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

CASE NO.: 2025-046206

In the matter between:

NEIL DAVID BUTTON N.O. Plaintiff

and

MOHAMED YUSUF MOHAMEDY Defendant

Coram: Adams AJ
Heard: 30 April 2026
Delivered: 12 May 2026

Summary: Exception – Particulars of claim — Cause of action — Plaintiff, acting as receiver of dissolved partnerships, seeking accounting and recovery of allegedly misappropriated funds from defendant director — Defendant contending that accounting and debatement constituted condition precedent to liability — Court holding that particulars of claim, read holistically, disclosed a sustainable cause of action and sufficiently enabled defendant to plead — Exception dismissed with costs.

JUDGMENT

ADAMS AJ:

Introduction

[1] The receiver appointed upon the termination of two partnerships claims repayment from the defendant of allegedly misappropriated funds, the defendant having acted as the director of the controlling partner in the partnerships, by way of two separate claims

[2] What serves before this Court at this juncture is an exception raised by the defendant in terms of Rule 23(1) of the Uniform Rules of Court. The defendant contends that the plaintiff's particulars of claim lack averments necessary to sustain a cause of action and are accordingly excipiable. The plaintiff opposes the exception, maintaining that the pleading, properly construed, discloses a complete and sustainable cause of action.

[3] The formulation of the grounds of exception can be summarised as follows:

a) that the plaintiff does not have a right to seek an accounting (and a debatement following on such accounting) from the defendant; and

b) that the only parties entitled to seek such accounting (and debatement) are the two juristic entities constituting each of the partnerships involved, namely New Exchange Investments (Pty) Ltd ("New Exchange") and Peppercorn Trading (Pty) Ltd ("Peppercorn").

[4] Despite having elected to deliver an exception instead of a plea to the particulars of claim, the defendant took no steps to prosecute the exception and initially did not deliver any heads of argument in support of his contentions. The plaintiff was accordingly required to set the matter down in order to compel a hearing and determination of the merits of the exception. Only once the matter had been enrolled for hearing and after the plaintiff had been obliged to deliver heads in the absence of same from the defendant, did the defendant deliver his heads.

[5] The determination of this exception requires the Court to consider whether, on every reasonable interpretation of the particulars of claim, no cause of action is disclosed.[1] I turn briefly to consider the facts underpinning the relief sought by the plaintiff.

<u>The background facts</u>

[6] Two *en commandite* partnerships were terminated in terms of a court order which is annexed to the particulars of claim, and provision was made for the appointment of a receiver to wind up their affairs. The plaintiff was duly appointed as receiver. The partnerships respectively operated service stations situated at Kuils River and Melkbos, with the general partners being Peppercorn (Kuils River) and New Exchange (Melkbos). The defendant was, at all material times, a director of both Peppercorn and New Exchange. Although the service stations were operated under the names of these companies, they constituted assets of the respective partnerships. Following the conclusion of the written partnership agreements, oral

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1 *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-E.

agreements were concluded in terms of which the defendant assumed responsibility for the day-to-day management of both service stations and undertook to provide financial information to the partnerships' accountant for the preparation of accounts, in return for an agreed monthly remuneration.

[7] The plaintiff alleges that the defendant breached these oral agreements and his duties to the partnerships by unilaterally increasing his own remuneration without authority, misappropriating partnership funds, and failing to provide proper financial records. In respect of the Kuils River service station, the defendant allegedly increased his salary from R30 000,00 to R70 000,00 per month and withdrew approximately R2 185 000,00 under the guise of a loan. In respect of the Melkbos service station, he allegedly increased his salary to R70 000,00 per month, caused an additional R30 000,00 per month to be paid to his wife without justification, and withdrew approximately R4 332 113,24 as the total a of series of purported loans. The defendant further failed, from about 2012, to furnish adequate financial information to the accountant.

[8] Relying on the powers conferred upon him in the court order in terms of which he was appointed as receiver, the plaintiff seeks an accounting and debatement from the defendant, together with repayment of all amounts found to have been misappropriated. The relevant powers are set out as follows in the court order:

> *"5. ….. The receiver's powers would be as follows:*
>
> *5.1 To take possession of all assets, whether moveable or immovable, of the partnerships and to determine and discharge all the labilities of the said*

partnerships.

5.2 Without derogating from the generality of the order in paragraph 5.1 to take possession of the service station business operated by the 7^{th} Respondent (Peppercorn Trading (Pty) Ltd) and the 8^{th} Respondent (New Exchange Investments (Pty.) Ltd), and to operate those businesses in the name of the two companies until such time as the receiver has discharged all his/her obligations in terms of the order and has disposed of those business as contemplated by this order.

5.3 To inspect all documents and vouchers, books of account and financial statements in respect of the 7" Respondent, Peppercorn Trading (Pty)Ltd and the 8th Respondent (New Exchange investments (Pty) Ltd.

5.4 To obtain information from any auditors or accountants that might have been engaged to prepare the books of account or financial statements of the partnerships as well as of the 7^{th} Respondent and the 8^{th} Respondent

5.6 To determine from first Applicant and first Respondent an account of all assets belonging to the said partnerships wherever such assets may be held. And to determine whether any assets were dealt with by first or second Respondent which are assets of the partnerships or is still in their respective possessions.

5.7 To demand from each of the aforesaid persons payments or delivery to the receiver of any balance of moneys or assets of the partnerships still in the possession of any of those persons.

5.15 To pursue any claims against any of the aforesaid persons or any other persons who may be owing money to the partnerships."

<u>The defendant's submissions</u>

[9] As indicated, the defendant's exception is premised on the contention that the plaintiff, acting as the appointed receiver of terminated partnerships, has failed to plead the necessary averments to sustain a cause of action. In particular, the defendant argues that on the plaintiff's own version any amounts allegedly owed only become due once an accounting and debatement of the funds advanced by the partnerships have taken place.

[10] The defendant contends that such accounting and debatement have not yet occurred. On this basis, it is argued that the rendering of an account and the debatement thereof constitute a condition precedent to any liability on the part of the defendant. In the absence of such prior steps, the plaintiff's claim is said to be premature.

[11] In advancing this argument, the defendant relies on Rule 18(4) of the Uniform Rules of Court, which requires a clear and concise statement of the material facts, with sufficient particularity to enable the opposing party to plead. It is further submitted that a pleading which omits material averments necessary to sustain a cause of action is excipiable.

[12] The defendant also invokes the well-established test for exceptions, namely whether on every reasonable interpretation of the pleading no cause of action is disclosed and contends that the plaintiff's particulars of claim fail this test.

[13] The defendant argues, in addition, that the particulars of claim are vague and embarrassing in that they lack sufficient particularity to enable a meaningful response. The defendant contends that he is unable to plead until such time as an accounting and debatement have been undertaken. On this basis, the defendant seeks an order upholding the exception, with costs.

<u>The plaintiff's submissions</u>

[14] The plaintiff contends that the exception is misconceived, and that the particulars of claim, when read as a whole and accepted as true, clearly disclose a cause of action.

[15] The plaintiff further submits that he is expressly authorised, by virtue of the partnership structure and the court order, to demand an accounting and to pursue the recovery of misappropriated funds. He contends that the defendant's role as director of the controlling partner gives rise to fiduciary duties, which are alleged to have been breached through, *inter alia*, the misappropriation of funds.

[16] The plaintiff argues that the exception is internally inconsistent, overly technical, and fails to demonstrate that no cause of action arises on any reasonable interpretation of the pleading.

The applicable legal principles

[17] The principles governing exceptions are trite. In *Trope v South African Reserve Bank and Another*[2] and *Lewis v Oneanate (Pty) Ltd* ,[3] the Appellate Division (as it then was) emphasised that a plaintiff must plead the material facts upon which the claim is founded with sufficient particularity to enable the defendant reasonably to appreciate the case it is required to meet and to plead thereto. Correspondingly, the excipient bears the onus of demonstrating that, on any reasonable interpretation, no cause of action is disclosed.

[18] It is well-established that an exception is directed at the legal sufficiency of a pleading, rather than the veracity of the allegations contained therein. Thus, for the purposes of an exception, the Court is required to accept the pleaded facts as correct and to determine whether, on every reasonable interpretation, the pleading fails to disclose a cause of action. The onus rests on the excipient to establish that, even on such acceptance, the pleading does not sustain a cognisable cause of action.

[19] The function of an exception is to eliminate pleadings that are bad in law, thereby avoiding the leading of unnecessary evidence and the costs attendant upon a trial where no sustainable claim or defence exists. It is trite that both the parties and the Court are bound by the pleadings; the Court may not stray beyond the four corners of the pleaded case or determine issues not raised, lest it engage in

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2 1993 (3) SA 264 (A).
3 1992 (4) SA 811 (A).

speculation and adjudicate matters not properly placed in dispute.[4] An exception is therefore not a mechanism to test probabilities, resolve factual disputes, or reformulate a party's case.

[20] In *Barclays National Bank Ltd v Thompson*[5] the function of an exception on the ground that necessary averments are lacking and the circumstances under which it may be taken, were restated. The Court held that a well-founded exception serves to dispose of a case, in whole or in part, and cannot be taken to part of a pleading unless that part is self-contained and amounts to a separate claim or defence. The purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at trial.

[21] In *Telematrix*[6] the Court emphasised that exceptions are a useful tool that help weed out cases that have no legal merit. The Court warned against an overly technical or formalistic approach because if courts treat exceptions too rigidly, they lose their usefulness. Courts are urged instead to deal with them sensibly and practically. An exception should act like a "sword" that cuts through the claim and exposes whether it is legally defective. In other words, it should test the legal validity of the claim clearly and not get bogged down in artificial arguments.

[22] In *McKelvey v Cowan NO*[7] it was stated that if evidence can be led which discloses a cause of action alleged in the pleadings, the pleading is not excipiable. A pleading is only excipiable where no possible evidence led on the pleading can

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4 See *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 898G–I.
5 1989 (1) SA 547 (A) at 553 F-H.
6 *Telematrix (Pty) Ltd v The Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3.
7 1980 (4) SA 525 (Z) at 526D.

disclose a cause of action. In order to disclose a cause of action, a plaintiff's pleading must set out every material fact necessary to support the right to judgment, if traversed. It need not include every piece of evidence but must contain each fact that must be proved.[8] The distinction is between the essential *facta probanda*, which must be pleaded, and the *facta probantia*, which are matters for evidential proof at trial. A failure to plead the former leaves the claim without a legal foundation, whereas the inclusion of the latter tends to obscure rather than clarify the real issues.

<u>Application of the law to the facts</u>

[23] I have mentioned at the outset that the defendant's exception is framed on two ostensibly distinct bases: first, that the plaintiff lacks the right and authority to seek an accounting and debatement from the defendant; and second, that such relief may be pursued only by the two juristic entities. On closer scrutiny, however, the latter contention undermines the former, and the exception in substance rests on a single proposition, namely, that the plaintiff is not vested with the requisite entitlement to demand an accounting.

[24] During oral argument before this Court, it became apparent that the defendant's exception is, in essence, predicated upon the further contention that an accounting and debatement constitute a condition precedent to the plaintiff's claim. On that footing it is argued that, in the absence of such prior accounting, no cause of action has accrued to the plaintiff.

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8 *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23.

[25] This contention is fallacious. The exception reflects a failure to appreciate the juridical structure of the *en commandite* partnerships in question. The plaintiff pleads that each service station is an asset of the respective partnerships, notwithstanding that they were operated under the names of New Exchange and Peppercorn. The written partnership agreements expressly record that the partners entered into partnerships in respect of the service stations, and that the business of each partnership would be conducted in the name of the juristic entities.

[26] This arrangement makes clear that the service stations are partnership assets, and that the juristic entities merely serve as vehicles through which the businesses are operated. The entities themselves have no ownership claim over the businesses. In these circumstances, paragraph 5.6 of the court order (quoted earlier in this judgment) empowers the plaintiff to obtain from the defendant an account of all partnership assets, wherever situated, including any dealings relating to the service station businesses. That authority is distinct from paragraph 5.3 of the same order, which entitles the plaintiff to inspect documents and financial records of the juristic entities.[9]

[27] The powers granted to the receiver must be interpreted holistically and purposively. In any event, the plaintiff's entitlement to an accounting also arises directly from paragraph 5.6 of the court order, which expressly provides for such relief and is binding on the defendant. Paragraph 5.6 expressly authorises the

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[9] Paragraph 5.3 reads as follows: "*To inspect all documents and vouchers, books of account and financial statements in respect of the 7" Respondent, Peppercorn Trading (Pty)Ltd and the 8th Respondent (New Exchange investments (Pty) Ltd.*".

receiver to determine from the relevant persons an account of all assets belonging to the partnerships, to trace their whereabouts, and to ascertain whether any such assets were improperly dealt with or remain in the possession of the respondents. Properly construed, this provision necessarily includes the power to require a comprehensive accounting where such accounting is required to identify, locate, and value partnership assets. Absent access to a full and transparent account, the receiver would be unable to discharge the central mandate of determining the nett assets and liabilities of the partnerships and to give effect to the order.

[28] Furthermore, on the plaintiff's version as pleaded, which must be accepted as correct for purposes of the exception, the defendant was effectively employed by the service station businesses. This gives rise to a fiduciary duty to account. The oral agreement in terms of which the defendant received a salary was concluded between the partnerships and the defendant, with the juristic entities playing no role. This is made plain in the particulars of claim.

[29] Additionally, paragraph 5.15 of court order[10] empowers the plaintiff to pursue claims against the defendant where monies are owed to the partnerships. The plaintiff has alleged that the defendant misappropriated substantial sums from the partnerships. These claims fall squarely within the scope of the authority granted by that order.

[10] This paragraph reads as follows: "*5.15 To pursue any claims against any of the aforesaid persons or any other persons who may be owing money to the partnerships."*.

[30] The defendant's contention is, additionally, not sustainable for the following reasons.

[31] First, when the particulars of claim are read holistically, they disclose a coherent cause of action grounded in the alleged misappropriation of partnership funds by a party occupying a fiduciary position. The plaintiff pleads its authority, derived from both the partnership structure and a court order, to pursue recovery of such funds and to demand an accounting.

[32] The plaintiff's claim is not confined to a mere demand for payment of a liquidated amount following a debatement. It encompasses the right to call for an accounting, to interrogate the financial dealings in question, and to recover amounts found to be due. In such circumstances, the accounting process forms part of the relief sought, rather than a condition precedent to the institution of the claim.

[33] Second, the defendant's characterisation of the accounting and debatement as a condition precedent is not borne out by anything currently before this Court, at least not in a manner that renders the particulars of claim excipiable. Whether an accounting must precede liability, or whether it is integral to the relief claimed, is a matter that may depend on the evidence and the precise legal relationship between the parties. It is not a question that can be definitively resolved at the exception stage. In *Al Mayya International Limited (BVI) v DDP Valuers (Pty) Ltd*[11] it was said that:

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11 [2024] ZAGPPHC 757 (31 July 2024) paras 11 to 13.

"*[11] A plaintiff is required to plead his/her case in terms that are lucid, logical and intelligible. A plaintiff must only plead the facta probanda and not the facta probantia.*

[12] A plaintiff should plead the outline of his case. That does not mean a defendant is entitled to a framework like a crossword puzzle where every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the appellant will have satisfied the requirements.

[13] In an exception premised on the grounds of a failure to disclose a cause of action, the onus is on the excipient to demonstrate that 'upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence (as the case may be) is disclosed'."

[34] Third, the defendant has not discharged the onus of demonstrating that, on every reasonable interpretation of the particulars of claim, no cause of action is disclosed. At best for the defendant, the exception raises an issue as to the timing and sequencing of relief. That does not extinguish the cause of action.

[35] Fourth, the complaint that the particulars of claim are vague and embarrassing is similarly unsustainable. The material facts underpinning the claim, namely the existence of the partnership, the plaintiff's authority, the defendant's fiduciary position, the alleged misappropriation, and the resulting loss, are sufficiently

pleaded to enable the defendant sensibly to formulate a response. Any further detail required can be sought by way of a request for trial particulars under Rule 21.

[36] Finally, the defendant’s approach reflects an impermissibly technical dissection of the pleading. The law requires a sensible and holistic reading, not one that isolates alleged deficiencies divorced from the overall structure and substance of the claim.

Conclusion

[37] The defendant’s exception is misconceived. It fails to establish that the plaintiff’s particulars of claim lack averments necessary to sustain a cause of action. On the contrary, the pleading discloses a sustainable claim which ought properly to proceed to trial.

[38] The exception appears to be an attempt to forestall the adjudication of the merits through technical objections, rather than a *bona fide* challenge to the legal sufficiency of the claim. It constitutes an attempt to avoid engaging with the particulars of claim. It is apparent that the exception is without merit, and the defendant’s failure to prosecute the exception reinforces this conclusion.

Costs

[39] I see no reason why costs should not follow the result. Neither party argued otherwise. In the exercise of my discretion under Rule 67A I am of the view that counsel's fees should be taxed on Scale B.

<u>Order</u>

[40] I accordingly order as follows:

1. The defendant's exception is dismissed.

2. The defendant shall pay the costs of the exception, including counsel's fees taxed on scale B.

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M. F. ADAMS

ACTING JUDGE OF THE HIGH COURT

<u>Appearances</u>

For the plaintiff: Adv. R, Randall, instructed by Stowell& C.O Attorneys.

For the defendant: Adv. M. Holland, instructed by Whelan Attorneys.