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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE Number: 2025-062949

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: YES

(3) REVISED: YES

DATE: 2026/08/24

SIGNATURE:

In the matter between: -

MARTHINUS JACOBUS BEKKER N.O.

First Applicant

GAIRONESA DAVIS N.O.

Second Applicant

**[In their capacity as the duly appointed liquidators
of the Third Plaintiff, Welatisha Investments (Pty) Ltd
(in liquidation) Master's Reference no: T[...]]**

**WELATISHA INVESTMENTS (PTY) LTD (IN LIQUIDATION)
(Registration Number: 1998/019518/07)**

Third Applicant

and

**MAXI GROUP SCHEME (PTY) LTD
(Registration Number: 1991/001408/07)**

Respondent

In re:

MARTHINUS JACOBUS BEKKER N.O.

First Plaintiff

GAIRONESA DAVIS N.O.

Second Plaintiff

**[In their capacity as the duly appointed liquidators
of the Third Plaintiff, Welatisha Investments (Pty) Ltd
(in liquidation) Master's Reference no: T[...]]**

**WELATISHA INVESTMENTS (PTY) LTD (IN LIQUIDATION)
(Registration Number: 1998/019518/07)**

Third Plaintiff

and

**MAXI GROUP SCHEME (PTY) LTD
(Registration Number: 1991/001408/07)**

Defendant

JUDGMENT

This Judgment was handed down electronically by circulation to the parties' and/or parties representatives by email and by being uploaded to Caselines. The date and time for the hand down is deemed on 24 August 2026.

DE JAGER AJ

INTRODUCTION

[1] Before me is an opposed application for leave to amend the applicants' (plaintiffs in the action) particulars of claim, in terms of the provisions of Rule 28(4) of the Uniform Rules of Court.

[2] The respondent (defendant in the action) initially delivered an exception to the particulars of claim as it stands on 18 August 2025, prompting the applicants to file a notice of intention to amend their particulars of claim in terms of Rule 28(1), proposing to replace the original particulars of claim with the particulars of claim attached to the said notice.

[3] The respondent, however, objected to the proposed amendment on the grounds set out in its notice of objection, attached as Annexure "FA6" to the founding affidavit. It is in the face of the said objection, that the present application was launched.

[4] The respondent's objection to the proposed amended particulars of claim, is that it would remain excipiable and that leave to introduce them should therefore be refused.

[5] In the notice of motion, the applicants pray for the following relief:

[5.1] That the applicants be granted condonation to bring the application outside of the 10-day period provided for in Rule 28(4); and

[5.2] That the applicant be granted leave in terms of Rule 28(4) to amend their particulars of claim in terms of the notice of amendment delivered in terms of Rule 28(1) dated 8 September 2025; and

[5.3] Costs to be paid by an opposing party.

[6] It is not necessary for me to grant the condonation prayed for, as it is common cause on the papers that the extension of time within which the applicants had to launch the present application, was granted by agreement between the parties. The issue of condonation was also not raised during argument.

THE APPLICABLE LEGAL PRINCIPLES

[7] Rule 28 confers a discretion upon a Court considering a contested amendment.

[8] An amendment that will render a pleading excipiable, should however, not be allowed. The party opposing the amendment, bears the burden of persuading the Court that the amended pleading is (not may be), excipiable. (See: **City of Cape Town v WBHO Construction (Pty) Ltd and Others** (86873/2014) [2017] ZAGPPHC 271 at paragraph 27; **H v Fetal Assessment Centre** 2015 (2) SA 193 (CC) at paragraph [10].)

[9] Where an objection is raised to a proposed amendment to a pleading on the ground that the pleading as amended would be excipiable, the Court should not confine itself to an enquiry as to whether or not the question of excipiability is arguable. The Court should indeed decide on the question of excipiability, and if it finds that the pleading as amended would be excipiable, the application for amendment should be refused. The position is therefore that this Court is tasked to decide the grounds for exception raised in the objection and opposing papers in considering the application for amendment. In this regard it is the "excipient" that bears the onus of showing that the pleading discloses no cause of action on every reasonable interpretation that can be attached to it. (See: **H v Fetal Assessment Centre supra**). The respondent therefor attracts this burden in these proceedings.

[10] Before dealing with the grounds for exception as bases for the objection to the amendment, it would be appropriate to refer to the principles governing exceptions.

[11] In considering an exception that a pleading does not sustain a cause of action, the Court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action. (See: **Living Hands (Pty) Ltd and Others v Ditz and Others** 2013 (2) SA 368 (GSJ)).

[12] The object of an exception is not to embarrass one's opponent, or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an

expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception. (See: **Barkleys Bank International Ltd v African Diamond Exporters (Pty) Ltd** 1976 (1) SA 100 (W)).

[13] The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed. (See: **Van der Westhuizen v Le Roux and Le Roux** 1947 (3) SA 385 (C) at 390).

[14] An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed. (See: **Fairoaks Investment Holdings (Pty) Ltd and Another v Oliver and Others** 2008 (4) SA 302 (SCA) at par [12]).

[15] In **Pretorius and Another v Transport Pension Fund and Others** 2019 (2) SA 37 (CC) at paragraph 15, the Constitutional Court held as follows:

"In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided."

[16] Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained. (See: **Jowell v Bramwell-Jones and Others** 1998 (1) SA 836 (W) at 902J).

[17] Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars. (See: ***Jowell v Bramwell-Jones and Others*** *supra* at 900J).

THE OBJECTION

[18] I now proceed to deal with the merits of the objection (exception).

[19] The proposed particulars of claim is considerably more detailed than the original. Broadly stated, it alleges that the third applicant and the respondent entered into a partnership agreement relating to the marketing and sale of insurance products, principally to members of the National Teachers Union ("NATU"). This partnership agreement is alleged in alternative formulations, to have been express and oral, or tacit, or partly expressly oral and partly tacit.

[20] The proposed particulars of claim describe the parties' respective roles in the alleged partnership. They explain how the business was conducted and how the resulting commissions were to be divided. They also plead the parties' performance, the eventual breakdown of the partnership, and the basis on which the amounts claimed is calculated.

[21] The respondent raises five objections. The first concerns the identity and citation of the second and third applicants. The remaining objections concern the alleged tacit agreement, whether the pleaded facts satisfy the requirements of a partnership, the basis of the monetary claim, and the alternative formulations of the agreement.

THE FIRST OBJECTION: IDENTITY AND CITATION OF THE SECOND AND THIRD APPLICANTS

[22] The first objection concerns two discrepancies in the proposed particulars of claim. Paragraph 2 of the proposed particulars of claim describes the second applicant, as an adult male liquidator. Paragraph 3 identifies the third applicant as Welathisha Financial Services (Pty) Ltd, notwithstanding that the caption and the proceedings themselves identify the third applicant as Welathisha Investments (Pty) Ltd.

[23] In response to this objection, it was submitted by Mr Nel on behalf of the applicants during argument, that these were clearly typographical errors, and that the original particulars of claim contain the correct citation. He proposed a solution in that the amendment not be granted in respect of the citation of the second and third respondents, with the result that the original particulars of claim will remain in that regard.

[24] This suggestion was not contested by Mr Sterk appearing on behalf of the respondent.

[25] In any event, the first discrepancy presents no real difficulty. The founding affidavit identifies Ms Davis as an adult female liquidator and records that the reference to a male person in the proposed particulars of claim, is a typographical error. The respondent itself accepts, in its Heads of Argument that this amounts, at worst, to a misdescription requiring formal correction and does not in itself render the proposed pleading vague and embarrassing.

[26] The position concerning the third applicant requires further attention. The respondent is correct that the pleading should not leave a defendant uncertain as to the identity of the entity asserting the cause of action against it. The applicants' response in the founding affidavit, namely that the company is known by its registration number, does not satisfactorily answer the inherent inconsistency in the proposed pleading.

[27] That does not, however, mean that the amendment as a whole must be refused. The caption to the proposed particulars identifies Welathisha Investments (Pty) Ltd as

the third plaintiff (applicant). The founding affidavit does the same. The first and second applicants are cited as joint liquidators of that company. The same registration number, 1998/019518/07, is used in the proposed paragraph 3. On a consideration of the papers as a whole, there can be no real doubt that the intended third plaintiff (applicant) is Welathisha Investments (Pty) Ltd (in liquidation).

[28] The proposed pleading should nevertheless not be permitted to remain inconsistent with the remainder of the contents of the pleadings. Rule 28(10) provides the appropriate solution. Leave to amend may be granted on such other terms on other matters as the Court deems fit. Should the application for amendment succeed, I intend imposing a condition correcting the relevant paragraphs to cite the second applicant as a female and the third applicant as Welathisha Investments (Pty) Ltd (in liquidation).

[29] The first objection therefore does not justify refusal of the amendment.

THE SECOND OBJECTION: THE TACIT AGREEMENT

[30] The respondent's second objection is that, insofar as the applicants rely upon a tacit agreement, they have failed to plead the unequivocal conduct from which such an agreement could be inferred. The respondent argues that the proposed particulars merely repeat the alleged terms of the agreement without pleading the conduct necessary to establish tacit *consensus*.

[31] Mr Sterk on behalf of the respondent, argued passionately in support of this objection or ground for exception. He also referred me to a recent judgment of the full bench of the Western Cape Division, ***Padayachee and Others v Sunwest International (Pty) Ltd*** (Case No: A260/2025, delivered on 10 June 2026). In its judgment, the Court again confirmed as follows:

"[17] On any of these formulations, the conduct of the parties lies at the heart of the enquiry, for it is from that conduct that agreement is inferred. A party relying

on a tacit contract must therefore plead facts that, if proved, could support the inference."

[32] It was therefore submitted on behalf of the respondent that the applicants' proposed particulars of claim fall short of the aforesaid requirement.

[33] That submission does not, in my view, take sufficient account of the proposed pleading as a whole. It should also be mentioned that the contents of the pleadings as a whole in that case, do not appear from the ***Padayachee*** judgment I was referred to. It is therefore impossible to ascertain or judge to which extent and on what grounds the pleadings in that matter were interpreted to be lacking averments which would sustain a cause of action, when read as a whole, and in the absence of allegations of conduct in support of a tacit contract.

[34] In the present matter, paragraphs 8.3 and onwards, describe the alleged object of the business and the parties' respective roles. On the applicants' case, the respondent made its insurance infrastructure and Assupol relationship available as its contribution to the partnership. It administered the business, received the commissions, and shared the relevant proceeds. The third applicant, in turn, marketed and sold the products and generated the business from which those commissions arose.

[35] Paragraphs 9.1 to 9.6 go further and plead performance of the agreement relied upon. The applicants allege that the arrangement was implemented until June 2016. During that period the third applicant marketed and sold the policies, while the respondent administered the business and received commission. The respondent is also alleged to have paid the third applicant's agreed share into its bank account each month until the alleged termination of the agreement.

[36] A partnership may arise from a tacit agreement. In the matter of ***Butters v Mncora*** 2012 (4) SA 1 (SCA), the Supreme Court of Appeal confirmed the established

requirements of partnership and recognised the agreement giving rise to partnership may be tacit.

[37] Whether the conduct pleaded by the applicants will ultimately prove *consensus*, is not a question which ought to be determined on the present application. The relevant question is whether facts capable of supporting that inference, have been pleaded. I find that they have.

[38] I am not at all convinced that upon any construction of the proposed particulars of claim, no cause of action is disclosed. Reading the applicants' proposed particulars of claim as a whole, I have no doubt that the respondent would know exactly what case it has to meet in defending the action, and would be, of own knowledge, able to plead what the nature and extent of the parties' relationship was.

[39] Even though there might be some criticism to be levelled against the construction of the proposed particulars of claim in this regard, it does not render it excipiable.

[40] In as far as the respondent might require more detail on the conclusion of the alleged tacit agreement, same should be cured by further particulars.

[41] In this regard I again refer to the matter of ***Jowell v Bramwell-Jones and Others*** *supra*, at 900J where the court found as follows:

"I am in full accord with the view expressed by Davis J in Kahn v Stuart and Others 1942 CPD 386 at 391, that 'the Court should not look at a pleading with a magnifying glass of too high power'.

I also agree that minor blemishes in and unradical embarrassments caused by a pleading can and should be cured by further particulars."

[42] I therefore find that the second objection does not establish that the proposed pleading is excipiable.

THE THIRD OBJECTION: THE *ESSENTIALIA* OF A PARTNERSHIP

[43] The respondent also contends that the facts and terms pleaded do not constitute a partnership.

[44] The essential requirements of a partnership are settled law. In this regard the Appellate Division held in ***Pezzutto v Dreyer and Others*** 1992 (3) SA 379 (A) that each partner must contribute, or undertake to contribute, something to the partnership. The business must be carried on for the joint benefit of the parties and with the object of making a profit.

[45] The proposed particulars expressly allege in paragraph 8.3 that the common object was to conduct the business for the joint benefit of the third applicant and the respondent and for the making of profit. Thereafter the third applicant's and the respondent's alleged contributions are pleaded in some detail.

[46] The respondent nevertheless submits that the pleaded relationship is closer to an agency or commission arrangement. It relies on the fixed percentage allocations and the percentage-based remuneration. It also criticises the applicants' description of commission as partnership profit.

[47] Those considerations may prove important at trial. They may ultimately support a conclusion that the legal relationship was something other than a partnership. They do not, however, demonstrate that the pleaded facts are incapable in law of sustaining the alleged partnership.

[48] The third ground of objection therefore also fails.

THE FOURTH OBJECTION: THE MONETARY CLAIM

[49] The applicants claim R2 493 101.19. The respondent contends that the proposed pleading does not establish the factual basis upon which the applicants may attribute the commission figures relied upon, to business actually generated by the third applicant.

[50] The proposed particulars identify the commission figures relied upon for the 2016 and 2017 financial years. They also state the percentages allegedly payable to the third applicant. Paragraph 11.7 alleges that the relevant commissions arose from the third applicant's marketing and sales activities. Paragraphs 11.8 to 11.12 then explain how the amount claimed is calculated.

[51] The Assupol letter and summary of commission paid by Assupol to the respondent, alleged in paragraph 11.4 and onwards of the proposed particulars of claim, are of importance in this regard. It states that the schedule provides a breakdown of commission paid to the respondent with specific reference to products sold by the third applicant. The schedule separately records commission for the NATU Funeral Protection Plan and the Inkomo Provider Funeral Solution. It also includes a category described as Other Business, but expressly states that this category relates to products falling outside the contractual relationship with the third applicant.

[52] The figures reflected in paragraph 11.6 of the proposed particulars of claim are drawn from the NATU and Inkomo categories, and not the Other Business category.

[53] The respondent may dispute the correctness of the applicants' allegation that all of the claimed commission was generated through the third applicant's activities and eventually may lead evidence to that effect. That dispute does not mean that the necessary factual allegations are absent from the pleading.

[54] The respondent raised a further argument for the first time in its heads of argument. It is there contended that, on partnership principles, one partner cannot ordinarily claim payment of an alleged balance from another before the partnership accounts have been settled under circumstances where the partnership is for instance dissolved.

[55] I do not intend to express any view on whether this proposition, or any qualification to it, ultimately applies to the applicants' pleaded claim. The respondent's difficulty in this regard is procedural, in that the argument is not formulated as one of the grounds stated in the notice of objection (Annexure "FA6" to the founding affidavit).

[56] The argument is also not raised in the respondent's answering affidavit to the application for amendment. To the contrary, the deponent to the answering affidavit expressly testifies as follows:

"9.

The grounds contained in the notice of objection are detailed and thorough. These allegations already provide the foundation upon which the objection is based.

10.

Consequently, my client relies, in opposition to this application, on all of the grounds of objection so advanced in the notice. For the sake of clarity I repeat here under oath such grounds of objection as if I have repeated word for word, all the allegations contained in the objection."

[57] Rule 28(3) requires the grounds of objection to be stated in the notice of objection. The applicants were therefore entitled to frame this application by reference to the grounds set forth in Annexure "FA6" to the founding affidavit.

[58] An excipient, (the respondent *in casu*) is obliged to confine its complaint to the stated grounds of its exception.

[59] In the Supreme Court of Appeal judgment of ***Feldman N.O. v EMI Music Publishing SA (Pty) Ltd*** 2010 (1) SA 1 at paragraph [7] the following was stated:

"Apart from noting that Tindall JA in Collin stated that a point of non-joinder may be taken on exception, but only if it is expressly referred to in the exception, it is not necessary to consider whether the decision by Jajbhay J of the first exception on the basis of joinder was correct in law. An excipient is obliged to confine his complaint to the stated grounds of his exception. As in Collin the exceptions here contain no mention of non-joinder. They accordingly fell to be decided on the grounds taken, namely that the particulars did not contain averments which founded the claim for relief. Nor did counsel in arguing the appeals for either party present argument based on the ground of non-joinder."

[60] In the premises I do not regard this argument to constitute an objection or ground for exception to be considered in this application.

[61] There is also no merit in the fourth objection.

THE FIFTH OBJECTION: ALTERNATIVE FORMULATIONS

[62] The final objection concerns the alternative formulations of the agreement relied upon. The applicants plead an oral partnership as their primary case. In the alternative, they rely on a tacit or quasi-partnership, and further alternatively on an agreement said to be partly oral and partly tacit. The respondent says these formulations are mutually destructive and render the pleading vague and embarrassing.

[63] Once again I find that the drafting is cumbersome. The repeated use of the expression quasi-partnership adds little clarity and may have been better avoided.

[64] That, however, is not the same as excipiability. The proposed particulars make clear that these are alternative formulations. The factual basis of the claim remains identifiable. The applicants' primary case is that the parties reached express oral *consensus*. In the alternative, they allege that *consensus* is to be inferred wholly or partly from the parties' conduct and established business practice, as executed between the parties.

[65] The fact that two claims, or two factual bases for the same claim, cannot ultimately co-exist, does not prevent them from being pleaded in the alternative. That is the purpose of alternative pleading. The Court considers the alternative, only if the primary case is not established.

[66] An express oral agreement and a tacit agreement cannot both explain how the same *consensus* was reached. They may nevertheless be pleaded as alternatives. What matters is whether each alternative is pleaded with sufficient clarity to disclose the case the respondent must meet. In the present matter, the applicants identify the terms relied upon and plead the factual basis on which *consensus* is said to arise. The respondent is therefore able to identify and answer each alternative case.

[67] The fifth objection accordingly fails.

[68] In the result the respondent has not satisfied the burden to indicate that the proposed particulars of claim would be excipiable, if allowed. In the premises I intend to grant leave to amend the particulars of claim.

COSTS

[69] The applicants have substantially succeeded in obtaining leave to amend. The question of costs nevertheless requires further consideration, for me to be able to exercise my discretion in this regard, judicially.

[70] Rule 28(9) provides that a party giving notice of amendment is, unless the court otherwise directs, liable for the costs thereby occasioned to any other party. The applicants tendered those costs in their Rule 28(1) notice. Their tender did not extend to the costs of opposition to the amendment. The respondent was however justified in raising the objections relied on, in opposition to the application for amendment. On the other hand, the respondent has ultimately not succeeded in its objections.

[71] I therefore consider the appropriate order to be that the costs of this application should follow the outcome of the main action.

ORDER

[72] I accordingly make the following order:

(i) The applicants are granted leave to amend their particulars of claim in accordance with the amended particulars of claim attached as Annexure "A" to their Rule 28(1) notice, dated 8 September 2025, subject to the following corrections:

(a) Paragraph 2 of the amended particulars of claim shall describe the second plaintiff, Gaironesa Davis N.O. as an adult female liquidator.

(b) Paragraph 3 of the amended particulars of claim shall identify the third plaintiff as Welathisha Investments (Pty) Ltd (in liquidation) with registration number 1998/019518/07.

(ii) The applicants shall effect the amendment within 10 (ten) court days of this order.

(iii) The costs of the application for leave to amend, are costs in the cause.

**DE JAGER AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date of hearing: 12 August 2026

Date of judgment: 24 August 2026

Appearance

Counsel on behalf of the Applicants: Adv FJ Nel
Instructed by Schabert Potgieter Attorneys Inc

Counsel on behalf of the Respondent: Adv C Sterk
Instructed by Couzyn Hertzog & Horak Inc