



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

Reportable

CASE No: 25781/2024

In the matter between:

AIRPORTS COMPANY SOUTH AFRICA LIMITED

Plaintiff

and

**ABERCROMBIE'S COFFEE SHOPS CC
t/a OCEAN BASKET (REGISTRATION No: 2000/001346/23)**

First defendant

ALEXANDER ABERCROMBIE

Second defendant

JENNIFER ABERCROMBIE

Third defendant

KEITH ABERCROMBIE

Fourth defendant

Heard: 6 November 2025

Judgment: 10 November 2025

Summary: Exception on basis that no cause of action disclosed.

ORDER

1. The second to fourth defendants' exception to the plaintiff's particulars of claim is dismissed.
2. The second to fourth defendants are to pay the plaintiff's costs of the exception jointly and severally, with scale A applying.

JUDGMENT

Handed down by email to the parties on 10 November 2025

Judgment handed down electronically by circulation to the parties' legal representatives on email and released to SAFLII

KANTOR, AJ:

1. Legal practitioners are not infrequently faced with the topical conundrum of whether to argue an interpretation of a contract without the court having had the benefit of evidence in a trial (or motion proceedings). This arises in the main in exceptions, objections to amendments and summary judgment (even though evidence in affidavit form would be in amendment and summary judgment applications). If proceeded with in one of those scenarios, a Judge is then faced with resolving the issue of whether the interpretation can be decided without the matter going to trial.
2. The present matter is such a case.
3. An exception was taken to the Particulars of Claim on the basis that they do not disclose a cause of action, the core aspect of the exception being the interpretation of a suretyship.

4. The plaintiff issued summons against:
 - 4.1 The first defendant on the basis of a written lease agreement concluded between them on 18 August 2009, subsequently amended by written addenda (**"the Written Lease"**).
 - 4.2 The second to fourth defendants (**"the Sureties"**) on the basis of a suretyship executed in August 2009 (**"the Suretyship"**) which is attached to the Written Lease.
5. Three written addenda to the Written Lease were concluded, the cumulative effect of which was the extension of the Written Lease to 30 September 2017 (the Third Addendum was the final extension pleaded of the Written Lease).
6. There were no further written extensions of the period of the Written Lease pleaded.
7. An extension of the Written Lease would have to be in writing and signed by or on behalf of the parties, as required by the standard non-variation clause contained in clause 22.9 thereof (this would presumably explain (at least in part) the conclusion of the addenda which did extend the Written Lease). Clause 22.9 reads as follows:

"No contract varying, adding to, deleting from or cancelling this Agreement, and no waiver of any right under this Agreement, shall be effective unless reduced to writing and signed by or on behalf of the Parties."
8. Similarly, clause 6 of the third addendum provides:

"Save for the aforesaid amendments the original agreement remains of full force and effect and shall not be varied unless such variation is reduced to writing and signed by the parties or their duly authorised agents."

9. The Written Lease therefore terminated by effluxion of time at the end of 30 September 2017.
10. In respect of the period from 1 October 2017, the plaintiff pleaded a further tacit lease ("**the Tacit Lease**") as follows:

"On or about 01 October 2017 the parties entered into a tacit and/or implied lease agreement, wherein the Plaintiff would lease the premises [to] First Defendant on the same terms as Annexure "A" above."
11. The Annexure "A" referred to is the Written Lease.
12. Accordingly, the plaintiff's pleaded case is that a tacit or implied lease was entered into between it and the first defendant on 1 October 2017 which was to govern the period going forward.
13. The Sureties have excepted to the Particulars of Claim on the grounds that they do not disclose a cause of action against them.
14. There are two main issues in this exception:
 - 14.1 Whether the Written Lease was (purported to be) extended, which includes whether the Written Lease could in law be extended without complying with clause 22.9 thereof and clause 6 of the third addendum, quoted above.
 - 14.2 The ambit of the liability undertaken by the Sureties in the Suretyship, which is largely a question of interpretation.
15. Mr MacKenzie, who appeared for the Sureties, conceded (after a *spatium deliberandi*), in my view correctly, that the Sureties had to be successful on both of the above aspects for the exception to be upheld.

16. In regard to questions of interpretation and exceptions:

16.1 In Picbel Groep Voorsorgfonds v Somerville; Sable Industries Pension Fund v Nash and Others 2013 (5) SA 496 (SCA) it was held at paragraph 26 as follows (in a minority judgment; the majority did not take issue with this paragraph):

“In *Lewis v Oeanate (Pty) Ltd & another* [1992 (4) SA 811 (A) at 817F-G] Nicholas AJA stated that an excipient bears the burden of persuading the court that ‘upon every interpretation which the particulars of claim’ and any agreement on which they rely ‘can reasonably bear, no cause of action is disclosed’.”

16.2 In Francis v Sharp and Others 2004 (3) SA 230 (C) at 237G it was held as follows:

“Secondly, the Courts are reluctant to decide upon exception questions concerning the interpretation of a contract (*Sun Packaging (Pty) Ltd v Vreulink* [1996] ZASCA 73; 1996 (4) SA 176 (A) at 186J). In this regard, it must be borne in mind that an excipient has the duty to persuade the Court that upon every interpretation which the Particulars of Claim can reasonably bear, no cause of action is disclosed (*Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500D; *Lewis v Oenanate (Pty) Ltd and Another* [1992] ZASCA 174; 1992 (4) SA 811 (A) at 817F).”

16.3 In Sun Packaging (Pty) Ltd v Vreulink 1996 (4) SA 176 (SCA) at 186J it was held as follows in regard to deciding whether an amendment should be refused on the basis of it resulting in excipiability:

“As a rule, courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where its meaning is uncertain (*Dettmann v Goldfain and Another* 1975 (3) SA 385 (A) at 400 A). In casu, the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous (*Standard Building Society v Cartoulis* 1939 AD 510 at 516). Contracts are not rendered uncertain because parties disagree as to their meaning (*Williston on Contracts*, 3rd ed, vol 4, para 601 (supplement)) ... For the reasons given, I do not find the meaning of clause 3 doubtful. Properly interpreted, it has only one meaning. It affords the appellant the right to terminate. This is what Mitchell AJ found. His

conclusion that the amendment should be refused was therefore the correct one.”

16.4 It was also held in Sun Packaging at 184CD as follows:

“It would seem that the evidence of ... background facts, is part of the context and as such is always admissible. It has been described as encompassing the ‘genesis of the transaction’ or its ‘factual matrix’. Its aim is to put the Court ‘in the armchair of the author(s)’ of the document ... Evidence of surrounding circumstances, on the other hand, is only justified in cases of uncertainty or ambiguity. At least this is the conventional thinking. But the possibility of adopting a more liberal approach has recently been raised by this Court ...”

16.5 The distinction between background and surrounding circumstances identified in Sun Packaging no longer exists: KPMG v Securefin Ltd 2009 (4) SA 399 (SCA) at 409J-410A.

16.6 All relevant contextual circumstances are admissible in all cases of interpretation, not only cases of ambiguity: Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph 18, University of Johannesburg v Auckland Park Theological Seminary 2021 (6) SA 1 (CC) at paragraphs 65-69, 81 and 87-92 and Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd 2022 (1) SA 100 (SCA) at paragraph 25 which reads:

“Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings’ consent was indeed required. The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni*

emphasised, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself'."

- 16.7 Subsequent to Endumeni, albeit without referring to it, the Supreme Court of Appeal held as follows in Picbel at paragraph 27 (in a minority judgment; the majority did not take issue with this paragraph):

"What these authorities mean in this case is that if the relevant clauses of the settlement agreement (for it is its terms that make or break the funds' cause of action for purposes of the exceptions) can reasonably bear any meaning that supports a cause of action in terms of s 2(12) of the ADA, the exceptions must fail – and the appeal must succeed. If, on the other hand, the relevant clauses of the settlement agreement can only reasonably bear the meaning attributed to them by the respondents, and they are incapable of sustaining a cause of action based on s 2(12) of the ADA, the exceptions must be upheld – and the appeal must fail."

- 16.8 In Tsaperas v Boland Bank 1996 (1) SA 719 (A) at 724C it was held that:

"... a deed of suretyship must be interpreted restrictively and in favour of the surety. It does not mean that the agreement must not be interpreted sensibly."

17. One must remain mindful of the fact that Sun Packaging was decided before the Endumeni era (although it was prescient in this regard: see at 184D, quoted above), which is reflected in its distinction between background and surrounding circumstances with the latter only being admissible in the case of ambiguity. Sun Packaging was, however, applied in Picbel after Endumeni was decided and reported (albeit without reference to Endumeni).
18. On my understanding of the authorities I think that the following can be distilled:
- 18.1 Courts are reluctant to decide on exception questions of interpretation of a document (which would include a contract of lease), but it is not prohibited and is permissible in certain situations. The ambit for this has, however, probably diminished in the context of Endumeni.

- 18.2 Difficulty in interpreting a document does not necessarily mean that it is ambiguous.
- 18.3 Contracts are not rendered uncertain because parties disagree as to their meaning.
- 18.4 If the meaning of a clause of a contract is doubtful, it ought not to be decided on exception.
- 18.5 To uphold an exception, a pleading must be excipiable on every interpretation that can reasonably be attached to it and the document(s) on which it is based.
- 18.6 The distinction between background and surrounding circumstances no longer exists and those circumstances are admissible in all cases of interpretation.
- 18.7 However, that is not a license for a free-for-all and the evidential exercise must remain disciplined by the principle that '[t]he inevitable point of departure is the language of the provision itself' (*Capitec*) and that while "evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible'" (*KPMG* at paragraph 39). In *KPMG* the Supreme Court of Appeal lamented the disregard of this discipline in trials, in respect of both lay and expert witnesses (at paragraphs 38 to 40).
- 18.8 A suretyship is interpreted restrictively and in favour of the surety. That, however, is not to say that the document must not be interpreted on the normal principles of proper interpretation. It is to say that, in cases of the normal interpretation process (which always involves the consideration

of context) resulting in doubt or ambiguity, the restrictive interpretation will prevail.

The argument that the Written Lease was extended

19. In argument, the plaintiff contended that the Written Lease had been extended. In my view, this accords with neither the facts, the terms of the Written Lease and the law:

19.1 An extension of the Written Lease would amount to a variation of its terms, which is required by clause 22.9 thereof to be in writing and signed by or on behalf of the parties. That is not pleaded.

19.2 On what is pleaded by the plaintiff (see paragraphs 6 to 12 above), the Tacit Lease is a separate and different agreement to the Written Lease. The fact that it is on the same terms as the Written Lease makes no difference to this. Put another way, the operation of the Written Lease ended on 30 September 2017 and was succeeded by the operation of the new Tacit Lease from 1 October 2017.

19.3 This accords with the legal position. As held in Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC and Others 2002 (1) SA 822 (SCA) at paragraph 4:

“After the termination of the initial agreement and prior to this letter the parties (in the light of the facts recited) conducted themselves in a manner that gave rise to the inescapable inference that both desired the revival of their former contractual relationship on the same terms as existed before. Taken together, those facts establish a tacit relocation of a franchise agreement (comparable to a tacit relocation of a lease) between the appellant and Sirad (*Shell South Africa (Pty) Ltd v Bezuidenhout and Others 1978 (3) SA 981 (N) 984B-E*). A tacit relocation of an agreement is a

new agreement and not a continuation of the old agreement (*Fiat S A v Kolbe Motors* 1975 (2) SA 129 (O) 139D-E; *Shell* 985B-C). The fact that the appellant had forgotten that the agreement had lapsed is beside the point because in determining whether a tacit contract was concluded a court has regard to the external manifestations and not the subjective workings of minds (*Fiat S A* 138H -139D).” [underlining added]

20. Mr Mnyandu, who appeared for the plaintiff, argued that the plaintiff could prove a waiver of the right to rely on the non-variation clause 22.9 and thereby establish an oral (or tacit) extension of the Written Lease. That, however, is not pleaded, and is therefore irrelevant to the merits of the exception. Mr MacKenzie, who appeared for the Sureties, pointed out in addition that clause 22.9 of the Tacit Lease (quoted above and incorporated from the Written Lease) excluded waiver of any right under the agreement.
21. The plaintiff claims “R4 491 896.24 ... *in respect of rental and other charges*” and “R118 892.75 ... *in respect of the cost of restoring the premises to the condition and order prior to the lease agreement.*”
22. The plaintiff pleaded that it “... *terminated the lease agreement by termination notice dated 12 April 2024.*” The ‘lease agreement’ as defined in the Particulars of Claim is the Written Lease and therefore this termination is a reference thereto. That reference is incorrect because, as explained above, in terms of the Particulars of Claim, the Written Lease had terminated by effluxion of time almost 7 years previously on 30 September 2017, whereafter the Tacit Lease was in place. Therefore, it could have only been the Tacit Lease which the plaintiff could have terminated in April 2024.

23. Similarly, the obligation to restore the premises on termination of the Tacit Lease is in terms of the Tacit Lease, not the Written Lease, the terms of which were simply pleaded to be incorporated in the Tacit Lease, and which had come to an end many years before. The rental and other charges for the almost seven-year period from 1 October 2017 to the date of termination in April 2024 could only have been in terms of the Tacit Lease. While, as mentioned, an excipient has the duty to show that *"the pleading is excipiable on every interpretation that can reasonably be attached to it"* (FNB v Perry 2001 (3) SA 960 (SCA) at 965CD), in my view it could not be reasonably interpreted that the claim is in respect of the period prior to 1 October 2017.
24. In my view, therefore, the Particulars of Claim cannot disclose a cause of action based on the Written Lease having been extended. Its pleaded case is, in my view correctly, the Tacit Lease,

The ambit of the Suretyship

25. With the Written Lease out of the picture, the question then becomes whether the Suretyship implicates the Tacit Lease.
26. This is where the legal question of interpretation of a contract on exception, considered above, looms large.
27. The Suretyship is attached to the Written Lease as an addendum. Its first term records that it is a suretyship for all obligations of the first defendant to the plaintiff *"in terms of the lease agreement to which this suretyship is attached"* –

in other words, the Written Lease (which is defined as '*the lease agreement*' in the Suretyship). As mentioned, that lease terminated on 30 September 2017.

28. The above wording is plain, crisp and unmistakable as to the ambit of liability of the Suretyship being restricted to the Written Lease. Were that to be it insofar as the relevant wording of the Suretyship is concerned, the exception would have succeeded.
29. That wording may, however, be seen to begin to lose some of its plain, crisp and unmistakable lustre in the company of clause 2 which provides as follows:

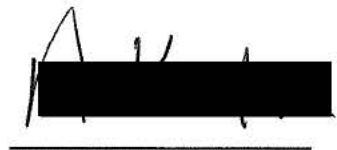
“Without derogating from the generality of any of the provisions of this deed of suretyship or the ambit of the obligations embraced, our liability shall cover all claims for compensation or damages which the Lessor may at any time have arising out of the enforcement, breach or cancellation of the lease agreement, including cancellation pursuant to the provisional or final liquidation or judicial management of the Lessee.”
30. I say this because clause 2 may appear to have a tension within its construct: On the one hand, it specifies 'the lease agreement' (ie the Written Lease), appearing to reinforce the limited ambit of liability recorded upfront in the Suretyship. On the other hand, however, it expressly provides that this is "*Without derogating from the generality of any of the provisions of this deed of suretyship or the ambit of the obligations embraced ...*", the words *generality*, *any provisions* and *ambit of obligations* suggesting that there may be something else in the document in this regard.
31. One must then consider whether any other provisions of the Suretyship might impact the ambit of liability covered by it. Why I think this may appear to create a tension is because clause 4 provides that the Suretyship:

“... shall remain in force as a continuing security for any indebtedness of the Lessee to the Lessor notwithstanding any immediate settlement of amounts owing by the Lessee, the termination of the lease agreement and notwithstanding our death or disability.”

32. Mr MacKenzie contended that the proper interpretation of this clause, in the context of the Suretyship, its plain, crisp and unmistakable (my choice of words) first term referred to above and the Written Lease, is that it preserved the liability of the Sureties for obligations arising from the Written Lease, notwithstanding the termination thereof.
33. Mr Mnyandu argued that the wording in clause 4 of the Suretyship covered any indebtedness of the first defendant to the plaintiff. Mr Mackenzie submitted that this is an extremely wide ambit of liability, for example in delict, enrichment or under an altogether different contract.
34. In my view, there is considerable force in Mr Mackenzie's argument which may well be difficult to combat at trial for various reasons, for example:
 - 34.1 The overall ambit of liability expressly recorded up-front in the Suretyship, which is for it to be in respect of obligations in terms of the Written Lease (which expired on 30 September 2017), is plain, crisp and unmistakable in its terms.
 - 34.2 Clause 4 provides for the continuing nature of the Suretyship. For example, it survives termination, ie notwithstanding that the Written Lease may terminate, amounts due in terms thereof are still covered by the Suretyship.
 - 34.3 A suretyship is construed restrictively and in favour of the surety.
35. However, pregnant in that forceful argument is the following:

- 35.1 The Suretyship must be interpreted in context.
- 35.2 If that exercise results in the wider interpretation contended for by the plaintiff, then that is the interpretation. Tsaperas is an example (albeit a much more obvious one than the instant matter): there the court declined to accept the restrictive interpretation contended for by the surety.
36. Had “any indebtedness of the Lessee to the Lessor” in clause 4 been followed by “in terms of the lease agreement” (the Written Lease is defined as such in the Suretyship) I think that there would have been no issue and the exception would have been upheld. But those limiting words (or others) do not appear and the “any indebtedness” remains unqualified, at least in express terms. That “any indebtedness” could potentially mean any indebtedness in terms of the Written Lease or any indebtedness generally. The effect of clauses 2 and 4 is, in my view, to create the possible tension as articulated above.
37. In the context of an exception, a court is reluctant to interpret a contract. Were it not for the possible tension I have perceived from clauses 2 and 4, I would have had no such reluctance in this matter. With such possible tension, it is my view that this is not properly to be decided on exception. While my inclination on what is before the Court in the exception is that the Sureties’ case may well be difficult to combat at trial, evidence is known to upset such inclinations, and I tend to the view that the interpretation exercise in this matter ought to take place in the context of a trial with the relevant evidence (mindful of the constraints mentioned in KPMG), and not in the sterile zone of an exception.
38. In the premise, it is my view that the exception ought not to be upheld.

39. A final point: Mr Mnyandu argued that the common exclusions of the defences of *non numeratae pecuniae* (funds not received), *non causa debiti* (no cause for the debt), *errori calculi* (error in calculation) and *beneficia excussionis et divisionis* (the benefits of excussion of the debtor and division of the debt between sureties) in clause 4 means that the Sureties had by agreement abandoned the right to make use of the exception procedure in Court. That argument has no merit – those defences have nothing to do with whether a court procedure can be used – and need not be considered further.
40. Neither counsel submitted that costs should not follow the result. As to scale, they both requested scale C. My perception is that this has become a fairly common and predictable request. Scale C is reserved for unusually complex, important or valuable matters. This exception is not such a matter (see the observations in Mashavha v Enaex Africa (Pty) Ltd 2025 (1) SA 466 (GJ), mainly at paragraphs 16 to 21). Scale A shall apply.
41. In the premise, it is ordered as follows:
1. The second to fourth defendants' exception to the plaintiff's particulars of claim is dismissed.
 2. The second to fourth defendants are to pay the plaintiff's costs of the exception jointly and severally, with scale A applying.



A Kantor

Acting Judge of the High Court

Appearances for the Plaintiff:

Counsel: K Mnyandu

Attorneys: Diale Mogashoa Attorneys (T Jantjies)

Appearances for the Second to Fourth Defendants:

Counsel: P Mackenzie

Attorneys: Bernadt Vukic Potash & Getz (G Ford and K Farmer)