IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MBOMBELA MAIN SEAT)

Case No.: 2889/2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED **YES/NO**

[redacted]

03 DECEMBER 2025
DATE

SIGNATURE

In the application between:

CAZ DRY ATTORNEYS	**FIRST EXCIPIENT**
BAREND MARITZ DRY	**SECOND EXCIPIENT**
and	
SHAMILA BRICKS (PTY) LTD	**RESPONDENT**

In Re:

SHAMILA BRICKS (PTY) LTD	**PLAINTIFF**
and	
CAZ DRY ATTORNEYS	**FIRST DEFENDANT**
BAREND MARITZ DRY	**SECOND DEFENDANT**
SHAMILA TRADING ENTERPRISES CC	**THIRD DEFENDANT**

JUDGMENT

FOURIE AJ

<u>INTRODUCTION:</u>

[1] The matter at hand concerns an exception brought by the First, Second, and Third Defendants to the Plaintiff's Particulars of Claim.

[2] The Notice of Exception forming the basis for the current adjudication follows a previous Notice of Exception filed by the same Defendants, after which the Plaintiff filed an amendment to their Particulars of Claim. The Excipients, not being satisfied with the amendments made, bring the current exception.

[3] The complaint levied against the Particulars of Claim, is that it does not disclose a cause of action against the First or Second Defendants and as such, the Defendants seek the Plaintiff's claim to be dismissed with costs.

[4] No relief is sought in the Particulars of Claim against the Third Defendant, and it seems as if the Third Defendant was joined *ex abundanti cautela* as a party that might have an interest in the outcome of the litigious process. Irrespective, it seems as if the Third Defendant has defended the main action and has, together with the First and Second Defendants, taken issue with the Particulars of Claim for the same reason.

[5] After the initial address by Adv Du Plessis SC was made, wherein he indicated that he represented the First and Second Excipients, and as Adv Ferreira SC was to commence his argument on the part of the Respondent, Adv Du Plessis SC indicated that he was informed that he is also representing the Third Defendant. Although the late submissions by Adv Du Plessis SC might seem

peculiar, nothing much turns on this point, save that the Third Excipient has not abandoned cause even though no practical relief has been sought against them. The submissions made in this regard on the part of the Excipients hold no real or practical effect on the outcome of the application, as the submissions made do not implicate the ultimate relief sought against the Third Excipient. Insofar as the highwater mark for the Third Excipient's case can be that they support the fact that no valid cause of action is disclosed in the Plaintiff's Particulars of Claim, the same is noted, and I deal with such in this Judgment.

[6] The First Excipient is an attorney law firm, and the Second Excipient is an attorney who is also the director of the First Excipient. The Respondent, the Plaintiff in the main action, seeks in the main action a statement and debatement of account which came into existence through a sale agreement concluded between the Third Excipient, the First Excipient, and the Respondent.

[7] At the hearing of the matter, it was conceded that the Second Excipient was properly before Court in his capacity as a director of the First Excipient in terms of Section 19(3) of the Companies Act, 71 of 2008, as well as the relevant provisions in terms of Section 34(7)(c) of the Legal Practice Act, 28 of 2014.

[8] It is an opportune time to state that the agreement of sale, which was annexed as Annexure "A" to the Plaintiff's Particulars of Claim, and the existence of which is not being challenged by any of the parties at its heading states as follows:

"**AGREEMENT OF SALE**

Concluded between:

SHAMILA TRADING ENTERPRISES CC
(Registration Number: 2203/055257/23)
Represented by Shadow Tsakani Nyathi
Duly authorised thereto
(hereinafter referred to as "the Seller")

and

SHAMILA BRICKS (PTY) LTD
(Registration Number: 2021/770084/07)
Represented by Hethlan Loock
Duly authorised thereto
(hereinafter referred to as "the Purchaser)

and

CAZ DRY ATTORNEYS INC
(Registration Number: 2017/221924/21)
Represented herein by BAREND MARITZ DRY
Duly authorised thereto
(hereinafter referred to as "the Attorney")

(Underlined own emphasis)

[9] On the face of the agreement, it appears to be a tri-party agreement. The contract is signed by all three parties, and, on a prima facie basis, each party has certain rights and obligations.

[10] During the argument, it was presented by the Excipients that Caz Dry Attorneys was the attorney for the Third Excipient, the Seller, and not the Respondent, and as such, no attorney-client relationship exists between the Attorney and the Plaintiff.

[11] For purposes of the current application, it is not necessary for this Court to delve into the existence, or not, of an attorney-client relationship between the First and/or Second Excipient and the Respondent. No doubt, if the matter ultimately proceeds to trial, this is an aspect which the trial court would need to scrutinise, and if the Plaintiff wishes to rely on such a relationship indeed existing, it is an

aspect which the Plaintiff will need to prove. *Ex facie*, the agreement seems to be a tri-party agreement entered into by three separate parties, with no specific party identified as acting solely as an agent of any other party.

[12] The Plaintiff's Particulars of Claim state that:

> *"5. At all material times:*
>
> *5.1. The First and Second Defendants were practising attorneys, acting on behalf of their client, Shamila Trading Enterprises CC……*
>
> *5.2. ….. was obliged to account to the Plaintiff in respect of a written agreement of sale dated 28 October 2021, concluded between the Plaintiff, Shamila Trading, and the First Defendant."*

[13] It is evidently clear from the aforesaid that the Plaintiffs aver that the right to a statement and debatement arises through contract.

[14] Paragraph 10 of the Plaintiff's Particulars of Claim takes the matter further, where the Plaintiff states:

> *"10. The First and Second Defendant, acting as attorneys in terms of the sale agreement, with a fiduciary duty, a contractual obligation and a statutory duty, incurred the obligation of rendering a full account to the Plaintiff"*

[15] The aforesaid paragraph reiterates the previous sentiments about the contractual obligation. Still, it states further that the First and Second Excipients also incurred a fiduciary and statutory duty in terms of which they were to account to the Plaintiff.

[16] The relevant portion of the agreement that finds application for the current proceedings states that:

"4.2. The attorney shall immediately after receipt of the funds reflected above, be responsible for making payment to the creditors of the Seller, from the funds held on its Trust Account in order to settle any outstanding amount owing to any creditor in respect of the assets hereby acquired and settled obligations of the Seller.

4.3. The Attorney shall immediately after making payment in settlement of the creditors provide proof of those payments having been successfully made.

4.4. The balance of the purchase price held by the Attorney on its Trust Account shall be disbursed immediately to the Seller after receipt of confirmation by the Purchaser that the VAT payable by the Seller in respect of the transaction has been paid to SARS."

[17] The contentious issues before me are found in Section 4.3 of the Contract, where the Plaintiff avers a contractual right to statement and debatement that arose under Section 4.3, and the Excipients state that no such right arose under the terms of the said Section.

[18] The case for the First and Second Excipients is that they held an obligation to account to their client, the Third Excipient, and not the Plaintiff.

[19] The grounds of exception persisted with at the hearing of the matter were as follows:

"1. The Attorney referred to in the agreement namely the First Defendant, was at all relevant times the attorney and agent for the Third Defendant, the Seller in the agreement, and any duty and obligation to account in terms of the agreement, on a proper interpretation thereof, was at all relevant time a duty by the First Defendant as attorney of the Third Defendant, the Seller, and no duty to account arose in law on the basis

of paragraphs 4.2, 4.3, and 4.4 of the Agreement, for First or Second Defendants to account to the Plaintiff.

2. *Therefore, the Plaintiff has not disclosed a cause of action on the basis of a fiduciary, contractual or statutory duty resting on First or Second Defendants, to render an account and for debatement thereof to justify the relief sought.*

3. *The existence and origin of none of the alleged legal duties referred to above have been set out or pleaded, and such duties as alleged did not exist in law in respect of the First and Second Defendants."*

<u>THE LAW RELATING TO EXECPTIONS:</u>

[20] Rule 18(4) of the Uniform Rules of Court provides:

> *"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader seeks relief for his claim, defence, or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."*

[21] The test on exception is whether, on all reasonable readings of the facts pleaded, no cause of action may be made out **[1]**.

[22] The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts **[2]**.*"*

[23] The well-established principle in our law is that the onus rests upon the excipient who alleges that a Summons discloses no cause of action. The duty rests upon the excipient to persuade the Court that the pleading is expiable on every interpretation that can reasonably be attached to it **[3]**.

[24] Whilst exceptions provide a useful mechanism to weed out cases without legal merit, it is nonetheless necessary that they be dealt with sensibly.

[25] In **Luke M Tembani and Others v President of the Republic of South Africa and Another** [4], the Supreme Court of Appeal set out the general principle relating to and the approach to be adopted regarding the adjudication of exceptions as follows;

"Whilst exceptions provide a useful mechanism to weed out cases without legal merit, it is nonetheless necessary that they be dealt with sensibly.

[26] It might be that where a pleading is so vague that it is impossible to determine the nature of the claim, or where pleadings are bad in law, the contents do not support a discernible and legally recognised cause of action, that an exception would be competent.

[27] It is where pleadings are so vague that it is impossible to determine the nature of the claim, or where pleadings are bad in law that their contents do not support a discernible and legally recognised cause of action, that exception is competent **[5]**.

[28] Where an exception is taken, a Court looks only to the pleading excepted to as it stands, not to facts outside those stated in it **[6]**.

[29] As such, the excipient must satisfy the Court that it would be seriously prejudiced if the offending pleading were allowed to stand **[7]**.

[30] A pleading will have sufficient particularity if it identifies and defines issues in such a way that it allows the other party to comprehend what they are **[8]**.

[31] A party cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvas another **[9]**.

[32] The norm of a fair trial means each side being given an unambiguous warning of the case they are to meet; moreover, these requirements are not mere subtilities as between advisories; the Court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented only with admissible evidence that is relevant to that question. Making up once case as you go along is an anathema to orderly litigation and cannot be tolerated by a Court. Counsel's duty of diligence demands an approach to litigation which best assists a Court to decide questions, and no compromise is appropriate **[10]**.

[33] An exception is not intended to solve a factual dispute between the parties and is decided solely on the allegations as made by the Plaintiff in its Particulars of Claim **[11]**.

[34] The Plaintiff's claim seeks a statement and debatement. A statement and debatement may arise from:

[34.1] A fiduciary relationship between the parties, which obliges the person who is in a fiduciary position to provide an account; or

[34.2] A contractual obligation to render an account; or

[34.3] A statutory duty to render an account. **[12]**

[35] In order to be successful, a party claiming a statement and debatement must allege and prove the following:

[35.1] The basis of the right to receive an account; and

[35.2] The opposing party's failure to render an account or, in other instances, the failure to render a proper account **[13]**.

[36] Harms JA in the matter of **DOYLE** *supra* stated further that any contractual terms of circumstances having a bearing on the outcome sought ought also to be provided.

[37] Insofar as it relates to the contractual right to a statement and debatement, the Excipients dedicated a significant portion of their Heads of Argument to the interpretation of contracts and why the Excipients believe the interpretation of the contract ought to be interpreted in their favour.

[38] This is, however, not the test when one has regard to exceptions. Irrespective of the view held by the Excipients and the case they wish to make out in respect of such, the Court is requested to evaluate whether **<u>any</u>** interpretation of the pleading would lead to a cause of action being made out.

[39] It might be that the interpretation as preferred by the Excipients, for the contract to be interpreted as an obligation existing purely between the First and Second Excipients, and not the Third Excipient to be ultimately upheld.

[40] Unfortunately for the Excipients, a further interpretation of the pleading and the annexed contract also possibly exists, and such interpretation is one where, as pleaded in the Particulars of Claim, a contractual right to account came into existence through specifically the working of Section 4.3 of the agreement, and that in terms thereof a contractual right to a statement and debatement arose.

[41] Whether the Plaintiff is ultimately successful in its endeavours in respect of such a claim is irrelevant when the Court considers the matter at this juncture. The question is simply whether the Court can, on any interpretation of what is presented in the Particulars of Claim, state that a cause of action has been made out.

[42] In this regard, the Plaintiff pleads the existence of a contract between all the respective parties and identifies the relevant portions of the contract on which it relies for its claim for a statement and debatement. As such, the Plaintiff has met the threshold of what was expected to be pleaded to set out a complete cause of action, once it averred claiming an account from the Excipients and that account being refused. As such, there is at least one interpretation of the pleadings and the contract that discloses a valid cause of action.

[43] Much can be said of the cryptic submissions that have been made pertaining to the fiduciary and statutory duty for the rendering of an account. The Plaintiff seemingly, in passing, states that, because the First and Second Excipients acted as attorneys in terms of the sale agreement, they owed a fiduciary and statutory duty above and beyond the contractual obligation towards the Plaintiff.

[44] Other than stating the designation of the First and Second Excipients as attorneys, the Respondent does not take the matter any further by pleading why an alleged fiduciary or statutory duty has come into existence.

[45] It might be that the First and Second Excipients are subject to the provisions of the Legal Practice Act as stated *supra,* specifically having regard to Sections 84, 86, and 87 thereof, read together with the Legal Practice Counsel Conduct Rules, Rule 55(12) and that, through the workings of that provision, a statutory or fiduciary duty arises. It has, however, not been pleaded as such.

[46] Much was said during argument on the statutory and fiduciary duties of legal practitioners to account to their clients or to other individuals who deposited money into their Trust Accounts. None of these issues, however, arises from an evaluation of the pleadings.

[47] The Plaintiff devoted much of the argument to the matters of Legal Practitioners Fidelity Fund v Guilherme 2023 (5) SA 409 (SCA) and Du Preez and Others v Zwiegers 2008 (4) SA 627 (SCA).

[48] The highwater mark in argument on the part of the Plaintiff was that, because the First and Second Excipients were legal practitioners, a fiduciary and statutory duty to account to the Plaintiff came into existence. I have already stated that the Plaintiffs have not provided any particularity to these statements and if the Court considers the fact that the Plaintiff themselves state that the First and Second Excipients were at all material times acting on behalf of the Third Excipient as per paragraph 5 – 5.1 of the Particulars of Claim, the Court would have had significant difficulty in accepting that the averments in paragraph 10 of the Plaintiff's Particulars of Claim constituted sufficient pleading of all the relevant statements to sustain a cause of action if evaluated on their own.

[49] Having regard, however, to what has been stated *supra* pertaining to the contractual obligation that exists between the respective parties and the interpretation by the Court in respect thereof, the exception cannot be upheld. The Plaintiff does not need to prove that the right to a statement and debatement exists on all the possible grounds. If they prove it on one ground, the claim will ultimately succeed.

[50] Whilst the Plaintiff might not have disclosed a cause of action in respect of a fiduciary or statutory duty, an aspect which this Court is not expressly finding upon as to avoid influencing the trial Court ultimately dealing with the matter, the fact that the Plaintiff has disclosed a cause of action on the base of a contractual right to a statement and debatement leads to the only possible deduction that can be made under the circumstances and that is that the Particulars of Claim discloses a cause of action against the First and Second Excipients at least on some interpretation of the pleadings and the contract on which such pleadings are premised.

[51] It might be that the trial Court ultimately finds that no contractual obligation as referenced in this judgment existed, or that a fiduciary and statutory duty indeed exists, and that the Plaintiff with the necessary degree of completeness indeed pleaded such averments. These aspects remain to be seen.

[52] I am, however, not persuaded that no cause of action has been made out in the Plaintiff's Particulars of Claim, and for that reason, the exception stands to be dismissed.

[53] I can do no better than what was stated in the matter of Exilite 4205 CC v Jacobs by Mfenyana J **[14],** where the Court concluded by stating:

> *"Having regard to the Plaintiff's Particulars of Claim as they stand, I cannot find any conceivable reason why the Defendants would not be able to plead to them. I must immediately concede that the Particulars of Claim are not a model of perfection. Precision is, however, not what is required. Neither is certainty that the Defendant should mount a redoubtable defence to the claim. Whether the Plaintiff's case falls or stands on account of its Particulars of Claim on trial, is immaterial for purposes of the present inquiry."*

COSTS:

[54] I see no reason to deviate from the general principle that costs follow the outcome. Having regard to the matter in total, I was, however, not persuaded that a punitive cost order of any sort is warranted. The court would have been inclined not to order costs on Scale C had it not been for the request by all the parties that such a cost order was warranted and indeed asked for, irrespective of the outcome. The court is accordingly guided by the agreement and the parties' request.

ORDER:

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

[52.1] The exception is dismissed.

[52.2] The First, Second, and Third Respondents shall, jointly and severally, be liable to pay the Respondent's costs occasioned due to the exception on a party and party scale, scale C.

[redacted]

H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MBOMBELA

Counsel for the Excipients: Adv. Roelof du Plessis SC
Instructed by: Caz Dry Attorneys

Counsel for the Respondents: Adv. E J Ferreira SC
Instructed by: Doyer & Doyer Attorneys

Judgment reserved on: 20 November 2025
Date of delivery: 03 December 2025

[1] Ocean Echo Properties 327 CC and Another v Old Mutual Life Insurance Company (South Africa) Ltd [2018] ZASCA 9; 2018 (3) sa 405 (SCA) para 9

[2] Trustees for the Time Being of the Children's Resources Centre Trust and Others v Pioneer Food (Pty) Ltd and Others [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) para 36 (Children's Resource Centre Trust.

[3] See Kunver and Others v Mistry and Another (22/007836) [2024] ZAGPJHC 974 (3 September 2024)

[4] Telematrix (Pty) Ltd v Advertising Standards Authority SA [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3.

[5] Cilliers et al Herbstein and Van Wisen the Practice of the High Courts of South Africa 5ed Vol 1 at 631; Jowel v Bramwell-Jones and Others 1998 (1) SA 386 (W) at 899E-F).

[6] Baliso v First Rand Bank Ltd t/a Wesbank 2017 (1) SA 292 (CC) at para 33

[7] Francis v Sharp & Others 2004 (3) SA 230 (C)

[8] Nasionale Aartappel Kooperasie Bpk v Price Waterhouse Coopers Ing en Andere 2001 (2) SA 790 (T) at 798F – 799J

[9] Minister of Agricultural and Land Affairs and Another v De Klerk and Other 2014 (1) SA 212 SCA

[10] South African Breweries (Pty) Ltd v Louw [2017] ZALAC 63; [2018] 39 ILJ (189) LLC at paragraph 4

[11] First National Bank of SA Ltd v Perry N.O [2001] 3 All SA 331 (A), [2011] ZASCA 37, 2001 (3) SA 960 (SCA)

[12] Rousseau NO v Cloete [1952] 3 All SA 407 (C), 1953 (3) 703 (C),
See also Rectifier & Community Systems v Harrison [1981] 1 All SA 444 (C), 1981 (2) SA 293 (C)
See also Doyle v Board of Executors [1999] 1 All SA 309 (C), 1999 (2) SA 805 (C)
See also ABSA Bank Bpk v Janse van Rensburg 2002 (3) SA 701 (SCA)

[13] See Doyle v Fleet Motors PE (Pty) Ltd [1971] 3 All SA 55 (A), 1971 (3) SA 760 (A)
See also Nusca v Nusca [1995] 3 All SA 104 (D), 1995 (4) SA 813 (D)

[14] Exilite 4205 CC v Jacobs, Case Number: 2347/2022, Northwest Division, Mahikeng in the Judgment delivered on 8 April 2024.