



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

(1) REPORTABLE: YES / <u>NO</u>	
(2) OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>	
(3) REVISED <u>Yes</u>	
<u>28/10/2025</u>	<u>[Redacted Signature]</u>
DATE	SIGNATURE

CASE NO.: 090696/2024

In the matter between:-

DUSTIN DEAN TITTA

Excipient/Defendant

v

CALVIN LEE MORRISON

Respondent/Plaintiff

Heard on: 17 November 2025

Delivered: 28 November 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 28 November 2025.

Summary:

1. The exception raised was good in law as the plaintiff in the main proceedings was required to communicate with the defendant of his intention to cancel. Until such notice is communicated, the cancellation does not have effect.
2. The particulars of claim lacked the material averments to sustain a cause of action. The averments as set out on the particulars of claim were insufficient to establish the defendant's unequivocal intention not to be bound by the agreement with the plaintiff. The principles enunciated and reiterated in the Supreme Court of Appeal decision of **Datacolor** is applied here.

ORDER

It is ordered:-

1. The exception is granted.
2. The respondent is ordered to pay costs of this application on Scale B.

JUDGMENT

KOOVERJIE J

THE EXCEPTION

- [1] The excipient, being the defendant in the main action, excepts to the particulars of claim on the premises that the respondent (plaintiff) failed to set out the necessary averments to sustain a cause of action.
- [2] The cause of action is based on the breach of an oral agreement. The plaintiff averred that the defendant did not rectify the breach which amounted to the repudiation of the agreement between the parties. For the purposes of this judgment, the defendant will be referred to as the excipient and the plaintiff as the respondent.
- [3] The thrust of the exception was that the respondent failed to specify what the conduct of the excipient was that indicated his deliberate and unequivocal intention not to be bound by the oral agreement. The ground of exception was pleaded as follows:

3.1 *In paragraph 8.1 of the particulars of claim the Plaintiff avers that the defendant allegedly breached an oral agreement between the parties and his further failure to rectify same amounted to a repudiation of the*

fundamental and essential terms of the said oral agreement between the parties;

- 3.2 *However the plaintiff fails to adequately specify what conduct of the defendant indicated his deliberate and unequivocal intention not to be bound by the said oral agreement, thus amounting to repudiation thereof.*

ANALYSIS

- [4] The objection was premised on Paragraph 7 of the particulars of claim, where the excipient argued that the allegations therein are insufficient to indicate his unequivocal intention not to be bound to the agreement. The averments made therein were:

"The defendant breached the terms of the oral agreement by, inter alia:

- 7.1 *Failing to put forth his 50% of the purchase price for the businesses / platforms / enterprises which would have resulted in the acquisition of same with 50% interest for each of the plaintiff and the defendant.*
- 7.2 *Failing to be transparent in the business dealings of which the agreement was the subject, and failing to provide the plaintiff with insight into the business activities, financial statements and financial instruments despite the plaintiff's various requests.*
- 7.3 *Failing to return to repay to the plaintiff the investment amount of USD \$ 121 533.36 (one hundred and twenty-one thousand five hundred and thirty-*

three US dollars and thirty-six cents) or any part thereof within 9 months of the payment thereof by the plaintiff to the defendant."

- [5] The respondent then pleaded repudiation and cancellation in paragraph 8 of the particulars of claim:

"8.1 The aforesaid breaches and failure to rectify same by the Defendant amounted to a repudiation of the fundamental and essential terms of the oral agreement between the parties.

8.2 The Plaintiff elected to, alternatively herewith elects to, accept the Defendant's repudiation and cancels the oral agreement herewith."

- [6] The respondent, on the other hand, argued that the necessary averments were made to sustain a cause for action for repudiation. The respondent relied on their conduct of the excipient in breaching the terms of the agreement. He argued that such conduct was sufficient to determine the excipients his conclusive intention that he no longer wanted to be bound by the agreement.

- [7] In the seminal decision of ***Datacolor International***¹ the Supreme Court of Appeal outlined the salient principles on the subject of repudiation. In summary the court affirmed the following that:

7.1 The test for repudiation is objective. The emphasis must be shifted from the state of mind of the repudiating party to what he subjectively intended, to

¹ *Datacolor International (Pty) Ltd v Intermarket (Pty) Ltd* 2001 (2) SA 284 (SCA)

what someone in the position of the innocent party would think the repudiating party intended to do;

7.2 Repudiation is premised on the perception of a reasonable person.² The test is whether a reasonable person would conclude that proper performance would not be forthcoming;

7.3 The matter must be considered from the vantage point of an innocent party. An innocent party is not requested to identify the breach or the grounds on which he relies for cancellation. In this matter, the respondent had identified the breach and listed same in paragraph 7 of the particulars of claim.³

7.4 The repudiation occurs when one party to a contract without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention to no longer be bound by the contract. Repudiation is therefore a form of a breach of contract. Once a contract has been repudiated the aggrieved party may either elect to enforce specific

² In paragraph [16] the court stated:

"The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach."

³ Datacolor, paragraph 28

performance or accept the repudiation and proceed to cancel the contract and claim damages. ⁴

[8] In paragraph 1 the court expressed:

“... The better view is that repudiation is a breach in itself ... that the “intention” does not in truth have to be either deliberate or subjective ... but is simply descriptive of conduct heralding non- or malperformance on the part of the repudiator; and that the so-called “acceptance”, although a convenient catchword, does not “complete” the breach but is simply the exercise by the aggrieved party of his right to terminate the agreement.”

[9] On his understanding of the established principles extrapolated in **Datacolor**, the respondent argued that the excipient's conduct as pleaded in paragraph 7, where *inter alia* the excipient failed to provide the respondent with 50% of the purchase price in the business and where he failed to put his half share towards the business venture, demonstrated his unequivocal intention not to be bound any longer to the agreement.

[10] The respondent further argued that the excipient had distanced himself from the agreement and failed to further comply with his obligations, particularly in failing to inform the respondent of the insights of the business, financial statements and instruments. Despite him following up, the excipient has failed to comply.

⁴ Van Rooyen v Minister Van Openbare Werke en Gemeenskapsbou 1978 (2) 835 at 845

- [11] The inference he drew was reasonable in the circumstances. Surely if the excipient intended to be bound by the agreement he would have taken it upon himself either to comply by the obligations, or to indicate that he does not wish to be bound to the terms of the agreement. He has failed to do so.
- [12] The core enquiry is - would any reasonable person in the position of the respondent have perceived that the excipient had no intention of performing in terms of the contract and fulfilling his obligations.
- [13] At paragraph [18] the court in **Datacolor** emphasized that:
- “The conduct from which the inference of impending non- or malperformance is to be drawn must be clearcut and unequivocal, i e not equally consistent with any other feasible hypothesis.”*
- [14] It is not in dispute that the respondent’s intention to cancel the agreement was not brought to the attention of the excipient. This was however a fundamental step that had to be taken in order to make a determination that his intention not to be bound by the agreement was unequivocal.
- [15] The excipient illustrated that the “breaches” outlined in paragraph 7 of the particulars of claim were not sufficient to draw an inference of the excipient’s unequivocal and deliberate intention not to be bound by the contract.

- [16] The excipient argued that he was not given an opportunity to express himself nor did he conduct himself in a manner that would have led to the conclusion that his intention was unequivocal and deliberate.
- [17] In considering the exception raised, I am required to read the pleadings as a whole. The respondent pleaded that parties entered into an oral agreement in October 2022 in terms of which the respondent would invest funds in the defendant and the excipient would in turn utilize the funds with the intention of establishing a business or grow various e-commerce businesses / platforms / enterprises.⁵
- [18] The main purpose of the agreement was for both parties to invest equally in the project so that they would achieve positive returns. The respondent was to invest over one hundred and twenty-one thousand dollars (USD).
- [19] The respondent alleged that he had complied with his obligations. It was further alleged that there was non-compliance on the part of the excipient. The excipient was not transparent in providing the necessary information. Despite the plaintiff's requests, the excipient failed to put up his 50% of the purchase price for the investment. He further failed to pay the invested amount within the 9 months of the respondent investing in the project.
- [20] Equipped with these facts, a reasonable person in the position of the respondent is required to objectively draw an inference of whether the excipient's conduct

⁵ Paragraph 3 of the particulars of claim

amounted to an unequivocal intention not to be bound by the agreement between the parties.

- [21] In ***Ponisammy*** reference was made to Universal ***Cargo Carriers Cooperation v Citati 1957 (2) QB 401 at 436*** where that court stated⁶:

"An renunciation can be made either by words or conduct, provided it is clearly made. It is often put that the party enunciating must evince and have intention not to go on with the contract. The intention can be evinced either by the words or by conduct. The test whether an intention is sufficiently evinced by conduct is whether the party enunciating has acted in a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract."

- [22] Our courts have repeatedly affirmed that a party who wishes to exercise his right to cancel must convey its decision to the other party unless the contract provides otherwise.

- [23] The Supreme Court of Appeal in ***Datacolor*** affirmed this proposition in law with reference to numerous authorities. At paragraph 30 it expressed:

23.1. *"A similar approach is apparent in England. Thus it was said by Lord Stein in Vitol SA v Nor Elf Ltd [1996] AC 100 (HL at 810G to 811B):*

"My Lords, the question of law before the House does not call for yet another general re-examination of the principles governing and anticipatory breach

⁶ *Panisammy and Another v Versailles Estates Pty Ltd* [1973] All SA 540 A at page 551

of a contract and the acceptance of the breach by the aggrieved party. For present purposes I would accept as established law the following propositions: (1) where a party has repudiated the aggrieved party has an election to accept or affirm the contract, *Fercometal S.A.R.L. v Mediteranian Shipping Company SA* [1989] AC 788; (2) an act of acceptance of the repudiation requires no particular form, the communication does not have to be couched in a language of acceptance. It is sufficient that the communication of conduct clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as an end. (3) It is rightly conceded by counsel for the buyers that the aggrieved party did not personally or by agent notified the repudiating party of its election to treat the contract as an end. It is sufficient that the fact of the election come to the aggrieved repudiating party's attention."

- 23.2 It also referred to **Jaffer v Falante** where that court expressed at 362 F-G⁷:
"Communication to the buyer of the seller's election would appear to be desirable so as to crystallise the rights and the position of the parties to the contract. For it would suffice for the seller merely to decide to cancel the contract without notifying his decision would lead the buyer in an invidious position. It seems to be both on principle and on authority that this is not the law"⁸.

⁷ Jaffa v Falante 1959 (4) SA 360 C

⁸ My emphasis

23.3. The court noted that this principle was upheld in **Swart v Vosloo 1965 (1) SA 100(A) at 105 F-H** and reiterated in **Miller & Miller v Dickinson 1971 (3) SA 581A at 587 to 588A** where the following was stated:

"In this Court it was not disputed on behalf of the appellants that in law, in the absence of an agreement to the contrary, a party to a contract to exercise his right to cancel must convey his decision to the mind of the other party and that cancellation does not take place until that happens. It is accepted that until the innocent party's election is brought to the attention of the guilty party there will be no finality and hence uncertainty."

[24] The court in **Datacolor** further held that indirect communication to the other party sufficed. At paragraph 29 the court expressed:

*"Once he has declared his decision to cancel it is, of course, in his own interest to ensure that it is brought to the attention of the guilty party lest the latter may retract his repudiation, if that is his breach thereby pre-empting any purported cancellation on his part. But he is not obliged to do so. Since the election to cancel provided that it is unambiguous, need not be explicit but maybe implicit, and since the cause of cancellation had not been correctly identified and stated, it follows that the actual communication of the decision to cancel, once made and manifested, may be conveyed to the guilty party by the third party."*⁹

[25] Having regard to the said principles enunciated by our courts, I find that an inference could not be drawn in the respondent's favour. A communication of his

⁹ My emphasis

intention to cancel necessary. On the facts pleaded, an unequivocal intention not to be bound by the agreement was not established.

[26] The general principles relating to exceptions was outlined in **Living Hands**¹⁰ with reference to various authorities namely:

- (a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
- (b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.
- (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.
- (d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
- (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

¹⁰ Living hands Pty Ltd v Dtiz and Others 2023 (1) SA 164 GJ 12/7/2022 at para 15

- (f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.
- (g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.

[27] I am further reminded of the long-established principle, that a party is required to plead every material fact which would be necessary for the plaintiff to prove in order to support his claim. In *Mckenzie*¹¹ the court reiterated that only the *facta probanda* need to be pleaded.

[28] Accordingly the exception raised herein, on the ground that the particulars of claim lacks averments necessary to sustain a cause of action, has merit. The excipient has shown that on every interpretation afforded, the cause of action lacked the material averment to sustain his cause of action namely, that the excipient had been informed of the respondent's intention to cancel the agreement. There is no evidence before me that the parties agreed that cancellation could be effected without notice.

[29] The Constitutional Court in the *Pretorius* matter¹² reminded us that the purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment that is so serious as to merit the costs even of an exception. An exception should only be upheld if the court is satisfied that the cause of action or

¹¹ *Mckenzie v Farmers Cooperative Meat Industries Ltd* 1922 AD 16 at 23

¹² *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 CC at paragraph 15

conclusion of law in the pleading cannot be supported on every interpretation put to the facts which is the case here.

[30] In the premises the exception is granted with costs.



H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicant:

Adv. L Hennop

Instructed by:

FVS Attorneys

Counsel for the respondent:

Adv. SM van Vuren

Instructed by:

Dyason Attorneys

Date heard:

17 November 2025

Date of Judgment:

28 November 2025