



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable/Not Reportable

Case no: 2025-111307

In the matter between:

**JOHN EDWARD FOLEY
t/a SEAGRAM CAPITAL**

Plaintiff

and

BAYBREAK PROPERTIES (PYT) LTD

First Defendant

GRAHAM BARNETT

Second Defendant

WMA ELECTRICAL (PTY) LTD

Third Defendant

WINSTON PRINSLOO

Fourth Defendant

Neutral citation: *John Edward Foley t/a Seagram Capital v Baybreak Properties (Pty) Ltd, Graham Barnett, WMA Electrical (Pty) Ltd, Winston Prinsloo*

Coram: MANGCU-LOCKWOOD J

Heard: 17 March 2026

Delivered: 24 March 2026

ORDER

1. The first to fourth grounds of exception are upheld, and the fifth ground of exception is dismissed;
2. The plaintiff is granted leave to amend his particulars of claim within 10 days; and
3. The plaintiff is to pay the costs of the exception, including the costs of two counsel, on scale B.

JUDGMENT

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The defendants have raised an exception against the plaintiff's particulars of claim, based on five grounds. Each ground of exception is based on the claim that

the particulars of claim are vague and embarrassing and that there are insufficient allegations to sustain a claim.

[2] The brief litigation history is that on 6 August 2025 the defendants delivered a notice in terms of Uniform Rule 23(1)(a), setting out their complaints and inviting the plaintiff to remove the cause of complaint, which did not occur. The defendants delivered their exception on 28 August 2025 in terms of Uniform Rule 23(1)(b).

[3] On 12 September 2025 the plaintiff delivered a notice of intention to amend its particulars of claim, to which the defendants noted an objection. The plaintiff, however, did not take any further steps and accordingly his intended amendments have not been effected.

[4] The plaintiff's claim originates from a lease of property owned by the first defendant, which he occupied in terms of a written agreement. The written lease was signed by the plaintiff on the one hand, and the second defendant on the other who represented the first defendant as its director. The central averments in the particulars appear at paragraphs 15 and 16 as follows:

“15. The First Defendant, alternatively Second Defendant, installed a generator backup system and is liable for the maintenance of said generator backup system in accordance with an agreement between the parties to ensure that the Plaintiff had uninterrupted electricity supply to the property.

16. The Third or Fourth Defendant was employed by First or Second Defendant to tend to the maintenance of the generator backup system”.

[5] The first claim, headed ‘damage to equipment’, is set out as follows at paragraphs 19 - 20 of the particulars:

- “19. On or about 16 August 2024, the First Defendant and/or Second Defendant and/or Third Defendant and or Fourth Defendant intentionally shut down the generator backup system without any prior notice to the Plaintiff. Due to the intentional down off of generator backup system, the plaintiff could not take the necessary precautionary measures to safeguard his equipment.
20. As a result of the intentional shutdown of the generator backup system, the plaintiff suffered damages in the form of loss of equipment and charges in respect of rectification services of professionals in the amount of R376, 254.00”.

[6] The second claim is based on loss of income which the plaintiff says he incurred during the period 17 December 2023 to 30 August 2024 in the amount of R17,704,440.00 *‘due to the non-fulfilment of the First or Second Defendant’s maintenance obligation relating to the generator backup system, alternatively the negligence of the First Defendant and/or Second Defendant and or Third Defendant and or Fourth Defendant in undertaking the maintenance of the generator backup system’*.

[7] The defendants’ point of departure in raising the exception is that both claims appear to be based on an agreement other than the written lease agreement attached to the particulars. They base this interpretation on paragraph 15 of the particulars, already set out above, which refers to *‘an agreement between the parties to ensure that the plaintiff had uninterrupted electricity supply to the property’*.

[8] The first ground of exception is that the details of this other agreement, which appears to be distinct from the written lease agreement, are lacking. There is no detail provided regarding who the parties were, when it was concluded, in what form, or what its terms were, all of which is contrary to Uniform Rule 18(6) which requires that a party relying upon a contract “shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true

copy thereof or the part relied on in the pleading shall be annexed to the pleading”. They state that these deficiencies strike at the root of the cause of action, and render the pleading vague and embarrassing.

[9] The plaintiff’s response to the first ground of exception is that paragraphs 15 and 16 of the particulars, read with an annexure “POC 5” should be interpreted to mean there was a separate generator backup system agreement which was concluded in January 2022. The parties to that agreement, says the plaintiff, also appear from paragraphs 15 and 16 of the particulars, and they are the first and second defendants, whilst the third and fourth defendants were employed by the first or second defendant to tend to the maintenance of the generator backup system.

[10] Starting with the parties, a simple, non-technical¹ reading of paragraph 15 indicates that the first, alternatively second defendant were parties to the generator backup agreement, together with the plaintiff. Further, that according to paragraph 16, the third and fourth defendants were employed by the first or second defendant to tend to the maintenance of the backup system and are not alleged to have been parties to the generator backup agreement.

[11] As regards the particulars of the agreement, the contents of ‘POC5’, which is incorporated by reference by reference in paragraph 23 of the particulars, require scrutiny. That is in keeping with the requirement to read the pleadings as a whole.² ‘POC 5’ is a tax invoice dated 24 April 2025. It contains the amount forming the claim for loss of income, accompanied by a very wordy description, whose contents

¹ *Telematrix (Pty) Ltd Trading as Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 SCA at 465H.

² *Telematrix* at 467H.

are summarized in the plaintiff's heads of argument³ as follows: *“(a) as early as January 2022 the first and second defendants were informed via WhatsApp and e-mail; (b) that the plaintiff operates within financial markets covering the globe and is logged direct into dealing desks in London; (c) that a loss of power would cause all systems to go down; (d) the result of which the plaintiff could not work from his home office; and (e) the first and the second defendants undertook to guarantee continued uninterrupted electricity supply to the plaintiffs office.*

[12] The plaintiff's reliance on the date of January 2022 is therefore based on the description in the tax invoice. However, it is not clear from the contents of the tax invoice, including the summary thereof from the plaintiff's heads of argument, that the defendants agreed to the plaintiff's demands on that date. What is stated is that the plaintiff advised someone – it is not clear who - regarding his work environment and needs and possibly made demands in that regard. Since it is alleged that this occurred over *‘endless WhatsApp and e-mails’*, it is even more unclear when exactly the alleged agreement was reached. And since the plaintiff's communication commenced *‘as early as January 2022’*, it is not clear which part of the summarized information was communicated when, or when the agreement was supposedly reached. The date of the alleged agreement is accordingly far from clear from the particulars of claim. The same goes for the form of agreement relied upon - whether it was oral, written or implied. Similarly, there is no detail of the exact terms of the agreement provided. None of that is clear from the tax invoice, read with paragraphs 15 and 16 of the particulars.

³ At paragraph 20.

[13] The deficiencies identified strike at the root of the cause of action as regards the damages to the generator backup system. It is also clear that the particulars are vague and embarrassing because the defendants are unable to plead to these allegations in any informed fashion.

[14] The second ground of exception is targeted at the plaintiff's claim that the defendants shut down the generator backup system without any prior notice to the plaintiff - what the defendants refer to as an alleged 'duty to forewarn'. The defendants complain that it is not clear whether this pleaded duty to forewarn is based on contract or delict. They point to what is implied at paragraph 20 of the particulars that adequate forewarning would have prevented the alleged harm.

[15] In response, the plaintiff's counsel argues in his heads of argument that the claim is obviously founded in contract and not delict, and that the relevant duty is not a duty to forewarn, but rather a duty to maintain. The plaintiff relies in this regard on the written lease and the generator backup agreement. In his heads of argument the plaintiff's counsel argues that the defendants simply need to admit or deny whether the first and second defendants were obliged to maintain the premises and the generator backup system, and whether the third and or fourth defendants were employed by them to do that.

[16] However, given the deficiencies already highlighted in respect of a generator backup agreement, regarding the time, terms and nature thereof, it is not as simple as suggested by the plaintiff's counsel. And as is common cause, the written lease provides no detail regarding the generator backup system. What is more is that the particulars of claim make no reference to the breach of an agreement in regard to the generator backup system and instead state that the damages relating to the damage

to equipment arose '*as a result of the intentional shutdown of the generator backup system*', an allegation which could be read to refer to delict. As the defendants' counsel points out, the fact that the defendants are informed only in the heads of argument of the plaintiff's counsel that the claim is founded in contract illustrates the problem. The defendants are entitled to know whether the claim is based on contract or delict and are entitled to discover that from the particulars of claim, not the counsel's heads of argument.

[17] The failure to specify in all these respects means the particulars are vague and embarrassing, and also that the defendants are unable to plead in reply thereto without being prejudiced.

[18] The third ground of attack also concerns the so-called duty to forewarn or duty to maintain. The defendants state that, apart from failing to adequately plead the particulars of the agreement, the plaintiff has failed to identify the legal duty on which the claim is based. They state that this is even more acute when considering the third and fourth defendants who are not parties to either the lease or the generator backup system agreement, and who are only defined with reference to their employment by the first and second defendants. Since the claim appears to arise from an omission, namely a failure to forewarn say the defendants, the plaintiff is all the more required to establish the existence of a legal duty owed by the third and fourth defendants. Otherwise, their failure to forewarn was not wrongful.

[19] In this regard the plaintiff repeats its arguments made in respect of the second complaint, namely that the third and fourth defendants are pleaded to have been employed by the first or second defendant to tend to the maintenance of the generator backup system, whilst it is the first and second defendants who are alleged not to

have fulfilled their maintenance obligations which they held as parties to the generator backup agreement. In the alternative, says the plaintiff's counsel, the first and or second and or third and or fourth defendants are alleged to have carried out such maintenance in a negligent manner.

[20] A reading of the particulars indicates that it is only in respect of the loss of income claim, at paragraph 23, that there is any reference to the non-fulfillment of a maintenance obligation relating to the generator backup system. By contrast, the damage to equipment claim is claimed 'as a result of the intentional shutdown of the generator backup system' at paragraph 20.

[21] I am in agreement with the defendants that a whole reading of the particulars indicates that the first claim is based on a failure to forewarn. That interpretation arises from a combined reading of paragraphs 19 and 20, where it is claimed that the generator backup system was intentionally shut down without any prior notice to the plaintiff, and that the plaintiff could not take the necessary precautionary measures to safeguard these equipment, and that as a result of the intentional shutdown he suffered damages. In other words, had the defendants forewarned the plaintiff about the shutdown, he would have taken the necessary precautionary measures and would not have suffered the damages claimed.

[22] The failure to forewarn is an omission, and as a result the plaintiff is required to establish the existence of a legal duty owed by the defendants affected, including the third and fourth defendants, otherwise their omission was not wrongful. This is because conduct in the form of an omission is *prima facie* lawful unless a defendant has a legal duty to the plaintiff to act in a particular manner.⁴ It was accordingly an

⁴ *Bergriver Municipality v Van Ryn Eck* 2019 (4) SA 1-7 (SCA) para 43.

essential element of the cause of action to plead and prove facts relied upon to support the essential allegation of a legal duty if that was the intention. The plaintiff has failed to meet this requirement. If there was no intention to rely upon such a duty, the particulars should be clarified to remove the cause of confusion.

[23] There is also to consider the fact that nowhere do the particulars refer to vicarious liability or make any an averment that the third and fourth defendants performed a wrongful act in the course and scope of their employment with the first or second defendant. An allied issue as regards to any claim against the third and fourth defendants is the nature of their alleged employment, since it is alleged that the third defendant is in itself a private company of which the fourth defendant is a director. All of this possibly implies that the third and/or fourth defendants were employed as independent contractors. But since there are no clear averments made in the particulars regarding the nature of their legal duty, the plaintiff is unable to deal with any claim involving them in any meaningful way.

[24] The fourth ground of exception relates to the second claim, namely the loss of income, and specifically whether it is a claim in contract or delict. Once again, the plaintiff argues that there is no delictual claim sought against any of the defendants. The confusion and difficulties already discussed regarding this bare argument arise here. There are many complaints raised in this regard by the defendants, which may simply be remedied by the plaintiff indicating clearly that the claim is in contract and not in delict. For one, as the defendants point out, the plaintiff's claim for loss of income is one for pure economic loss which requires the plaintiff to establish the existence of a legal duty which was owed to him by the defendants to prevent the loss he suffered. The plaintiff has not done so.

[25] There is also a reference to negligence at paragraph 23, which provides no supporting detail whatsoever, referring to no more than: *'alternatively the negligence of the First Defendant and/or the Second Defendant and/or the Third Defendant and/or the Fourth Defendant'*. Then, the tax invoice 'POC 5', refers to 'damages due to financial loss', 'negligence', 'incompetence of the crews you used and their negligence'.

[26] It is no wonder that the defendants are at a loss regarding the nature of the claim. It is not enough for the plaintiff's counsel to argue in his heads of argument that the claim is only based on contract while the pleadings point to potential reliance on delict, without saying so and whilst lacking the necessary averments in that regard. The pleadings are evidently also vague and embarrassing.

[27] As regards the fifth ground of exception, the defendants take issue with the quantification of the plaintiff's claim based on loss of income of R17 704 440. They state that the plaintiff only offers a homemade invoice which is of no assistance.

[28] Whilst it is true that the particulars provide scant information regarding the basis for the claim, the tax invoice annexed as POC5 states as follows:

'the resulting fact is the financial trading los[s]es during these outage periods from 17th December to 30th August is clear EURO 873, 000 current EU/ZAR spot 20.28.

An international accounting firm will provide the certificate with further and more detailed particulars and I expect the claim will increase including but not least the extensive professional costs of such audit which may be \$50 - 100K.'

[29] At the very least, the particulars, read with the tax invoice, suggest that the quantum for loss of income is based on alleged financial trading losses. There is, in

addition annexure POC 4, which sets out the amount claimed in respect of the first claim for damage to equipment.

[30] In terms of Uniform Rule 18(10) the plaintiff is required to set out his damages in such a manner as will enable the defendants reasonably to assess the quantum. He is not required to set out the quantum in such a manner as to ascertain whether his assessment of the quantum is correct, but rather for the defendants to know why the particular amount is being claimed.⁵

[31] I am of the view that contents of the particulars, read with the invoices meet the requirements of the uniform rules in that they explain what they are for. It is a matter for evidence whether the amounts contained in the tax invoices satisfy the alleged claims. For these reasons the complaint in regard to the fifth ground of exception is dismissed.

[32] The defendants have substantially been successful. There is no reason why they should not obtain their costs. I, however do not think the matter is of such complexity as to warrant a scale higher than scale B.

B. ORDER

[33] In the circumstances the following order is made—

1. The first to fourth grounds of exception are upheld, and the fifth ground of exception is dismissed;

⁵ *Grindrod (Pty) Ltd v Delport and Others* 1997(1) SA 342 (W).

2. The plaintiff is granted leave to amend his particulars of claim within 10 days; and
3. The plaintiff is to pay the costs of the exception, including the costs of two counsel, on scale B.

N. MANGCU-LOCKWOOD
Judge of the High Court

Appearances:

For plaintiff: L. F. Wilkin

Instructed by: H. T. Hendrikse, Kellerman Hendrikse

For defendants: D. Goldberg SC

C. Quinn

Instructed by: R. Kudo, Kudo Law