 44F-G; *Brocsand Pty Ltd Tip Trans Resources* 2021 (5) SA 457 SCA at para 14

have a beneficial occupation thereof, alternatively could not make use of the entirety of the shop and did not have complete beneficial occupation thereof.

[8.3] **Due to the breach by the Defendants**, the Plaintiff suffered damages as set out below:

Negligence

[8.3.1] The Defendant were negligent in one or more of the following ways:

[8.3.1] The Defendants owed a duty of care towards the Plaintiff in that it was obliged to protect the shop against the fire damage and or to prevent fire damage to the shop.

[8.3.2] The Defendant failed to contain the fire at the shopping centre and failed to prevent the fire from spreading to the shop.

[8.3.3] The Defendant did not have the necessary protection in place or take the necessary precaution to contain the fire or to prevent the fire from spreading to the shop.

[8.3.4] The Defendants owed a duty of care towards the Plaintiff to not cause construction workers to interfere with the business of the Plaintiff, obstruct the entrance to the Plaintiff's shop, cause a nuisance or a disturbance to the shopping centre and or the Plaintiff's shop and or to the Plaintiff's clients or potential clients.

[8.3.5] The Defendants owed a duty of care towards the Plaintiff to keep the shopping centre and the Plaintiff's shop clean during the period of repair and construction as mentioned.

[8.3.6] and to do all things necessary in order for the Plaintiff to occupy and be able to utilise the shop for the purpose the Plaintiff leases it.

[8.4] The Plaintiff failed to do the above.

[8.5] Due to the aforesaid negligence and or breach of the Defendants, the Plaintiff suffered damages as described below, as a result of the fact that the Plaintiff was unable to do business at the shop, alternatively to do business as it previously did.

[9] The Plaintiff then claims damages for goods destroyed in the fire, the loss of income and future loss in the amount of R200 000.00.

[10] The Plaintiff's claim is therefore based on the breach of duty of care, that is Defendants' failure to furnish it with or not being able to have a beneficial occupation of the leased premises due to Defendants' negligence or breach of duty of care, they owed to the Plaintiff to prevent or stop the fire from destroying the shop, to not cause disturbance and obstruction in the running of its business operations as a result of which it suffered damages.

Exception

[11] The Defendants excepts to the particulars of claim on the following grounds:

[11.1] The plaintiff's claim purports to be a delictual claim based on allegations that it suffered damages due to the negligence or breach of a duty of care owed to it by the Defendant.

[11.2] The Plaintiff pleads the alleged duty of care in its particulars of claim:

[11.3] The facts averred to be in support of Plaintiff's allegations that the Defendants owed it a duty of care, do not give rise to such a duty of care in light of the contractual relationship between the Plaintiff and the Defendants as pleaded in the particulars of claim;

[11.4] In particular, the contractual relationship excluded any of the alleged duties sought to be imposed on the Defendants in delict,

[11.4.1] The autonomy (self-rule) of the parties to the lease agreement precludes imposition of duties in delict that may be different and have different consequences.

[11.4.2.] In addition, any liability on the part of the Defendants for any fire damages, delict and or any alleged damage or loss occasioned by the construction to the leased premises were expressly excluded in the agreement,

[11.4.3] The Respondents accordingly argue that the Plaintiff cannot sustain a claim in delict and has no concurrent action in contract. In the premises they fail to disclose a cause of action.

[11.5] As a result prays for the exception to be upheld and the Plaintiff to be granted leave to amend its particulars of claim, failing which they pray to be entitled to apply for the dismissal of the action.

Re: The exception that “ The facts averred to be in support of Plaintiff’s allegations that the Defendants owed it a duty of care, do not give rise to such a duty of care in the light of the contractual relationship between the Plaintiff and the Defendants as pleaded in the particulars of claim;

[12] It is trite that the Plaintiff is only required to plead sufficient facts to make the cause of action intelligible and lucid.⁷ A Plaintiff who fails to state his cause of action with sufficient clarity is held to do so at his own risk.⁸

[13] The exception deals with the sustainability of the Plaintiff’s delictual claim on negligence that is reliant on the facts pleaded on the duty of care the Defendants are

⁷ *Koth Property Consultants CC v Lepelle Nkumpi Local Municipality Ltd* 2006 (2) SA 25 (T) para 18

⁸ *Du Preeze vs Boetsap Stores (Pty) Ltd* p187 (1978) 4 All SA 184 NC

alleged to owe to the Plaintiff, in the face of their existent contractual relationship, given the autonomy of the contract and its legally enforceable rights and obligations arising.

[14] In principle, a legally binding promise, like a commercial document executed by the parties with a clear intention that it should have a commercial operation would not lightly be held to be ineffective. A similar approach would be adopted to oral commercial agreements. This was elucidated in *D.E and Another v C.E and Others*⁹ further stating that ... “A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not likely be held unenforceable because the parties have not expressed themselves as clearly as they might have done.”¹⁰

[15] In *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others CCT 109/19*¹¹ the court emphasized the principle of *pacta sunt servanda* in stating the following:

“Moreover, contractual relations are the bedrock of economic activity, and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.”

[16] The Plaintiff is bound by the terms of the written lease agreement it concluded with the Defendants and it is not open to it to rely on facts that are contrary to the

⁹ (3991/19) [2019] ZAWCHC 142; [2020] 1 All SA 123 (WCC)

¹⁰ In this regard see also see Murray and Roberts Construction Ltd v Finat Properties (Pty) Ltd **1991 (1) SA 508** (A) ...at 514B-F

¹¹ [2020] ZACC 13 at paragraph 84

terms thereof unless a challenge to the validity and or enforceability of the agreement on public policy is simultaneously noted.¹²

[17] The Plaintiff's claim as pleaded is in delict (based either on negligence or breach of a duty of care) and therefore unsustainable given the autonomy of the lease agreement, its binding terms, the specific exclusion of the facts relied upon from which the liability on the duty of care is alleged to arise, which exonerates the Defendants from any such liability.¹³

[18] The terms of the lease agreement are pleaded by the Plaintiff to be incorporated as if specifically pleaded. Clauses 11.3 and 11.4 of the agreement read:

"11.3 The lessee shall at its own expense insure and be responsible for the stock, fixtures and fitting contained within the leased premises, against theft, destruction by fire or any damage should a conflagration take place in the leased premises, the lessee shall within a reasonable time restore the leased premises and recommence trading.

11.4 Should a theft, fire or any damage take place only in the leased premises, the lessor shall in no way be liable for any damage or loss sustained by the lessee in consequence thereof no shall the lessee be entitled to any remission rent whatsoever."

[19] The clauses are inflexible. They cancel away the option of a doctrine of duty of care arising as the Defendants are explicitly exonerated from any liability, specifically in relation to a loss or damages suffered by the Plaintiff resultant from inter alia, a fire. The particulars as far as such allegations on the delict are concerned, fail to sustain a cause of action. The duty of care cannot trump the binding effect of the terms of the contract unless they are contrary to public policy or invalid.

¹² *Sasfin (Pty) Ltd v Beukes* [1989 \(1\) SA 1](#) (A); *de Beer v Keyser and Others* [2002 \(1\) SA 827](#) (SCA) para 22

¹³ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 89 per Cameron JA

[20] Furthermore, courts are cautioned in line with the Constitutional value of dignity, equality and freedom to approach their task of striking down contracts or declining to enforce them with perceptive restraint, recognising contractual autonomy to be part of freedom, shorn of its obscene excesses, to inform also the constitutional value of dignity.¹⁴

[21] In *Devland Cash and Carry (Pty) Ltd v GS4-Cash Solutions SA (Pty) Ltd*¹⁵ the court as per Moorcroft AJ grappled with the question whether delictual liability arises in respect of services that were performed pursuant to a contract between the parties, as pleaded in the Respondent/Plaintiff's Particulars of Claim. Even though he had found that: "*A loss causally connected to a contract but not arising from the performance of the contract but rather from additional or complementary duties may give rise to a claim for delictual damages, subject to qualifications.*" He continued to find in that matter that 'the delictual claim pursued by Devland arose pursuant to and during the performance of G4S's contractual obligations.

[22] The facts in summary were that Devland had in terms of a cash management and security services contract it had with G4S that includes collection, storage and delivery of money in accordance with G4S's operating methods, made two collections of cash from Devland's premises on 9 September 2019. One before noon and the second in the afternoon. Later that afternoon G4S's armed vehicle was robbed of both collections during a cash-in-transit. Devland instituted a claim against G4S for the lost amount of the first collection. No claim was made (in contract or in delict) in respect of the loss of the second collection. Devland alleged that G4S's failure to timeously deliver the first collection before it was robbed was wrongful or negligent, and in breach of a duty of care, which therefore rendered G4S liable to Devland in delict for the loss of the money in accordance with the *actio lex Aquilia*. Moorcroft J found that Devland's loss occurred in the performance of the contract and that G4S cannot be held liable in delict in respect of the services that were performed pursuant to the contract between the parties, as pleaded. If G4S were under a contractual obligation to first deposit cash before going for another collection

¹⁴ Ibid par 94. or 7

¹⁵ *Devland Cash and Carry (Pty) Ltd v G4S Cash Solutions SA (Pty) Ltd* (2020/16910) [2023] ZAGPJHC 754 (3 July 2023)

and they had failed to do so, then Devland's potential claim would have been that of contractual damages.

[23] In *casu*, the specific facts that the Plaintiff is reliant upon, alleged to give rise to a duty of care are excluded by the contract. There is a contractual remedy, with the loss arising directly out of the circumstances that are covered in terms of the contract, the Defendants cannot be held liable in delict.¹⁶ It is further unclear if on negligence the Plaintiff is basing it on the fact that the losses therefore did or did not occur in the performance of the contract but were causally related.

[24] However, a delictual remedy cannot be made available merely because the contracting parties could have provided for a contractual remedy but failed to do so, or the parties excluded the contractual remedy in the contract that govern the relationship between the parties.¹⁷ The time to negotiate adequate contractual remedies is, after all, when the contract is being negotiated.

[25] There is also a constitutional consideration that is also mooted on *pacta sunt servanda* that, in our new constitutional era, it is not the only, nor the most important principle informing the judicial control of contracts, but also the requirements of public policy which are informed by a wide range of constitutional values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances.¹⁸ In that case, there would be no basis for privileging *pacta sunt servanda* over other constitutional rights and values. In *Barkhuizen Supra* the SCA put it thus:

“[I]ntruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires

¹⁶ *G4S Cash Solutions SA (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and another* [2022] ZAGPJHC 7

¹⁷ *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 18. Brand JA said: “The point underlying the decision in *Lillicrap* was that the existence of a contractual relationship enables the parties to regulate their relationship themselves, including provisions as to their respective remedies.

¹⁸ In *Barkhuizen* SCA above n 173 at para 13,

them to impose their individual conceptions of fairness and justice on parties' individual arrangements.”

[26] According to *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020) certainty in contractual relations was said to foster a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*.

[27] On the other hand the terms in the lease agreement the Plaintiff relies upon and the breach thereof are however not pleaded. Instead, there is an attempt at pleading a breach of the lease agreement although not intelligible. It stated that resultant from the fire, the Plaintiff was not able to use the shop for the purpose it was leased for and did not have a beneficial occupation thereof, alternatively could not make use of the entirety of the shop and did not have complete beneficial occupation thereof. No reference is however made to the relevant clauses in the agreement where such a breach is referred to.

Re: The exception that the Plaintiff in its particulars, cannot sustain a claim in delict and has no concurrent action in contract.

[28] Duties that complement or are not repugnant to contractual obligations may give rise to concurrent contractual and delictual claims. In *Trio Engineered Products Inc v Pilot Crushtec International (Pty) Ltd*¹⁹ Unterhalter J in dismissing an exception to the second counterclaim and the alternative second counterclaim in that matter opined that “*the law occupies a middle ground between the two extremes of recognising a delictual duty that co-exists with every contractual duty, and the equally unpalatable approach of refusing to recognise a duty in delict whenever a contractual duty is found to exist.*” [framed in the alternative. He further stated that:

¹⁹ [2019 \(3\) SA 580](#) (GJ). PARA 27

“[29] The position in our law may, I think, be summarised as follows:

- (a) A breach of contract is not, without more, a delict.*
- (b) Where parties have chosen to regulate their relationship under a contract, the contractual rights and obligations undertaken will not ordinarily permit of the recognition of a delictual duty at variance with the contract.*
- (c) Parties to a contract may have additional or complementary duties that arise independently in delict.²⁰ (my emphasis)*

[29] It is therefore trite that a plaintiff is entitled to rely on mutually contradictory averments in his particulars of claim, provided that it is clear from the manner of pleading them, that he is only relying on the one, in the event that the other is not sustainable.²¹ Although the claims may be concurrent their pleading must be mutually exclusive, that is in the alternative. In the Plaintiff's particulars of claim there is no alternative contractual claim expressly pleaded and now with a claim in delict contractually excluded, the Plaintiff's particulars are excipiable for failure to sustain a cause of action. The Defendants correctly argued that although the Plaintiff has pleaded the conclusion of a written lease agreement, its cause of action is however premised only on what appears to be a claim in delict and nothing significant contractually.

[30] It is apparent that the Plaintiff' has not pleaded a contractual claim as an alternative to the negligence and or breach of duty of care. The gist is therefore that there is no concurrent contractual claim pleaded with clarity and or in the alternative in the Plaintiff's particulars of claim. Since the autonomy of the lease agreement precludes imposition of duties in delict that may be different and have different consequences; absent the delictual claim the Plaintiff has no cause to meet. Any liability on the part of the Defendants for any alleged damage or loss occasioned by the fire or construction to the leased premises were expressly excluded in the agreement,

²⁰ At PARA 29

²¹ *Feldman NO v EMI Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA) at para 11

[31] The Defendants had referred to Plaintiff's pleading of various instances under "Negligence" where it claims the Defendants were negligent and argued that negligence does not arise in a contractual claim which instead is concerned with whether there has been a breach of the contractual rights and obligations of the contracting parties that may give rise to a claim based on the contract. Further that delictual claims, on the other hand, arise from wrongful acts that cause harm, and they are governed by the law of delict, not by the specific terms of a contract.

[32] In principle, contractual and delictual remedies are said not to be mutually exclusive. Moorcroft AJ in *Devland*²² elucidates that the two can concur, however the autonomy of contractual damages and remedies need to be respected, because the parties' voluntary rights and obligations according to the contract need to be respected – before those imposed by law. He accordingly maintains that the concurrence of the two does not mean that a delictual remedy must immediately and automatically be made available merely because contracting parties failed to provide contractual remedy when they could have done so.

[33] In *Trio*, Unterhalter J further opined as follows.²³

"I recognise that the duties that are said to arise from the business relationship do not, on the pleaded case, arise independently of the agreement (since the agreement is pleaded to be foundational to the relationship). Nevertheless, where the business relationship is built upon an agreement but extends beyond the agreement and is complementary to it, I see no reason why a cause of action in delict cannot be pursued in the alternative as a claim that subsists concurrently with the claim based on a breach of contract."

[34] The Plaintiff amongst pleading negligence, also pleads various duties of care allegedly owed by the Defendants to the Plaintiff and nothing in the alternative. The

²² Supra at para 17

²³at para 40

Plaintiff's particulars of claim indeed lack a lucid cause of action that would not cause an embarrassment to the Defendants in pleading thereto, and therefore excipiable.

[35] Under the circumstances the following order is made:

1. The exception is upheld;
2. The Plaintiff is granted leave to amend its particulars of claim, within 15 (Fifteen) days from date of the order;
3. On Plaintiff's failure to amend its particulars as per paragraph 2 hereof, the Defendants are granted leave to approach this court to apply for the dismissal of the action and
4. Plaintiff to pay the Defendants costs.

N V Khumalo
Judge of the High Court
Gauteng Division, Pretoria

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