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THE REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2023/037384

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:
DATE: 17/11/2025
SIGNATURE

In the matter between:

NEDBANK LIMITED

Plaintiff

(Registration No: 1951/000009/06)

And

ALZABAA (PTY) LIMITED

Defendant

trading as CALTEX UNIVERSAL MOTORS

JUDGMENT

NKOENYANE AJ

Introduction

- [1] This is an exception by the defendant to the plaintiff's amended particulars of claim. The defendant contends that the pleading lacks the necessary averments to sustain a cause of action. The plaintiff opposes the exception. The parties will be referred to as in the main action.
- [2] The plaintiff's claim is for the repayment of R14,628,707.67, alleged to be duplicate payments made to the defendant between 29 October 2020 and 11 May 2022. The claim is founded on unjustified enrichment, pleaded in the alternative:
- [2.1] **Claim A** is based on the *condictio sine causa* (without cause).
- [2.2] **Claim B**, the alternative, is based on the *condictio indebiti* (payment of a non-existent debt).
- [3] The defendant raises four exceptions, the crux of which is that the plaintiff's entire case is vitiated by a fundamental and irreconcilable flaw: it relies on a written merchant agreement to contextualise the payments, while that very agreement, on the plaintiff's own pleaded version, was never validly concluded.

Legal Principles on Exceptions

- [4] The principles governing exceptions are trite. An exception that a pleading lacks a cause of action succeeds if, upon every interpretation which the document can reasonably bear, no cause of action is disclosed. In **Telematrix (Pty) Ltd v Advertising Standards Authority**¹ the court said, "The purpose of an exception is to protect litigants against claims that are bad in law and to avoid the leading of unnecessary evidence.

¹ SA 2006 (1) SA 461 (SCA) at para 3

[5] An exception that a cause of action is not disclosed by a pleading cannot succeed unless it is shown that on every interpretation that the pleading can reasonably bear, no cause of action is disclosed. The test has been formulated as whether the pleading, on the face of it and as it stands, discloses a cause of action. For the purpose of this enquiry **all the allegations in the pleading are accepted as true.**" [Own emphasis]

[6] The court must accept as true all the factual allegations in the pleading. The question is whether, on those facts, the plaintiff has disclosed a cause of action. The court in **Picbel Groep Voorsorgfonds v Somerville**² was reaffirming the well-established principles for deciding an exception that a pleading discloses no cause of action. The key points made in that section of the judgment are:

The "Working Rule" for Exceptions: The court cited with approval the classic formulation from *McKelvey v Cowan* NO 1980 (4) SA 525 (Z) at 526D-G, which states:

"The criterion is... whether on all possible readings of the facts no cause of action is made out. ...It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts."

[6.1] **Accepting Pleadings as True:** The court emphasized that for the purpose of this exception, "every fact alleged in the particulars of claim must be taken as correct and justified." The court is not concerned with the plaintiff's ability to prove these facts at trial.

[6.2] **Pleading a Conclusion of Law is Insufficient:** A critical point made by the court is that a plaintiff must plead the **facta probanda** (the facts that must be proved), not just a **conclusory legal statement**.

² 2013 (5) SA 496 (SCA) at 511–512.]

The judgment states: "A pleader must of course indicate the conclusion of law that it seeks to draw from the facts... But that is not the same as permitting a pleader to merely set out a conclusion of law without alleging the facts that support that conclusion." The pleading is to be read as a whole.

The Foundational Defect: The Invalid Merchant Agreement

- [7] A preliminary and decisive issue is the status of the written merchant agreement ("POC1"), which the plaintiff pleads as the foundation for its payment obligations.
- [8] Clause 1.4.18 of POC1 defines the "commencement date" as "the date on which this agreement was signed by the last of the parties concerned." Clause 4.1 stipulates that the agreement "will come into force on the commencement date."
- [9] The signature page of POC1 reveals only the defendant's signature. The plaintiff's signature is conspicuously absent. Consequently, on the plaintiff's own averments and the document it relies upon, the "commencement date" never occurred, and the agreement never came into force.
- [10] It is a well-established principle that where parties have stipulated that a contract will only be binding once signed by both, no contract comes into existence until that condition is met. **Goldblatt v Fremantle 1920 AD 123 at 129**; At page **129**, the court stated the following principle (emphasis added):
 - [10.1] **"It is a general principle of our law that parties may make the formation of a contract dependent upon the happening of a future event.** In such a case, there is no contract unless and until the event happens. **Similarly, the parties may agree that the contract shall not be binding until reduced to**

writing and signed. In such a case there is no contract unless and until it is signed. The mere fact that the parties intend to reduce their agreement to writing does not necessarily mean that they intend to postpone the obligation to a future date. But **if they do so intend, then there is no contract until the writing is signed."**

[11] The case of **Markram v Scholtz**³ is a clear authority on a specific point of contract law relevant to the case in point. The case states the following principle regarding multi-partite contracts. In a contract that requires signature by all parties to become binding, no single party is bound until every party has signed.

[11.1] **The Facts:** The case involved a written deed of suretyship intended to be signed by **three sureties**. The crucial question was whether the sureties who had signed were bound by the contract even though the third surety had not yet signed.

[11.2] **The Judgment:** The court held that they were **not bound**. The parties had, by the very structure and nature of the agreement, demonstrated their intention to be bound only as a complete group. The court found that the obligation was a joint one, and the contract was conceived as a single, unified agreement between the creditor and all three sureties together.

[11.3] **The Key Quote:** The court reasoned that the intention was for the contract to take effect **"only when the last one signed"**. Therefore, until that happened, the contract was incomplete and not binding on any of the parties.

[12] The plaintiff's implicit reliance on a partly oral or tacit agreement is precluded by the express terms of POC1. Clause 34.2 constitutes an entire agreement clause, while clause 33.2.1 mandates that any variation to the agreement must be reduced to writing. The principle established in **SA Sentrale Ko-op**

³ [2000] 4 All SA 452 (NC)

Graan Maatskappy Bpk v Shifren⁴ upholds the enforceability of such clauses, rendering any suggestion of an oral or tacit amendment legally untenable.

[13] It follows that a tacit term cannot be introduced to contradict the express written requirement for a signature. The contractual provisions relied upon by the plaintiff clearly prevent the importation of any unwritten term, and the Shifren principle confirms that the formalities chosen by the parties for amendments are binding. Any attempt to circumvent these express terms would therefore be inconsistent with the law and cannot succeed.

[14] In ***Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd***⁵, the Appellate Division (now the Supreme Court of Appeal) made a definitive statement regarding tacit terms. The court held that:

"No term can be imported into a contract which is inconsistent with an express term thereof."

[15] This principle underscores that tacit or implied terms cannot be used to contradict or override the express provisions of a contract. Any attempt to introduce a term inconsistent with the written agreement is impermissible and will not be recognized by the courts.

[16] **The Plaintiff's Problem:** The plaintiff (Nedbank) is trying to rely on the terms of the Merchant Agreement (POC1) to explain its actions, even though it never signed the document. At most, the plaintiff could contend that a tacit or oral agreement on the same terms arose through the parties' conduct. However, such an argument is inherently weak, given the absence of any formal signature and the express contractual provisions requiring written formalities.

⁴ 1964 (4) SA 760 (A)

⁵ 1965 (3) SA 150 (A)⁵ at 175

- [17] **The Court's Rebuttal:** The judgment uses the *Pan American* principle to shut down this potential argument. The express terms of POC1 itself (Clauses 1.4.18 and 4.1) state that the agreement only comes into force **"on the date on which this agreement was signed by the last of the parties."**
- [18] **The Legal Conclusion:** Therefore, a court **cannot** imply a tacit term that the agreement was binding without signature, because such a term would be **directly inconsistent** with the express term requiring signature for the agreement to "come into force." The express term requiring a signature overrides any attempt to argue for a tacit variation of that requirement.
- [19] I therefore find that the plaintiff has failed to plead a validly concluded merchant agreement. This finding is fundamental to the analysis of the exceptions that follow.

Analysis of the Exceptions

First Exception: Claim A (*Condictio Sine Causa*) is Contradictory and Unfounded

- [20] In Claim A, the plaintiff avers that the duplicate payments were made "in error" and were "neither due nor owing," thus unjustly enriching the defendant *sine causa*.
- [21] However, in its preceding paragraphs, the plaintiff pleads that it made payments to the defendant "through its intermediary, EasyPay" and that it "fulfilled all its obligations to the defendant in terms of the merchant agreement by making payment through EasyPay."
- [22] This creates an insurmountable logical flaw. The *condictio sine causa* is aimed at reclaiming a performance for which there never was, or no longer is, a legal cause. Here, the plaintiff's own pleading identifies the (purported)

merchant agreement as the cause (causa) for the payments. The payment was thus not made *sine causa* (without a cause), but rather *ob falsam causam* (on account of a mistaken cause). This distinction is material, and by pleading the contract as the reason for payment, the plaintiff has negated the very foundation of a *condictio sine causa* claim.

[23] The first exception is upheld.

Second Exception: Claim B (Condictio Indebiti) Fails to Plead a Reasonable Error

[24] In the alternative, Claim B relies on the *condictio indebiti*. The plaintiff pleads it made the duplicate payments in the *bona fide* and reasonable belief that the defendant had not yet received payment via EasyPay.

[25] For this claim to succeed, the plaintiff must prove not only a *bona fide* belief but that the error was both excusable and reasonable. In the case of **Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd**⁶, The Appellate Division (now the SCA) clarified that for the *condictio indebiti* to succeed, the plaintiff must prove more than just a mistaken payment. The key requirement is that the mistake must be **excusable**.

[26] The court held that a mistake is **not excusable** if the person making the payment was **negligent**, and that a reasonably careful person in the same position would not have made the same error.

[27] **The Plaintiff's Pleaded Case:** Nedbank (the plaintiff) pleads that it made the duplicate payments in a *bona fide* and *reasonable* belief that the money was due (because it believed the defendant had not been paid via EasyPay).

⁶ 1996 (4) SA 19 (A)

[28] **The Defendant's Exception:** The defendant argues that this belief was **not reasonable** and that the error was therefore **not excusable**. The defendant's logic, now backed by the authority of *Buzzard Electrical*, is as follows:

[28.1] The payment was made based on the assumption that a valid, binding Merchant Agreement (POC1) existed, which created the obligation to pay.

[28.2] However, the very document the plaintiff relies upon (POC1) objectively proves that **the plaintiff itself failed to execute the agreement** by not signing it.

[29.3] A sophisticated entity like a bank is held to a high standard of care in its commercial dealings. For such a party to make a multi-million rand payment based on a contract that it itself never finalized is a clear failure to take reasonable care.

[30] Applying the principle from *Buzzard Electrical*, I conclude (in paragraph that the plaintiff's error "stems from the Plaintiff's own negligence in not finalising the agreement, rendering the error unreasonable as a matter of law." Because the error was not excusable (i.e., it was negligent), the essential requirement for the *condictio indebiti* is missing.

[31] In summary, *Buzzard Electrical* provides the crucial legal authority that **negligence vitiates a plea of excusable error**. This allows the court to find that, based on the pleaded facts alone, Nedbank's mistake was legally unreasonable, thereby defeating its alternative Claim B before it even gets to trial.

[32] The defendant correctly argues that the plaintiff's error cannot be considered reasonable. The plaintiff, a sophisticated financial institution, made substantial payments based on the assumption that a valid, binding contract was in place. Yet, the very document it annexes to its particulars of claim objectively demonstrates that it failed to execute the agreement, thereby ensuring it never came into force. To find a belief and subsequent action on a contract

one has oneself failed to finalise is, in these circumstances, unreasonable as a matter of law.

[33] The second exception is upheld.

Third Exception: Failure to Plead Impoverishment and Causa

[34] This exception further attacks Claim A. A claim for unjustified enrichment requires a clear plea of the defendant's enrichment, the plaintiff's corresponding impoverishment, and the absence of a legal cause for the enrichment.

[35] Firstly, the plaintiff pleads it made payments "through its intermediary, EasyPay. " If EasyPay, a separate legal entity, was the source of the funds, the plaintiff has not pleaded facts demonstrating that it, and not Easy Pay, suffered the impoverishment. In the absence of such allegations, the causal link between the transfer of funds and the plaintiff's own financial detriment remains unestablished.

[36] Secondly, as held in upholding the first exception, the plaintiff has pleaded a *causa* (the agreement) for the payment. The defendant received what it was intended to receive under that purported agreement. In these circumstances, the plaintiff has failed to plead convincingly that the enrichment was without cause.

[37] The third exception is upheld.

Fourth Exception: Failure to Comply with a Condition Precedent

[38] Clause 29.1 of POC1 requires the plaintiff to give the defendant five days' written notice to remedy a breach. Clause 33.1 designates the addresses on

the cover page as the chosen domicilia for serving such notices. The defendant's chosen domicilium is 9[...] V[...] R[...] Avenue, Edenvale.

[39] The plaintiff's letter of demand (POC3) was sent only to "Unit 1 Saxonwold Apartments, Saxonwold," an address not stipulated in POC1. Service on the chosen domicilium is a mandatory contractual precondition. The plaintiff's failure to comply renders the issuance of summons premature. In **Brisley v Drotsky**⁷. The central holding of the case is that **a contractual clause requiring that any variation or cancellation of the agreement must be in writing and signed by the parties (a "non-variation clause") is legally enforceable.**

[39.1] Sanctity of Contract: The court emphasized the importance of upholding the clear intentions of the parties as expressed in their written contract. If the parties agreed to a specific formal procedure for changing the contract, the law should respect that.

[39.2] Enforceability of Non-Variation Clauses: The court explicitly held that a non-variation clause like the one in the *Brisley* case and similar to Clause 33.2.1 in the Nedbank POC1) is valid and binding. Therefore, an oral agreement to cancel or vary the contract is ineffective if the written contract contains such a clause.

[39.3] The Shifren Principle Reaffirmed: This decision firmly entrenched the principle first established in **SA Sentrale Ko-op Graan Maatskappy Bpk v Shifren**⁸ which upheld the validity of "contract-in-contract" clauses, i.e., clauses that dictate how the contract itself can be changed.

[40] The Supreme Court of Appeal (SCA) overturned previous suggestions that such clauses were against public policy. The court held that adults of sound mind should generally be held to the agreements they freely enter into.

⁷ 2002 (4) SA 1 (SCA)

⁸ 1964 (4) SA 760 (A)

[41] The fourth exception is upheld.

Conclusion

[42] The plaintiff's particulars of claim are excipiable on multiple, interrelated grounds. The core defect is the attempt to find a claim on payments made under a contract that never existed, creating fatal contradictions in its pleadings.

[43] In the result, I make the following order:

1. The defendant's exceptions are upheld.
2. The plaintiff's particulars of claim are set aside.
3. The plaintiff is granted 15 (fifteen) days from the date of this order to deliver amended particulars of claim.
4. The plaintiff is to pay the costs of the exception on scale B.

NKOENYANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Date of Hearing: 11 August 2025

Date of Judgment: 17 November 2025

Appearances:

Counsel for the Defendant: M Cajee

Attorneys for the Defendant: SLH Incorporated

Counsel for the Plaintiff: L Acker

Attorneys for the Plaintiff: KWA Attorneys