

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2025-201701

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

SIGNATURE

DATE 27 August 2026

In the matter between:

NCUMISA THEODORE NDAMASE

First Plaintiff

MAKHENKODWA MLONDOLOZI MAHLANGENI

Second Plaintiff

and

K2015032194 (SOUTH AFRICA) (PTY) LTD

Defendant/Excipient

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JUDGMENT

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VERVEEN AJ:

*This judgment is handed down electronically by circulating it to the parties' representatives by email and by uploading on CaseLines.*

## **Introduction**

- [1] This judgment determines the defendant's exception under Uniform Rule 23(1) to the plaintiffs' amended particulars of claim. The defendant advances two grounds. The first concerns the replacement and installation costs claimed for specified items: the plaintiffs allegedly fail to plead that those items were fixtures and fittings of a permanent nature under clause 7.1. The second concerns the alleged failure to plead compliance with the notice-to-remedy requirement in clause 9.2.
- [2] The plaintiffs seek contractual damages of R842,900.00 arising from alleged breaches of the agreement of sale. The argument upon which they rely includes, among other things, "Install new CCTV system", "Assess removals & supply cinema equipment" and "Gas ovens - supply and deliver".
- [3] As to clause 9.2, the plaintiffs plead that they were obliged to give the defendant seven days' notice and rely upon correspondence dated 26 September 2025. The correspondence is pleaded as a demand that the defendant "within a period of 14 (fourteen) days effect payment" of R842,900.00.
- [4] The defendant submits that the particulars contain neither the material averments which establish that the listed items were permanent fixtures, nor averments establishing a compliant notice to remedy. The plaintiffs submit that the damages claim is indivisible, fixture status is for trial, and their 26 September letter allowed 14 days and substantially complied with clause 9.2.

## **The applicable principles**

- [5] An exception must be determined on the pleading as it stands, read as a whole with the documents incorporated into it. It succeeds only where the excipient establishes that, on every reasonable interpretation, the pleading does not

disclose a legally recognised cause of action.<sup>1</sup> Exceptions must nonetheless be dealt with sensibly and not over-technically.<sup>2</sup>

- [6] The material facts, rather than the evidence by which they will be proved, must be pleaded. A cause of action comprises every fact necessary to be proved, if traversed, to sustain the right to judgment.<sup>3</sup>
- [7] Where a litigant relies on a contract subject to a condition, it must plead and prove fulfilment of that condition.<sup>4</sup> Where the contract requires a demand and the expiration of a stipulated cure period before enforcement, proof of the expiration of that period forms part of the cause of action.<sup>5</sup>

### **The agreement**

- [8] Clause 7.1 provides that "the property includes all fixtures and fittings of a permanent nature in or on or attached to the property", which the seller warrants are in working order.
- [9] Clause 9.1 requires written notice "calling upon [the defaulting party] to remedy such default" and affords seven days from receipt to comply. Clause 9.2 applies that mechanism, *mutatis mutandis*, where the seller commits the breach: "I/we shall be obliged to give the Seller notice, as set out in paragraph 9.1 above".
- [10] Clause 9.3 provides that, where notice is sent by email, "receipt shall be deemed on the day of dispatch", and that a party giving notice "shall be obliged to furnish a copy of said notice to HAMILTON'S PROPERTY PORTFOLIO by way of email transmission".

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<sup>1</sup> *Tembani and Others v President of the Republic of South Africa and Another* 2023 (1) SA 432 (SCA) para 14.

<sup>2</sup> *Telematrix (Pty) Ltd v/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 3.

<sup>3</sup> *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23.

<sup>4</sup> *Kate's Hope Game Farm (Pty) Ltd v Terblanchehoek Game Farm (Pty) Ltd* 1998 (1) SA 235 (SCA) at 241B–D.

<sup>5</sup> *Henriques and Another v Lopes* 1978 (3) SA 356 (W) at 359C–D.

### **First ground: replacement and installation costs**

- [11] The plaintiffs do not allege that the CCTV system, alarm system, security/AVI cabling, cinema equipment or gas ovens were fixtures and fittings of a permanent nature, or plead facts from which that conclusion follows. The particulars identify the alleged removals and quantify replacement cost. They do not plead the material fact which makes removal a breach of clause 7.1.
- [12] The plaintiffs' contention that fixture status may be established at trial confuses a *facta probandum* with evidence. The nature of the item, its annexation and the intention with which it was annexed may ultimately be proved by evidence, but the plaintiffs must first plead that the item formed part of the property and plead the factual basis for that conclusion. An exception is not defeated by the possibility that evidence might establish a material fact not pleaded.<sup>6</sup>
- [13] Nor does the global formulation of the damages prayer answer the complaint. The plaintiffs' own quotation differentiates distinct losses. The alleged removal of fixtures is a discrete alleged breach requiring its own material averments, distinct from alleged damage to the garden, pool, electrical installation, or certificates of compliance. The first ground accordingly succeeds as to the replacement and installation heads of damages.

### **Second ground: was the pleaded notice compliant?**

- [14] POC10 must be read as a whole, not merely by reference to its ultimate demand. It identifies the agreement and property, describes in detail the alleged deterioration, removals, non-compliances and safety hazards, and alleges that the defendant is liable for "all costs associated with getting the property into its condition as at 29 October 2024 when the agreement was concluded". It then demands R842,900.00—the quotation cost of that restoration—within 14 days, failing which the plaintiffs would enforce their rights.

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<sup>6</sup> *McKenzie v Farmers' Co-Operative Meat Industries Ltd supra*.

- [15] The letter does not employ the precise phrase “remedy the default”. That is a consideration which the defendant may advance at trial. But clause 9.2 prescribes no formulaic wording. The letter is reasonably capable of being construed as identifying the alleged defaults, requiring the defendant within a defined period to place the plaintiffs in funds to rectify them, and warning that “Should you fail to act as demanded herein above and within the stipulated period, Our Clients will not hesitate to enforce their rights”. It afforded 14 days - twice the contractual cure period.
- [16] The parties dispute whether that demand constituted compliance with clause 9.2 and whether the required mode of delivery and copying to the agent can be established. Those issues turn on the proper construction of the letter in its contractual and factual context, and, potentially, proof of transmission and receipt. The excipient has not established that the plaintiffs' construction is untenable on every reasonable interpretation.<sup>7</sup> The second ground of exception must be dismissed. This finding does not preclude the defendant from raising non-compliance with clause 9.2 in its plea.

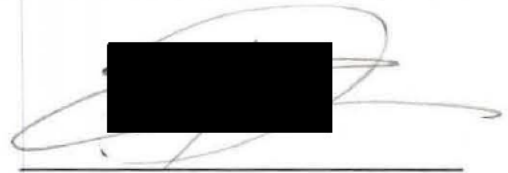
### **Order**

- [17] The following order is made:
1. The defendant's exception is upheld only in respect of the first ground, concerning the replacement and installation heads of damages based on clause 7.1.
  2. The defendant's exception on the second ground, concerning clause 9.2, is dismissed.
  3. The plaintiffs are granted 10 days from service of this order to deliver further amended particulars of claim in respect of the first ground.

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<sup>7</sup> *Tembani and Others v President of the Republic of South Africa and Another supra.*

4. The costs of the exception are reserved for determination at the trial.

A handwritten signature in dark ink, appearing to be 'P Verveen', is written over a black rectangular redaction box.

**P VERVEEN**

Acting Judge of the High Court  
Johannesburg

**APPEARANCES:**

|               |                                 |
|---------------|---------------------------------|
| Applicant     | : Advocate M Booysen            |
| Instructed by | : Bregman Moodley Attorneys Inc |
| Respondent    | : Advocate D Ndlovu             |
| Instructed by | : Smith Bekwa Incorporated      |
| Hearing       | : 24 August 2026                |
| Judgment      | : 27 August 2026                |