**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

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

| **25 May 2026** | **SM MARITZ AJ** |
|---|---|
| DATE | SIGNATURE |

**Case No: 2023-038205**

In the matter between:

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| **LIBERTY GROUP LIMITED** | First Plaintiff |
| **2 DEGREES PROPERTIES (PTY) LTD** | Second Plaintiff |
| **PARETO LIMITED** | Third Plaintiff |

(all of whom are herein represented by **JHI RETAIL (PTY) LTD**)

and

| | |
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| **TIKKA 'N KEBAB CC T/A GHAZAL EXPRESS** | First Defendant |
| **BHUPINDER GILL** | Second Defendant/ Excipient |

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**JUDGMENT**

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**MARITZ AJ**

## A. INTRODUCTION

[1] This is an exception brought by the Second Defendant, Bhupinder Gill (hereinafter referred to as "the Excipient" or “the Second Defendant”), to the Plaintiffs' Amended Particulars of Claim dated 24 October 2024 and filed on 8 November 2024. The exception is advanced in terms of Rule 23(1) of the Uniform Rules of Court on the ground that the Amended Particulars of Claim lack the averments necessary to sustain a cause of action against the Second Defendant. The Plaintiffs oppose the exception and seek its dismissal with costs on the attorney-and-client scale, together with a direction that the Second Defendant deliver his plea within ten court days of the order.

[2] The Second Defendant was represented by Adv NS Beket of Umhlanga Chambers, instructed by MCH Attorneys Inc (c/o Friedland Hart Solomon & Nicolson). The Plaintiffs were represented by Adv LA Pretorius of Parc Nouveau Advocates' Chambers, instructed by Mark Efstratiou Inc. The matter was heard on 13 May 2026 as matter number 10 on the opposed motion roll, by agreement between the parties virtually via MS Teams. Both counsel filed comprehensive heads of argument and argued the matter fully before me.

## B. RELEVANT FACTUAL BACKGROUND

[3] The Plaintiffs are Liberty Group Limited, 2 Degrees Properties (Pty) Ltd and Pareto Limited (collectively, "the Plaintiffs"), three juristic persons that together own and let commercial retail property at Sandton City Shopping Centre, Johannesburg, each represented in these proceedings by JHI Retail (Pty) Ltd. The First Defendant, Tikka 'N Kebab CC (trading as Ghazal Express), was a tenant at Shop No F[...], Food Court Level, Sandton City Shopping Centre, Cnr R[...] Road and […] Street, Sandhurst Ext 3, Sandton, measuring approximately 83.48 square metres (hereinafter "the premises"). The premises were let to the First Defendant for use as an Indian fast food outlet.

[4] On or about 28 March 2019, the Plaintiffs and the First Defendant executed a document described as an Offer to Lease, a copy of which is attached to the Amended Particulars of Claim as Annexure "A". The Second Defendant, Bhupinder Gill, signed a Deed of Suretyship on 1 February 2019, binding himself as surety and co-principal debtor jointly and severally with the First Defendant for all debts and obligations arising out of the First Defendant's occupation, use, enjoyment and/or possession of the premises, including any extension, renewal or tacit relocation thereof. He renounced the benefits of excussion, division and cession of action. His spouse, Ajinder Kaur Gill, consented to the suretyship in terms of section 15 of the Matrimonial Property Act 88 of 1984.

[5] The First Defendant was placed in final liquidation in May 2023. The Plaintiffs thereafter instituted the present action against both Defendants by combined summons, claiming arrear rental and associated charges in the sum of R3 956 476.57 for the period April 2020 to April 2023, together with interest at 10.75% per annum *a tempore morae* and costs on the attorney-and-client scale. The action against the Second Defendant is pursued solely in his capacity as surety.

[6] This is the second exception brought by the Second Defendant in these proceedings. The first exception was upheld by Naude AJ on 22 November 2023 on three grounds — the basis of JHI Retail's representation of the Plaintiffs was not adequately pleaded; the basis for rental claimed beyond the initial lease period was absent; and the citation of the Second Defendant was defective — with the Plaintiffs granted 20 days' leave to amend. A procedural dispute regarding compliance with that order was resolved by Nyathi J on 16 October 2024, who declared an irregular step but granted the Plaintiffs a further 10 days to file a fresh notice of intention to amend under Rule 28. The Plaintiffs filed a fresh notice on 24 October 2024. The Second Defendant filed no objection under Rule 28(2). The Amended Particulars of Claim were delivered on 8 November 2024, and the present second exception was filed on 1 December 2025.

## C. ISSUES IN DISPUTE

[7] The exception raises two related grounds. The first is that the Amended Particulars of Claim, read with the incorporated Offer to Lease (Annexure "A"), fails to disclose the conclusion of a binding lease agreement and therefore fails to disclose any cause of action for arrear rental against the First Defendant. The second, which is derivative of the first, is that since no valid principal obligation is disclosed, no accessory cause of action against the Second Defendant as surety can be sustained. The resolution of both grounds depends entirely upon the first: whether the Amended Particulars of Claim, read as a whole with the incorporated documents, adequately pleads the conclusion of a binding lease agreement.

## D. THE AMENDED PARTICULARS OF CLAIM AND THE OFFER TO LEASE

[8] Paragraph 3.1 of the Amended Particulars of Claim pleads as follows: "*On or about the 28th of March 2019, and at Sandton, Gauteng, the Plaintiffs and the First Defendant signed an Offer to Lease*." Paragraph 3.2 attaches the Offer to Lease as Annexure "A". Paragraph 3.3 pleads that "*the Plaintiffs plead that the contents of the Offer to Lease be read as if specifically incorporated herein by way of reference*." Paragraph 4.1 pleads that in concluding the Offer to Lease the First Defendant was represented by the Second Defendant as its duly authorised representative, and paragraph 4.2 pleads that the Plaintiffs were represented by Preston Charles Gaddy, duly authorised thereto.

[9] Paragraphs 5.1 to 5.14 plead the material terms of the Offer to Lease: the premises (paragraph 5.1); the three-year lease period (paragraph 5.2); the commencement date of 1 April 2019 (paragraph 5.3); the termination date of 31 March 2022 and thereafter a tacit relocation of the lease agreement on the same terms and conditions until April 2023 when the First Defendant vacated the premises (paragraph 5.4); the basic monthly rental (paragraph 5.5); turnover rental (paragraph 5.6); property expense contributions (paragraph 5.7); rates and levies contributions (paragraph 5.8); City Improvement District

Levy (paragraph 5.9); sewerage and effluent charges (paragraph 5.10); refuse charges (paragraph 5.11); electricity, gas and water contributions (paragraph 5.12); marketing fund contributions (paragraph 5.13); and the deposit (paragraph 5.14). Paragraph 6 pleads the First Defendant's indebtedness. Paragraph 7 pleads the Deed of Suretyship.

[10] What the Amended Particulars of Claim does *not* plead is significant: it does not plead that the Plaintiffs' acceptance of the Offer to Lease was conveyed to the First Defendant in writing, as required by Clause 2 of the Offer to Lease. Nor does it plead that this requirement was waived, or that the lease was tacitly accepted or tacitly concluded by conduct.

[11] Clause 2 of the Offer to Lease, which is incorporated into the Amended Particulars of Claim by reason of paragraph 3.3, reads as follows:

> *"The tenant, by signing the endorsement below, hereby irrevocably offers to lease the premises from the landlord, on the terms and conditions of this offer (read with all annexures hereto) which offer shall only be accepted on behalf of the landlord if signed by the landlord's duly authorised representative and such acceptance having been conveyed to the tenant in writing."*

[12] The opening NOTE to the Offer to Lease states that the document "*shall constitute a binding agreement once accepted and signed on behalf of the landlord*". Clause 3.1 provides that the terms and conditions of the lease shall be those contained in the offer read together with the Landlord's Standard Agreement of Lease attached as Annexure "D". Clause 3.2 provides: "*The lease must be signed by the parties concerned after acceptance of this offer by the landlord. A failure by the tenant to sign and return the lease to the landlord on demand shall constitute a material breach of the terms of this offer, but not the right to terminate the agreement between the parties. Until the said lease is signed, this offer once accepted by the landlord constitutes a binding Lease Agreement between the parties.*" Clause 4.4 provides that should the tenant remain in occupation after the lease expiry date (with or without the landlord's

consent), the lease shall continue on a monthly basis with the basic monthly rental escalating by 20%.

[13] The acceptance endorsement on page 8 of Annexure "A" reflects the signature of Preston Gaddy as the Plaintiffs' representative, signed and witnessed at Sandton City on 28 March 2019. The tenant's confirmation reflects the signature of B. Gill on behalf of Tikka 'N Kebab CC, dated 15 February 2019. Both parties' representatives accordingly signed the document. The Amended Particulars of Claim pleads nothing further as to the conclusion of the lease.

## E. THE PLAINTIFFS' CASE

[14] The Plaintiffs advance their opposition to the exception on several grounds, each of which is addressed in turn.

### Clause 2 as a suspensive condition

[15] The Plaintiffs' primary submission is that Clause 2 of the Offer to Lease does not prescribe a conjunctive method of acceptance but rather operates as a *suspensive condition*. Their counsel contends that Clause 2 suspends the rights and obligations of an already-concluded agreement until the condition — written conveyance of acceptance — is fulfilled. On this characterisation, the Plaintiffs say they have already pleaded that the lease agreement was concluded, which must be accepted as true at exception stage, and that it is accordingly unnecessary to plead the fulfilment of the suspensive condition: the pleading of conclusion imports fulfilment.

[16] The Plaintiffs rely on the judgment of Kubushi J in *Carla Oberholzer v Seventy Two Telecommunications & Glocell (Pty) Ltd* (GP Case No 20338/2015, 26 July 2017) ("*Oberholzer*"). In that case the plaintiff claimed commission under an alleged employment agreement. The defendant excepted on the basis that the Letter of Offer of Employment annexed bore no signature from the plaintiff (the prescribed acceptance mechanism) and accordingly the particulars of claim

disclosed no concluded agreement. Kubushi J dismissed the first ground of exception. At paragraphs 9 to 12, the court held that the plaintiff's claim was based on a concluded employment agreement — not merely on an offer — and that the court at exception stage must accept this as true. Critically, the court identified the issue of non-signature as a matter of a suspensive condition: the exception presupposed that the cause of action was based on an offer, not a concluded agreement. The court further held at paragraph 12 that the failure to annex a signed copy was a deficiency curable by evidence at trial.

[17] The Plaintiffs submit that the same analysis applies here: their claim is founded on a concluded lease agreement; the court must accept this as true; and any question about whether the Clause 2 acceptance formality was completed is a matter of evidence for trial. They reinforce this submission by reference to paragraph 5.6 of their heads of argument, where they characterise Clause 2 as a suspensive condition, and to paragraphs 5.15 to 5.16, where they submit that by pleading signature and breach they have pleaded all material facts (*facta probanda*) necessary to sustain the cause of action.

**Written notice as facta probantia**

[18] The Plaintiffs submit that compliance with Clause 2 — specifically the written conveyance of acceptance — is a matter of evidence (*facta probantia*) to be established at trial, not a material fact (*factum probandum*) to be pleaded. They rely on *Benson & Simpson v Robinson* 1917 WLD 125, where Wessels J held that a plaintiff must state clearly and concisely the facts on which the claim is based, with sufficient exactness that the defendant knows what must be proved against him, but is not required to set out the evidence. On this basis, the Plaintiffs contend that the conclusion of the agreement is the material fact, whilst the mechanical steps by which conclusion was achieved are evidentiary details.

**The pleading discloses a concluded agreement**

[19] The Plaintiffs further submit that, on reading paragraphs 5.4, 6.1 and 7 of the Amended Particulars of Claim holistically, the pleading discloses the conclusion of a binding agreement and a tacit relocation thereof. They point to the pleaded four-year occupation of the premises from 1 April 2019 to 1 April 2023, the levying of rental from the inception of the lease in accordance with the lease terms, and the specific invocation of Clause 4.4 of the Offer to Lease as the basis for the continued tenancy. They argue that this conduct, accepted as true, necessarily discloses a binding lease agreement — and that the Second Defendant's exception, in targeting only paragraph 3.1 and ignoring these averments, does not read the pleading as a whole.

**The exception is a merits defence**

[20] Finally, the Plaintiffs submit that the exception amounts to no more than a defence on the merits dressed in the language of a pleading objection. They rely on *Doyle v Fleet Motors (Pty) Ltd* 1971 (3) SA 760 (A) for the proposition that an exception is not a substitute for a plea, and on *Masakhane Mining Supply and Construction CC t/a Masakhane Megawatt Services v FPM Business Solutions (Pty) Ltd t/a FPM Security Services* [2025] ZANWHC 190 for the proposition that even a weak pleaded case survives an exception if the essential elements of a cause of action are present. The Second Defendant, they say, should deliver a plea denying conclusion of the lease and place the Plaintiffs to proof at trial.

## F. THE SECOND DEFENDANT'S CASE

[21] The Second Defendant's case, as advanced by Adv Beket, proceeds on several distinct submissions.

**Only an offer to lease was signed — not a concluded agreement**

[22] The Second Defendant's first and most fundamental submission is that the Amended Particulars of Claim does not plead the conclusion of a lease agreement at all. What paragraph 3.1 pleads is that the parties "*signed an*

*Offer to Lease*" — which is precisely what the document is. Clause 2 of the Offer to Lease makes this characterisation explicit: the tenant's signature constitutes an irrevocable *offer* to lease; it is not a concluded agreement. The landlord's signature constitutes acceptance of that offer only when combined with written conveyance of that acceptance to the tenant. Neither the conclusion of a lease agreement nor the conveyance of written notice of acceptance is pleaded. The Amended Particulars of Claim pleads the signing of an offer; it says nothing about that offer having been accepted in the manner prescribed by its own terms. The cause of action for arrear rental requires, as a *factum probandum*, the conclusion of a lease agreement — which is absent from the pleading.

**Clause 2 prescribes a method of acceptance, not a suspensive condition**

[23] The Second Defendant submits that the Plaintiffs' characterisation of Clause 2 as a suspensive condition is legally incorrect. A suspensive condition (*conditio suspensiva*) presupposes a concluded agreement and suspends the operation of rights and obligations under that agreement until the condition is fulfilled. Clause 2 does not presuppose a concluded agreement — it defines the mechanism by which the tenant's offer becomes a concluded agreement. The tenant's signature is expressly described as an *offer*; the clause then prescribes how that offer is accepted. This is the language of contract formation, not of a condition subsequent to an existing agreement. The authority of *Laws v Rutherford* 1927 AD 261 at 263 per Ennis CJ governs: where an offeror prescribes a specific method of acceptance, only compliance with that method concludes the contract.

**The exception to the rule that pleaded facts are accepted as true — Fresh Produce**

[24] The Second Defendant draws the court's attention to an important qualification to the general principle that a court accepts all facts pleaded as true for the purposes of an exception. In *Fresh Produce Holdings (Pty) Ltd v Transpaco Ltd* 1990 (4) SA 749 (N) at 753H, Howard J held that the rule that all facts

pleaded by the plaintiff must be accepted as true is limited to *facts properly so called* — it does not extend to *inferences*. A conclusion drawn by a pleader from primary facts is not itself a fact to be accepted as true; the court examines the primary facts from which the inference is drawn to determine whether the conclusion is sustainable. The proposition that "*a lease was concluded*" is, in the present context, not a primary fact but an inference drawn from the pleaded primary fact — namely, that the parties signed the Offer to Lease. The court must therefore examine the incorporated document (Clause 2) to determine whether that inference is open on the pleaded facts. It is not: Clause 2 shows that signature alone, without written conveyance of acceptance, does not conclude the lease.

**The Oberholzer judgment does not assist the Plaintiffs**

[25] The Second Defendant specifically argues that *Oberholzer* does not assist the Plaintiffs. The Court attention was drawn to paragraphs 7, 8, 10 and 11 of that judgment. At paragraph 7, Kubushi J noted the plaintiff's submission that it was unnecessary to plead a suspensive condition because the plaintiff had already pleaded that the employment agreement was concluded. At paragraph 8 the court confirmed the principle that a suspensive condition must be pleaded where the claim rests on its fulfilment. At paragraphs 10 and 11, the court dismissed the first ground of exception on the basis that the claim was founded on a concluded agreement — finding that the pleading had *already asserted* the agreement's conclusion. The court further noted, at paragraph 10, that the exception "*presumes that the cause of action is premised on an offer which should have been accepted*" and held that this was not the plaintiff's case.

[26] The Second Defendant argues that the very reasoning which made *Oberholzer* a good case for the plaintiff there operates against the Plaintiffs here. In *Oberholzer*, the court was satisfied that a concluded agreement was pleaded. In the present case, paragraph 3.1 of the Amended Particulars of Claim uses the very language of an offer — "*the Plaintiffs and the First Defendant signed an Offer to Lease*" — and incorporates a document which itself defines the signing as an irrevocable *offer*. In *Oberholzer*, the court expressly

distinguished a claim based on a concluded agreement from one based on an offer. The Amended Particulars of Claim, on its own language, pleads the latter. Furthermore, the court in *Oberholzer* addressed the written notice as a suspensive condition and found that where the claim is based on a concluded agreement, the plaintiff need not plead fulfilment of the suspensive condition. In the present case, however, Clause 2 does not operate as a condition of an already-concluded agreement — it defines the method by which the offer becomes an agreement. Accordingly, the conclusion that *Oberholzer* supports the Plaintiffs is mistaken.

**Waiver and tacit acceptance must be specifically pleaded**

[27] The Second Defendant submits that if the Plaintiffs wished to rely on waiver of the Clause 2 written notice requirement, or on tacit acceptance of the Offer to Lease by conduct, they were obliged to specifically plead those facts. The Second Defendant relies on *Timoney and King v King* 1920 AD 133 at 141 for the proposition that where a party relies on tacit acceptance, the conduct from which such acceptance is to be inferred must be specifically pleaded. A bare assertion that the lease was concluded, without pleading the conduct constituting waiver or tacit acceptance, is insufficient. Similarly, waiver is a question of fact — requiring the voluntary and intentional abandonment of a known right — which must be specifically pleaded, not inferred from silence or from the mere fact of occupation. The Second Defendant points out that paragraph 5.4 pleads a "*tacit relocation*" but does not plead any conduct from which a tacit *conclusion* of the original lease could be inferred, which are distinct legal concepts.

**To claim arrear rental the conclusion of the lease must be pleaded**

[28] The Second Defendant submits that the conclusion of the lease agreement is a fundamental *factum probandum* without which no cause of action for arrear rental can be sustained. The Second Defendant relies on *Ramnath v Bunsee* 1961 (1) SA 394 (N) and *Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl* 1965 (4) SA 475 (E) at 478G for the proposition that the conclusion of a lease

is an essential element of a claim for arrear rental that must be pleaded and proved. The Amended Particulars of Claim does not plead the conclusion of the lease — it pleads only that the parties signed an Offer to Lease, which is the very document that, on its face, expressly distinguishes between the signing of the offer (paragraph 3.1 of the PoC) and the conclusion of the agreement (which requires the additional step of written acceptance prescribed by Clause 2). In the absence of that averment, the essential element of the cause of action is missing.

**The suretyship claim**

[29] The second ground of exception is that the suretyship claim against the Second Defendant cannot be sustained in the absence of a validly pleaded principal obligation. Suretyship is accessory in nature: the surety's liability depends upon the existence of a valid and enforceable principal debt. In the absence of a pleaded principal obligation, no accessory claim can stand: *Dobson and Dobson Industrial Ltd v Van Der Werf* 1981 (4) SA 417 (C) at 431; *Evins v Shield Insurance Company Ltd* 1980 (2) SA 814 (A) at 825F.

**Costs**

[30] The Second Defendant seeks that the exception be upheld with costs on the party-and-party scale, including the costs of counsel on Scale B. The Second Defendant submits that whilst attorney-and-client costs might be appropriate where a party has acted in bad faith or vexatiously, the present exception raises a genuine and substantive legal question that has not been previously adjudicated in a manner that would have clearly forewarned the Plaintiffs of the deficiency.

## G. ANALYSIS

**Legal Principles**

[31] The applicable principles are not in dispute and may be briefly stated. An exception on the ground that a pleading lacks the averments necessary to sustain a cause of action is governed by Rule 23(1) of the Uniform Rules. The court accepts all facts as pleaded by the plaintiff as true and reads the pleading as a whole, holistically and benevolently: *Merb (Pty) Ltd & 2 Others v Matthews, Michael Brian & Others* (GJ, Case No 2020/15069, 16 November 2021, Maier-Frawley J) at para 8; *Living Hands (Pty) Limited and Another v Fitz and Others* 2013 (2) SA 368 (GSJ) per Makgoka J. An exception may be upheld only where it is impossible to recognise the claim, irrespective of the facts as they might emerge at trial: *Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd and Others* 2014 (2) SA 157 (GNP) at para [20]; *Tembani v President of the Republic of South Africa* 2023 (1) SA 432 (SCA) at para [1]. The defect relied upon must appear *ex facie* the pleadings: *YB v SB and Others NNO* 2016 (1) SA 47 (WCC) at para 12. The excipient must establish that upon every reasonable interpretation of the pleading, and of the document upon which it is based, no cause of action is disclosed: *Gallagher* (supra) at para [20].

[32] A cause of action consists of every fact (*factum probandum*) which the plaintiff would need to prove, if traversed, in order to support the right to judgment: *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23. The distinction between *facta probanda* and *facta probantia* is fundamental: a plaintiff must plead the former but is not required to plead the latter. Whether a particular matter falls on one side of this line or the other is a question that turns on the specific facts of each case.

**The characterisation of Clause 2**

[33] The Plaintiffs' submission that Clause 2 operates as a suspensive condition must be rejected. A suspensive condition (*conditio suspensiva*) presupposes a *concluded* agreement and operates to suspend the coming into force of rights and obligations under that agreement pending the occurrence of a stipulated event. Clause 2 does not presuppose a concluded agreement: it defines the mechanism by which the tenant's irrevocable offer becomes a binding contract. The clause opens with the words "*the tenant, by signing the*

*endorsement below, hereby irrevocably offers to lease the premises from the landlord*" — language that is unambiguous in describing the tenant's act of signing as an offer, not a concluded agreement. The clause then prescribes how and when that offer will be accepted: "*only if signed by the landlord's duly authorised representative and such acceptance is conveyed in writing to the tenant*." This is the language of contract formation — of offer and acceptance — not of a condition subsequent to an existing contract. The NOTE at the opening of the Offer to Lease confirms the analysis: the document "*shall constitute a binding agreement once accepted and signed on behalf of the landlord*". Until acceptance in the prescribed manner occurs, there is no agreement to be suspended.

[34] Clause 3.2 reinforces this analysis. It provides that "*until the said lease is signed, this offer once accepted by the landlord constitutes a binding Lease Agreement between the parties*." Acceptance by the landlord is thus the pivotal event that transforms the offer into a binding agreement. Acceptance, in terms of Clause 2, requires both signature by the landlord's authorised representative and written conveyance of that acceptance to the tenant. Clause 3.1, which describes the terms of the lease as being those in the offer together with the Landlord's Standard Agreement, further confirms that the document is an offer that becomes a lease upon acceptance — not a concluded agreement subject to a condition. The Plaintiffs' characterisation of Clause 2 as a suspensive condition is accordingly inconsistent with the plain language of the document they have incorporated into their own pleading.

**The critical question — what is pleaded**

[35] The point of departure in any exception is what the pleading actually says. Paragraph 3.1 of the Amended Particulars of Claim pleads in terms that "*the Plaintiffs and the First Defendant signed an Offer to Lease*". This is precisely and only what is pleaded: the signing of an offer. Paragraph 3.3 incorporates the contents of the Offer to Lease by reference in full. The incorporated document, on its face and in terms of Clause 2, expressly provides that the tenant's signing is an *offer*, and that the offer is *only* accepted if two

conjunctive requirements are met — signature by the landlord's authorised representative and written conveyance of that acceptance to the tenant. The Amended Particulars of Claim pleads that both parties signed the document, but says nothing about written conveyance of acceptance having occurred. Critically, it also does not plead that the parties concluded a lease agreement — it pleads only that they signed an Offer to Lease.

[36] This distinction is not a matter of label or form. The Amended Particulars of Claim adopts precisely the language of offer, not of concluded contract. The Second Defendant's submission that the pleading does not aver the conclusion of a lease agreement is therefore correct. Paragraphs 5.1 to 5.14 plead the material terms of the Offer to Lease — not of a concluded lease — in fulfilment of the obligation to disclose the terms of the agreement relied upon. Paragraph 5.4 pleads a "*tacit relocation*" after March 2022, but a tacit *relocation* is a concept that arises upon the expiry of an existing lease where the tenant holds over — it presupposes that a lease was in operation and then expired. The pleading of a tacit relocation does not assist in establishing the *conclusion* of the original lease and is, in fact, conceptually distinct from it.

**The Fresh Produce qualification and the limits of acceptance**

[37] The Second Defendant correctly invokes the qualification articulated in *Fresh Produce Holdings (Pty) Ltd v Transpaco Ltd* 1990 (4) SA 749 (N) at 753H, where Howard J held that while the court accepts facts pleaded as true, this acceptance extends only to facts properly so called and not to inferences. The proposition that a lease was *concluded* is not a primary fact averred in the Amended Particulars of Claim — it is an inference that would need to be drawn from the primary facts pleaded. The primary facts pleaded are: (a) the parties signed the Offer to Lease; and (b) the contents of the Offer to Lease are incorporated by reference. The Offer to Lease itself, as incorporated, discloses the mechanism required for conclusion of the lease. The question whether the lease was concluded is therefore an inference from those primary facts — and the incorporated document reveals that the inference is not sustainable on the pleaded primary facts alone, because a further step (written

conveyance) is required and not averred. The court is entitled to examine the documents incorporated into the pleading to determine whether the conclusion drawn is open: *Gallagher (supra)* at para [20].

**The Benson & Simpson submission and the facta probanda/probantia distinction**

[38] The Plaintiffs' reliance on *Benson & Simpson v Robinson* 1917 WLD 125 and the *facta probanda/facta probantia* distinction does not advance their case. Wessels J in *Benson & Simpson* held that a plaintiff must state facts clearly and concisely so that the defendant knows what is to be proved against him, but is not required to plead the evidence by which those facts are to be proved. The Plaintiffs invoke this to argue that *how* the lease was accepted — the mechanics of written conveyance — is a matter of evidence for trial. This argument misconceives the nature of the required averment. The issue is not *how* the acceptance was communicated, but *whether* a binding lease was concluded at all. The conclusion of the lease — not merely the signing of the offer — is a *factum probandum*: it is a fact the Plaintiffs would be required to prove, if traversed, to support the right to judgment. The *McKenzie* test confirms this: if the Second Defendant were to deny in a plea that the lease was ever concluded, the Plaintiffs would be required to prove at trial not only that both parties signed the document, but that the Plaintiffs' acceptance was conveyed to the First Defendant in writing as prescribed by Clause 2. That fact is a *factum probandum*, not a *factum probantis*. The Plaintiffs' own reliance on *McKenzie* for the definition of *facta probanda* simultaneously confirms that written conveyance falls within that definition.

**The Oberholzer case — analysis and distinction**

[39] The *Oberholzer* case requires careful examination, because whilst it is the most directly relevant authority cited by the Plaintiffs, a close reading of the judgment reveals that it does not support the Plaintiffs' case and may, on proper analysis, be distinguished on facts that are material to the present dispute.

[40] In *Oberholzer*, the plaintiff claimed commission arising from an employment agreement between herself and the second defendant. The Letter of Offer of Employment was annexed as Annexure "A". The document bore signatures of two representatives of the employer but no signature from the plaintiff. Clause 32.1 of the letter required the plaintiff to acknowledge acceptance of the offer "*by signing and dating the attached copy of the letter and returning it to the second defendant not later than 19 June 2014, failing which, the offer will lapse.*" The exception was that the document constituted only an offer — not a concluded agreement — because the plaintiff had not signed it.

[41] Kubushi J dismissed the first ground of exception on the basis, at paragraph 11, that "*the plaintiff's claim is based on an agreement of employment. The allegations in the plaintiff's particulars of claim presupposes that the employment agreement was already concluded at the time the claim was launched*." At paragraph 12, the court found that the failure to annex a signed copy of the letter was curable by evidence at trial.

[42] There are four material differences between *Oberholzer* and the present case that distinguish it and render it inapplicable. First, in *Oberholzer* the court was satisfied that the particulars of claim positively asserted the conclusion of an employment agreement. In the present case, paragraph 3.1 does not assert the conclusion of a lease agreement — it asserts only that the parties "*signed an Offer to Lease*", which is the language of an offer, not of a concluded contract. Second, in *Oberholzer* the deficiency relied upon was the absence of the plaintiff's signature on a copy of the document annexed — a procedural matter of not annexing the correct version of the document. The court held this was curable by evidence. In the present case, the deficiency is not the failure to annex a document evidencing acceptance: it is the failure to plead that a distinct and separate act (the written conveyance of acceptance) occurred at all. That act is not visible on the face of any document in the pleading and cannot be "*cured*" merely by producing a document at trial. Third, in *Oberholzer* the prescribed method of acceptance (signing and returning the letter) was a single act that simultaneously constituted acceptance and communicated it to the offeror. Clause 2 of the present Offer to Lease prescribes two distinct

steps: the landlord's signature (acceptance) and the separate written conveyance of that acceptance to the tenant (communication). The present case involves a missing averment about a subsequent, independent act — not merely an evidentiary gap in the documentation. Fourth, and perhaps most importantly, the court in *Oberholzer* at paragraphs 7 and 8 engaged with the concept of a suspensive condition: it confirmed the principle that where a claim is premised on a suspensive condition, fulfilment of that condition must be pleaded. The court then found, at paragraphs 10 and 11, that the claim was *not* premised on an offer but on a concluded agreement. In the present case, the Amended Particulars of Claim, by its own language and by the terms of the incorporated Clause 2, is premised precisely on an offer — the language of paragraph 3.1 is the language of an offer, and Clause 2 expressly confirms this. The plaintiff in *Oberholzer* successfully argued that her claim was based on a concluded agreement; the Plaintiffs in the present case cannot make the same argument without contradicting their own pleading.

[43] The Second Defendant's submission that *Oberholzer* does not assist the Plaintiffs is well-founded. The very reasoning that permitted the exception to be dismissed in *Oberholzer* — that a concluded agreement was pleaded — is absent in the present case. *Oberholzer* accordingly offers no support for the Plaintiffs.

**Waiver, tacit acceptance, and the pleading obligations**

[44] The Plaintiffs do not in terms plead waiver of the Clause 2 written notice requirement or tacit conclusion of the lease by conduct. They argue, however, that the pleaded facts of four-year occupation and the invocation of Clause 4.4 are sufficient to establish the existence of a concluded lease. This argument cannot be sustained at the exception stage, for the reasons that follow.

[45] Waiver is a question of fact: the voluntary and intentional abandonment of a known right with full knowledge of its existence. As a question of fact, it must be specifically pleaded, together with the material facts from which it is to be inferred. Similarly, tacit acceptance must be established by pleading the

conduct from which acceptance can be inferred: *Timoney and King v King* 1920 AD 133 at 141. The Amended Particulars of Claim pleads neither. The four-year occupation is pleaded, but occupation of premises may be consistent with many legal bases — a lease, a tacit relocation, a lease by conduct, or even a precarious/unlawful occupation. The pleading does not identify any of these as the basis for the claim in terms that go beyond the Offer to Lease and its signed-but-not-accepted status. Nor does the invocation of Clause 4.4 cure the deficiency: Clause 4.4 is a term of the Offer to Lease; if the Offer to Lease never became a binding agreement for want of written conveyance of acceptance, Clause 4.4 equally never became operative. An exception court reads the pleading as a whole, and reading paragraphs 5.4 and 6.1 together with Clause 2 of the incorporated Offer to Lease, the pleading is internally inconsistent: it invokes the Offer to Lease as the source of financial obligations (including the holdover clause) whilst simultaneously failing to aver that the Offer to Lease ever became a binding contract.

[46] The argument that waiver belongs in a replication (in response to a defence of non-conclusion pleaded by the Second Defendant in a plea) misapprehends the position at exception stage. Waiver of the Clause 2 formality is not merely an answer to a potential future defence — it is an essential element of the Plaintiffs' cause of action, because without it there is no concluded lease. In a case where the foundation of the entire claim is a contract whose formation is expressly made conditional on an act that is neither pleaded as having occurred nor pleaded as having been waived, the deficiency is in the cause of action itself, not merely in the anticipation of a possible defence. The Plaintiffs cannot defer to a replication that which is a *factum probandum* required to establish the cause of action in the first place.

**The holistic reading and the internal inconsistency argument**

[47] The Plaintiffs invite this court to read the Amended Particulars of Claim holistically, including paragraphs 5.4 and 6.1, and to conclude from the pleaded occupation and the levying of rental from inception that a binding lease must have existed. This submission, whilst superficially attractive, does not

withstand scrutiny. The obligation to read a pleading holistically does not permit the court to draw inferences from pleaded facts that contradict the terms of the documents incorporated by the plaintiff into the pleading itself. Clause 2, incorporated by paragraph 3.3, states unequivocally that the signing of the offer by both parties does not conclude the contract — only signature combined with written conveyance of acceptance does so. The court cannot, on a holistic reading, draw the inference that the contract was concluded when the document at the heart of the pleading expressly negates that inference on the facts as pleaded. The benevolent reading principle does not require the court to accept a legal conclusion — the conclusion of the lease — that is unsupported by and inconsistent with the primary facts and documents that the Plaintiffs themselves have placed before the court.

[48] The submission that the Second Defendant has selectively read the pleading by focusing on paragraph 3.1 to the exclusion of paragraphs 5.4, 6.1 and 7 is not well-founded. The Second Defendant's case is not that there was no occupation or no levying of rental — he does not dispute those averments. It is the case of the Second Defendant that the Amended Particulars of Claim, on its own terms, fails to aver that the Offer to Lease was ever accepted in the manner prescribed, and accordingly fails to aver the foundation of any cause of action under that document. Reading paragraphs 5.4, 6.1 and 7 does not cure this deficiency: those paragraphs plead what happened *after* the document was signed, not that the document became binding by compliance with its own terms of acceptance.

**The Doyle and Masakhane Mining submissions**

[49] The Plaintiffs' reliance on *Doyle v Fleet Motors (Pty) Ltd* 1971 (3) SA 760 (A) and *Masakhane Mining* [2025] ZANWHC 190 does not assist them. *Doyle* confirms that an exception is not a substitute for a plea and that questions of fact should not be decided on exception. This principle is well-established and applies where the alleged deficiency is a disputed factual matter that ought to be resolved at trial. But it has no application where, as here, the deficiency appears *ex facie* the pleading and the incorporated documents themselves —

without the need to go to any external facts or to resolve any factual dispute. The question here is not whether written notice of acceptance was in fact given — it is whether the averment that it was given is present in the pleading. It is not. In any event, the proposition that "*even a weak case survives exception if the essential elements are present*" contains the determinative qualification: the essential elements must be present. The essential element of a concluded lease is not present.

**H. CONCLUSION**

[50] The Amended Particulars of Claim, read as a whole and together with the incorporated Offer to Lease, does not disclose a concluded lease agreement. The pleading avers the signing of an Offer to Lease — a document that on its own terms and in express terms distinguishes between the signing of the offer (which constitutes an irrevocable offer by the tenant) and the conclusion of the agreement (which requires both signature by the landlord's authorised representative and written conveyance of that acceptance to the tenant). The Amended Particulars of Claim pleads the former and is silent as to the latter. It does not aver the conclusion of a lease agreement; it does not plead compliance with the Clause 2 method of acceptance; it does not plead waiver of that requirement; and it does not plead the conduct from which tacit conclusion of the lease could be inferred. Without an averment of a validly concluded lease agreement, the claim for arrear rental cannot be sustained, and without a validly pleaded principal obligation, the accessory suretyship claim against the Second Defendant equally cannot be sustained.

[51] The first ground of exception accordingly succeeds, and the second ground succeeds consequentially. The Plaintiffs have already amended their Particulars of Claim once, following the first exception, and the deficiency identified in the present exception was apparent on the face of the amended pleading. Notwithstanding this, the Court not persuaded that a further amendment is incapable of curing the deficiency. The Plaintiffs may be in a position to aver, in good faith, that written notice of acceptance was given, or to plead the facts from which waiver or tacit conclusion of the lease may be

inferred. Leave to amend is accordingly granted on the conditions set out in the order below.

## I. COSTS

[52] The Second Defendant has been substantially successful on both grounds of exception. The ordinary principle that costs follow the event applies. The Second Defendant seeks costs on the party-and-party scale, including costs of counsel on Scale B. I agree that the party-and-party scale is appropriate. Whilst Clause 14 of the Deed of Suretyship provides for attorney-and-client costs in respect of any action instituted in terms of the deed, this is an interlocutory step in the proceedings and the contractual costs clause was not relied upon by the Second Defendant in support of an enhanced costs order; to the contrary, the Second Defendant sought only party-and-party costs. The Plaintiffs, for their part, sought attorney-and-client costs only in the event that the exception was dismissed (which it has not been). Costs are accordingly awarded on the party-and-party scale, including the costs of counsel on Scale B.

## J. ORDER

[53] In the result, the following order is made:

1. The Second Defendant's exception dated 1 December 2025 to the Plaintiffs' Amended Particulars of Claim filed on 8 November 2024 is upheld.

2. The Plaintiffs are granted leave to deliver a further Notice of Intention to Amend and its amended Particulars of Claim within **twenty (20) days** from date of this order.

3. The Plaintiffs are ordered to pay the Second Defendant's costs of the exception, jointly and severally, the one paying the other to be

absolved, on the party-and-party scale, including the costs of Counsel on Scale B.

**BY ORDER**

**SM MARITZ AJ**
**ACTING JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

**APPEARANCES**

| | |
|---|---|
| Counsel for the Plaintiffs: | Adv LA Pretorius |
| Instructed by: | Mark Efstratiou Inc, Pretoria (Ref: MR Efstratiou/E15926) |
| Counsel for the Second Defendant: | Adv NS Beket (Umhlanga Chambers) |
| Instructed by: Solomon | MCH Attorneys Inc (c/o Friedland Hart & Nicolson, Pretoria) (Ref: MD Maharaj/G0370.25) |
| Date of hearing: | 13 May 2026 |
| Date of judgment: | 25 May 2026 |