



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

JUDGMENT

Not Reportable

Case No: 14705/2024

In the matter between:

WILLIAM TOBIAS JACOBUS OOSTHUIZEN

Plaintiff

and

GEORGE MICHAEL CASSAR N.O.

First Defendant

CAROLYN COLLEEN CODBURN N.O.

Second

Defendant

BARRY SCOTT NAPIER N.O.

Third

Defendant

GEORGE MICHAEL CASSAR

Fourth Defendant

PRIZETRADE 31 CC

Fifth Defendant

Neutral citation: *Oosthuizen v Cassar NO & Others* Case No 14705/2024

ZAWCHC (19-08-2026)

Coram : **MAPOMA, AJ**

Heard : 4 May 2026

Judgment : 19 August 2026

Summary : *Exception taken by defendants against plaintiff's particular of claim – claim based on written agreement – exception based on alleged failure to disclose cause of action - and pleadings allegedly vague and embarrassing - contract based on suspensive conditions - failure to plead fulfilment or waiver of suspensive conditions – render pleadings excipiable – for having failed to make the necessary averment to sustain the cause of action – summons not vague and embarrassing.*

ORDER

1. The exception upheld.
2. The plaintiff is granted leave, if so advised, to amend the particulars of claim within 30 days from the date of this order.
3. The plaintiff shall pay costs of the exception on a party and party scale, including counsel's costs on scale B of the High Court.

JUDGMENT

MAPOMA, AJ

[1] This matter concerns an exception taken by the first to the fourth defendants ('the excipients') against the plaintiff's amended particulars of claim, in which

the plaintiff claims from the defendants, payment of the amount of R2 277 235.84 as damages occasioned by the alleged breach of a written purchase and sale agreement ('the agreement').

[2] The defendants' exception is based on two grounds, *first*, that the amended particulars of claim ('the particulars of claim') lack the averment necessary to sustain the cause of action and *second*, that the particulars of claim are vague and embarrassing. The plaintiff resists the exception, contending that neither of the complaints is sustainable in law, for the reasons to be alluded to in more detail in this judgment. The ensuing paragraphs pertaining to the parties and the pleaded facts provides relevant background to the exception.

The Parties

[3] The plaintiff is a farmer and businessman. The first, second and third defendants are the trustees of the George Cassar Family Trust with IT No 6[....] ('the Trust'), sued in their official capacities as such. The fourth defendant is a businessman who has a loan account in his favour in respect of the fifth defendant. The fifth defendant, Prizetrade 31 CC, is a duly incorporated close corporation in which it appears, the Trust has members interests.

Relevant Background

[4] According to the pleaded facts in the particulars of claim,¹ on 28 September 2021, the plaintiff and the defendants concluded a written purchase and sale in terms of which the plaintiff agreed to purchase from the Trust, the Trust's 100% membership interest in the fifth defendant for the purchase price of R10 070 847.00.² It is also pleaded that the plaintiff would purchase the fourth

¹ Paragraph 10, particulars of claim.

² Paragraph 10.1, particulars of claim, referring to clauses 1.2 and 8.1.2 of the sale agreement.

defendant's loan account held in his favour in respect of the fifth defendant for an amount of R539 152.09,³ and that plaintiff would also be liable for the agent's commission in the amount of R390 000.00.⁴ A copy of the sale agreement relied upon by the plaintiff is annexed in the particulars of claim marked POC 1.⁵

[5] The plaintiff further pleaded that the plaintiff agreed to purchase the membership interest and the business as a going concern, with effect from 1 September 2021 ("the effective date"), subject to the fulfilment or waiver of the suspensive conditions, In the regard, the pleadings make reference to clauses 3.1 and 4.7 of the sale agreement.⁶

[6] The relevant clauses 3.1, 3.2 and 4.7 of the agreement states as follows:

- "3.1 The Purchaser agrees to purchase the membership interest and Business as a going concern from the seller with effect from the effective date subject to the fulfilment or waiver of the suspensive conditions.
- 3.2 After the fulfilment or waiver of the Suspensive Conditions ownership, risk and benefits in the Business will be deemed to have passed to the Purchaser on the Effective Date....
- 4.7 'Effective Date' shall mean 1 September 2021, as being the date on which the business is run as a good concern for the risk and benefit of the Purchaser."

[7] The material conditions of sale described under suspensive conditions were referred to as contained in Appendix 4 of the agreement and included, *inter alia*, the zoning of Portion 51 of the farm, identified as Port Beaufort, number 484 held under the title deed T[...], ("the property") as Business; fixed assets being confirmed; 6 months financial statements reflecting the loan account being

³ Paragraph 10.3, particulars of claim, referring to clauses 1.2 and 8.1.1 of the sale agreement.

⁴ Paragraph 10.3, particulars of claim, referring to clauses 23.2 read with 23.4 of the sale agreement.

⁵ PoC1 is titled "Agreement of the sale of a member's interest and claim on loan account (including Sale of Business as a Going Concern)".

⁶ Paragraph 10.3, particulars of claim, referring to clauses 3.1 read with 4.7 of the sale agreement.

provided; and clearance certificates in respect of plumbing, gas, electric and beetle being provided by the fifth defendant before the transfer date.

[8] The plaintiff also alleged in the particulars of claim that he complied with his obligations in terms of the agreement, which include payment of the purchase price in the amount of R1 800 000 to the Trust; taking possession of the Trust's immovable property to be zoned as business, and taking possession of the supermarket, the bottle store and the business as identified in the agreement payment of an amount of R87 235.84 for purchasing fuel for the benefit of the Trust; and payment of the agent's commission in the amount of R390 000.00 on 18 October 2021.

[9] The plaintiff further alleged that the Trust materially breached the terms of the agreement and set out his averments in backing up the claim of breach. He also pleaded that the defendants were duly notified of the breach by his attorneys on or about 24 December 2021, alternatively 13 January 2022, alternatively 24 January 2022. The plaintiff has also pleaded that the numerous breaches by the Trust amounted to repudiation and that on 24 January 2022, his attorneys delivered a letter, a copy of which is annexed in the particulars of claim, notifying the Trust of his acceptance of the repudiation, hence his claim.

Exception

[10] The defendants' first cause of complaint is that the particulars of claim do not disclose a cause of action, in that the plaintiff failed to plead the fulfilment or waiver of the suspensive condition, which is a condition precedent to pursuing the claim, and that by so doing, the plaintiff impermissibly treats the suspensive conditions as contractual terms capable of breach.

[11] The second ground of exception is that the particulars of claim are vague and embarrassing in that the plaintiff has failed to plead with sufficient precision or clarity whether the written agreement relied upon concerns the purchase of the membership interest and loan account only, or the business itself that is conducted by the fifth defendant.

Issues

[12] In light of the above facts, the issue for determination is whether the particulars of claim are excipiable on the grounds raised by the defendants. In particular, the pertinent issues are two-fold. The first leg is whether the alleged failure by the plaintiff to expressly aver the fulfilment or waiver to the suspensive conditions render the pleadings bad in law or failing to disclose the cause of action and therefore excipiable.

[13] The second is whether the plaintiff's alleged failure to plead with sufficient clarity – whether the written agreement relied upon concerns the purchase of the membership interest and loan account only, or the business itself – renders the pleading vague and embarrassing to the extent that the defendant is prejudiced from pleading.

Legal Principles on Exception

[14] Rule 18(4) of the Uniform Rules of Court provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for the claim, defence, or answer to any pleadings with sufficient particularity to enable the opposing party to reply thereto.

[15] Exception provides a useful tool to weed out unfounded claims at an early stage to save the litigants from costs of pursuing a hopeless case. However, it is

imperative that exception must be addressed with careful consideration. When ceased with exception, the court looks at the pleading benevolently instead of over-technically. An excessively technical approach undermines its utility and must be avoided.⁷

[16] When exception is taken on the basis that it fails to make the averments necessary to sustain a cause of action, the excipient must satisfy the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.⁸

[17] Pleadings must be read and considered wholistically and not by isolating individual allegations from their context.⁹ Further, if there is any uncertainty regarding the intention of the pleader, an excipient cannot avail himself thereof unless he shows that upon any construction of the pleadings, the claim is excipiable.¹⁰

[18] In deciding an exception, the court's approach is to accept that the factual allegations in the pleading for the purposes of assessing the exception.¹¹

[19] It is trite that when pleading for the cause of action, the pleading must contain all the facts which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (*facta probanda*). In this regard, care must be taken to distinguish *facta probanda*, that is necessary for a complete and properly pleaded cause of action, from evidence which is

⁷ Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 465H.

⁸ Trope v South African Reserve Bank and Another 1992 (3) SA 208 (T).

⁹ Nel and Others NNO v McArthur and Others 2003 (4) SA 142 (T) at 149F.

¹⁰ Klerck NO v Van Zyl and Maritz NNO and Another and Related Cases 1989 (4) SA 263 (SE) at 288E-F.

¹¹ Trustees for the time being of the Burmilla Trust and Another v President of the RSA and Another (64/2021) [2022] ZASCA 22; [2022] 2 All SA 412 (SCA); 2022 (5) SA 78 (SCA).

necessary to prove each fact (*facta probantia*). What must be pleaded is every fact which is necessary to be proved, not evidence.¹²

[20] An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. Thus, such an exception can succeed only if it is vague and its vagueness causes embarrassment of such a nature that the excipient is prejudiced from pleading.

[21] In the backdrop of the factual matrix and the applicable legal principles alluded to above, the Court will analyse the defendants' exceptions and make the required determination.

Whether the particulars of claim fail to disclose cause the cause of action

[22] The thrust of the defendants' contention is that for a contract that is subject to suspensive conditions as pleaded, the suspensive condition must have been fulfilled or waived for the contract to be enforceable. The defendants' complaint is that the plaintiff alleges that the Trust had breached the contract, alternatively repudiated the terms thereof, without pleading the fulfilment or waiver of the suspensive condition, which is an integral averment for the contract to be enforceable. The consequence of that, so goes the contention, is that the particulars of claim fail to disclose the cause of action.

[23] Put differently, the defendants contend that the plaintiff cannot jump to allege breach of a contract that is subject to suspensive condition, without pleading that it was enforceable, by alleging that the suspensive conditions were fulfilled or waived, because no cause of action can arise unless the suspensive conditions had been fulfilled or waived.

¹² McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 at 23.

[24] The question is whether the alleged defect claimed by the defendant amounts to failure to make the averment necessary to sustain the claim. The plaintiff contends the contrary.

[25] According to the plaintiff, the defendants' exception is based on a fragmented reading of the particulars of claim. He contends that read benevolently its entirety as a whole, the particulars of claim show that the plaintiff had pleaded the essential averments relating to the contract relied upon which was implemented by the parties; had alleged the material facts necessary to sustain the claim; had pleaded his (plaintiff) performance on his obligations, and that the defendants failed to comply with their obligations, resulting in the termination of the agreement. He disputes that by not expressly pleading that the conditions were fulfilled or waived would amount to failing to disclose the cause action.

[26] It is so that the agreement has been pleaded and attached to the particulars of claim, and averments have been made referring to the relevant terms of the agreement. The plaintiff's alleged performance in terms of the contract, the alleged non-compliance by the defendants and alleged breach by the Trust, as well as the alleged resultant repudiation have been pleaded. However, that is off the point. The question is whether the fulfilment of the suspensive conditions have been pleaded, and if not, whether that failure to so plead does render the pleading excipiable as disclosing no cause of action.

[27] In *Red Dunes of Africa v Masingita Property Investment Holdings*,¹³ the SCA held that a party relying on an agreement that is subject to a suspensive condition cannot rely on it to found any right where there is no averment that

¹³ [2015] ZASCA 99 para 11.

the suspensive conditions were fulfilled or waived. In asserting this legal position, the SCA cited the decision in *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd*,¹⁴ where it was stated that in our law the suspensive condition must be pleaded and proved by the person relying on the contract that is subject to it.¹⁵ This is so because, as the court said in *Naidu v Naidoo*,¹⁶ if there was a suspensive condition to the agreement which had not been fulfilled, there exists no valid binding agreement of sale between the parties.

[28] In this case, the contract is subject to suspensive conditions. There is no averment in the particulars of claim that the suspensive conditions were fulfilled or waived. This is an essential averment because it determines the enforceability of the agreement, for the agreement will only be enforceable if suspensive conditions have been fulfilled. Absent the fulfilment or waiver of the suspensive conditions, there is no enforceable agreement, and consequently no breach may arise from an unenforceable contract.

[29] In light of the legal position laid down in the above paragraph, it follows that the plaintiff cannot rely on the agreement without pleading the fulfilment or waiver of the suspensive condition. Accordingly, the particulars of claim lack the averment necessary to sustain the claim. Thus, this ground of the exception succeeds.

Whether the particulars of claim are vague and embarrassing

[30] Case law has it that the summons is vague and embarrassing if there is inconsistency amounting to contradiction between the summons and the

¹⁴ 1963 (1) SA 632 (A) at 644G-H.

¹⁵ See also *Kate's Hope Game Farm (Pty) Ltd v Terblanchehoek Game Farm (Pty) Ltd* 1998 (1) SA 235 (SCA).

¹⁶ 1967 (2) SA 223 (N).

documents relied upon as the basis of the claim.¹⁷ The defendants' contention is that the plaintiff has failed to plead with sufficient clarity the nature of the agreement, that is whether it is the sale of the membership interest or of the business, as these are two distinct assets.

[31] The defendants contend that the plaintiff's claim is premised on the written agreement marked annexure POC1, yet according to the defendants, annexure POC is unclear as to whether the plaintiff purchased the membership interest and claims on loan account or the business as described paragraph 10.5 of the particulars of claim.

[32] An exception that is grounded on the averment that summons is vague and embarrassing requires a two-fold consideration. The first enquiry is whether the pleadings are vague, and the second is whether the vagueness leads to embarrassment that causes prejudice to the other party.¹⁸ Prejudice arises where the excipient cannot plead or properly prepare for trial.¹⁹

[33] Paragraph 3 of annexure POC1 is titled '*Agreement for Sale of Member's Interest and Claims on Loan Account in a Close Corporation (Including Sale of Business as a Going Concern*'. The above title is followed by clause 3.1 referred to above which also expressly states that the plaintiff agreed to purchase the membership interest and business as a going concern from the defendants. Further, in paragraph 10.4 of the particulars of claim, the plaintiff pleaded that the plaintiff agreed to purchase the membership interest and the business as a going concern.

¹⁷ *Computer Users Council of South Africa Property Holdings CC v City of Johannesburg and Others* [2023] ZAGPJHC 805.

¹⁸ *Shoprite Checkers (Pty) Ltd v Premier of the Western Cape Province and Another* (2023) JDR 4533 (WCC) para 8 - 9.

¹⁹ *Levitan v Newhaven Holiday Enterprise CC* 1991 (2) SA 297 (C) at 298I-J.

[34] In my view, based on the reading of the express terms of annexure POC1 and the pleading, it is clear that the parties contemplated that the plaintiff agreed to purchase both the member's interest and claims loan account, and the business as a going concern. Further, whilst it is so that summons are vague and embarrassing if there is inconsistency amounting to contradiction between the summons and the documents relied upon as the basis of the claim, I am not persuaded that there is any such contradiction between the particulars of claim and annexure POC1 in this case.

[35] Even if it were to be assumed that the summons were vague or ambiguous as alleged, that would not be the matter, for the next question would be whether the defendants are embarrassed thereby, in the sense that they would be unable to plead without exposing themselves to prejudice. I do not find any prejudice on the part of the defendants from pleading to the particulars of claim on the basis set out. Thus, this ground must fail.

[36] In conclusion, having considered the exception and the grounds thereof, I am satisfied that by failing to plead the fulfilment or waiver of the suspensive conditions in the agreement, the plaintiff has failed to make the necessary averment to sustain the cause of action. On this basis, the exception succeeds.

Costs

[37] The established principle that costs follow the results. I find no reason to deviate from this principle in this case. The defendants have succeeded in the exception and are thus entitled to an award of costs on a party and party scale, which include counsel fees at scale B.

Order

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

1. The exception upheld.
2. The plaintiff is granted leave, if so advised, to amend the particulars of claim within 30 days from the date of this order.
3. The plaintiff shall pay costs of the exception on a party and party scale, including counsel's costs on scale B of the High Court.

ZL MAPOMA
ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff : Adv DJ Rabie

Instructed by : Johan Cronje Attorneys, Cape Town

Counsel for the Respondents : Mr Kulenkampff

Instructed by : Kulenkampff & Associates, Somerset West