

REPUBLIC OF SOUTH AFRICA



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

CASE NO:2023/120194

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES/
_____	_____
DATE	SIGNATURE

In the matter between:

TIGER BRANDS LIMITED

EXCIPIENT/DEFENDANT

and

NGOBENATHI INVESTMENTS (PTY) LTD

RESPONDENT/PLAINTIFF

JUDGMENT

DREYER AJ

- [1] The plaintiff, Ngobenathi Investments (Pty) Ltd, seeks contractual damages from the defendant, Tiger Brands Ltd, arising out of a written service level agreement the parties concluded in April 2018 (the Agreement). The Agreement required the plaintiff to provide the defendant with reverse logistics and quality assurance services. The plaintiff pleads that the defendant was liable to pay the rental for the premises the plaintiff occupied in order to execute its obligations under the Agreement. The plaintiff pleads the defendant paid the

rental for the premises it so occupied from inception of the service level agreement until March 2021.

- [2] The plaintiff has two claims for contractual damages. The first claim is for the reimbursement of the rental the plaintiff paid for the premises it occupied in order to execute its obligations under the Agreement for the period April 2021 to April 2023. The second claim is for patrimonial loss including general and specific damages the plaintiff pleads it has suffered as a result of the defendant's ceasing to provide the plaintiff with stock for the plaintiff to render the reverse logistics and quality assurance services under the Agreement.

Claim A

- [3] The defendant excepts to both claims. The defendant relies on six grounds, certain of which assert that the plaintiff's particulars of claim are either vague and embarrassing or that the particulars of claim fail to sustain a cause of action.
- [4] The general principle is that a pleading is excipiable if no possible evidence led on the pleading can disclose or make out a cause of action.¹ In making this determination the court considers the pleadings excepted to, as it stands.² Pleadings must be read as a whole and an exception cannot be taken to a paragraph or part of a pleading that is not self-contained.³
- [5] An exception to a pleading on the ground that it is vague and embarrassing is a two-step consideration.⁴ The excipient must show both that the pleading lacks the particularity to the extent that it is vague and that such vagueness causes embarrassment of such a nature that the excipient is prejudiced and cannot plead. This requires that the excipient must demonstrate that the

¹ *Vermeulen v Goose Valley Investments* 2001 (3) SA 986 (SCA) at 997.

² *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) at 52G.

³ *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553.

⁴ *Merb (Pty) Ltd v Matthew* per Maier Fawley J, unreported decision, 2020/15069, dated 16 November 2021 (Merb); *Sun City Waterworld (Pty) Ltd v Sun International South Africa Ltd*, unreported GJ case, A2024001715, dated 28 October 2024, decision of the Full Court at paras 15–20.

pleading is ambiguous or meaningless or contradictory or capable of more than one meaning.

- [6] In comparison, an excipient, who alleges that the particulars of claim do not disclose a cause of action, must establish, upon any construction of the particulars of claim, no cause of action is disclosed.⁵
- [7] I will deal with the exception to each claim. The excipient raises three grounds why the plaintiff's first claim is vague and embarrassing.
- [8] At paragraph 5, the plaintiff pleads that "*the material, express, tacit or implied terms of the Service Level Agreement required the defendant to be responsible for the payment of rental in terms of several lease agreements that the plaintiff entered into with third party lessors*".
- [9] The first ground the defendant relies on is that on an analysis the particulars and by a process of deductive reasoning, paragraph 5 is neither express, implied nor tacit of the Agreement itself. Consequently, the defendant contends the plaintiff's claim A fails to sustain a cause of action.
- [10] Clause 5 of the Agreement stated that "*It will be the responsibility of Tiger Brands to manage the lease agreement on the facility. The maintenance of the facility shall be the responsibility of Tiger Brand.*"
- [11] How this clause is to be interpreted lies at the heart of the plaintiff's claim A. It is not clear whether the word "*manage*" in clause 5 of the Agreement means Tiger Brand would be responsible for the payment of the facility or merely to determine the terms of the lease. When this clause is read with the balance of the clauses of the Agreement, where Tiger Brands dictates how every single aspect of the relationship governed by the Agreement is to be met, it is not clear to me that the interpretation the defendant seeks is the only way paragraph 5 of the particulars of claim can be read.

⁵ *Living Hands (Pty) Ltd v Ditz* 2013 (3) SA 368 (GSJ) at 347G, referred to in *Merb*.

- [12] The analysis on which the defendant relies goes to an interpretation of the Agreement. *“As a rule, Courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where its meaning is uncertain.”*⁶ I am of the view that the meaning of clause 5 of the Agreement is uncertain. The first ground of exception fails.
- [13] The second ground the defendant relies on is that the plaintiff has not pleaded in paragraph 7 that it had a legal obligation to conclude the leases on the defendant’s behalf and why the defendant is liable for costs of the lease. For this reason, the defendant contends the particulars are vague and embarrassing and / or fail to sustain a cause of action.
- [14] In paragraph 7, the plaintiff pleads: *“Subsequent to entering into the SLA [it] entered into three lease agreements with Izandla Property Fund (Pty) Ltd (Izandla) at the behest and insistence of the defendant. The lease agreements between the plaintiff and Izandla were entered into between April 2021 and May 2022 The said several lease agreements were both in accordance with the specifications of and in compliance with the requirements of the defendant”*.
- [15] The defendant identifies one paragraph in isolation for its contention that the claim as a whole is vague and embarrassing and / or fails to sustain a cause of action. The defendant fails to consider the claim as a whole. The second ground of exception fails.
- [16] The third ground the defendant relies on is that the plaintiff has failed to allege in paragraph 8 whether there was an obligation on the defendant to pay the lessor directly or to refund the plaintiff. For this reason, the defendant contends the particulars are vague and embarrassing.
- [17] In paragraph 8, the plaintiff pleads:

“The defendant has failed, refused and/or neglected to make payments of the rentals of the lease agreements aforesaid and has also failed, neglected and/or

⁶ *Bentel Associates International (Pty) Ltd and another v Bradford Corner (Pty) Ltd and another* [2013] JOL 30165 (GSJ).

refused to maintain said premises in terms of the SLA. As a result, and consequent to the failure, neglect and/or refusal by the defendant as herein stated, the plaintiff has expended an amount of R2 854 703 .65 to Izandla in the period from April 2021 to April 2023, which amount, in terms of the service level agreement between the plaintiff and defendant, ought to have been expended by the defendant.”

- [18] The particularity the defendant seeks is not required for the defendant to plead. The essence of the defendant's second and third grounds is that the plaintiff has not pleaded with sufficient particularity. Pleadings need not be perfect nor do pleadings need to be to the defendant's liking. All a party is required to plead are the necessary facts to sustain the cause of action. There is sufficient particularity for the defendant to plead. It is available to the defendant to request such further particulars as it may require for the purpose of trial. The second and third grounds of exception fail.

Claim B

- [19] The plaintiff's second claim is that the defendant stopped providing stock that it could provide the defendant with the quality assurance services as required by the Agreement. The plaintiff pleads it had a legitimate expectation that the defendant would continue to do so. As a consequence, the plaintiff pleads it has suffered pure patrimonial loss, general and specific damages.
- [20] Legitimate expectation is a construct of administrative law, not contractual law. As the Constitutional Court stated in *Trustees of the Simcha Trust v Da Cruz and Others (Trustees of Simcha Trust)*:⁷

“[27] The concept of legitimate expectation finds its origins in administrative law. In Traub, the then Appellate Division cited with approval the following passage from a judgment of an English Court:⁸

⁷ *Trustees of the Simcha Trust v Da Cruz and Others; City of Cape Town v Da Cruz and Others* 2019 (3) SA 78 (CC) at para 27.

⁸ *Administrator of Transvaal v Traub* [1989] ZASCA 90; (1989) 10 ILJ 823 (A) at 835C-F (*Traub*).

“But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”⁹

[18] Section 3(1) of the Promotion of Access to Justice Act¹⁰ requires fairness to be observed in *“administrative action that materially and adversely affects the rights or legitimate expectations of any person”*. This underpins the administrative law nature of a legitimate expectation.

[19] The plaintiff does not plead any express promise given by or on behalf of a public official giving rise to the legitimate expectation or how the representations by the defendant give rise to a legitimate expectation.

[20] The Constitutional Court in *Trustees of Simcha Trust* stated:¹¹

“[28] The Full Court correctly distinguished the creature of legitimate expectations known to administrative law from the phrase as it is used in Camps Bay. The Full Court held:

“The reference to ‘legitimate expectations’ in Camps Bay Ratepayers is therefore to be understood as a reference to the hypothetical range of future possibilities which the parties to a notional sale would, as a legal construct, be considered to have had in the forefront of their minds, at the time, and is not to be confused with the concept of a ‘legitimate expectation’ as it has been established in law, in order to protect a party, by way of a procedural remedy, from the adverse consequences of a decision being taken by another without a prior opportunity to be heard.”¹²

⁹ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 401A-B.

¹⁰ Act 3 of 2000.

¹¹ *Trustees of Simcha Trust* note 7 above.

¹² *Cape Town City v Da Cruz* 2018 (3) SA 462 (WCC) (Full Court judgment) at paras 68-9. Per Binns Ward J.

[21] The plaintiff has not pleaded the legitimate expectation that falls into the mould of Camps Bay Ratepayers, namely a hypothetical range of future possibilities, that both parties considered at time the agreement was concluded.

[22] The plaintiff does not plead that the defendant has breached the Agreement. The plaintiff pleads that the defendant failed to comply with a term of contract. The plaintiff does plead how or why such failure gives rise to a legitimate expectation, nor how delictual damages arise from such legitimate expectation. The plaintiff argues that there is no bar to claim damages arising from a legitimate expectation. If I were to agree with this argument, it would require that I develop the common law.

[23] While there is no general rule that issues relating to the development of the common law cannot be decided on exception where “*the factual situation is complex and the legal position is uncertain*”, it would be better not to do so.¹³ The Supreme Court of Appeal, in *Tembani v The President of the Republic of South Africa*, held that, where a case involves an unprecedented and novel delictual claim, the position on exception is as follows:¹⁴

“[19] H v Fetal Assessment Centre *also confirmed the judgment of this court in the Children’s Resource Centre Trust that if a novel and unprecedented claim is ‘legally plausible’ then it must be determined in the course of the action. Children’s Resource Centre Trust was concerned with a delictual claim based on a novel legal duty not to act negligently. As was explained ‘the existence of such a duty depends on the facts of the case and a range of policy issues’, which required the Court to be ‘fully informed in regard to the policy elements’ and therefore ‘the enquiry militates against that decision being taken without evidence’. This, so it was held, renders it impossible to arrive at a conclusion except upon a consideration of all the circumstances of the case and every other relevant factor.*

¹³ *Tembani v The President of the Republic of South Africa* 2023 (1) SA 432 (SCA) (*Tembani*) at para 15, overturned in *President of the Republic of South Africa v Tembani* 2025 (2) SA 371 (CC), but not on this point.

¹⁴ *Tembani* id at paras 19-20.

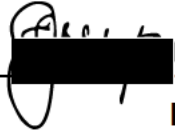
[20] *Accordingly, a court must be satisfied that a novel claim is necessarily inconceivable under our law as potentially developed under s39(2) of the Constitution before it can uphold an exception premised on the alleged nondisclosure of a cause of action. Citing H v Fetal Assessment Centre, the Constitutional Court held in Pretorius that the dismissal of an exception does not deprive the respondents of the opportunity of raising the same defences as substantive defences in their respective pleas or for their merits to be determined after the leading of evidence at the trial, which is probably, in any event, a better way to determine the potentially complex factual and legal issues involved.”*

[24] The pleading conflates a contractual claim with an administrative law concept. The resultant damages claimed are delictual damages for patrimonial loss, general and specific damages. This conflation of three distinct areas of law does not give rise to a cause of action. This is not an instance where the cause of action as pleaded can result in the development of the law. I agree with the defendant that the particulars in claim B fail to sustain a cause of action.

[25] Having decided that the particulars of claim B fail to sustain a cause of action, it is not necessary for me to consider the balance of the exception grounds relied on by the defendant.

[26] I make the following order:

1. The exceptions to Claim A are dismissed.
2. The exception to Claim B is upheld.
3. Claim B of the plaintiff's Particulars of Claim is struck out.
4. The plaintiff is granted 10 days to amend its Particulars of Claim.
5. Each party to bear their own costs.


DREYER AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the excipient/defendant:	Adv Whittaker instructed by Bowman Gilfillan Inc
For the respondent/plaintiff:	Mr Zikalala instructed by Zikalala Attorneys
Representative:	M Mmakola & Matsimela Inc
Date of hearing:	29 July 2025
Date of judgment:	12 January 2026