



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

CASE NO: 2023-126429

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

24/02/2026

DATE

SIGNATURE

In the matter between:

EWALD BERNARDUS COLESKE

Plaintiff

And

INHOUD HUIS MUSIEK KOPIE REG (PTY) LTD

Defendant

JUDGMENT

TD SENEKE, AJ

CASE FOR THE PLAINTIFF

1. On 12 November 2024, the Plaintiff filed amended particulars of claim after the Defendant successfully brought an exception to the initial particulars of claim.¹
2. The case that has been made in terms of the amended particulars of claim is as follows:
3. During April 2018 and at Pretoria, the Plaintiff, personally represented and the Defendant, duly represented by Jacomien de Villiers, entered into an oral Joint Venture Agreement (“the agreement”) as to the artist rights, performing rights, recording rights and service rights of the Recording Artist known as Roan Ash (“the artist”).
4. The material terms of the agreement were:
 - 4.1. The agreement covers the entire world.
 - 4.2. The parties would produce, manufacture, market, sell and distribute new recordings performed by the artist.
 - 4.3. The parties will divide earnings from 5.1 above, after the costs are recovered, on a 50% basis each.
 - 4.4. The agreement would regulate the relationship between the parties.
5. The terms of the agreement were recorded in writing by the Defendant’s attorney of record, Mr David Feinberg, a copy of which is annexed hereto marked POC 1.
6. The Plaintiff performed his obligations in terms of the agreement in that:

¹ Caseline 02-32 to 02-35

- 6.1. During 2018 and 2019 the Plaintiff produced, did the vocal productions, vocal editing, arranged and recorded quality demonstration recordings to generate international interest in the artist.
 - 6.2. During February 2019, the Plaintiff travelled to Nashville, Tennessee in the United States of America where the parties met with Warner Music's Cris Lacy and John Espocito to present the artist's music.
7. As a result of the parties meeting with Warner Music in Nashville, the Defendant, entered into a written override agreement with Warner Music particular to the artist.
8. The Plaintiff has repeatedly requested a copy of the override agreement from the Defendant, but still does not have a copy of the override agreement.
9. In terms of the agreement, the Plaintiff is entitled to 50% of the nett income received by the Defendant as a result of the conclusion of the override agreement.
10. Despite demand, the Defendant has failed to account to the Plaintiff for the income received as a result of the conclusion of the override agreement.
11. The Plaintiff claims:
 - 11.1. A full account, supported by vouchers, of the income derived as a result of the conclusion of the override agreement.
 - 11.2. Debatement of the account.
 - 11.3. Payment to the Plaintiff of whatever amount appears to be due to the Plaintiff upon debate of account.

CASE FOR THE DEFENDANT

12. The Defendant brought an exception to the Plaintiff's amended particulars of claim on the grounds that they lack averments necessary to sustain a cause of action, in the following respects:

First cause of complaint

13. The Plaintiff prays for a "*full account ... of the income derived as a result of the conclusion of the override agreement*", as that agreement is defined in the particulars of claim, and for the debatement of the account.

14. A claim for statement and debatement of account is available only where a party is under a duty to account.

15. A duty to account for purposes of a statement and debatement of account arises either because of a:

15.1. fiduciary duty owing to the nature of the relationship between the parties;

15.2. statutory duty; or

15.3. contractual duty.

16. The Plaintiff fails to allege any basis for a duty to account.

17. In particular, the Plaintiff fails to allege any:

17.1. fiduciary duty on the part of the Defendant to account and debate;

17.2. statutory duty on the part of the Defendant to account and debate;

17.3. contractual duty on the part of the Defendant to account and debate.

18. In the premises, the particulars of claim lack averments necessary to sustain a cause of action for a statement and debatement of account.

Second cause of complaint

19. The amended particulars of claim allege that the parties concluded an oral agreement, the material terms of which were:

“5.1 The agreement covers the entire world;

5.2 The parties would produce, manufacture, market, sell and distribute new recordings performed by the artist [known as Roan Ash]

5.3 The parties will divide earnings from 5.1 above, after the costs are recovered, on a 50% basis each.

5.4 The agreement would regulate the relationship between the parties.”

20. The Plaintiff has failed to make any allegation capable of establishing that the Defendant breached the pleaded terms of the alleged agreement.

21. The amended particulars of claim allege that the Defendant entered into an override agreement with Warner Music in Nashville.

21.1. Nothing in the alleged oral agreement, or the document annexed as “POC1” to the amended particulars of claim, prohibits the conclusion of the alleged override agreement.

21.2. Indeed, the alleged conclusion of an override agreement is not related to any of the pleaded obligations of the Defendant under the alleged oral agreement.

- 21.3. Accordingly, the alleged conclusion of the override agreement cannot give rise to any breach of any obligation which the Plaintiff alleges the Defendant owes to it.
22. The amended particulars of claim allege that the Defendant has failed to provide the Plaintiff with an account for income received as a result of the alleged override agreement. However, the Plaintiff does not make any allegation that:
- 22.1. the alleged agreement between the parties, and the performance of any obligation by either party under that agreement, caused the conclusion of the override agreement;
 - 22.2. the conclusion of the override agreement has led to the production or release of any recordings by the artist;
 - 22.3. the conclusion of the override agreement has resulted in the distribution or sale of any recordings by the artist;
 - 22.4. the conclusion of the override agreement has led to the Defendant earning any revenue in relation to the performance by the parties of any obligations pleaded by the Plaintiff;
 - 22.5. the Defendant has profited from the parties having undertaken productions, manufacturing, marketing, selling or distributing of new recordings performed by the artist, whether through the conclusion of the override agreement or otherwise or by any other means.
23. Accordingly, the Plaintiff has not made allegations sufficient to disclose any breach by the Defendant of its alleged obligations to divide earnings with the Plaintiff.

24. The amended particulars of claim make no other allegations of any conduct by the Defendant which could sustain a finding that the Defendant breached any of the contractual obligations alleged by the Plaintiff.
25. In light of the foregoing, even if every allegation made by the Plaintiff is assumed to be true, the amended particulars of claim do not disclose any breach of contract.
26. In the premises, the amended particulars of claim lack averments necessary to sustain an action for breach of contract.

Third cause of complaint

27. The amended particulars of claim purports to rely on the provisions of an alleged oral agreement between the parties.
28. The amended particulars of claim allege that the pleaded terms of the oral agreement between the parties, on which the Plaintiff relies, were “record [sic] in writing by the Defendants [sic] attorney of record”.
29. The Plaintiff annexed to the amended particulars of claim the purported recordal, and marked it “POC1”.
30. POC1 provides in relevant part that:
 - 30.1. the term of the agreement shall be an “Initial period of 10 years from date of signing” (clause 4); and
 - 30.2. POC1 constitutes the whole agreement between the parties relating to its subject matter and “supersedes any other discussions, agreements and/or understanding regarding the subject matter” (clause 6)
31. Accordingly, in terms of the amended particulars of claim:

- 31.1. POC1 was intended to supersede any discussions or agreements between the parties; and
- 31.2. the parties would only conclude the binding agreement reflected in POC1 with effect from the date of signing of POC1.
- 32. POC1 is unsigned, and the Plaintiff fails to allege that it was signed on behalf of either of the parties.
- 33. Accordingly, the amended particulars of claim fail to make sufficient averments to establish that the Plaintiff and the Defendant concluded an agreement, and consequently fails to disclose a cause of action based on a breach of contract.
- 34. The Defendant prays for an order in the following terms:
 - 34.1. The Defendant's exception is upheld and the Plaintiff's amended particulars of claim are struck out.
 - 34.2. In the alternative to prayer 1, the Defendant's exception is upheld and
 - 34.2.1. the Plaintiff is granted leave to amend the amended particulars of claim within 15 days of the Court's order; and
 - 34.2.2. if the Plaintiff fails to deliver a notice of intention to amend within the aforementioned 15 days, its claim against the Defendant is deemed to be dismissed with costs on the attorney and own client scale, including the costs of counsel.
 - 34.3. The Plaintiff will pay the costs of the exception, including the costs of counsel, on the C scale.

LEGAL FRAMEWORK

35. In the matter of *Living Hands Living Hands (Pty) Ltd v Ditz*,² the test for such an exception was conveniently summarised by Makgoka J (as he then was) as follows:

“Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

- (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.*

² 2013 (2) SA 368 (GSJ) at 374G

(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.*

(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.”*

36. The Judgment of *Living Hands* has been cited, with approval, in the matter of *Merb (Pty) Ltd v Matthews* (unreported case no 2020/15069 dated 16 November 2021 in the Gauteng Court) the following useful summary of some of the general principles applicable to exceptions, in referring to the *Living Hands* Judgment *supra*, was made by Maier-Frawley J:

“9. Exceptions are also not to be dealt with in an over-technical manner, and as such, a court looks benevolently instead of over-critically at a pleading.

10. An excipient must satisfy the court that it would be seriously prejudiced if the offending pleading were allowed to stand, and an excipient is required to make out a very clear, strong case before the exception can succeed.

11. Courts have been reluctant to decide exceptions in respect of fact bound issues.

12. Where an exception is raised on the ground that a pleading lack averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed. It is trite that when pleading a cause of action, the pleading must contain every fact which

would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (facta probanda). The facta probanda necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the facta probantia) but every fact which is necessary to be proved.

13. An exception to a pleading on the ground that it is vague and embarrassing requires a two-fold consideration: (i) whether the pleading lacks particularity to the extent that it is vague; and (i) whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced in the sense that he/she cannot plead or properly prepare for trial. The excipient must demonstrate that the pleading is ambiguous, meaningless, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness, which vagueness causes embarrassment to the excipient.”

ANALYSIS OF THE EXCEPTION

37. The first cause of complaint is based on the premises that a claim for statement and debatement of account is available only where a party is under a duty to account.
38. The duty arises from fiduciary duty, statutory duty and contractual duty.
39. In paragraph 5 of the amended particulars of claim, the Plaintiff outlined the material terms of the oral agreement.
40. At paragraph 5.3, the Plaintiff refers to the sharing of earnings on a 50% basis each after costs are recovered.

41. Paragraphs 7.1, 7.2 and 8.1 also outlined how the override agreement with Warner Music was initiated and was eventually signed by the Defendant.
42. In my view, the Plaintiff has laid proper contractual basis to make a claim for statement and debatement of account.
43. The exception is accordingly dismissed.
44. In respect to the second cause of complaint, the Defendant alleges that the Plaintiff has failed to make allegation capable of establishing that the Defendant breached the pleaded terms of the alleged agreement.
45. I disagree with the points that are raised in 9.1 to 9.3. As already stated above, the Plaintiff has pleaded that the override agreement which was concluded with Warner Music was directly linked to the oral agreement. Both the Plaintiff and the Defendant directly and jointly presented the artist's music to Warner Music which culminated in the conclusion of the override agreement with Warner Music.
46. Accordingly, I find that the override agreement is intrinsically linked to the oral agreement and was in fact concluded pursuant to the oral agreement between the parties.
47. I, therefore, find that this cause of complaint has no merit and must be dismissed.
48. In respect to the third cause of complaint, in paragraph 6 of his amended particulars of claim, the Plaintiff stated that the terms of the agreement as pleaded in 5.1 to 5.4 were recorded in writing by the Defendant's attorney of record, Mr David Feinberg.
49. What is alleged in this paragraph is in variance with how the Defendant regards the recordal of the oral terms of the agreement. The Defendant's approach is

that the whole recorded agreement is invalid insofar as it has not been signed and supersedes any discussions or agreements between the parties.

50. The case of the Plaintiff is that the terms of the oral agreement were recorded by the attorney of the Defendant. The Plaintiff's case is not based on the entire written record of the oral agreement. The Plaintiff relies only to the terms of the oral agreement as recorded by the attorneys of the Defendant.
51. It is not unusual for the parties who are engaged in discussions to conclude an oral agreement to exchange letters, emails, WhatsApp messages and written recordal of the terms of the oral agreement.
52. I am satisfied that the recorded terms of the oral agreement reflect the intention of the Plaintiff and the Defendant to conclude a joint venture agreement.
53. The case of *African National Congress v Ezulweni Investments (Pty) Ltd*,³ underscores that an oral agreement, supported by clear evidence of consensus and performance, can be enforced, even in the absence of the written contract provided that the necessary authority to contract is established.

CONCLUSION

54. I make a finding that the exception that was brought by the Defendant must be dismissed with costs.

The order:

In the result, I make the following order:

1. The exception is dismissed.

³ (Case no 979/2022) [2023] ZASCA 159 (24 November 2023)

2. The Defendant will pay the costs, including the costs of counsel on the C scale.


TD SENEKE AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Appearances

For Plaintiff : Advocate Z Schoeman

Instructed by : Couzyn Hertzog & Horak Incorporated

For Defendant : Advocate D Linde

Instructed by : Rosengarten & Feinberg