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

JUDGMENT

Reportable

Case no: A196/2025

In the matter between:

WILLEM DE SANDERS GREEF NO	**FIRST APPELLANT**
RUDOLPH PHILIP BOTHA NO **In their capacities as Trustees of the** **W de S Greef Family Trust**	**SECOND APPELLANT**

and

GPP PROPERTIES CC	**FIRST RESPONDENT**
THE REGISTRAR OF DEEDS, CAPE TOWN	**SECOND RESPONDENT**

Coram: **MANTAME J, O'BRIEN AJ *et* JONKER AJ**

Heard: 20 March 2026

Delivered: 11 May 2026

Summary: Exception - particulars of claim - Subdivision of Agricultural Land Act 70 of 1970, s 3(e)(ii) and s 6A - whether settlement agreement void for contravening s 3(e)(ii) - particulars of claim pleaded no primary facts in support of the interpretation of the settlement agreement upon which the cause of action depended - distinction between facta probanda and facta probantia does not relieve a plaintiff of the obligation to plead the primary material facts - exception upheld on pleading grounds - appeal dismissed - leave to amend pleading allowed.

ORDER

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1 The appeal is dismissed with costs including the costs of two counsel, where so employed, with senior counsel's fees taxable on scale C, and junior counsel on scale A.

2 The order of the High Court is confirmed save for para 2 of the order, which is substituted as follows:

> ‘2. The Trust is given leave, if so advised, to deliver its intention to amend its particulars of claim within ten days of the date of this order.’

JUDGMENT

Jonker AJ (Mantame J *et* O'Brien AJ concurring):

Introduction

[1] This is an appeal by the trustees of the W De S Greef Family Trust ('the Trust') against the judgment of Parker AJ, delivered on 13 September 2024, in which the court a quo upheld an exception raised by the first respondent, GPP Properties CC ('GPP'), against the Trust's particulars of claim. The court a quo found that the particulars of claim failed to disclose a valid and enforceable cause of action. In arriving at that conclusion, the court a quo reasoned, first, that the Trust's particulars of claim failed to set forth sufficient averments to sustain a cause of action and would need to be more elaborate; and, second, that the court order of 2014 remained binding on all parties unless and until set aside, so ~~that~~ the proper enquiry was whether the Trust had established adequate grounds for the rescission of that order.

[2] The court a quo did not resolve the substantive question of whether s 3(e)(ii) of the Subdivision of Agricultural Land Act 70 of 1970 ('the Act') applies to servitudes, nor did it definitively determine whether the grazing right was in respect of a portion or the whole of Volkers River, leaving those questions expressly open for determination at trial. The court a quo further granted the Trust leave to amend within ten days and awarded costs against the Trust,

including the costs of two counsel, on scale B for senior counsel and scale A for junior counsel.

[3] On 7 October 2024 the Trust applied for leave to appeal to the court a quo. That application was heard on 31 October 2024 and dismissed by the court a quo on 20 February 2025, with a further costs order against the Trust. The Trust then petitioned the Supreme Court of Appeal. On 22 May 2025 the Supreme Court of Appeal ordered that leave to appeal be granted to this Full Court. It set aside the costs order made by the court a quo in dismissing the leave to appeal application and directed that the costs of the application for leave to appeal before both the court a quo and the Supreme Court of Appeal be costs in the appeal. The matter accordingly came before this Court.

[4] The dispute has its origin in litigation between the Trust and GPP that was resolved by means of a settlement agreement. On 17 November 2014, that settlement agreement was made an order of court ('the order of 2014'). In giving effect to the order of 2014, a permanent servitude of grazing was subsequently registered over Portion 7 (a portion of Portion 3) of the Farm Volkers River No. 244, Blue Crane Route Municipality, Division Somerset East, Eastern Cape Province ('Volkers River'), which is a cadastral unit registered as a whole in the Deeds Office, on 3 March 2021.

[5] The Trust thereafter instituted action against GPP and the Registrar of Deeds for, in substance, the rescission of the order of 2014 and the

deregistration of the registered servitude. The foundation of the Trust's cause of action is that the settlement agreement was void from its inception because it contravened s 3(e)(ii) of the Act, in that the settlement agreement, upon a proper interpretation, purported to grant a permanent right of grazing in respect of a portion of agricultural land as contemplated in that provision, without the prior consent of the Minister of Agriculture. GPP excepted to the particulars of claim on the basis that they disclosed no valid cause of action.

[6] GPP raised four grounds of exception. At the hearing before the court a quo, GPP pursued only the first and third grounds. The court a quo upheld the exception and afforded the Trust the opportunity to amend. It is from that decision that the Trust now appeals.

The reasoning of the court a quo

[7] The court a quo upheld the exception on two principal bases. The first and primary basis was that the Trust's particulars of claim were insufficiently pleaded: they did not set forth the averments necessary to sustain a cause of action and would need to be more elaborate. The court a quo did not invoke or analyse the *facta probanda/facta probantia* distinction by name, but concluded broadly that the particulars of claim, as formulated, did not present a sustainable case. The second basis was that the court order of 2014 remained binding on all parties unless and until it was set aside, and the Trust was accordingly required to make out a proper case for rescission rather than simply attacking the underlying

settlement agreement. The court a quo reasoned that to allow the Trust to ignore the court order in the manner it sought to do would be inconsistent with the rule of law.

[8] Significantly, however, the court a quo expressly declined to resolve the substantive legal questions that underlie the Trust's cause of action. She did not decide whether s 3(e)(ii) of the Act applies to servitudes, nor did she determine whether the grazing right related to a portion or the whole of Volkers River, observing that those questions remain to be seen when ventilated at the trial. The exception was therefore upheld on the comparatively narrow ground that the pleadings were deficient, not on the basis that the Trust's case was bad in law.

The Trust's pleaded case

[9] Since the appeal turns critically on what was and was not pleaded, it is necessary to set out the relevant portions of the particulars of claim with some care.

[10] In paragraph 9 of the particulars of claim, the Trust pleads that on 17 November 2014, the settlement agreement was made an order of court, a copy of which is attached as POC1. In paragraph 10.1, the central averment upon which the Trust's entire cause of action rests, the Trust pleads that the settlement agreement, on a proper interpretation, read in context and having regard to admissible evidence concerning its purpose, background, subsequent conduct,

and implementation, purported to grant a permanent servitude of grazing in favour of the Trust in respect of a portion of agricultural land as contemplated in s 3(e)(ii) of the Act, without the prior consent of the Minister.

[11] In paragraph 12 of the particulars of claim, introduced with the words 'in the premises', the Trust then pleads the following legal conclusions: that the settlement agreement contravenes the prohibition in s 3(e)(ii) of the Act and is therefore illegal, void and of no force and effect; that its terms do not accord with the law and are at odds with public policy; that it did not comply with the legal requirements for incorporation as a court order; that the court erred in making it an order of court; and that the order of 2014 ought to be rescinded. Paragraphs 13 and 14 deal with the implementation of the order and paragraph 16 again pleads, as a fact, that the Minister did not consent to the registration of the servitude under s 6A of the Act.

[12] The Trust's position, maintained both before the court a quo and before this Court, is that those averments are sufficient to disclose a cause of action. It contends that paragraphs 10.1 through to 14 of the particulars of claim collectively establish a viable cause of action and that the court a quo was wrong to hold otherwise.

The Trust's arguments on appeal

[13] Before this Court, the Trust takes issue with four specific findings and conclusions in the judgment of the court a quo. It contends that (a) the court a

quo erred in finding that the settlement agreement could not be attacked until the order of 2014 was set aside, and that the court that granted the order was entitled to make it; (b) the court a quo was wrong to find that the Trust was required to plead and tender restitution as part of its cause of action; (c) the court a quo erred in finding that the particulars of claim were insufficiently elaborate and failed to disclose a cause of action; and (d) the court a quo was wrong to find, implicitly, that the Trust's case was bad in law. Each of these grounds requires this Court to examine not merely the correctness of the conclusion reached by the court a quo, but the reasoning by which that conclusion was reached.

[14] The Trust advanced its case along three lines of argument. I deal with each in turn before expressing my conclusions.

[15] The first line of argument concerns the distinction between *facta probanda* and *facta probantia*. The Trust contends that it was required to plead only the primary material facts constituting its cause of action, the *facta probanda*, and was not obliged to plead the subsidiary evidentiary facts, the *facta probantia*, by which those primary facts would be proved at trial. The Trust submits that paragraph 10.1 of the particulars of claim adequately pleads the *facta probanda* by identifying the existence of admissible contextual and background evidence and expressing the Trust's intention to place such evidence before the trial court. Accordingly, the Trust maintains, the court a quo impermissibly deprived it of the

opportunity to present that evidence at trial by upholding the exception prematurely.

[16] The second line of argument invokes the approach to contractual interpretation described in *Vermeulen*[1] and *Tembani*[2]*.* The Trust contends that contextual evidence is always relevant to the interpretation of a contract, as a matter of course, and whether or not the words of the contract are ambiguous. The court must therefore take context and purpose into account when interpreting any document. It follows, so the argument goes, that a court deciding an exception should be slow to interpret a contract in isolation from potentially admissible contextual evidence, and should rather permit the matter to proceed to trial where such evidence may be led. The Trust submits that the court a quo failed to apply these principles correctly.

[17] The third line of argument concerns the substantive illegality. The Trust submits that the granting of a permanent right of grazing by means of a personal right agreed upon in the settlement agreement, if such right relates to a portion of agricultural land as contemplated in s 3(e)(ii) of the Act, is prohibited by that provision from the very moment the agreement is concluded. On that basis, the settlement agreement is illegal and constitutes a nullity, and ought not to have been made an order of court in 2014. In support of this proposition, the Trust relies, on the principle that the law will not preserve a transaction which it has prohibited, and that an agreement concluded in contravention of a statutory

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[1] *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] (3) All SA 350 (A).
[2] *Tembani and others v President of the Republic of South Africa and Another* 2023 (1) SA 432 (SCA).

prohibition is void from its inception[3]. The Trust accepts, as it must, that the order of 2014 remains binding until set aside, which is the reason it has sought a rescission order as primary relief. The appeal falls to (be) decided on the pleading ground. It is therefore not necessary for this Court to determine the substantive question whether s 3(e)(ii) applies to servitudes or whether the servitude related to a portion or the whole of Volkers River.

GPP's arguments on appeal

[18] GPP resists the appeal on the following principal grounds. First, that the particulars of claim disclose no cause of action because they are devoid of any pleaded primary facts in support of the interpretation of the settlement agreement upon which the Trust's case depends. The invocation of interpretive methodology and the bare assertion of an interpretive conclusion do not constitute a pleading of material facts, and the distinction between *facta probanda* and *facta probantia* does not relieve the Trust of its obligation to plead the primary facts themselves.

[19] Second, that even accepting the Trust's asserted interpretation of the settlement agreement as correct, s 3(e)(ii) of the Act does not apply to servitudes. The legislature addressed servitudes specifically and separately through s 6A, inserted by the 1977 amending Act for that express purpose, and s 3(e)(ii) is confined to transactions involving the subdivision and disposal of portions of agricultural land by way of personal rights akin to sale.

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[3] *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) at para 29.

[20] Third, that the registered servitude of grazing is in any event a general servitude encumbering the whole of Volkers River and does not constitute a right to a portion of the property within the meaning of s 3(e)(ii).

[21] Fourth, that s 6A, even if relevant, does not invalidate the underlying obligatory agreement and provides no basis for setting aside the court order of 2014. GPP accordingly submits that the court a quo was correct and the appeal should be dismissed with costs of two counsel.

The law relating to exceptions

[22] The principles governing exceptions are well established. As concisely articulated in the judgment by Makgoka J in *Living Hands*[4]: The Court will accept, as true, the allegations as pleaded by the plaintiff to assess whether they disclose a cause of action. The object of an exception is not to embarrass one's opponent but to dispose of a case or portion thereof in an expeditious manner. The purpose is to raise a substantive question of law that may settle the dispute. An excipient can attack a pleading on the ground that it is either vague and embarrassing or that it does not disclose a cause of action. Where, as here, the exception is directed at the failure to disclose a cause of action, the court accepts all allegations of fact made in the pleading as correct and determines whether, on those facts, a cause of action is disclosed on any reasonable interpretation. The onus rests on the excipient to establish that the pleading is excipiable on every reasonable interpretation of the facts.

[4] *Living Hands (Pty) Ltd v Ditz and Others* 2013 (2) SA 368 (GSJ) at para 15.

[23] Two principles of particular significance in this matter deserve emphasis. The first is that a party is required to plead, with sufficient clarity and particularity, the material facts upon which it relies for the conclusion of law it wishes the court to draw. It is not sufficient to plead a conclusion of law without pleading the underlying material facts upon which that conclusion rests. This was confirmed in *Trope*[5] *and Mabaso*[6].

[24] The second is that while the court assumes the truth of everything alleged for the purposes of an exception, this applies only to facts that are actually alleged. Conclusions of law are not facts that are assumed to be correct. As the test on exception was recently again confirmed by the Supreme Court of Appeal in *Venator Africa*[7], where Mabindla-Boqwana JA confirmed:

> 'It is trite that it is for an excipient to show that on every reasonable interpretation of the facts, the pleading is excipiable. On interpretation, "the question is not whether the meaning contended for by the [plaintiff] is necessarily the correct one, but whether it is a reasonably possible one". The excipient must satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable on every interpretation that can be put on those facts. It is important to note that "the facts are what must be accepted as correct; not the conclusions of law".'

[5] *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A) at 267–268 and 273.Verme

[6] *Mabaso v Felix* 1981 (3) SA 865 (A) at 875A–H.

[7] *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA) at para 20.

Applying the law to the issues

Facta probanda and facta probantia

[25] The distinction between *facta probanda* and *facta probantia* is a well-established feature of our law of pleading. The *facta probanda* are the primary or essential facts that must be established to constitute the cause of action, the facts without which the cause of action does not exist. The *facta probantia* are the subsidiary or evidentiary facts by which the *facta probanda* will be proved at trial. A plaintiff is required to plead the former but not the latter[8]. This principle protects a plaintiff from being required to set out in its pleadings the full evidential edifice by which it proposes to prove its case at trial.

[26] The Trust invokes this distinction in support of the argument that paragraph 10.1 of its particulars of claim is adequate. It says that by pleading that the settlement agreement is to be interpreted '*in context and in light of admissible evidence*' regarding purpose, background, subsequent conduct and the manner of implementation, it has adequately pleaded the *facta probanda* relating to the interpretive exercise, namely, that admissible contextual evidence exists and will be adduced at trial.

[27] I cannot accept this argument. The distinction between *facta probanda* and *facta probantia* does not relieve a plaintiff of the obligation to plead the primary facts of its case. It merely relieves it of the obligation to plead the

[8] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838A-839B.

evidence by which those primary facts will be established. The question, therefore, is what the primary facts of the Trust's case are.

[28] The Trust's cause of action depends on the proper interpretation of the settlement agreement. It was therefore required to plead the primary facts that sustain that interpretation. Those facts must include, at a minimum, that the agreement, properly construed, granted a servitude of grazing over a defined portion of agricultural land, as opposed to the whole, and that such a grant falls within the prohibition in s 3(e)(ii) of the Act.

[29] Paragraph 10.1 does not plead those primary facts. It invokes a method of interpretation and asserts a conclusion. It does not identify the provisions of the agreement relied upon, the meaning contended for, or the facts said to sustain that meaning. It does not plead any specific contextual fact, background circumstance, or subsequent conduct that supports the interpretation advanced.

[30] A statement that evidence will be led at trial does not amount to a pleading of fact. Pleading that admissible evidence exists, and will be adduced, is not a substitute for pleading the primary facts themselves. What is required is a statement of what those facts are. The Trust has not done so.

[31] The Trust also relied on the dictum in *Garlick*[9]. I accept the principle stated there. However, it does not assist the Trust. The dictum addresses whether it is necessary to plead that extrinsic evidence will be led. It does not relieve a pleader of the obligation to plead the material facts to which that evidence will

[9] *Garlick v Smartt and Another* 1928 AD 82 at 87.

relate. These are distinct requirements. The Trust conflates them. It has not pleaded the primary facts and has instead relied on a general reference to evidence, which does not cure the defect, which is precisely the substitution that *Garlick* does not authorise.

[32] The purpose of the pleadings is to define the issues between the parties and the court, and to give fair notice of the case that must be met. As stated in *Fischer*[10], a pleading that says, in effect, '*we will lead evidence at trial about various contextual matters that will support our interpretation*' gives the opponent no notice of what primary facts are alleged and no basis upon which to formulate a plea. It fails at the threshold of what a pleading is required to achieve.

[33] The Trust contends that the court a quo erred in upholding the exception on this basis. The submission is that the court a quo impermissibly deprived the Trust of the opportunity to lead contextual evidence at trial, and that- the court a quo was therefore premature in finding the pleadings deficient. That criticism is, however, misdirected. The court a quo was correct to uphold the exception on the pleading point, and her conclusion is confirmed, albeit by a different and more direct route, by this Court. The court a quo concluded, broadly, that the particulars of claim did not set out the necessary averments; this Court holds that, applying the *facta probanda/facta probantia* distinction, the particulars of claim failed to plead even the primary facts upon which the Trust's cause of action depends. The distinction between the two types of facts does not, as the Trust suggests, save the pleading: it presupposes that the primary facts have

[10] *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) at para 13.

been pleaded, while excusing a plaintiff from pleading the evidential substructure by which those primary facts will be proved. Paragraph 10.1 of the particulars of claim does not plead the primary facts at all. In The court a quo was correct, and the Trust’s criticism of it on this ground must fail.

Contractual interpretation: Vermeulen and Tembani argument

[34] The Trust's second argument requires closer examination of the decisions in *Vermeulen* and *Tembani.*

[35] In *Vermeulen,* the Appellate Division expressed the view that courts should, as a general matter, be cautious about upholding exceptions that require the interpretation of contractual provisions, where the true meaning of the contract might only become apparent once the surrounding circumstances and the background against which it was concluded have been placed in evidence. The consideration underlying this caution is the risk of misinterpreting a document by reading it in a factual vacuum. Where a contract is ambiguous, or where its meaning is genuinely dependent on context, the exception stage, where no evidence is led, may not be the appropriate occasion to resolve the interpretive dispute.

[36] The Trust also relies on *Tembani* and *University of Johannesburg*[11] for the broader proposition that contextual interpretation of a document is always

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[11] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC).

required, not only when the document is ambiguous, and that context and purpose must be considered as a matter of course. In *University of Johannesburg*, the Constitutional Court affirmed that the process of interpretation is one of determining the meaning of the words used in their context, having regard to the purpose of the provision and the background against which the document was concluded, a process that does not require the text to be ambiguous before context is considered.

[37] I accept both propositions as accurate statements of the current approach to contractual interpretation. The caution expressed in *Vermeulen* is sound and I do not depart from it. Courts should indeed be slow to resolve interpretive disputes at the exception stage where the correct interpretation of a contract may depend on admissible contextual evidence not yet before the court.

[38] However, the principle in *Vermeulen* has no application in the present circumstances, for the following reasons.

[39] First, *Vermeulen* presupposes that facts have been pleaded that raise a genuine and reasonably arguable interpretive dispute. That is a case in which the plaintiff has pleaded the primary facts from which an alternative interpretation of the contract may plausibly arise, leaving the resolution of that dispute to trial. As this Court has found, the Trust has not pleaded any primary facts at all in support of its interpretation. There is accordingly no interpretive dispute before the court on the pleadings, as the interpretation advanced is unsupported by any pleaded fact. *Vermeulen* protects a plaintiff who has pleaded facts capable of sustaining a

particular interpretation, even if those facts require proof at trial. It does not assist a plaintiff who has substituted the primary facts of its case with the conclusion of an interpretive exercise it seeks to undertake at trial.

[40] The Trust further submits that the court a quo erred in interpreting the settlement agreement in isolation and failing to take proper account of potentially admissible contextual evidence. That submission must also fail. The court a quo did not resolve the interpretive question at all. She expressly left it open for trial. This Court, however, having found that no primary facts were pleaded capable of raising a genuine interpretive dispute, finds it unnecessary to defer the interpretive question in the manner urged by the Trust. The caution reflected in the *Vermeulen* line of authority against resolving interpretive disputes at the exception stage presupposes that a genuine dispute of interpretation has been raised on the pleadings. As has been found above, it has not. There is accordingly no interpretive question before this Court that requires the trial court's consideration. On this further ground too, the approach of the court a quo is confirmed, albeit by reasoning that differs from that adopted by the court a quo.

Section 3(e)(ii) and section 6A applicability

[41] GPP also raised as a ground of opposition the question whether s 3(e)(ii) applies to servitudes at all. The legislative history of the Act formed a central feature of the competing arguments. The Act was originally enacted in 1970 with the primary object of preventing the fragmentation of agricultural land into

uneconomic units. In its original form, s 3 prohibited subdivision and the sale or disposal of portions of agricultural land without the minister's written consent, but made no provision for servitudes. In 1972, Act 55 of 1972 extended the scope of s 3 by introducing prohibitions in respect of undivided shares and certain long-term leases. In 1974, the section was further expanded to include, among other transactions, what is now s 3(e)(ii), which prohibits the granting of a right to a portion of agricultural land for a period of ten years or more without ministerial consent. At that stage the Act still made no mention of servitudes. The legislature addressed servitudes for the first time only in 1977, when Act 12 of 1977 inserted s 6A as a new and freestanding provision. Section 6A prohibits the registration of any servitude over agricultural land without the Minister's written consent, subject to specified exceptions in subsections (a) and (b). The preamble to the 1977 amending Act records that s 6A was inserted specifically to regulate servitudes.

[42] The Trust's case, in broad outline, is that the settlement agreement falls within s 3(e)(ii) because it purported to grant a permanent right of grazing in respect of a portion of agricultural land as contemplated by that provision. On the Trust's argument, the phrase '*right to such portion'* is broad enough to encompass the grant of a grazing right over a defined part of the farm, and the practical effect of such a grant, the long-term devotion of a defined portion of agricultural land to a use determined by a party other than the owner, without the Minister's oversight, falls squarely within the mischief the Act was designed to address.

[43] The Trust further contends that s 3(e)(ii), which operates at the level of the obligatory agreement, and s 6A, which operates at the level of registration, address different stages of the same transaction and are not mutually exclusive. On this argument, both may apply concurrently, and the fact that s 6A was introduced to regulate servitudes does not mean that a transaction involving a servitude over a portion of agricultural land falls outside s 3(e)(ii).

[44] GPP's answer is that servitudes are regulated exclusively by s 6A, which was introduced for that express purpose, and that s 3(e)(ii) does not extend to servitudes. GPP relies on the legislative architecture: the legislature had s 3(e)(ii) before it when it inserted s 6A in 1977, yet chose not to amend s 3 to include servitudes. Instead it enacted a structurally separate provision. GPP further contends that s 6A and s 3(e) operate at different levels, s 6A at registration, s 3(e)(ii) at the obligatory agreement, and that this difference in operation reflects a deliberate legislative choice to regulate servitudes through the mechanism of registration control rather than through the invalidation of the underlying agreement. On GPP's argument, the settlement agreement, as an agreement to register a servitude, is not the kind of transaction that s 3(e)(ii) was designed to govern, and the only provision of the Act that bears upon it is s 6A.

[45] It is not necessary for this Court to resolve the question definitively, and it declines to do so.

The question of restitution

[46] The Trust argued, both before the court a quo and before this Court, that the doctrine of restitutio in integrum does not apply where no valid contract came into existence, that is, where the contract is void *ab initio*, and that it was accordingly not necessary for the Trust to plead and tender restitution in order to complete its cause of action. It is unnecessary to determine this argument. This Court has dismissed the appeal on the ground that the particulars of claim fail to plead the primary facts necessary to establish the cause of action, not on the basis that the settlement agreement is or is not void *ab initio*. The question of restitution accordingly does not arise for determination on this appeal.

Conclusion

[47] For these reasons the court a quo cannot be faulted for upholding the exception. The court a quo correctly identified that the particulars of claim were insufficiently pleaded to sustain a cause of action and that the court order of 2014 remained binding until properly set aside. This Court confirms that conclusion. The particulars of claim fail to plead the primary facts. That deficiency is fatal to the appeal.

[48] The substantive questions, whether s 3(e)(ii) of the Act applies to servitudes and whether the servitude relates to a portion or the whole of Volkers River, do not require determination and are left open. The appeal must accordingly fail. It was submitted that the order of the court a quo, granting leave to amend, must be substituted to provide for a new operative date. I agree.

Costs

[49] There is no reason to depart from the ordinary rule that costs follow the result. GPP has been successful and is entitled to its costs. The matter justified the employment of two counsel. Senior counsel's fees taxable on scale C, and junior counsel's fees on scale A.

Order

[50] I propose the following order be made:

1 The appeal is dismissed with costs including the costs of two counsel, where so employed, with senior counsel's fees taxable on scale C, and junior counsel on scale A.

2 The order of the High Court is confirmed save for para 2 of the order, which is substituted as follows:

‘2. The Trust is given leave, if so advised, to deliver its intention to amend its particulars of claim within ten days of the date of this order.’

EM JONKER

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

BP MANTAME

JUDGE OF THE HIGH COURT

I agree.

S O’BRIEN

ACTING JUDGE OF THE HIGH COURT

Appearances

For the Appellants:	DJ van der Walt SC
Instructed by:	Spangenberg Zietsman & Bloem Attorneys
For the First Respondent:	J Butler SC and L Liebenberg
Instructed by:	Nel Mentz Steyn Ellis Inc.
For the Second Respondent:	No appearance