



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO: CA110/2024

In the matter between:

MARK BELLINGAN

APPELLANT

And

PHOTINI STEFANIA BELLINGAN

RESPONDENT

APPEAL JUDGMENT

Nkele AJ:

RELEVANT FACTUAL BACKGROUND.

[1] The respondent is a stepmother to the appellant. On the 17th of May 1996 respondent got married to the late JHV Bellingan ("**the deceased**"), who is the appellant's father. During 2001 the respondent and the deceased signed a joint Will in terms of which they regulated the manner in which the assets of their joint estate were to be disposed of. It was only upon the death of the deceased on the 06th of May 2021 that the respondent got an unpleasant and shocking surprise that the deceased had, after the joint Will, executed another Will, which will disinherit her.

[2] Deeply distraught at being so disinherited and almost at her wit's end, the respondent sought legal advice, and on the basis thereof, lodged a claim against the deceased's estate. On receipt of the claim, the executor of the estate, Mr Herman Pieterse, initiated settlement negotiations between the parties, that is the appellant

and the respondent herein, in an endeavour to avoid a delay in the finalisation of the administration of the estate, which business interests would have complicated and hampered its prompt finalisation.

[3] Indeed, the settlement negotiations, it is common cause, took place between the parties both orally and through emails. The validity, authenticity or otherwise of the oral agreement and the emails came under scrutiny in a legal battle instituted by the respondent against the appellant in the Humansdorp Regional Court. That Court found in favour of the respondent and the appellant, aggrieved by the judgment of the Court a quo dated 30 April 2024, lodged the present appeal.

[4] In the notice of appeal dated 30 May 2024, the appellant raised fifteen grounds of appeal however, during argument appellant's counsel dealt with the following five points. In summary the five points that the appellant wanted the court to deal with are as follows:

- 1.1.1 "The importance of pleadings in the presentation of a party's case;*
- 1.1.2 whether a case can be decided outside pleadings and, if so, under what circumstances and the considerations of prejudice that will be taken into account in such circumstances;*
- 1.1.3 the true meaning of the emails exchange by the parties in the factual circumstances of this case;*
- 1.1.4 the application of the Galante principle in the present factual matrix;*
and
- 1.1.5 the impact of the attorney's testimony on the respondent's evidence during trial in the court a quo".*

ISSUES FOR DETERMINATION.

[5] The main issues for determination in this appeal are whether the respondent's case, as pleaded in the Summons, accords with the evidence led during trial in the court a quo, whether the respondent has been able to prove that an oral agreement has been concluded between her and the respondent, in the manner alleged or at all

and whether the contract would have only come into being upon it being reduced into writing and signed by both parties.

THE APPLICABLE LEGAL PRINCIPLES.

[6] It is trite that every pleading must contain a clear and concise statement of material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.¹ In *Trope v South African Reserve Bank* ²it was held that pleadings must be lucid and logical and in an intelligent form; the cause of action or defence must appear clearly from the factual allegations made. This is a basic requirement of pleading that is designed to enable the opposite party to formulate an adequate response to the claim in the form of a plea.³

[7] The court in Venter put the position clearly when it stated that *“The basic requirement is that the defendant must have a clear enough exposition of the plaintiff’s case to enable it to take instructions from the client and file an adequate response to the claim in the form of a plea”*^{b.4}As W.A. Joubert et al puts in LAWSA *“The object of a pleading is to state in clear and concise terms the facts upon which a party relies to enable all sides to come to trial prepared to meet the case of the other and to enable the court to isolate the issue it is to adjudicate upon”*.⁵

[8] The necessity to plead material facts, and this is an entrenched principle of our procedural law, is in accordance with the general requirement of our common law that the particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto, and the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. [9] In this regard the pertinent remarks made by the court in

¹ Rule 6 (6), Magistrate Court Rules Herbstein & Van Winsen the Civil Practice of the Superior Courts in South Africa Juta Service Issue 1 page 17-5

² 1992 (3) SA 208 (T) at 210G-I

³ Herbstein & Van Winsen ibid page 17-5.

⁴ Venter & Others v Barrit; Venter & Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd 2008 (4) SA 639 (C) para 15.

⁵ Vol. 4 para 308. Page 204-205.

Buchner & Another v Johannesburg Consolidated Investment Co Ltd are apposite when it stated that “*The necessity of pleading material facts does not have its origin in this Rule. [sc rule 18(4)]. It is fundamental to the judicial process that the facts have to be established. The court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff’s own conclusions and opinions instead of the material facts is defective. Such summons does not set out a cause of action. It would be wrong if a court were to endorse plaintiff’s opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based*”.⁶

[10] Furthermore, it is a trite and an established principle that where a party relies on a fact he or she will fail in the claim or defence unless he or she achieves in proving it during trial⁷. A party who relies on a contract to establish his or her cause of action, must state whether the contract is written oral and when, where and by whom it was concluded⁸. It is unacceptable to plead ‘during or about’, and ‘at or near’ as those terms are vague. The precise date and place of conclusion of the contract must be given⁹. Where an action is based on a contract the material terms must be pleaded and those should indicate the existence of the contract, the relevant terms thereof and the applicability of those terms to the particular right forming the basis of the claim¹⁰. In the event of a partly written and partly oral contract, a true copy of the written part relied on in the pleading must be attached to the pleading and the relevant particulars of the oral part of the contract must be stated. This position was neatly explained by the Court in *Bantry Head Investments v Murray & Stewart (C.T.)* when it stated that “*The original oral contract in terms of which the plaintiff undertook to do that work would not in itself form a cause of action for payment of any money. This is, therefore, a case of a plaintiff suing on a contract, partly oral and partly written, the written part being contained in the plans and specifications and the written instructions all of which were accepted by plaintiff and*

⁶1995 (1) SA 215 (T) at 216H-J.

⁷ Herbstein & Van Winsen ibid page 17-16.

⁸ Herbstein & Van Winsen ibid page 17-21.

⁹ Herbstein & Van Winsen ibid page 17-21.

¹⁰ Herbstein & Van Winsen ibid page 17-21, Prins v University of Pretoria 1980 (2) SA 171 (T) 174G-H.

*in accordance with which it agreed to and did in fact carry out the work forming the basis of the claim”.*¹¹

[11] Another relevant and important principle, which follows necessarily from the fact that the purpose of pleadings is to bring a clear and concise cause of action to the attention of the opposite party and the Court, is that a pleader cannot be allowed to direct the attention of the other party and the Court to one issue in the pleadings and then, at the trial stage, pursue another.¹² The Supreme Court of Appeal, in *Minister of Safety and Security v Slabbert* authoritatively restated the guiding principle in this regard when it said that *“It is impermissible for plaintiff to plead a particular case and seek to establish a different case at trial. It is equally not permissible for a trial court to have recourse to issues falling outside the pleadings when deciding a case”*¹³. In *Notyawa v Makana Municipality* apex court re-emphasized this all-important principle where it held that courts are bound not to decide issues falling outside pleadings, without determining the issues of fairness and prejudice.¹⁴

[12] It is impermissible for a party to plead a particular case and seek to establish a different case at trial and in stepping outside pleadings courts deny respective parties’ right to know the case they have to meet and the right to a fair opportunity to meet that case¹⁵. The importance of adhering to the issues in pleadings was succinctly narrated in *Maphanga v Aengus Lifestyle Properties (Pty) Ltd (Inner City Resources Centre as amicus curae)* as follows

“The rule in terms of which a court permits to raise a point of law is subject to well-known conditions. These conditions ensure fairness to all parties. First, the point sought to be raised must be a point of law in the true sense of the word. Second, if not foreshadowed in the pleadings, it must be supported by established facts in the record. Third, the entertainment of the point must not prejudice the other parties. Consistent with the requirements, in Barkhuizen this court made it clear that a party will not be permitted to raise a point not covered in the pleadings if its consideration will result in unfairness to the other party. The purpose of this rule is to give a fair

¹¹ page 1974 (2) SA 386 (T) at 393G-H.

¹² *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H

¹³ (2010) 2 All SA 474 (SCA) para 11 at page 478 of the judgment

¹⁴ 2020 (2) BCLR 136 (CC); (2020) 41 ILJ 1069 (CC).

¹⁵ *Minister of Safety and Security v Slabbert* (668/2009) [2009] ZASCA 163; [2010] 2 All SA 474 (SCA) (30 November 2009) [at para 11]

*hearing to all parties. Therefore, the rule promotes the right to a fair hearing which is entrenched in section 34 of the Constitution”.*¹⁶

[13] Most recently, the apex court in *Bliss Brands (Pty) Ltd v Advertising Regulatory Authority NPC and Others* quoted with approval the words of Ngcobo CJ in *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 82, when he stated:

*‘Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for proper disposition of the case. Judicial wisdom requires us to resist the temptation and wait for an occasion when both the facts and proper disposition of the case require an issue to be confronted. This is not the occasion to do so. There may well be cases, and they are very rare, when it may be necessary to decide [for example] an ancillary issue in the public interest’*¹⁷.

[14] Lastly, it is a well-entrenched principle of our law that a party who does not object to pleadings or argument or evidence not foreshadowed by pleadings cannot complain that the pleadings are defective and that he or she has been surprised¹⁸.

EVALUATION OF PLEADINGS AND EVIDENCE IN THE LIGHT OF THE GROUNDS OF APPEAL

[15] I now turn to consider both the pleadings as well as the evidence that served before the court a quo, in the light of the grounds of appeal argued before at the hearing of the appeal, bearing in mind that the duty of this court, as an appeal court, is to consider whether the trial court applied the law incorrectly to the facts, or whether it erred in determining the law. ¹⁹

¹⁶ 2012 (5) BCLR 449 (CC); [2012] JOL 28529 (CC); 2012 (3) SA 531 (CC) para 109

¹⁷ 2023 (10) BCLR 1153 (CC) para 1.

¹⁸ LAWSA Vol 4 309 page 207, LAWSA 5 para 126 page 86, MN VJ [2011] JOL; 2013 (3) SA 26 (WCC) paras 26 38-39

¹⁹ Erasmus superior court practice, A2-75.

[16] In the particulars of claim, the respondent based her claim on an oral agreement allegedly entered on or about the 07th of March 2022. The pertinent averment in the particulars of claim is couched as follows:

“On or about the 7th of March 2022 and at Jeffrey’s Bay, the plaintiff and the defendant reached an oral agreement in terms whereof:

15.1 the plaintiff agreed not to contest the will of the late Mr J.V.H. Bellingan or to lodge a claim against the said estate; and

15.2 in exchange the defendant agreed to;

15.2.1 pay the plaintiff a lump sum of R220, 000. 00 on receipt of his inheritance from estate late Mr J.V.H. Bellingan (“the lump sum”);

15.2.2 pay the plaintiff an amount of R5, 700. 00 per month for a period of 5 (five) years (until 31 March 2027) with an annual escalation of 5%, wef. 1 June 2022 (“the monthly contribution”);

15.2.3 pay plaintiff an amount of R 1500.00 per month for a period of 5 (five) years (until 31 March 2027) towards the plaintiff’s fuel consumption (“the fuel consumption”);

15.2.4 pay the plaintiff an amount of R 2000.00 per month for a period of 5 (five) years (until 31 March 2027) for cleaning services rendered to the plaintiff by her domestic worker (“the domestic contribution”);

15.2.5 pay plaintiff an amount of 4% of the defendant’s portion of the dividend earned from Sovereign Liquor Cellar CC (“the agreed dividends”); and

15.2.6 task Pieterse Attorneys to embody the terms of the agreement in a written document for signature by the parties”.²⁰

[17] It is quite glaring and apparent from the particulars of claim that the respondent’s cause of action is that the appellant is in breach of an oral agreement concluded by the parties on or about the 07th of March 2022. On his part, the appellant vehemently disputes that an agreement was entered into between him and the respondent, either as alleged or at all. All that the appellant admits to is that there

²⁰ Vol 1 page 5 para 3.

were negotiations between him and the respondent, which were aimed at facilitating a speedy finalisation of the estate, and the appellant was willing to enter into an agreement, provided that it was reduced to writing and signed by both parties. The appellant further avers that when the agreement was eventually presented to him it was not in accordance with what was discussed during the negotiations and for that reason, he refused to sign it.²¹

[18] What now is the bone of contention and a point of serious disagreement between the parties in this appeal is whether the evidence presented during trial was in consonant with the respondent's case, as foreshadowed in the particulars of claim and whether the agreement would have become valid and enforceable only upon it being reduced to writing and signed by both parties. The parties hold divergent and irreconcilable contentions, and this court is tasked with the onerous obligation to make a finding in that regard.

[19] The divergence of views is more obvious in the evidence led during trial in the court a quo, the appellant's grounds of appeal, the heads of argument and the submissions made during the hearing of this appeal. During argument both Counsel gave different interpretations of what was the respondent's case, as presented in the particulars of claim, and whether it was supported by the evidence led during trial. Moreover, they gave different views regarding when and what conditions should have been met, before the agreement could become valid and binding between the parties.

[20] In the grounds of appeal, one of the appellant's main grounds is that the learned magistrate erred and misdirected himself as he failed to appreciate that in the particulars of claim the respondent adumbrated that the agreement she relies on, for her cause of action, was concluded on or about the 07th of March 2022, while during trial she failed to lead any evidence to prove that oral agreement. She never gave any evidence, the argument goes, to support the averment in the particulars of claim relating to an oral agreement concluded on the 07th of March 2022, instead she relied in an email exchange that point to an agreement having been concluded on

²¹ Vol 1 page 15 to 16 para 2.

the 10th of March 2022. In any event, the appellant contends, such emails were on a without prejudice basis and therefore the learned magistrate erred and misdirected himself in relying on them on his judgment.

[21] In this regard the appellant's contention, in a nutshell, is that the applicant's case, presented in the particulars of claim, that the offer and acceptance occurred orally on the 7th of March 2022, is incompatible with the evidence in the emails to the effect that the agreement was concluded through emails on the 10th of March 2022. In support of this argument the appellant relies on the provisions of Rule 6(6) of the Magistrates' Courts which are to the effect that a party who in such party's pleading relies upon a contract shall state whether the contract is in writing or oral, when, where and by whom it was concluded, and if the contract is in writing a copy thereof or the part relied on in the pleading shall be annexed to the pleading.

[22] The appellant further argues, on the same point, that it is impermissible and unacceptable in law to plead one case and seek to establish a different one at the trial. That means that a party is not allowed to direct the attention of the other party to one issue and then, when giving evidence during trial, canvass a totally different one.²² This, according to the appellant happened when the respondent pleaded that an oral agreement was concluded on or about 07 March 2022 but gave evidence of emails that demonstrated that the alleged agreement was entered into on 10 March 2022. It is the appellant's contention that the learned magistrate erred and misdirected himself when he failed to find that such evidence did not seek to establish that an oral agreement came into being on 07 March 2022.

[23] Another point that the appellant relies on in this appeal is that no agreement ever came into existence between the parties in the manner alleged by the respondent or at all. In substantiation of that argument, the appellant avers that there were still negotiations between the parties and no definite agreement had been concluded. In this regard, the appellant refers to a reply email from him to the effect that "*... the agreement will be a separate agreement and the estate will pay out as*

²²Imprefed v National Transport Commission [1993] 2All SA 179 (A) 188-189; 1993 (3) SA 94 (A) at 107C-H.

per the will and once paid out then the agreement will be in place".²³ As further evidence of the fact there was no agreement that was concluded between the parties, the appellant contends that as at the 9th of September 2022 the parties were still negotiating terms of the agreement. According to the appellant in that email the respondent stated that *"I also need to discuss a couple of issues regarding the agreement, and I wanted to share some information and to get your input."* The appellant strongly argued that this clearly demonstrated that there were still negotiations going on between the parties and no agreement had been concluded as of the 9th of September 2022.

[24] Moreover, the appellant strongly argues that from the factual and evidential material presented at the court a quo, it is abundantly clear that for the agreement between the parties to have become valid it would have to be in writing and signed by both parties. That, according to the appellant, is apparent from the fact that the respondent signed the agreement attached to the particulars, which agreement states very clearly in clause 6 thereof that the date of validity and effectiveness will be the date of the signature thereof. By appending her signature thereon, the respondent was manifestly demonstrating her understanding that the agreement would only become binding upon signature and as someone who is well vexed with how contracts work, from her previous employment at the Bank, she could not have misunderstood the meaning and import of clause 6 of the agreement as well as the significance of appending her signature on it. In any event, the appellant argues, these are the best external manifestations of the respondent's own state of mind which cannot be ignored for purposes of determining the conditions that the parties had to fulfil for the agreement to be valid.²⁴

[25] In opposing the appeal, Ms Zeitsman who represented the respondent, argued, with much vigour and determination, that the fact that the appellant continued the payments, even after the death of respondent's husband, was a clear manifestation that there was an agreement between the parties. She further argued that the remuneration agreement came from the appellant himself and the respondent was called by an attorney Mr Herman for signature, when she expressed

²³ email dated 7 March 2022 Vol 1 page 54.

²⁴ South African Railways & Harbours v National Bank of South Africa 1924 AD 704 at 715-16

her unhappiness with the fact that it was headed “Remuneration Agreement” and requested that it be changed to “agreement”.²⁵ In fact, in an email dated 07 March 2022, the appellant himself directed that the agreement be drawn by an attorney.²⁶ Furthermore, the respondent contended, it was agreed that Mr Pieterse would draft a document embodying the terms of the agreement,²⁷ and the separate agreement refers to a settlement other than claiming from the estate and in support of that argument the respondent makes reference to an email dated 08 September 2022.²⁸ She further contends that an email from the appellant dated 21 August 2022 is clear evidence of the terms that should be embodied in the agreement.²⁹

[26] Respondent further refers to an email dated 15 December 2022 and argues that it is another clear evidence that an agreement was concluded by the parties. This email was written by the appellant in response to the respondent’s letter of demand³⁰. It is further submitted that it was never agreed that the validity of the agreement would dependent on it being reduced to writing and signed by the parties, instead a more plausible and natural conclusion is that an oral agreement was concluded and that is confirmed by the emails from 07 to 10 March 2022. There was no agreement to the effect that such an agreement must be reduced to writing and signed by the parties, for it to be valid and enforceable. The respondent, in addition, further argues that the emails, although they are without prejudice, are admissible to prove that there was an oral agreement that the parties reached.

[27] In this regard the respondent referred to the judgment of the Supreme Court of Appeal to the effect there are instances where the without prejudice rule is relaxed and that is where the negotiations leading to the disputed agreement need to be ascertained in order to establish the true intention of the parties, and, the respondent so argued, this is one such instance.³¹ One another aspect that the respondent argued was to the effect when she stated in the particulars of claim that the

²⁵ Vol 1 page 38, vol 3 page 224.

²⁶ Vol 1 page 54.

²⁷ vol 1 page 64.

²⁸ vol 1 page 70.

²⁹ Vol 1 page 42.

³⁰ Vol 1 page 69.

³¹ LKD Residential CC v Empire Earth Investment 17 (Pty) Ltd. [2017] 3 All SA 739 (SCA); 2017 (6) SA 55 (SCA) at para 11.

agreement was concluded on or about the 07th of March 2022, all she meant was that the contract was entered into at the beginning of March 2022 and not at any exact date.

ANALYSIS AND CONCLUSION

[28] At this juncture it is quite appropriate to consider and analyse the weight and veracity of the grounds of appeal, in their summary form, upon which the appellant relies in this appeal. Quite apparently, the respondent's case as stated in the particulars of claim is that the agreement she relies on was concluded on or about the 07th of March 2022. However, during trial she relied on an email dated 10 March 2022 as proof that an agreement was entered into on 07 March 2022. That, no doubt, is a deviation from the version foreshadowed in the particulars of claim, which deviation is impermissible as it is prejudicial to the other party. The evidence tendered by the respondent makes it very difficult to comprehend when the agreement was actually concluded, in the light of the fact that pleadings point to the 7 of March and the emails point to the 10th of March 2022. That, in my considered view, makes the evidence not only unreliable but inadmissible to prove the existence of the agreement relied on by the respondent³².

[29] I base my finding in this regard on the trite principle of our law that it is not only the legal conclusions in the pleadings that determine the outcome but also the facts relied on, which in this case is the evidence presented during the trial stage. What this central principle really means, in essence, is that the cause of action must appear from the factual allegations made in pleadings and supported by evidential material, oral or documentary in nature. This all-important Legal Principle was made clear by the court in *Director-General, Department of Public Works v Public Service Sectorial Bargaining Council* when it referred to *Matlala Coal Ltd v Commissioner for Mediation and Arbitration and Others* ³³where Van Dijkhorst AJA said:

"Where a defence is not pleaded and not articulated in evidence it is not a defence, and a court errs when that "defence" is made a reason for its conclusion. The

³² LAWSA Vol 5 para 126 page 86.

³³ case no. JA33/04 at page 6.

essence of our procedure is to give each party to a dispute a fair opportunity to put his or her case and meet the allegation made by the other party. To this end there are pleadings which define and therefore give a fair warning of the issues in dispute". ³⁴

[30] It is quite evident from the incongruity of the respondent's pleaded case and the evidence led in support thereof that the Court a quo made a finding on an issue falling outside the respondent's pleaded case. In a recent case the apex court has issued a stern warning against such a practice in *Notyawa v Makana Municipality* when it stated that courts are bound not to decide issues falling outside and prejudice without determining issues of fairness and prejudice.³⁵

[31] To add salt to the respondent's gaping wound and insurmountable woes, the respondent failed to give the precise date on which the oral agreement was concluded. In terms of Rule 6(6) of the Magistrates Court Rules a party who in such party's pleading relies upon a contract shall state whether the contract is in writing or oral, when, where and by whom it was concluded, and if the contract is in writing a copy thereof of the part relied on in the pleading shall be annexed. According to **Jones & Buckle** the interpretation of Sub-Rule 6 of Rule 6 is that if a Plaintiff relies on a contract, he is bound by the requirements of the sub-rule and obliged to give the information required in precise terms.³⁶

[32] As this is a civil suit, clearly in my view, the probabilities weigh heavily against the respondent. A close consideration of the conspectus of evidence present in the court a quo leads to one conclusion, in my view, that for the agreement to be valid and enforceable it had to be reduced into writing and signed by both parties. This is apparent from the emails as well as from the fact that the agreement that the respondent relies on contains a clause that makes it very clear that for it to be valid and enforceable it had to be in writing and signed by the parties.

³⁴ [2012] 5 BLLR 468 (LC) at para 38.

³⁵ See footnote 14 above.

³⁶ Jones & Buckle, the Civil Practice of the Magistrate Courts in South Africa Vol ii page Rule 6 – 8, Vorster v Herselman 1982 (4) SA 857 (0) at 861F.

[33] The respondent's woes are also compounded by the fact that as far as September 2022 she was still making proposals for some terms that she desired they be included in the agreement, while she, on the other hand, would have everybody believe it was concluded on the 07th of March 2022. That is glaring in the email she sent to the appellant on 08 September 2022 and in my considered view it cannot be that there was an agreement that the parties concluded on 07 March 2022. That is unfathomable in the present factual scenario. For the reason the respondent's evidence to support the cause of action articulated in the particulars of claim is incongruous with foreshadowed claim. The respondent's case was fatally flawed and should have been dismissed by the court a quo.

[34] The other insurmountable problem that the respondent has is that she has failed to present credible evidence to prove that it was not a requirement of the agreement that it should be in writing and signed by the parties, for it to be valid. The overwhelming evidence presented during trial in the court a quo is to the effect that it was a requirement for its validity that the agreement should be in writing and signed for by the parties. That is apparent from the fact that the parties agreed to refer the matter to an attorney for it to be reduced into writing. That is corroborated by the fact that the respondent herself is an experienced former Bank worker well experienced in contractual matters. It is therefore not expected of someone of her calibre and experience to have misconceived the implications of a clause in an agreement to the effect that the agreement will be valid only if reduced into writing and signed by the parties. What is difficult to understand, and which the respondent has failed to explain, is why did she sign an agreement with a clause to the effect that it would be valid only if it is in writing and signed by both parties, attach it to the particulars of claim, and thereafter change tune and argue that writing and signature was not a requirement for validity. That boggles the mind, and it is indeed inexplicable in the circumstances of this case.

[35] In argument, Ms Zietsman effectively sought to persuade the court to regard the conditions precedent to the validity of the agreement as having been fulfilled. That cannot be so in the present factual circumstances. This is so because, traditionally, courts have treated agreements to agree to negotiate, as too vague to

be enforceable.³⁷ The Supreme Court of Appeal in *Premier, Free State v Fire chem Free State (Pty) Ltd* stated that an agreement that parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree to disagree³⁸. This principle was reaffirmed by the Supreme Court of Appeal in *Ferrostaal GmbH and another v Transnet Soc Ltd and another* when it stated that, as general rule, an agreement to negotiate and conclude another agreement is not enforceable.³⁹ From the record of evidence presented at the Lower Court it is clear that the parties agreed to enter into an agreement in the future, which was to be reduced into writing and signed by both of them, for it to be valid. What they had in mind is an agreement to negotiate an agreement which never came into existence.

[36] I am therefore fortified by the above stated authorities in my finding that their agreement to agree is not enforceable. In my view, that is what happened between the parties, a promise to enter into an agreement in the future. I therefore find that the evidence favours the appellant's view and to that extent it solidifies my view, and the appeal should therefore succeed. This is so because the respondent's version of events is unpersuasive.

[37] For the above stated reasons, I am of the firm view that the court a quo erred and misdirected itself when it found in favour of the Respondent and it therefore goes without saying that the appeal should succeed. In the result the following order will issue:

1. The appellant's appeal succeeds with costs in terms of scale B of the High Court Tarriff.

T. A. NKELE
ACTING JUDGE OF THE HIGH COURT

³⁷ Christie's Law of contract in South Africa Lexis Nexis 8th page 52.

³⁸ 2000 (4) SA 413 (SCA) at para 35.

³⁹ 2021 (5) SA 493 (SCA) Para 23.

I agree

GNZ MJALI J
JUDGE OF THE HIGH COURT

APPEARANCES:

COUNSEL FOR THE APPELLANT : ADV MARAIS

Instructed by : **Whitesides Attorneys**
Makhanda

Counsel for the RESPONDENT : ADV T ZIETSMAN

Instructed by : **Rushmere Noach Incorporated**
Gqeberha

Matter heard on : **12 SEPTEMBER 2025**

Judgment delivered on : **04 DECEMBER 2025**