

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

Case Number: 2023-132153

|               |                                                                                    |
|---------------|------------------------------------------------------------------------------------|
| (1)           | REPORTABLE: YES                                                                    |
| (2)           | OF INTEREST TO OTHER JUDGES: YES                                                   |
| (3)           | REVISED: YES                                                                       |
| 23 March 2026 |  |
| DATE          | SIGNATURE                                                                          |

In the matter between:

**MOKIMA MUSIC AND PUBLISHING (PTY) LTD**

Applicant

and

**BLACK BRAIN PICTURES CC**

Respondent

*This matter involves an exception taken by the Applicant (Mokima) to a defence raised by the Respondent (Black Brain) in a copyright infringement action.*

*Mokima instituted action against Black Brain for copyright infringement, alleging ownership of the copyright in the song "Ngixoolee" through administration*

*agreements with the authors. Black Brain used the song as the theme music for its 275-episode television series "The Black Door" without Mokima's consent. Mokima claims R11 million in damages.*

*Black Brain admitted using the song but pleaded that it had concluded a licence agreement with Thupa Industry (Pty) Ltd, which entitled it to the copyright. As an alternative defence under section 24(2) of the Copyright Act 98 of 1978, Black Brain contended that even if infringement were proven, it should not be liable for damages because it was not aware, and had no reasonable grounds for suspecting, that Mokima owned the copyright. It relied on Thupa's warranty and Mokima's 16-month delay in asserting its rights.*

*Mokima excepted to this defence on the basis that section 24(2) requires lack of knowledge that copyright subsists in the work, not lack of knowledge as to the identity of the copyright owner. The facts pleaded by Black Brain (the warranty, invoicing and public celebration) demonstrated that Black Brain was aware that copyright subsisted.*

*The crisp issue was whether the protection afforded by section 24(2) requires a lack of knowledge that copyright subsists, or extends to a lack of knowledge of the owner's identity.*

*Held –*

*The preliminary argument that the exception should not be proceeded with was dismissed. The matter raised a precise question of law properly decided on exception.*

*Section 24(2) creates a narrow exception to strict liability for direct infringement. Its plain wording requires a lack of awareness that copyright subsists in the work, not a mistaken belief about ownership.*

*The pleaded facts demonstrated Black Brain's awareness of copyright subsistence through the warranty from Thupa and related conduct.*

*South African and English authorities support this interpretation. A belief that one has permission or that copyright is owned by another is predicated on the existence of copyright.*

*Constitutional and purposive arguments advanced by Black Brain did not warrant a broader interpretation.*

*The exception was upheld. The defence pleaded in paragraph 4 of the Plea was bad in law, lacking the necessary averments to sustain a defence under section 24(2).*

*Quill Associates (Pty) Ltd v Randfontein Local Municipality (36264/2013, 36265/2013) [2015] ZAGPPHC 557 (31 JULY 2015) followed.*

*Order*

- 1. The exception is upheld.*
- 2. The Defendant is granted leave to amend its plea within 15 days.*
- 3. Should the Defendant fail to amend, the defence in paragraph 4 of its plea shall be deemed to be struck out.*
- 4. The Defendant is to pay the costs of the exception on the party and party scale (Scale B).*

---

## JUDGMENT

---

**WANLESS J**

### **Introduction**

- [1] This matter was heard by this Court as a Special Opposed Motion. It concerns an exception taken by the Plaintiff, Mokima Music and Publishing (Pty) Ltd

("Mokima"), to a defence raised in the Plea of the Defendant, Black Brain Pictures CC ("*Black Brain*").

- [2] The action is one for copyright infringement. Mokima alleges that it is the owner, *alternatively*, the exclusive licensee, of the copyright in the musical and literary work comprising the song "Ngixoolee" ("*the Song*"). The Song was co-authored by two artists, namely Hlengiwe Manyathi (*professionally known as "Boohle"*) and Thapelo Ndou (*professionally known as "Busta 929"*). By virtue of written administration agreements concluded with the authors in May 2021, Mokima alleges that it holds the copyright in the Song.
  
- [3] Mokima's claim arises from the fact that Black Brain, the producer of a 275-episode television series titled "*The Black Door*", used the Song as the titular theme for every episode, commencing in April 2022, without Mokima's consent. Mokima claims damages in the amount of R11 million, being the licence fee it would have charged (*calculated at R40 000 per episode*), *alternatively*, a reasonable royalty calculated as 10% of the income derived by Black Brain from the series.
  
- [4] Black Brain admits using the Song, but denies that Mokima owned the copyright. It pleads that it concluded a licence agreement with Ndou's company, Thupa Industry (Pty) Ltd ("*Thupa*"), on 22 March 2022, in terms of which Thupa warranted that it owned the copyright. It is this defence that gives rise to the present exception.
  
- [5] In its Plea, Black Brain raises an alternative defence based on section 24(2) of the Copyright Act 98 of 1978 ("*the Act*"). It contends that, even if it is found to have infringed Mokima's copyright, it should not be liable for damages because it was not aware, and had no reasonable grounds for suspecting, that Mokima owned the copyright. It relies on the warranty provided by Thupa and on Mokima's failure to assert its rights for approximately 16 months, during which all 275 episodes were broadcast.
  
- [6] Mokima has excepted to this alternative defence on the grounds that the factual averments pleaded by Black Brain do not sustain a defence under section 24(2) of the Act. The crisp issue for determination is one of statutory interpretation.

Does the protection afforded by section 24(2) of the Act require a lack of knowledge that copyright *subsists* in the work at all, or does it extend to a lack of knowledge as to the *identity* of the copyright owner?

- [7] This Court was advised by Counsel for both parties that there is no earlier decision by any court that directly resolves this question. In the premises, this Court was urged to deliver a reportable judgment. This was despite the fact that this Court was referred to the decision of Potterill J in the matter of *Quill Associates (Pty) Ltd v Randfontein Local Municipality*,<sup>1</sup> an unreported decision in this Division. Reference will be made thereto later in this judgment.

### **The Pleadings**

- [8] It is necessary to set out the relevant portions of the pleadings, as the exception must be adjudicated on the facts as pleaded by Black Brain, which are assumed to be true for this purpose.
- [9] In its amended particulars of claim, Mokima alleges the subsistence of copyright in the Song; the conclusion of administration agreements with the authors, in terms of which the copyright was assigned to it and that Black Brain infringed that copyright by reproducing the Song in synchronisation with each of the 275 episodes of the television series. The damages claimed are as set out above.
- [10] Black Brain's Plea is structured in several parts. For present purposes, the focus is on paragraph 4 thereof (*and its subparagraphs*), which pleads the alternative defence in terms of section 24(2) of the Act. The relevant portion reads as follows:

*"4.1 In the alternative to what the defendant has pleaded above, the defendant alleges that even if the plaintiff were to succeed, on some or other basis, in demonstrating that the plaintiff held copyright in the Song, on the basis alleged in the particulars of claim, which subsisted in March 2022, and that the Black Door Licence Agreement infringed the plaintiff's copyright (which is denied), the*

---

<sup>1</sup> (36264/2013, 36265/2013) [2015] ZAGPPHC 557 (31 JULY 2015).

*plaintiff would still not be entitled to recover damages from the defendant by virtue of section 24(2) of the Copyright Act.*

...

*4.4 In terms of the Black Brain Agreement, Mr Ndou and Thupa warranted that Thupa, alternatively Mr Ndou, was the holder of the copyright in the sound recording, as well as the literary and musical work in the Song.*

*4.5 The plaintiff's particulars of claim do not allege 'guilty knowledge' on the part of the defendant.*

*4.6 The defendant was not aware and had no reasonable grounds for suspecting that copyright in the Song was owned or held by the plaintiff.*

*4.7 The reasonableness of the defendant's conduct is illustrated by various facts, including the following.*

*4.8 After the conclusion of the Black Door Licence Agreement:*

*4.8.1 Mr Ndou and Thupa sent the Defendant an invoice for the agreed contract amount.*

*4.8.2 Mr Ndou was paid the agreed contract amount of R75 000.*

*4.8.3 Mr Ndou and Thupa sent the defendant copies of the 'separate' tracks for the Song...*

*4.8.4 Mr Ndou even celebrated the use of the Song in a social media post on 25 May 2022...*

...

*4.11 The plaintiff was aware, alternatively ought reasonably to have been aware, that the Song was being used in the Series.*

...

*4.14 The first letter of demand that the defendant received alleging that the plaintiff held copyright in the Song was received on 22 August 2023.*

...

*4.17 Thus, the defendant did not broadcast the Song in the title sequence of the Series in the face of any contention that doing so would breach copyright held in the Song by the plaintiff or any other person.*

*4.18 Section 24(2) of the Act applies and the plaintiff's claim falls to be dismissed."*

- [11] The crux of the defence, therefore, is that Black Brain believed the copyright was owned by Thupa or Ndou and that it had no reason to suspect that Mokima was the owner. It does *not* plead that it was unaware that copyright *subsisted* in the Song.

### **The Exception**

- [12] On 18 July 2024, Mokima delivered its notice of exception in terms of Rule 23(1). The grounds of exception are set out concisely. Mokima contends that the defence pleaded in paragraph 4 of the Plea is bad in law for two reasons.

- [13] First, the allegation that Black Brain had no reasonable grounds for suspecting that Mokima owned the copyright is *not* an allegation that Black Brain was not aware, and had no reasonable grounds to suspect, that copyright *subsisted* in the Song. The language of section 24(2) of the Act speaks to the *subsistence* of copyright, *not* its ownership.

- [14] The second reason, flowing from the first reason, is that the warranty alleged by Black Brain and communicated to it, is that copyright *did* subsist in the Song. Therefore, the averments contained in paragraph 4 of the Plea disclose that Black Brain did have reasonable grounds for suspecting that copyright subsisted. It cannot, in the same breath, plead facts that demonstrate its awareness of copyright and then seek refuge in a provision designed for those who are unaware of its very existence.

***Black Brain's submission that the exception should not be proceeded with.***

- [15] Before addressing the merits of the exception, it is necessary to deal with a preliminary argument raised by Black Brain. Counsel for Black Brain submitted that this Court should decline to uphold the exception, even if it had merit, on the basis that proceeding with it would be a waste of judicial resources. The argument was that the interpretation of section 24(2) of the Act is a question of fact that is intricately linked to the evidence to be led at trial, and that it could be more properly and efficiently dealt with at that stage. Black Brain relied on the principle that exceptions should be dealt with sparingly where a matter is complex and requires contextual evidence. In support of this submission, counsel referred to the matters of *Denel (Edms) Bpk v Vorster*<sup>2</sup> and *Telecom Namibia (Pty) Ltd v Cell C (Pty) Ltd*<sup>3</sup>
- [16] This argument has no merit. It is correct that our courts have cautioned against upholding exceptions in cases where the pleading is potentially excipiable but the defect can be cured by evidence at trial, or where the matter is so complex that it requires the context of a full trial. However, those are *not* the circumstances of this matter.
- [17] The present exception raises a precise question of law, namely the proper interpretation of section 24(2) of the Act. The enquiry is confined to the four corners of the pleadings and the text of the statute. No amount of evidence led at trial can alter the plain meaning of the words used in the section. To postpone this question to trial would not save judicial resources. It would squander them, since it would compel the parties to prepare for, and the court to preside over, a lengthy trial on issues of fact (*including the reasonableness of Mokima's conduct and the question of Black Brain's knowledge*) when a key legal foundation for a significant component of the pleaded defence may be fundamentally flawed.
- [18] The decisions relied upon by Black Brain are distinguishable from the present matter. In *Denel*, the exception concerned a claim for specific performance and

---

<sup>2</sup> 2004 (4) SA 481 (SCA).

<sup>3</sup> 2022 ZASCA 56.



the interpretation of a contract in the context of a broader employment relationship, where the surrounding circumstances were central to the interpretive exercise. In *Telecom Namibia*, the court found that the excipiable pleading was not "*bad on the face of it*" and could possibly be remedied by evidence. Here, Mokima submits that the Plea is bad on its face. It pleads facts that explicitly contradict the legal requirement of the section. The warranty from Thupa; the invoicing and the public celebration of the Song's use, are facts pleaded by Black Brain itself which demonstrate its awareness of the subsistence of copyright. No evidence can transform this pleaded awareness into ignorance. As the Supreme Court of Appeal has held, an exception is a perfectly proper way to raise a concise legal argument that is capable of being decided without the need for evidence. This is such a case.

### **The Law**

- [19] The legal principles governing an exception are well-established. An exception that a pleading lacks the averments necessary to sustain a defence is designed to obtain a decision on a point of law which will dispose of the case, in whole or in part, and avoid the leading of unnecessary evidence at the trial.<sup>4</sup>
- [20] The excipient bears the onus of persuading the court that, on every interpretation which the pleading in question can reasonably bear, no cause of action or defence is disclosed.<sup>5</sup> The pleading must be read as a whole and the court must assume that all the facts alleged by the respondent in the exception are true.
- [21] The present exception raises a pure question of law, namely the proper interpretation of section 24(2) of the Act. The modern approach to statutory interpretation, as established in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,<sup>6</sup> requires a unitary exercise. The court must consider the text, context and purpose of the provision, having regard to the language used in the

---

<sup>4</sup> Tecmed (Pty) Ltd v Minister of Health 2012 JDR 1025 (GP)].

<sup>5</sup> Barclays National Bank Ltd v Thomson 1989 (1) SA 547 (A).

<sup>6</sup> 2012 (4) SA 593 (SCA).

light of the ordinary rules of grammar and syntax; the context in which the provision appears and the apparent purpose to which it is directed.

- [22] Furthermore, section 39(2) of the Constitution requires that when interpreting any legislation, a court must promote the spirit, purport and objects of the Bill of Rights. This, however, does not permit a court to adopt an interpretation that is unduly strained or does violence to the clear language of the text.<sup>7</sup>

### **Copyright and Section 24(2)**

- [23] The Act establishes strict liability for *direct infringement*. Section 23(1) provides that copyright is infringed by any person, not being the owner, who, without the licence of the owner, does any act which the owner has the exclusive right to do or authorise. Knowledge is not an element of this form of infringement.<sup>8</sup>
- [24] Section 23(2) creates a separate category of *indirect infringement*, covering infringements such as importation, sale, or distribution. This form of infringement is qualified by a “*knowledge requirement*”. The section states that copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work, imports, sells or distributes an article “...if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in the Republic.”
- [25] Section 24 sets out the remedies available to a copyright owner. Section 24(1) makes all of the usual proprietary remedies available. Section 24(2) provides a limited defence to a claim for damages:

*"Where in an action for infringement of copyright it is proved or admitted that an infringement was committed but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright*

---

<sup>7</sup> South African Broadcasting Corporation v Via Vollenhoven & Appollis Independent CC 2013 ZAGPJHC 146.

<sup>8</sup> In Amler's Precedents of Pleadings (10th ed), Harms J notes that "knowledge is not an element of direct infringement."

*subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement, but shall be entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not.”<sup>9</sup>*

[26] The plain wording of the section is clear. It creates a narrow exception to the general rule of strict liability, and it does so only in respect of a defendant's awareness of the *subsistence* of copyright. It says nothing about knowledge of the *owner's identity*.

[27] This interpretation is supported by the only South African decision to address the point. In *Quill*,<sup>10</sup> the court considered a defence under section 24(2) based on the defendant's belief that it held a licence. The court rejected the defence, holding that an allegation of the existence of a licence is not an allegation of a lack of knowledge of the copyright's subsistence. Potterill J held:<sup>11</sup>

*“The defendants also pleaded and argument was presented in writing by counsel for the defendants that “even if the plaintiff should succeed in its claim the defendants pleaded that they were not aware nor did they have reasonable grounds to suspect that copyright subsisted in the BIQ software on their system. This was borne out by the evidence of Mr Hay.” Mr Hay never testified that he did not know that copyright existed in BIQ. In fact he testified that he had it in his head that they could use BIQ because they had a licence. As the IT manager of Randfontein he was searching for the basis of his idea that they could use BIQ because he knew they could not use it without a licence. They would only be barred from using it if there was copyright attached to BIQ. He had a copy of the contract and was thus aware of the clause 9 that copyright existed on BIQ. Westonaria also had a copy of the contract. The defendants were thus aware of the copyright and/or had reasonable grounds to suspect that copyright existed and Section 24(2) of the Act does not bar the plaintiff from claiming damages. In*

---

<sup>9</sup> Emphasis added.

<sup>10</sup> Paragraph [7] *ibid*.

<sup>11</sup> At paragraph [42].

*any event the plaintiff is not claiming damages in terms of section 24(1) of the Act but a reasonable royalty in terms of section 24(1A)."*<sup>12</sup>

[28] The reasoning of Potterill J is directly applicable. A belief that one has a licence, or that the copyright is owned by a particular entity, is predicated on the existence of copyright. It is the *opposite* of a belief that there is no copyright at all. In the premises, it is not true, as was submitted by both Counsel in the present matter, that "*there is no earlier decision by any court that directly resolves this question*". The *dicta* of Potterill J in *Quill* could not have been clearer. Nevertheless, despite the foregoing, this Court has acquiesced to the request made on behalf of both parties that this judgment be marked "*reportable*". This has been done solely on the basis that this Court may, in some way, supplement the common law by adding to the findings of Potterill J made so clearly (*and succinctly*) in *Quill*.

[29] The position in English law, under the materially identical section 97(1) of the Copyright, Designs and Patents Act 1988, is to the same effect. In *Byrne v Statist Company*,<sup>13</sup> the court held:

*"The position of the defendants in fact was not so much that they did not suspect that the translation was copyright as that they supposed that the copyright was in the Governor of Bahia, whose instructions for its reproduction they had obtained. This merely amounts to saying that they supposed themselves to have the authority of the owner of the copyright, a very different thing from alleging and proving that they did not suspect that any copyright existed."*

[30] This approach was followed in *Hoffman v Drug Abuse Resistance Education (UK) Limited*,<sup>14</sup> where the court stated that to believe one had permission under copyright "*is the opposite of a belief or reason to believe that there is no copyright in existence.*"

[31] Black Brain sought to rely on the Australian provision, section 115(3) of the *Copyright Act 1968 (Cth)*. That section provides a defence where the defendant "*was not aware, and had no reasonable grounds for suspecting, that the act*

---

<sup>12</sup> Emphasis added.

<sup>13</sup> [1914] 1 KB 622.

<sup>14</sup> [2012] EWPCC 2.

*constituting the infringement was an infringement of the copyright.*" The wording differs from that in section 24(2) of the Act. The Australian provision focuses on knowledge of the *infringing nature of the act*, which is a broader concept that could arguably encompass a mistaken belief about the identity of the owner. The South African provision is narrower, focusing specifically on knowledge of the *subsistence* of the right itself. The Australian case of *The Dempsey Group Pty Ltd v Spotlight Pty Ltd*,<sup>15</sup> relied upon by Black Brain, is therefore distinguishable on the basis of the different statutory text. Furthermore, the finding in that case that the defendant qualified for the defence was based on a detailed factual finding that it did not know the works were the Plaintiff's. It does not purport to interpret the South African statute.

[32] Black Brain's argument that the text of section 24(2) of the Act supports its interpretation because it refers to "*the work to which the action relates*" is, with respect, unconvincing. This phrase serves to identify the specific work in dispute. It does not, as Black Brain contends, incorporate into the knowledge requirement the *identity* of the owner of the copyright in that work. The "*subsistence*" of copyright in a work is a separate legal question from the "*ownership*" of that copyright. A work either has copyright protection (*subsistence*) or it does not. Who owns that protection is a distinct enquiry.

[33] Turning to the purposive arguments put forward by Black Brain, it was submitted that a narrow interpretation of section 24(2) would render it nugatory, applicable only to works such as those of Mozart or Beethoven, where copyright has expired. This is an overstatement. As Mokima pointed out, the section could still apply where a defendant reasonably, but mistakenly, believes a work was generated by artificial intelligence, or where the defendant has reasonable grounds to believe the work is not subject to protection in South Africa by virtue of section 4 of the Act. The fact that the defence is narrow does not render it redundant. It is designed to be narrow, as a "*carve-out*" from a regime of strict liability.

---

<sup>15</sup> [2018] FCA 2016.

[34] Black Brain's reliance on the principle of acquiescence is also misplaced. It argued that its interpretation is consistent with the principle that a party that stands by and watches its rights being infringed should not be permitted to profit from its own inaction. This may be a valid argument on the facts of the case but it is an argument for a substantive defence of acquiescence or waiver, not for an interpretation of section 24(2). If such a defence exists in our law (a proposition doubted by the SCA in *Turkeb Trading CC v Lotus River, Ottery, Grassy Park Community Fundraising Association*,<sup>16</sup> it would require its own factual foundation. It cannot be used to rewrite the clear language of the statute.

[35] Finally, it is incumbent upon this Court to consider the "*constitutional argument*". Black Brain submitted that its interpretation better gives effect to the right to freedom of expression under section 16 of the Constitution. This Court disagrees. The right to freedom of expression is not engaged in the manner suggested. The copyright in the Song protects the authors' expression. They have, on Mokima's version, voluntarily assigned their rights for commercial reward. There is no free-standing right of a third-party producer to use that expression without a licence. As this Court held in *South African Broadcasting Corporation v Via Vollenhoven & Appollis Independent CC*<sup>17</sup> the Act strikes an appropriate balance. To interpret section 24(2) as Black Brain suggests would not promote the Bill of Rights. It would weaken the property rights guaranteed by section 25 of the Constitution without a corresponding benefit to any identifiable constitutional right-holder.

### **Discussion and analysis**

[36] Applying these principles to the pleadings, the conclusion is inescapable that Black Brain's Plea does not disclose a defence in terms of section 24(2) of the Act.

[37] The defence is premised on the allegation that Black Brain was not aware, and had no reasonable grounds for suspecting, that *Mokima* was the owner or holder

---

<sup>16</sup> 2011 ZASCA 201.

<sup>17</sup> [2016] 4 All SA 623 (GJ) (2 September 2016).

of the copyright. That is not what the section requires. The section requires a lack of awareness that copyright *subsists* in the work.

- [38] Furthermore, the factual matrix pleaded by Black Brain itself demonstrates the contrary. Black Brain pleads that it concluded a written licence agreement with Thupa, which contained an express warranty that Thupa owned and/or controlled the copyright in the work. It pleads that Ndou provided copies of the tracks; invoiced Black Brain and publicly celebrated the use of the Song. All of these facts point inexorably to the conclusion that Black Brain was fully aware that copyright subsisted in the Song. Its defence is that it believed the copyright was owned by Thupa, not Mokima. This is a plea of mistaken identity, not a plea of ignorance as to the existence of the right itself.
- [39] In essence, Black Brain seeks to read into section 24(2) of the Act the words "*that the plaintiff owned the copyright*". This Court cannot accede to the interpretation as sought by Black Brain. To do so would require this Court to ignore the plain language of the statute and to "*rewrite it*" in a manner that was never intended by the legislature. As the Constitutional Court has held, the interpretive exercise is objective, and judges must be alert to the temptation to substitute what they regard as reasonable, sensible, or businesslike for the words actually used.<sup>18</sup>
- [40] Black Brain is also not assisted in this matter by its reliance upon *Universal City Studios Inc v Movie Time*.<sup>19</sup> That decision concerned a claim for an interdict and an account of profits, not damages. The court's remarks on "*knowledge*" were made in the context of section 23(2) of the Act (*indirect infringement*) and were, in any event, *obiter*. The court expressly left open the question of whether the notice from the applicant's attorneys was sufficient to impute the requisite knowledge. It is *not* authority for the proposition that section 24(2) of the Act protects a defendant who is aware of the existence of copyright but mistaken as to its owner.

---

<sup>18</sup> University of Johannesburg v Auckland Park Theological Seminary 2021 (6) SA 1 (CC).

<sup>19</sup> Unreported judgment of Booyesen J (D & CLD) (15 June 1984)

## **Conclusion**

[41] For these reasons, this Court finds that the alternative defence as pleaded in paragraph 4 of Black Brain's Plea, is bad in law. It lacks the necessary averments to sustain a defence under section 24(2) of the Act. In the premises, the exception must be upheld.

## **Costs**

[42] It is trite that the issue of costs is within the court's discretion. This discretion is to be exercised judicially. The general rule is that costs follow the result. Mokima has been successful in this exception. There is no reason to depart from the general rule. Black Brain should be ordered to pay the costs of this application.

[43] Mokima has sought costs on Scale B, citing the novelty of the issues. Black Brain has not made any specific submissions on the scale of costs. This Court is satisfied that Scale B is appropriate. The matter required extensive written argument and raised a fairly novel point of law.

[44] As to the form of the order, Mokima sought an order striking out paragraph 4 of the Plea. However, the proper course, where an exception to a defence is upheld, is to grant the defendant leave to amend its plea, should it be so advised. This avoids the risk of procedural injustice and aligns with the usual practice.<sup>20</sup> This Court understood Counsel for Mokima to concede (*correctly*) that an order in those terms would be appropriate.

---

<sup>20</sup> Coetzer v People Perfect (Pty) Ltd 2021 JDR 2232 (GJ).



**Order**

[45] This Court makes the following order:

1. The exception is upheld.
2. The Defendant is granted leave to amend its plea within 15 (fifteen) days of the date of this order.
3. Should the Defendant fail to amend its plea within the stipulated period, the defence pleaded in paragraph 4 of its plea (comprising subparagraphs 4.1 to 4.19) shall be deemed to be struck out.
4. The Defendant is to pay the costs of the exception, including the costs of counsel, such costs to be on the party and party scale (Scale B).



---

**BC WANLESS  
JUDGE OF THE HIGH COURT  
JOHANNESBURG**

**Date of Hearing:** 26 January 2026

**Date of Judgment:** 23 March 2026

**Appearances**

**On behalf of the Applicant/Excipient:** Adv A Friedman

Instructed by: Rosengarten & Feinberg

Email: [davidf@rf-law.co.za](mailto:davidf@rf-law.co.za)

**On behalf of the Respondent:** Adv S Scott (with Adv M Shiaka)

Instructed by: Maphike Attorneys Inc.

Email: [manaileng@maphikeinc.co.za](mailto:manaileng@maphikeinc.co.za)