REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 11788/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

16/03/2026 [redacted]

DATE SIGNATURE

In the matter between:

PIETER BENNETTE	First Plaintiff
ADRIANA BENNETTE	Second Plaintiff
and	
MARIUS VERSTER	First Defendant
BMV ATTORNEYS	Second Defendant

JUDGMENT

DJ Smit, AJ

Introduction

[1] This exception concerns whether the first plaintiff (*Mr Bennette*) has pleaded a cause of action to claim back the fees and disbursements he paid to the second defendant (*BMV Attorneys)*.

Background

[2] Mr and Mrs Bennette issued summons against Mr Bennette's erstwhile attorney Mr Verster (the first defendant) and his firm (BMV Attorneys) in May 2020.[1]

[3] The underlying dispute has a long history. For purposes of this exception, which is the third, the necessary background may be briefly stated. This is of course done on the basis that the facts pleaded in the particulars of claim must be assumed to be true for purposes of an exception.[2]

[4] Mr Bennette's claim is based on a mandate he gave to BMV Attorneys in 2012 to challenge an amendment to the rules of a pension fund which excluded him from eligibility to serve as a trustee of the fund. The plaintiffs plead that, in the execution of the mandate, BMV Attorneys acted negligently in that:

a. BMV Attorneys instituted a review application in terms of the Promotion of Administrative Justice Act, 3 of 2000 (*PAJA*) against the amendment of the rules without exhausting Mr Bennette's internal remedies.

b. The review application was not instituted on the correct grounds or within the prescribed time periods and no condonation was sought for the lateness of the application.

c. BMV Attorneys did not communicate settlement proposals to the fund and did not provide proper advice or feedback on prospects of success.[3]

[5] While the review was successful at first instance, it was later overturned on appeal and Mr Bennette was ordered to pay the taxed legal costs of the fund.

[1] In what follows, the defendants are referred to by shorthand as "BMV Attorneys", even though the particulars of claim pleads a claim against "the first and / or the second defendant".
[2] *Stewart v Botha* 2008 (6) SA 310 (SCA) para 4.
[3] More grounds of negligence are pleaded but this fairly summarises them.

[6] Mr Bennette pleads that, if BMV Attorneys acted without negligence, it "*would have ascertained the true facts and instituted the correct procedures and / or application within the prescribed time periods in challenging the decision taken by the*" fund.

[7] Mr Bennette claims the fees and disbursements paid to BMV Attorneys (in an amount of R557,602.33) and the taxed legal costs of the fund (in an amount of R602,261.74) from BMV Attorneys as damages payable for breach of contract.

The exception

[8] BMV Attorneys excepted against the particulars of claim on the basis that Mr Bennette is precluded as a matter of contract law from claiming <u>both</u> the fees and disbursements paid to BMV Attorneys and the taxed legal costs paid to the fund. The exception states that:

> *"The former constitutes reliance interest damages and the latter constitutes expectation interest. They cannot be claimed together in respect of the same breach of contract."*

The parties' arguments

[9] In the heads of argument filed on behalf of BMV Attorneys, it is argued that in claims for contractual damages, the innocent party should be placed in the position they would have occupied had the contract been properly performed, insofar as this can be done by payment of money and without undue hardship to the defaulting party.[4] (This is interchangeably referred to as "*positive interesse*" or "*expectation interest*".)

[10] This entails a comparison between two positions of the innocent party: the actual position that the innocent party now occupies after the breach of contract, and the hypothetical position they would have occupied had there been no breach and/or had the contract been properly performed.

[11] This is different from a claim for delictual damages, in which the measure of damages is that the wronged party must be put in the position they would have

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[4] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687C-D.

occupied had the wrongful conduct never occurred.[5] (This is interchangeably referred to as "*negative interesse*" or "*reliance interest*".)

[12] The measure of damages in delict also entails a comparison between two positions of the innocent party: the actual position that the innocent party now occupies after the wrongful conduct, and the hypothetical position they would have occupied had there been no wrongful conduct.

[13] BMV Attorneys argued that <u>generally</u> a claim for the contract price (in this case, the fees and disbursements paid to BMV Attorneys) is incompetent in claims for breach of contract, because that claim is based upon the supposition that the contract was or should never have been entered into by the innocent party. The logical basis of quantifying loss in breach of contract is that the contract was fully and correctly performed by both parties, which presupposes payment of the contract price by the innocent party.

[14] BMV Attorneys referred to three decisions in support of the submission that the particulars of claim are excipiable on the basis that the contract price is claimed in a claim for breach of contract in circumstances where the claim is based on full performance by both contract parties: *Wijtenburg;*[6] *Mainline Carriers*;[7] and *Drummond Cable Concepts*.[8]

[15] In my view, these cases – when read together – bear out the proposition that to allow a plaintiff to claim both the contract price and the costs that the defendant would have saved had the defendant performed the contract fully (and without breach), would generally overcompensate the plaintiff, who is limited to his positive interesse.

[16] In their heads of argument, the plaintiffs argued that exception cannot be taken to particulars of claim on the basis that it does not support one of several claims arising out of one cause of action.[9] The plaintiffs also argued that the claim for the fees and disbursements is a claim in reliance on BMV Attorneys'

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[5] *Trotman v Edwick* 1951 (1) SA 443 (A) at 449B-C.
[6] *Wijtenburg Holdings v Bobroff* 1970 (4) SA 197 (T) at 205C.
[7] *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C) esp paras 63-66.
[8] *Drummond Cable Concepts v Advancenet (Pty) Ltd* 2020 (1) SA 546 (GJ) esp paras 23-25.
[9] *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706E.

representation that they would carry out their mandate non-negligently and hence consistent with the decision in (at least) *Mainline Carriers* that the reliance interests of the plaintiff in a claim for breach of contract may (sometimes) be used to quantify the plaintiff's damages.

[17] At the hearing of the exception, Mr De Beer (the plaintiffs' attorney, who had not drawn the heads) appeared for the plaintiffs. He did not argue these propositions. In my view correctly, he was correct not to press them at the hearing, for the following reasons:

a. The rule in *Dharumpal (supra)* that an exception cannot be taken to particulars of claim on the basis that it does not support one of several claims arising out of one cause of action, does not apply in circumstances where the exception is taken on the basis that one claim is inconsistent or contradictory or cannot co-exist with the other claim. Put differently, where the subject-matter of the exception is whether the impugned claim arises from the pleaded cause of action as a matter of law and logic, it is immaterial that it is one of several claims said to arise from the same cause of action.

b. Further, what *Mainline Carriers* (and certain other cases quoted by the plaintiffs' heads) shows is that in exceptional circumstances, the "*reliance interest*" and the "*expectation interest*" may overlap and for that reason, the reliance interest may be claimed if it does not exceed the expectation interest. These cases offer no support for the proposition that a plaintiff may claim both the reliance interest and the expectation interest.

[18] At the hearing Mr De Beer conceded that a claim for both positive interesse (expectation interest) and negative interesse (reliance interest) would be excipiable. He rather advanced an argument not found in the plaintiffs' heads, namely that the particulars of claim is open to the interpretation that the fees and disbursements being claimed refer, in truth, to the costs that the plaintiffs would have recovered from the fund if the review (or whatever other procedure was followed to set aside the rule-change) was successful.

[19] This argument is based on the trite principle that an exception will only be upheld if, on every interpretation that the pleading can reasonably bear, no cause of action (or defence) is disclosed.[10]

[20] Thus, the issue for decision is whether these particulars of claim can reasonably bear the interpretation that the plaintiffs claim the costs they would have recovered from the fund on success, not the fees and disbursements they paid to BMV Attorneys.

Discussion

[21] The new argument advanced for the plaintiffs is ingenious, but does not withstand scrutiny.

[22] In the words of paragraph 21.1 of the particulars of claim, the plaintiffs' first claim is for "*fees and disbursements paid to [BMV Attorneys] R557 602.33*". It is not a claim for costs that would have been recovered from the fund upon successful proceedings. There is clearly a difference in kind (not only amount) between fees paid as between attorney and own client and fees recovered from another party, which is taxed by the Taxing Master (if not agreed between the parties) – typically on a not overly generous party-and-party scale.

[23] Further, the claim asserted in paragraph 21.1 flows directly from the allegation in paragraph 20.5 that: "*As a result of [BMV Attorneys'] incorrect and negligent advice, [Mr Bennette] … made payment of fees and disbursements in respect of legal services not properly rendered by [BMV Attorneys] to [Mr Bennette].*"

[24] The allegation in paragraph 20.5 is clearly that, but for the negligent advice, Mr Bennette would not have paid legal fees to BMV Attorneys (which is the delictual measure of loss). The allegation is <u>not</u> that, but for the negligent advice, Mr Bennette would have recovered legal fees from the fund.

[25] In my view, paragraph 19.4 of the particulars of claim, which the plaintiffs' counsel relied on in argument, does not assist. The paragraph reads as follows:

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[10] *Stewart v Botha* 2008 (6) SA 310 (SCA) para 4.

"Although the above Honourable Court had initially granted the application in favor of [Mr Bennette] on common law review grounds, as a result of the failure to follow the correct processes, as prescribed by PAJA, the above Honourable Court, sitting as a Court of Appeal, upheld the appeal, dismissing [Mr Bennette's] application. A copy of the Judgment by Ismail J, Makume J and Francis J, dated 6 June 2017, is attached as Annexure "POC1"."

[26] This paragraph does not refer to an award of costs or even suggests that costs would have been awarded to Mr Bennette had the legal advice he obtained not been negligent. It does not detract from the clear wording of paragraphs 20.5 and 21.1 of the particulars of claim, which asserts a claim for the "*reliance interest*" of Mr Bennette in addition to and in contradiction of the claim in paragraph 21.2, which is for his "*expectation interest*".

[27] In the result the exception must be upheld. The parties were agreed that costs should follow the event and that scale C would be appropriate.

Order

[28] I make the following order:

a. The exception is upheld.

b. The amended particulars of claim dated 22 April 2025 is set aside.

c. The plaintiffs are granted leave to amend the particulars of claim within twenty (20) days from the date of this order.

d. The first plaintiff shall pay the defendants' costs of this exception on scale C.

[redacted]

DJ SMIT
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 4 March 2026

Date of judgment: 16 March 2026

For the Excipient:	M Sethaba instructed by Eversheds Sutherland
For the Respondents:	G de Beer (attorney) instructed by DBM Attorneys