REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024-008410

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

16/03/2026 [redacted]
DATE SIGNATURE

In the matter between:

LINSEY DE MENDONCA	Plaintiff
and	
FNB FIDUCIARY (PTY) LTD N.O	First Defendant/First Excipient
JOSE JORGE DE FREITAS (JUNIOR)	Second Defendant

JOSE JORGE DE FREITAS (JUNIOR) Second Defendant

JOHANNA CATHARINA SOPHIA HAGEMAN N.O. Third Defendant/Third Excipient

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JUDGMENT

WENTZEL-THOMPSON J

Introduction

[1] This is an opposed exception in terms of Uniform Rule 23(1). The first and third defendants, as excipients, except to the plaintiff's amended particulars of claim on the basis that they lack averments necessary to sustain a cause of action and, in certain respects, are vague and embarrassing.

[2] The dispute arises from the administration of the estate of the late Henrique De Mendonca ("*the deceased*"), and the alleged undervaluation of the deceased's business interests pursuant to a settlement agreement concluded by the executrix (Johanna Catharina Sophia Hageman N.O. ("*Hageman*") who is the third excipient/defendant) and Jose Jorge De Freitas ("*De Freitas*") (Junior), the second defendant. De Frietas was the deceased's business partner. As no relief is sought against the second defendant, he is not party to the current exception.

[3] The plaintiff seeks damages in the amount of R5,435,959.25, representing the alleged difference between R20,000,000 (the alleged value payable under a buy-and-sell agreement), and R14,564,040.75 (the amount paid to the estate pursuant to the settlement agreement).

[4] The plaintiff opposes the exception. She contends that, read as a whole, the amended particulars of claim disclose a sustainable cause of action against the first and third defendants. She also says that the exception is unduly technical and that the disputes raised by the excipients concern matters of interpretation, inference and proof more appropriately determined at trial.

The pleaded case

[5] The plaintiff pleads that she is the surviving spouse of the deceased and is his nominated beneficiary of his deceased estate. Her pleaded claim is that she has adiated the benefit due to her under the will. Part of that benefit comprises of the deceased's pecuniary interest in a partnership known as Die Vleispot and a close corporation known as Lewisham Properties CC.

[6] The plaintiff pleads that, during his lifetime, the deceased and the second defendant concluded two buy-and-sell agreements, with the later agreement concluded on 23 May 2019, replacing the earlier agreement.

[7] The purpose of the agreements was to ensure that on the death of either of the partners in the business, the other partner would purchase the other partner's interest in the business from his deceased estate at an agreed value of the businesses. In order to fund this purchase, each partner would take out a life policy on each other's life to the amount agreed upon as being the value of the business. The plaintiff alleges that the agreed value of the deceased's interest under the second agreement was R20 million.

[8] It is pleaded that after the deceased's death, the executrix (third defendant) concluded a settlement agreement with the deceased's business partner (the second defendant) in terms of which she sold the deceased's interest in the businesses to the second defendant for R14 564 949.75. She alleges that this was below the contractual price contemplated in the buy-and-sell agreement.

[9] The plaintiff's pleaded cause of action is the executrix owed fiduciary duties to the estate and its beneficiaries and breached those duties by concluding the settlement agreement for less than the contractual price of R20 million. As a result she has suffered damages in the amount of R5 435 959.25.

The grounds of exception

[10] The excipients' heads of argument identify, in substance, five principal grounds of exception. These are:

a. First, that the plaintiff has failed to plead a valid and enforceable second buy-and-sell agreement because there was no binding consensus on price.

b. Second, that the plaintiff's reliance on a pleaded tacit term is legally impermissible and inadequately pleaded.

c. Third, that the claim is premature because the plaintiff has not pleaded compliance with the Administration of Estates Act 66 of 1965, particularly in relation to the estate administration process.

d. Fourth, that the damages calculation is illogical and speculative because the settlement concerned a broader suite of business interests than that allegedly covered by the second buy-and-sell agreement; and

e. Fifth, that the allegations relating to fiduciary duty are vague and incomplete, including the plaintiff's failure to properly plead fault.

Applicable legal principles to exceptions

[11] The principles governing exceptions are trite. The purpose of an exception is to dispose of a pleading that is legally flawed and which cannot sustain a claim or defence, assuming the facts pleaded are true.[1]

[12] An exception is a useful procedural mechanism "to weed out cases without legal merit."[2] which are bad in law, but it is not designed to settle questions of fact, to decide probabilities, or to anticipate the full ventilation of disputes better suited to trial.[1] A pleading will be excipiable on the ground that it discloses no cause of action only if, upon every interpretation that the pleading can reasonably bear, no cause of action is disclosed.[2] Put differently, the excipient bears the burden of satisfying the court that the conclusion of law contended for by the pleader cannot be supported on any reasonable construction of the pleaded facts.[3]

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[1] *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 184G–I.
[2] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) 461 SCA at para [3].

[13] For purposes of an exception, the pleaded facts must be accepted as true. The court does not concern itself with whether those facts will ultimately be proved. Nor is the court ordinarily concerned with *facta probantia*, that is the evidence to support those facts; what the rules require is that the material facts, the *facta probanda* necessary to sustain the claim, be pleaded with sufficient particularity to enable the opposing party to know the case it must meet.[4]

[14] The Constitutional Court in *Transport Pension Fund*[3] provided a useful summary of the trite principles concerning exceptions as follows:

> *"[15] In deciding an exception the court must accept all allegations of fact made in the particulars of claim as true, and may not have regard to any other extraneous facts or documents, it may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided."*

[15] Ultimately the test is whether the excipient is prejudiced by the offending pleadings.[4]

[16] Courts are, moreover, generally cautious about deciding issues of contractual interpretation on exception, especially where context or admissible background facts may influence the meaning. That said, there is no absolute rule against deciding a question of interpretation on exception where the document is clear and reasonably admits of only one meaning.[5] The operative question remains whether the plaintiff's pleaded interpretation is one that the contract can reasonably bear. If it is, the exception cannot succeed.[6]

[17] Against this framework, I turn to deal with the grounds of exception in turn.

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[3] *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC) para 15.
[4] *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A.

First ground: alleged absence of a valid and enforceable second buy-and-sell agreement

[18] The excipients submit that the plaintiff's case depends upon the validity and enforceability of the second buy-and-sell agreement and that clause 5 of that agreement contemplated that annual valuations of the parties' business interests would take place, the recording thereof, and endorsement by the contracting parties. As no subsequent valuations or endorsements are pleaded, and, absent compliance with that mechanism, the agreement lacks consensus on an essential term of the contract, namely the price, and was accordingly void for vagueness.

[19] The excipients argue that it is trite that the necessary, material and essential features (i.e., the *essentialia*) of a contract of sale include consensus between the parties on (i) the thing purchased (*merx*); and (ii) the price (*pretium*).[5]

[20] With reference to the price, in *Westinghouse Brake & Equipment*11, the Supreme Court of Appeal reiterated the following:

"It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them… This is part of the wider general principle that contractual obligations must be defined or ascertainable, not vague and uncertain."

[21] Accordingly, it is argued that if the parties fail to reach any definite agreement on a vital term of their proposed bargain, namely the price, then the court is not entitled to make a bargain for them. Consequently, the parties would not have an enforceable claim with reference to the agreement.[6]

[22] The excipients' counsel explains in his heads of argument that *"[i]n determining the purchase price, clause 5 of the Second Buy and Sell Agreement sets out an express mechanism by (i) requiring annual valuations (i.e., every 12months); (ii) the recording of such annual valuations in a note appended to the Annexure to the Second Buy and Sell Agreement; and (ii) endorsements by both the*

[5] *Burroughs Machines Ltd v Chenille Corp of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670C–G.
[6] Supra at 676C

deceased and the second defendant. This express mechanism and procedure are not alleged to have been complied with."

[23] The second buy-and-sell agreement was concluded on 23 May 2019. The deceased passed away on 22 June 2023. However, in the intervening period of more than three years, no further valuations or endorsements were carried out other than the initial valuation carried out in May 2019 of R20 million. The excipients argument is that the plaintiff is impermissibly treating the initial 2019 valuation of R20 million as if it remained binding indefinitely and was binding as at the date of the deceased's death.

[24] This, it is argued, is impermissible in law as clause 5 of the second buy and sell agreement expressly provides that the initial value endures only for 12 months from signing, after which updated valuations must be agreed and recorded.

[25] It is argued further that in the absence of allegations that (i) any further valuations were undertaken; (ii) the prescribed endorsement procedure was followed; or (iii) the parties agreed to dispense with the valuation procedure; the plaintiff's amended particulars of claim fail to disclose a binding consensus on the price. This is because in the absence of compliance with the prescribed valuation mechanism, there is no determinable or agreed price. The second buy and sell agreement thus lacks consensus on a material term and is void for vagueness.

[26] Obviously as a matter of fact, circumstances may be such that the business may have grown and been more prosperous in the intervening period; it could equally have had a slump and been less valuable at the date of the death of the deceased. This is a question of fact to be determined at the trial.

[27] It is of course correct that a contract of sale requires agreement on the merx and the *pretium*, or at least an objective and ascertainable mechanism by which the price may be determined.[7] It is equally correct that a court may not make a bargain for the parties where they have failed to achieve consensus on an essential term.[8]

[28] Clause 5.1 of the later agreement provides that the agreed price would be as set out in the Annexure to the agreement.

[29] Clause 5.2 reads:

"The value of the partner's interest and claim may vary from time to time and therefore the partners must, within a period of not more than 12 months from the date of signing this agreement, and also every year thereafter, i.e. within 12 months reckoned from a previous date, carry out or cause to be carried out a valuation of the partners interest and claims, after which the value thus determined must be recorded by the partners (or they must cause it to be recorded) in a note contained in the Annexure, and both partners must endorse such note and the date of such note by affixing their signatures thereto."

[30] Clause 5.3 in turn provides that the purchase price would be equal to the latest note in the Annexure.

[31] The plaintiff pleads that in terms of the Annexure to the second buy-and-sell agreement the purchase price was R20 million.

[32] The plaintiff pleads:

"On a proper interpretation of clauses 5.1, 5.2 and 5.3 of the Second Buy and Sell Agreement, in the event that the partners did not subsequent to the conclusion of the Second Buy and Sell Agreement carry out or cause to be carried out a valuation of the partners' interests and claims, the purchase price of a former partner's interest and claim would remain the amount as per the Annexure to the Second Buy and Sell Agreement, beingR20,000,000.00."

[33] In the alternative, the plaintiff pleads a tacit term to the same effect. She also pleads that, notwithstanding the absence of a subsequent valuation, the deceased and the second defendant continued paying premiums on life policies taken out on each other's lives, which conduct is said to be consistent with the pleaded interpretation of clause 5 or tacit term.

[34] The plaintiff has pleaded positively that on a proper interpretation of clauses 5.1 to 5.3 the purchase price remained the amount recorded in the annexure to the first agreement, namely R20 000 000, in the event that no subsequent valuation was undertaken. That may or may not ultimately prove to be correct. But at the exception stage, the question is solely whether that interpretation is one that the contract can reasonably bare.

[35] Her case is that the agreement, properly construed, preserved the annexed valuation unless and until a later valuation was performed. That construction may eventually be rejected after the leading of evidence at the trial including contextual evidence. But I am unable to say, at exception stage, that the plaintiff's contention is so untenable that the claim is bad in law on every possible reading.

[36] Where a plaintiff pleads a construction of an agreement that is reasonably sustainable, an exception directed at the merits of that interpretation should not be upheld merely because the excipient contends for another construction, even if that may be a stronger one.[7] The plaintiff's pleaded interpretation is linked to the prior and factually, the only existing valuation performed as contemplated in clause 5. That in my view is sufficient at this stage for her to plead.

[37] The first ground of exception must therefore fail.

Second ground: alleged impermissible reliance on a tacit term

[38] The excipients contend that the plaintiff's reliance on a tacit term in the alternative is excipiable because the proposed tacit term contradicts the express valuation machinery in clause 5. Clause 5, it is argued, deals exhaustively with the subject and one cannot plead a contrary tacit term. It is further argued that the plaintiff has failed to adequately plead the factual basis from which the tacit term is to be inferred.

[39] The excipients are correct: A tacit term cannot be imported where it contradicts the express terms of the contract, and a court will not imply a term merely because it appears reasonable to do so.[8] The recognised tests remain those of business efficacy, and whether the term is capable of clear formulation.[9]

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[7] *Picbel Groep Voorsorgfonds (In Liquidation) v Somerville and Related Matters* 2013 (5) SA 496 (SCA) paras 26-28, 39.

[8] *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) at 567C-D; *Union Government (Minister of Railways and Harbours) v Faux Ltd* 1916 AD 105 at 112.

[9] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531H-533B; *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136I-141D; *Desai v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A) at 522H-523A.

[40] Kerr, in his work on Contract[10] explains tacit terms thus:

> "***10.20*** *There is another category of terms which derive (or at least are said to derive) from the common intention of the parties, but which are not expressed by them. These terms are inferred from the express terms and surrounding circumstances of a contract (including the conduct of the parties after the conclusion of the contract). They are, in other words, deduced or inferred from the facts and may be called 'tacit terms'. Tacit terms must be distinguished from 'implied terms' in the sense of terms implied by law.*
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> ***10.21*** *There is no difference between express terms and tacit terms as far as their nature and effect are concerned. However, there is a difference in the way in which these terms are to be proved: an express term is proved by direct evidence and a tacit term by circumstantial evidence, including the conduct of the parties. The courts are generally slow to import a tacit term into a contract.*"

[41] The officious bystander test has been adopted from English law. Its application in assessing the existence of a tacit term is stated by Kerr to be as follows:

> "***10.23*** *At first blush, our courts may seem to understand this test to require that a tacit term must as such have been actually intended by the contractants. Such an impression would be misleading. In many cases the reason for the parties' failure to give expression to the term, which one of them subsequently contends should be incorporated in their contract, will be that they never thought of the particular matter when they were negotiating the contract, and not that they thought of it but decided that it was such an obvious term that they need not express it. And if they did not think of a particular term it can hardly be said at a later stage that they themselves intended the term to operate.*
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> ***10.24*** *It will also not be easy for a court to 'be confident' of a particular unexpressed intention where parties who did not actually envisage the alleged*

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[10] 6th Ed, 2020, ch 10-p 328

circumstances during their negotiations now dispute an alleged tacit term. The courts have, consequently, applied the test with references such as the 'imputed intention' or (probably more correctly) the 'inferred intention' of the parties, or what may reasonably be assumed to have been their intention.

10.25 *All told, the courts seem to adhere to the intention of the contractants as the basis for a tacit term inasmuch as the alleged unexpressed term must be compatible with the expressed intention of the parties. References to a presumed or inferred intention simply mean that there are circumstances which justify the inference that the alleged term does fall within the scope of the parties' actual expressed intention, even though they may not have had the particular alleged term in mind.*

10.26 *The business efficacy of the contract and what reasonable contractants would have agreed upon in the circumstances of the particular case, are part of the facts from which the inference of the alleged intention can be made. To this extent, the bystander test has been objectified. If such an inference cannot be made, a consensual tacit term cannot be read into the contract. In given circumstances, a court may find that a naturale with the alleged content has developed for the particular type of contract, but that would depend on the policy considerations that underlie the implication of terms ex lege.*

10.27 *Attempts to link unexpressed terms to the intention of the parties at all costs, and to reserve the application of the innocent bystander test for so-called 'imputed tacit terms' alone, only serve to obscure the useful distinction between true consensual terms and terms implied by operation of law, as well as, potentially, the distinction between applications for rectification and importing tacit terms into a contract."* (footnotes omitted)

[42] I align myself with Kerr's formulation of tacit terms and the tests to be applied in ascertaining whether or not there is indeed a tacit term.

[43] As indicated from the above quoted passages of Kerr, where the express terms of a contract do not preclude the possibility of importing a tacit terms, there are three recognised tests for importing a tacit term into a written agreement.

[44] The classic test is the officious bystander test. This test provides that if an officious bystander bystander were to suggest the alleged tacit term at the time the contract was concluded, both parties would have responded "*of course*" without hesitation. This test determines whether the term is (i) so obvious it went without saying; and (ii) consistent with the express terms.[11]

[45] This "officious bystander" test does not require that the parties must consciously have directed their minds to the tacit term and actually have intended it, but only that they would unanimously have asserted it if the situation requiring it had been drawn to their attention.[12]

[46] The second, test is the "*business efficacy*" test which provides that the term must be necessary in the business sense to give efficacy to the contract. This requires that the interpretation or tacit term be commercially sensible and businesslike.[13]

[47] The third (further) test is that the alleged tacit term must be capable of clear and exact formulation, because the intention of the parties to include it in the contract could not otherwise be inferred or imputed.[14]

[48] The excipients state that the express terms of the contract may prohibit the importation of tacit terms,[15] or may deal with the subject matter in such detail as to leave no room for tacit terms,[16] and a tacit term cannot be imported into the contract in respect of any matter to which the parties have applied their minds and for which they have made express provision in the contract.[17] On the other hand, an ambiguity in the express terms may leave room for a tacit term.[18]

[49] The excipients accept that the courts are generally reluctant to determine disputes regarding the interpretation of the terms of a contract at the exception stage.[19] They, however, argue that where the meaning of a contract is clear and unambiguous, the court may do so on exception.

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[11] *Per MacKinnon LJ in Shirlaw v Southern Foundries* (1926) Ltd (UK)

[12] Per Nienaber in Wilkens NO v Voges 1994 (3) SA 130 A

[13] *Centriq Insurance Company Ltd v Oosthuizen* 2019 (3) SA 387 (SCA) at paras [17]-[18]

[14] Desai v Greyridge Investments (Pty) Ltd 1974 (1) SA 509 (A) 522H-523A; *Group Five Building Ltd v Government of the Republic of South Africa* 1993 (2) SA 593 (A) 600C-E.

[15] *Rouwkoop Caterers (Pty) Ltd v Incorporated General Insurance Ltd* 1977 (3) SA 941 (C) 945G.

[16] *Union Government (Minister of Railways and Harbours) v Faux Ltd* 1916 AD 105 112.

[17] *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) 567C-D.

[18] *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) 175C.

[19] *Deltmann v Goldfain & Another* 1975 (3) SA 385 (A) at 400A–B.

[50] In this regard, the excipients' counsel referred me to the following dicta by the Appellate Division in Sun Packaging (Pty) Ltd[20]:

"*Difficulty in interpreting a document does not necessarily imply that it is ambiguous ... Contracts are not rendered uncertain because parties disagree as to their meaning ... Counsel was probably right in saying that the letter is not a lawyer's contract. But this is no reason for interpreting it differently. For the reasons given, I do not find the meaning of clause 3 doubtful. Properly interpreted, it has only one meaning.*"

[51] The excipients thus argue that the exception should be upheld as the meaning of the contract is certain and clear. It was argued that the purported interpretation is irreconcilable with the express provisions of the second buy-and-sell agreement which clause makes provision for mandatory and recurring valuations; limits the validity of each valuation to a 12 month period; and requires express endorsement by both parties.

[52] Flowing from this argument it was argued further that the tacit terms may not contradict the express terms of the agreement. In this respect it was contended int the heads of argument that *"[t]he plaintiff's pleaded and alleged tacit term is directly inconsistent with the express and recurring valuation mechanism provided for in clause 5 of the Second Buy and Sell Agreement. As such, it cannot be implied by law or fact.*"

[53] I was also referred to The Supreme Court of Appeal judgment in *KPMG Chartered Accountants (SA)*[21] that reaffirmed the principle that where a document that was "*intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning*". I was told that the SCA also expressed its dismay at the parol evidence rule being frequently ignored by practitioners and seldom enforced by trial courts.

[54] However, whether or not a tacit term has been proved is an issue for trial. At the exception stage, the enquiry on exception is a limited one. The issue is not whether the plaintiff has already proved a tacit term. The plaintiff has pleaded not

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[20] *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 184G–I.

[21] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) par [39].

only the content of the alleged tacit term, but also conduct said to support the inference, namely that no subsequent valuation was procured and yet premiums on the relevant policies continued to be paid. Conduct is relevant in determining whether a tacit term as alleged existed.[22]

[55] It may transpire at trial that such conduct is neutral, equivocal, or inadmissible. It may equally transpire that the express terms of the agreement leave no room for the implied term contended for. The plaintiff is correct to submit that disputes concerning whether the pleaded conduct supports the inference sought are ordinarily matters for evidence and argument at trial, and should not be decided on exception.

[56] I accept that the tacit-term pleaded is so bald as to be non-justiciable and is formulated with sufficient clarity. Whether the pleaded surrounding circumstances (ie the subsequent conduct of the parties) is ultimately sufficient to sustain the inference is a different question.

[57] The second ground of exception must also accordingly fail.

Third ground: prematurity and the Administration of Estates Act

[58] The excipients argue that the plaintiff's claim is premature because the estate is still under administration and the plaintiff has not pleaded compliance with the Administration of Estates Act, including the machinery relating to liquidation and distribution. Their contention is that the plaintiff's alleged damages are speculative until the estate administration process has run its course.

[59] I do not agree. The claim has already arisen and the damages have already been suffered; it is not necessary for the estate to be wound up before determining the quantum. What is clear at this stage already is that the ultimate distribution payable to the plaintiff, whatever that amount is, will be some R5000 less than it would otherwise have been but for the alleged breach by the executor of the estate's fiduciary duties.

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[22] *Telcordia Technologies Incorporated v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at [91]; *Rane Investments Trust v CSARS* 2003 (3) SA 332 (SCA) at paras[26]-[27]

[60] The argument raised by the excipients overlooks the true nature of the pleaded claim. The plaintiff's case is not framed as an objection to a liquidation and distribution account, nor as an attempt to circumvent the statutory estate-administration process. It is framed as a personal claim for damages arising from the alleged breach by the executrix of a fiduciary duty owed to the estate and to the plaintiff as beneficiary, by concluding a settlement agreement at an undervalue.

[61] Moreover, the plaintiff pleads that an objection by her under the Administration of Estates Act would not have altered the amount already contracted for in the settlement agreement, and that what the estate would receive had effectively been fixed by that agreement. That allegation may be disputed on the merits, but it cannot simply be ignored for purposes of exception. It must be accepted as true at this stage.

[62] Once that is accepted, the claim is not obviously premature. The pleaded wrong is the conclusion of the settlement itself, not the later finalisation of the liquidation and distribution account. Whether the plaintiff will ultimately establish ripeness, patrimonial loss, or causation is a matter for trial. The excipients have not shown that the claim is legally bad on every possible interpretation.

[63] Thus the third ground of exception cannot be upheld.

Fourth ground: alleged speculative and incoherent damages calculation

[64] The excipients submit that the damages claim is illogical because the settlement figure of R14 564 040.75 related to a broader basket of assets, including, on their case, interests in more entities than those covered by the second buy-and-sell agreement. They complain that the plaintiff has not isolated what part of the settlement amount related to the relevant interests and has therefore compared non-equivalent subject matter.

[65] In this respect it is pointed out that in terms of annexure POC4, the *merx* that forms its subject matter is (i) a former partner's interest in Die Vleispot partnership, and (ii) his "*rights against the partnership*" (defined as a "*Claim*"), as confirmed in paragraphs 19.2, 19.3 and 19.4 of the plaintiff's amended particulars of claim.

[66] The excipients argue that the plaintiff confirms in paragraph 30.1 of her amended particulars of claim that clauses 2.1.1 to 2.1.3 of annexure POC5 lists the merx that forms the subject matter of the settlement agreement to be the "*the business and all claims that [the third defendant/ Mr. de Mendonca's deceased estate] may have against the business*"; being the deceased estate's 50% interest in and claims against (i) the membership of Lewisham, (ii) Die Vleispot partnership, and (iii) Ricky & Jorge CC.

[67] Further, Clause 2.1 of annexure POC5 records that "*the purchase consideration due and payable ... for the acquisition of the business and all claims*" is an agreed amount of R14,564,040.75.

[68] Accordingly it is argued that the *merx* under the first and second buy-and sell agreements are not the same. The *merx* of the second buy and sell agreement is limited to the deceased's partnership interest and claim in Die Vleispot partnership. In contrast, the merx in the settlement agreement includes a broader range of assets,namely (i) the deceased's partnership agreement in Die Vleispot and (ii) the deceased's membership interests, claimsand rights in two additional entities, namely Lewisham Properties CC and Ricky & Jorge CC.

[69] In the aforesaid circumstances, it is argued by the excipients that the plaintiff's damages calculation is based on non-equivalent subject matter and is entirely speculative and without foundation. Moreover, it is argued further that on the face of it, the claim is patently contradictory.

[70] It may well be that the quantification of the plaintiff's loss may prove contentious and that the pleaded comparison between what should have been paid for the deceased's interests in the various businesses in the partnership may, after evidence, require refinement. But the law does not require a plaintiff to prove her quantum in the particulars of claim. Rule 18(10) simply requires that the quantum of the damages claimed be pleaded with sufficient particularity to enable the defendant to plead thereto.[12]

[71] The plaintiff has pleaded the basis upon which damages have been computed, namely that the estate received R14 564 040.75 under the settlement instead of R20 million, as she states was expressly, alternatively agreed, and that the

difference is the plaintiff's loss. That is not speculative. It is a pleaded method of quantification which the excipients may dispute in their plea and at trial.

[72] Whether the deceased had other assets which may affect the quantification of the plaintiff's damages need not be decided at this stage. In addition, whether the plaintiff can prove her quantification of her damages claim is a matter for trial.

[73] The fourth ground of exception therefore fails.

Fifth ground: alleged vagueness in relation to fiduciary duty and fault

[74] The excipients finally contend that the plaintiff's allegations concerning fiduciary duty are vague and embarrassing because they do not sufficiently identify the juridical basis of the duty, and because, so it is said, the plaintiff fails properly to plead whether the breach was intentional or negligent.

[75] I do not agree. The plaintiff pleads that the third defendant, in her capacity as executrix and representative of the first defendant, owed fiduciary duties, under the common law, to the estate and to the plaintiff as beneficiary; that those duties included acting in the best interests of the estate and beneficiary, exercising reasonable care, skill and diligence, and ensuring that the maximum value of the benefit was received. She then pleads that the third defendant acted contrary to those duties and, further, it has been expressly pleaded that the executrix's conduct was intentional. The plaintiff has also pleaded a misrepresentation that the settlement amount was fair which she relied upon to her detriment.

[76] Again, whether the plaintiff will ultimately establish a fiduciary duty as alleged, whether such duty was owed directly to her, whether negligence or *dolus* is required, and whether the facts support the pleaded conclusion are all matters for later determination. For present purposes, the pleading identifies the duty alleged, the conduct said to constitute breach, the causative connection, and the damages said to result.

[77] That is sufficient to enable the excipients to plead. The allegation is not so vague that they do not know the case they must meet.

[78] The fifth ground must also fail.

Conclusion

[79] The exceptions raised, viewed as a whole, are not directed at the legal sufficiency of the pleading, but rather than at the merits of the plaintiff's case. The excipients may ultimately succeed at trial in demonstrating that the second buy-and-sell agreement did not operate as the plaintiff alleges; that no tacit term can be inferred; that the settlement was justified; that no actionable duty was owed directly to the plaintiff; or that the damages are wrongly calculated.

[80] However, at the exception stage, the court does not ask whether the plaintiff's case is persuasive; it asks whether the plaintiff has pleaded a case recognised by law, supported by material factual averments, which on some reasonable interpretation may entitle her to relief. In my view she has done so.

[81] I accordingly conclude that none of the grounds of exception can be sustained.

Costs

[82] There is no reason to depart from the ordinary principle that costs should follow the result. The plaintiff has successfully resisted the exception and is entitled to her costs.

Order

[83] The following order is made:

1. The first and third defendants' exception is dismissed.
2. The first and third defendants are directed to deliver their plea within 15 days of the date of this order.
3. The first and third defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the exception.

[redacted]

S WENTZEL-THOMPSON

Judge of the High Court
Gauteng Local Division,
Johannesburg

For the Excipient:	GW Amm SC instructed by Glover Kannieappan Attorneys
For the Plaintiff:	L Hollander Andre Pienaar and Associated (APA Africa)