THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: Yes

CASE NO: A2024-102280
SCA CASE NO: 656/2024
GJ CASE NO: 51959/2021

Date: 14 November 2025 [redacted]

In the matter between:

BETAPOINT MANAGEMENT CONSULTANTS (PTY) LTD	Appellant/Plaintiff
and	
KPMG SERVICES (PTY) LTD	Respondent/Defendant

JUDGMENT

DU PLESSIS J (with whom Dlamini J and Mfenyana J agree)

Introduction

[1] This is an appeal, with leave from the Supreme Court of Appeal to the Full Court of the Gauteng Division, Johannesburg. It concerns an exception upheld by the High Court[1] against the appellant's particulars of claim, on the basis that the contractual terms pleaded amount to an unenforceable agreement to agree.

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[1] *KPMG Services SA Limited v Betapoint Management Consultant (Pty) Ltd* [2024] ZAGPJHC 57.

[2] Betapoint Management Consultants (Pty) Ltd (“Betapoint”) and KPMG Services (Pty) Ltd (“KPMG”) are parties to a written Job Arrangement Letter (“JAL”) governing KPMG’s Real Estate Optimisation Project. Betapoint was to review KPMG's leases and recommend interventions to reduce associated costs. The JAL included a fee structure based on the value of cost savings achieved through these interventions (the "Transaction Stream").

[3] Betapoint alleges that it performed in accordance with the JAL, achieving significant cost savings (pleaded at nearly R1 billion), and that it is entitled to variable fees under the formula in clause 7 of the JAL.

[4] KPMG excepted to Betapoint's particulars of claim, raising objections to both the main claim, based on the express terms of the JAL, and to two alternative claims, one relying on implied or tacit terms and another seeking the development of the common law.

[5] Only the exception to the main claim was upheld, on the ground that the JAL contains an unenforceable agreement to agree; the exceptions to the alternatives were dismissed. Accordingly, the sole issue before this court is whether the particulars of claim for the main claim disclose a cause of action.

[6] Although the court a quo upheld the exception for vagueness and embarrassment, all parties agree that the issue is whether a cause of action is disclosed. The appeal, therefore, concerns the resulting order, not the court a quo's reasoning, and focuses on whether the order considers if the particulars of claim disclose a cause of action.

The JAL: Terms and structure

[7] The main dispute turns on clause 7 of the JAL, but other parts of the agreement provide context. The covering letter to the JAL sets out the project's objectives and scope, records that Betapoint completed "Phase Zero" free of charge, and indicates

that all subsequent phases would incur fees in accordance with the stipulated formulas.

[8] Clause 6 of the JAL outlines the baseline assumptions for Betapoint’s provision of services, including conditions such as KPMG's cooperation and the timely supply of information. If these assumptions are not fulfilled, clause 6 obliges the parties to negotiate in good faith to revise work plans, schedules, and fees.

[9] Clause 7 is the core of the dispute and the centre of KPMG’s exception. Clause 7, titled “Duration, Fees and Expenses,” states that KPMG “agrees to pay Betapoint the fees and expenses referred to in this letter in accordance with its terms”. It then provides an operational formula for a variable fee calculation that links the payment to the value of the cost savings KPMG will realise from implementing the deliverable. One such example is that Betapoint will be paid 10% of the total transaction value in the event of a successful sub-let transaction by KPMG. A crucial invoicing provision in this clause states:

> “<u>The determination of the value of the cost savings or transaction value, for the purposes of determining the fee owing to Betapoint, will be agreed upon by the Parties prior to the presentation of a valid invoice.</u> Should the parties fail to agree on a value within 7 days, the dispute resolution process outlined in Section 10 of our Terms of Business will be applied”.

[10] The dispute between the parties concerns whether this clause creates an enforceable obligation to pay determinable fees or, by requiring agreement on cost savings or transaction value before invoicing, defers a material term to the future, rendering it unenforceable (an “agreement to agree”).

[11] Clause 8 of the JAL allows either party to terminate the agreement and provides that in such an event, KPMG must pay Betapoint the fees and expenses incurred up to the date of termination, as fees and expenses shall be due and payable immediately.

[12] The Terms of Business attached to the JAL include additional provisions. Section 10 outlines the procedure for resolving disputes between the parties: they must first try to settle disputes internally through management escalation and, if that fails, utilise a mutually acceptable alternative dispute resolution process before resorting to litigation.

[13] These terms must thus be construed in line with the accepted contractual interpretation methods.

Legal principles applicable

[14] The principles governing exceptions are well established. First, pleaded facts must be taken as true.[2] Second, the excipient must show that on every reasonable interpretation of the pleadings, no cause of action is disclosed.[3] Third, exceptions should not resolve questions of vagueness or enforceability where evidence may be necessary.[4] Linked to that, the object of an exception is to avoid the leading of unnecessary evidence where a claim is untenable in law;[5] it is not a device to exploit minor technical deficiencies.

[15] When considering those principles, it is also important to consider the interpretation principles applicable to contract law. In contract cases, courts should seek to uphold bargains, not destroy them.[6] A court must adopt a businesslike interpretation that does not stultify the broader operation of the agreement.[7] Contracts must be interpreted in light of the contract as a whole.[8] In case of ambiguity, a contract must be construed to avoid an inequitable result and on the basis that the parties negotiated in good faith.[9] Courts should adopt a holistic approach that considers text, context and purpose.[10] Importantly, evidence of context and purpose is admissible

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[2] *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 10; *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 (1) SA 624 (W) at 632-634.
[3] *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 (1) SA 624 (W) at 632-634).
[4] *Picbel Group Ltd v Somerville* 2013 (5) SA 496 (SCA) para 26; *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* 2020 (2) SA 419 (SCA) paras 16–18.
[5] *Dharumpal Transport (Pty) Ltd v* Dharumpal 1956 (1) SA 700 (A) at 706.
[6] *Namibian Minerals Corporation Ltd v Benguela Concessions* Ltd 1997 (2) SA 548 (A) at 561G.
[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 para 26.
[8] *Centriq Insurance Co Ltd v Oosthuizen* 2019 (3) SA 387 (SCA) para 17.
[9] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 32.
[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 paras 18, 26; .

even when the contract is unambiguous.[11] If the terms are ambiguous or require factual context for proper interpretation, the matter is not suitable for determination on exception.[12]

[16] As to the contract itself, it is accepted in law that agreements to agree are unenforceable unless they are subject to a deadlock-breaking mechanism.[13] Without such a mechanism (or a readily ascertainable external standard by which the court can fill the gaps), agreements to negotiate or agree on essential contractual terms in the future cannot be enforced for lack of certainty.

[17] Whether an agreement is an agreement to agree will depend on its construction. The question is thus how to interpret the provisions of the JAL.

The parties' submissions on the interpretation of the JAL

[18] Betapoint states that clause 7 does not amount to an agreement to agree. Instead, clause 7 prescribes a fixed, objective formula for determining fees based on the percentage of cost savings or transaction value achieved. The requirement to agree is administrative, not an invitation to renegotiate the fee each time an invoice is issued. The agreement on value is not a condition for Betapoint's entitlement to payment. If the parties cannot agree, one party (e.g., Betapoint) may still seek to recover its fees calculated under the JAL formula and, if there is disagreement, enforce them through court proceedings, where KPMG may then challenge the calculation by showing how Betapoint misapplied the contractual terms. This interpretation, Betapoint submits, is supported by the clear language in clause 7, which refers to specific fee amounts and percentages, and would not render Betapoint's entitlement illusory or wholly dependent on KPMG's goodwill. The contract should not be construed to allow KPMG to avoid payment for substantial services rendered and benefits received.[14] Furthermore, since an agreement to agree will have the effect of destroying the parties' bargain, the court's approach to interpreting such agreements

[11] *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) at paras 66-68
[12] *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 898I–899D.
[13] *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* [2019] ZASCA 178 paras 10 – 18.
[14] See analogous situations in *Chamotte Holdings (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A) at 649D–G; *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (A) at 574.

must be benevolent and, where possible, seek to adopt an interpretation that avoids destroying the bargain.[15]

[19] While Betapoint submitted that, on the face of it, clause 7 does not constitute an agreement to agree, other clauses in the contract support this interpretation. Clause 6 of the contract addresses the assumptions underpinning Betapoint's service delivery. It outlines the baseline conditions under which Betapoint can apply its fee table, implying that if these assumptions are met, the fees payable are those stipulated in the agreement. It also details what would happen if KPMG failed to take certain steps, and it requires the parties to negotiate in good faith to adjust schedules and renegotiate applicable fees and timetables. Betapoint's submission is that this structure presupposes the existence of enforceable, determinable fees. The risk and liability regime, as well as adjustment mechanisms, only make sense if the fees are not left undefined or left to future agreement, but can be ascertained by reference to the contractually prescribed formula. To interpret the contract otherwise would render these provisions meaningless.

[20] Betapoint contends that clause 8 further strengthens its case. The clause provides that, upon termination, KPMG must pay Betapoint all fees and expenses incurred up to the date of termination. This presupposes that fees are calculable in accordance with the contract's objective mechanisms, even if the contract ends before full project completion. If, as KPMG contends, fees only vest upon agreement under clause 7, then upon termination before such agreement, Betapoint would have no entitlement. This result, Betapoint says, is commercially illogical and inconsistent with the plain language of the termination clause.

[21] Betapoint also refers to section 9 of the Terms of Business, which similarly indicates that Betapoint would earn a determinable fee for its work. They thus have a vested right to a determinable fee once Betapoint has delivered, and, as a result, clause 7 cannot reasonably be interpreted as an agreement to agree.

[15] They rely on *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A) at 649 and *Genac Properties JHB (Pty) Ltd v NBC Administrators CC (Previously NBC Administrators (Pty) Ltd)* 1992 (1) SA 566 (A) at 574.

[22] Finally, Betapoint submits that if one rejects that the words are unambiguous or that the ambiguity can be resolved by referring to the rest of the contractual terms, then there is a severance clause in the Business Terms (section 11(f)) which states that if any provision in the agreement is illegal or unenforceable, that term or provision shall be deemed not to form part of the agreement, while the remaining terms will remain in full force and effect. Therefore, if the court ultimately finds that the invoicing provision is void for vagueness, the appropriate order is to dismiss the exception and permit KPMG to plead that the invoicing provision is void for vagueness and cannot be severed from the JAL. Whether the invoicing provision is severable is a matter that may properly be determined at trial.

[23] KPMG, on the other hand, advances a textual interpretation of the underlined words.[16] They submit that the wording is clear: no valid invoice can be presented unless the parties have agreed to the values that inform the amount to be invoiced. It simply means that the parties must determine the values of the transactions and savings, which, in turn, will determine the fees that Betapoint can invoice KPMG for. If there is no such agreement, Betapoint may not raise an invoice, as the underlying values and savings that will impact the invoice fee have not been agreed upon. This must be agreed upon "prior to the presentation of a valid invoice". The reason for this is that the values are not objectively determinable. And absent a clear and determinable deadlock-breaking mechanism,[17] clause 7 is an unenforceable agreement to agree.[18] This might seem unbusinesslike, but it is not for the court to fix a bargain badly made, they submit. The court below agreed with this interpretation and upheld the exception on this basis.[19]

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[16] Relying on *Capitec Bank v Coral Lagoon* (1) SA 100 (SCA) para 26.

[17] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) para 97; *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* (1318/2018) [2019] ZASCA 178 paras 10–18.

[18] *Van Zyl v Government of RSA* 2008 (3) SA 294 (SCA) para 75, where the court said "[a] promise to contract is not a contract".

[19] *KPMG Services SA Limited v Betapoint Management Consultant (Pty) Ltd* [2024] ZAGPJHC 57 para 39:"I now consider whether the first ground of exception is bad in law or vague and embarrassing to KPMG. I was referred to clause 7 the JAL which spells out the mechanism on cost savings and transactions value determination by Betapoint and the process to be embarked upon for invoicing purposes. I have checked the particulars of claim in relation to what has been pleaded in so far as this aspect is concerned, I find nowhere in the pleading is reference made about such processes having been followed. In the result, I am in agreement with KPMG on this point. It should be remembered that contracts are concluded freely by the parties concerned and unless they are fundamentally *contra bonos mores*, they should be enforced. In the instant case, there is no suggestion that clause 7 does not find application, but simply, as submitted on behalf of Betapoint, that although it has not been pleaded, it should be accepted that the negotiations prior to invoicing failed to yield positive results. I disagree with this submission, and consequently am of the view that unless the pleading is amended to deal with the necessary averment, KPMG will be embarrassed."

[24] As to the other clauses in the contract, KPMG submits that clause 6 (the good faith negotiation clause) means there is no binding entitlement to any changed assumptions, as the obligation to pay arises only after agreement and a proper invoice are reached under clause 7. Similarly, KPMG maintains that the effect of clause 8 (payment on termination) is limited by clause 7: unless the parties first agree on values, no fee is “incurred,” and nothing is due, even upon termination.

Analysis

[25] Accepting, for purposes of the exception, that the facts pleaded are true, clause 7 of the JAL, read in the context of the agreement, cannot be said unequivocally to amount to an unenforceable agreement to agree. The parties themselves present directly opposing yet plausible interpretations. KPMG maintains that clause 7 requires a further agreement on cost savings or transaction value as a precondition for any fee entitlement, whereas Betapoint contends that the fee formula and dispute-resolution process together provide an objectively ascertainable standard of calculating fees, along with a deadlock mechanism in case of disagreement. The existence of such competing interpretations is itself evidence of ambiguity. Whether the interpretation advanced by either party ultimately prevails, and whether the clause is enforceable considering the parties’ conduct and the surrounding circumstances, are matters that cannot be resolved on exception and are best determined at trial. It is not for this court to close that door.

[26] Applying a contextual and businesslike reading of the contract, including clauses 6 and 8, further demonstrates why it is inappropriate to determine the proper understanding of clause 7 in exception hearings. Betapoint’s interpretation of clause 6, that it presupposes determinable, objectively calculable fees for work performed under defined assumptions and provides only for renegotiation if the underlying assumptions are not met, is plausible. Similarly, clause 8 confirms that, upon termination, KPMG must pay Betapoint's fees and expenses incurred up to that date, which possibly presupposes that the fees are objectively calculable, even if the contract ends before full completion. The same applies to the other provisions. In short: the structure and operation of these provisions, assuming the pleaded facts are true, revolve around the idea that fees are objectively determinable. Especially when

considering that, in line with case law,[20] a sensible, commercial interpretation seeks to uphold the bargain and prevent one party from unilaterally frustrating contractual entitlements by withholding agreement; overall, the contract does not appear to be an unequivocal and unenforceable agreement to agree.

[27] A further critical consideration is that the exception to the main claim does not serve the object of the exception procedure, which is to avoid unnecessary evidence.[21] Betapoint has pleaded two alternative claims, one based on implied or tacit terms of the JAL, and another based on the development of the common law. Both alternative claims rest on the same factual foundation as the main claim. Accordingly, upholding the exception to the main claim would not dispose of the litigation or eliminate the need for trial evidence on the core facts, Betapoint's performance, the cost savings achieved, and the parties' understanding of the fee structure. At trial, evidence regarding context, commercial practice, post-contractual conduct, and the parties' understanding and intention will be admissible and may well clarify and resolve any ambiguity in clause 7. Resolving the matter on exception, where such evidence might change the interpretive outcome, would be premature and inconsistent with the purposes of an exception procedure.

[28] Additionally, section 11(f) of the Business Terms provides a severance clause: if any provision is determined to be illegal or unenforceable, that term shall be severed and deemed not to form part of the agreement, while all other terms and provisions remain in full force and effect. This clause indicates the parties' intention to preserve the remainder of the contract even if a particular provision fails. Should the invoicing provision in clause 7 ultimately be found void for vagueness, severance would operate to sever that provision while preserving the fee formula and the rest of the JAL. Whether severance applies, and its effect on the substance of the bargain, is best determined at trial in the light of full evidence regarding the parties' substantial intention.

[20] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 para 26.
[21] *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706.

Conclusion

[29] For all these reasons, the exception must fail. The particulars of claim disclose a cause of action, at a minimum, on one reasonable interpretation of the JAL. The interpretation of clause 7, read contextually within the agreement as a whole, cannot be resolved on exception. Dismissing the exception does not obviate the need for evidence; it merely allows the parties to proceed and have the matter properly ventilated before the trial court. On the facts pleaded and principles expounded, the claim discloses a cause of action, and the exception ought to have been dismissed.

[30] The order of the High Court upholding the exception and striking out the particulars of claim should be set aside. Costs are to follow the result.

[31] The parties asked for costs for two counsel, on scale C. Given the scale of the matter, the value of the relief sought, and the complexity of the contractual interpretation submissions advanced, such a scale is justified, and an order for costs of two counsel is appropriate.

Order

[32] The following order is made:

1. The appeal is upheld.
2. The court a quo’s order is substituted with the following order:
    a. The exception on the first ground is dismissed.
    b. The defendant is to pay the costs of the exception, including the costs of two counsel.
    c. The respondent is to pay the costs of the appeal, including the costs of two counsel on scale C.

[redacted]

WJ du Plessis
Judge of the High Court
Gauteng Division,
Johannesburg

Date of hearing:	15 October 2025
Date of judgment:	14 November 2025
For the appellant:	G Marcus SC and D Watson instructed by Harris Nupen Molebatsi Attorneys
For the respondent:	Myburgh SC and D Linde instructed by Bowman Gilfillan