

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE No:2345/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES

DATE: 4 September 2026

SIGNATURE: PILLAY J

In the matter between:

BASIC BLUE TRADING 740 CC t/a NATPRO

1ST EXCIPIENT

JACOMINA ELIZABETH ADRIANA KEMP N.O

2ND EXCIPIENT

JACOMINA ELIZABETH ADRIANA KEMP

3RD EXCIPIENT

CHARISSE KEMP

4TH EXCIPIENT

V

ARMLICQO CONSULTANTS CC

1ST RESPONDENT

FREDERIC ARNOLD WAGNER

2ND RESPONDENT

(Identity number 6[...])

IN *RE*:

ARMLICQO CONSULTANTS CC

1ST PLAINTIFF

FREDERIC ARNOLD WAGNER

2ND PLAINTIFF

(Identity number 6[...])

V

BASIC BLUE TRADING 740 CC t/a NATPRO

1ST DEFENDANT

JACOMINA ELIZABETH ADRIANA KEMP N.O

2ND DEFENDANT

JACOMINA ELIZABETH ADRIANA KEMP

3RD DEFENDANT

MASTER OF THE HIGH COURT, POLOKWANE

4TH DEFENDANT

CHARISSE KEMP

5TH DEFENDANT

Coram

Pillay J

Reserved

22 April 2026

Date Delivered

4 September 2026.

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for hand down of the judgment is deemed to be **4 September 2026.**

JUDGMENT

PILLAY J:

INTRODUCTION:

[1] The parties before Court sought the Court to adjudicate an exception raised by the First, Second, Third and Fifth Defendants, who contended that the Plaintiffs' particulars of Claim failed to disclose a cause of action. The Plaintiffs oppose the exception and maintain that all essential averments had been pleaded, in respect of the Summons and particulars of Claim, met the essential requirements relevant for the defendants to plead.

[2] The dispute between the parties was in respect of an oral agreement allegedly concluded during August 2021 between Armlicqo Consultants CC and Frederic Arnold Wagner (the Plaintiffs), on the one hand, and Basic Blue Trading 740 t/a Natpro and the late Stephanus Johannes Kemp (the deceased), on the other hand.

[3] The agreement concerned opportunities introduced by the plaintiffs which enabled the first defendant to conclude contracts with Bidvest Protea Coin for the provision of security services relating to MTN and later Vodacom infrastructure. The plaintiffs alleged that the first defendant would perform the security services, receive payment from Bidvest, deduct agreed operational expenses, and pay the remaining surplus to the plaintiffs.

[4] This arrangement operated successfully until the death of Mr Kemp on 24 May 2022. Following his death, the plaintiffs contended that the remaining defendants became aware of the agreement, repudiated or breached it, failed to account to the plaintiffs, withheld payments, and acted in a manner designed to bypass the plaintiffs and attempted to secure the business opportunities for themselves. The plaintiffs subsequently cancelled the agreement and instituted proceedings against the defendants and based on the aforesaid the exception was raised.

BRIEF BACKGROUND:

[5] Around August 2021, the plaintiffs allegedly concluded an oral agreement with the first defendant, represented by the late Mr Stephanus Johannes Kemp, both in his personal and representative capacity. The plaintiffs undertook to provide the first defendant with business opportunities that would enable the first defendant to conclude contracts with Bidvest for the rendering of security services. The first defendant would contract directly with Bidvest, invoice Bidvest, receive payment, and deduct agreed operational expenses. The remaining surplus would thereafter be paid to the plaintiffs. The second plaintiff was to oversee and manage the security projects and assist with financial calculations and invoicing.

[6] According to the plaintiffs during February or March 2022, the parties allegedly amended the agreement to include a second Bidvest-related opportunity concerning Vodacom signal towers. Around March 2022, the agreement was further amended to permit payment of R25,000.00 per month to Dennis Kemp the son of Mr Stephanus Johannes Kemp, and the first defendant was to retain R250 000.00 as security or retention money or alternatively as a security deposit from the income generated. The parties further allegedly agreed that the retained amount would become payable to the Plaintiffs upon termination of the agreement.

[7] The plaintiffs alleged that the parties performed in terms of the agreement until the death of Mr Stephanus Johannes Kemp on 24 May 2022. Following his death, the third defendant was appointed as the executrix to the deceased's estate and became involved in the management of the first defendant, while the fifth defendant continued employment as the general manager. The plaintiffs alleged that, despite being aware of the agreement, the third and fifth defendants repudiated or breached same by refusing to account to the plaintiffs, denying the existence of the agreement, attempting to renegotiate the arrangement, interfering with the Bidvest contracts, and causing the first defendant to withdraw services from Bidvest. The plaintiffs alleged that Bidvest consequently terminated the contracts during September 2022. The plaintiffs thereafter cancelled the agreement and instituted proceedings seeking repayment of the retained R250,000.00, statement and the debatement of account for the period October 2021 to

September 2022 and payment of any amount found due, and an order declaring the third and fifth defendants be held personally liable to the plaintiffs as per the particulars of Claim.

[8] The defendants entered an appearance to defend and raised the following exceptions to the particulars of Claim as highlighted in part A and B as grounds justifying the striking out of the particulars of Claim.

[8.1] Ground 1: Non-compliance with Section 9(4) of the Private Security Industry Regulation Act¹ (PSIRA)

The defendants alleged that the agreement formed part of the security-services framework and should have been reduced to writing, signed and provided to the parties. Failure to do so according to the defendants rendered the agreement unenforceable as same was not compliant with the provisions of the Act which required that the agreement be reduced to writing and the plaintiffs failed to comply, provide proof of compliance, or produced the written agreement.

[8.2] Ground 2: Non-compliance with Section 20(1) of PSIRA by the plaintiff

The defendants alleged that the first plaintiff was obliged to be registered with PSIRA to render security services for remuneration, reward, a fee or benefit unless exempted. That the particulars of Claim failed to address same and if found that the first plaintiff was unregistered, any remuneration flowing from security services was prohibited by statute and therefore the agreement was unenforceable.

[8.3] Ground 3: Failure to Plead Quantifiable Loss or basis for Monetary Claims

The defendants alleged that the particulars of Claim failed to disclose what damages were caused to the plaintiffs and how same was calculated or quantified or the basis upon which the amounts allegedly became due.

¹ See Act 56 of 2001

[8.4] Ground 4: This was in respect of Claim 1 which constitutes Specific Performance, not Damages.

The defendants contended that the facts pleaded suggested damages, whereas the relief sought constituted contractual performance.

[8.5] Ground 5: This was in respect of Claim 2 which constitutes Specific Performance.

The defendants contended that the account and debatement Claim was inconsistent with the pleaded factual basis and appeared to be for specific performance and not damages.

[8.6] Ground 6: This was in respect of Claim 3 which concerned Damages rather than Debt.

The defendants argued that the personal-liability Claim related to damages and therefore did not fall within section 424 of the Company's Act.

[8.7] Ground 7: This concerned the non- applicability of Section 424 of the Companies Act²

The defendants alleged that section 424 did not apply to Claims for damages, but only to non-payment of debt in circumstances involving winding-up or judicial management.

[9] Based on the various exceptions raised especially in part A the defendant's sought that the particulars of Claim be struck out, alternatively an opportunity be afforded the plaintiffs to make the necessary amendments. Both parties argued whether there was merit to the exceptions raised and handed in written heads of argument and relevant case law to support their contentions.

[10] The defendants indicated that the plaintiffs' pleaded case failed to disclose a valid cause of action and highlighted that the particulars of Claim were vague, contradictory, incomplete and legally defective. The defendants relied primarily on the argument that the alleged agreement fell within the ambit of the framework of the Private Security Industry Regulation Act (PSIRA). According to the defendants the

² See Act 61 of 1973

provisions of Section 9(4) PSIRA provided that a security service provider must ensure that the full contractual agreement was required to be reduced to writing and that the plaintiffs failed to plead compliance with the statutory requirements applicable in respect of the aforesaid Act.

[11] The defendants highlighted that the plaintiffs' sought to fragment the pleaded arrangement into discreet agreements which were inconsistent with the established principle as the true nature of the said agreements were not placed fully before the Court especially the role of the second plaintiff which went beyond facilitator and extended to deriving remuneration directly from the income generated by rendering security services, participating in income, expenses and surplus calculations and further the plaintiffs actively managed and oversaw the rendering of security services as the project managers.

[12] The defendants argued that the plaintiffs Claim was founded upon an alleged agreement which properly characterized, formed part of the full contractual framework regulating the rendering of security services, which was subject to the peremptory requirements of Section 9(4) of PSIRA. The defendants therefore sought that since the plaintiffs failed to plead a written contract between the plaintiffs, first defendant and the deceased, the plaintiffs lacked material facts necessary to sustain a cause of action and thus the pleadings must be struck out.

[13] In respect of the second ground of exception the defendants indicated that the first plaintiff was obliged to be registered with PSIRA to render security services for remuneration, reward, a fee or benefit unless exempted. That the particulars of Claim failed to address same and if found that the first plaintiff was unregistered, any remuneration flowing from security services was prohibited by statute and therefore the agreement was unenforceable.

[14] The defendants noted that the plaintiffs sought to circumvent the prescripts of Section 20(1) of PSIRA by alleging in paragraph 17 of the particulars of Claim that the

first plaintiff did not render a security service, however, at paragraph 53 the plaintiffs derived remuneration directly from the income generated by rendering security services, participating in income and expenditure calculations and actively being involved in managing and overseeing the rendering of security services.

[15] The defendants argued that thereafter in the alternative the plaintiffs sought to indicate that the second plaintiff, deceased and the first defendant were all registered under PSIRA, without making mention of the first plaintiff being registered and the plaintiffs reliance on the contract not being void ab initio. This was contrary to the penal provisions as contained in Section 38(3)(a) of PSIRA which provided a penal provision for non-compliance with Section 20(1) of PSIRA resulting in that argument being without merit and that the failure to plead registration of the first plaintiff rendered the contract void thus the plaintiffs particulars of Claim lacked sufficient particularity to sustain a cause of action and was to be struck out.

[16] The defendants indicated that the plaintiffs sought in Claims 1 and 2 an alleged entitlement to payment of R250 000,00 and such further amounts as may be determined upon debatement, however, they had failed to plead alternatively unable to establish any properly quantified or legally cognizable monetary Claim. The plaintiffs did not plead what the income was that was received from Bidvest nor the expenses paid, save to indicate that there were no reductions or losses. This was without factual basis upon which a Court could determine whether the retention amount or any portion thereof was repayable.

[17] The plaintiffs failed to plead any causal link between the alleged breach and the amount of R250 000,00 as Claimed. The plaintiffs made no allegations that the retention amount became due as a result of the breach nor why the amount was now exigible save to state that the defendants allegedly had no right to hold such amount.

[18] The defendants highlighted that the plaintiffs had not pleaded facts establishing an entitlement to an account, including the prima facie basis for indebtedness. The

plaintiffs failed to allege or prove any amount was due nor provided any factual basis upon which it may have been inferred that a surplus existed. The plaintiffs failed to plead material facts upon which the duty arose or the entitlement existed for the defendants being required to account to the plaintiffs.

[19] The defendants argued that the plaintiffs had improperly sought contractual remedies while alleging conduct more consistent with a damages Claim yet failed to plead the elements of either cause of action.

[20] In conclusion, the defendants highlighted that the plaintiffs sought to rely on the provisions of Section 424 of the Companies Act, to hold the third and fifth defendants personally liable on account of alleged misconduct in relation to the affairs of the first defendant. The defendant argued that the allegations against the third and fifth defendants did not satisfy the requirements of Section 424 of the Companies Act in that the provisions of the Act did not impose personal liability merely because a defendant was alleged to have acted improperly or even wrongfully and that the plaintiffs failed to allege that the third and fifth defendants had carried on business recklessly or had displayed any lack of genuine concern for the first's defendants prosperity. Further, the defendants highlighted that there were no factual averments made by the plaintiffs and that the allegation of recklessness was based on assumption and speculation without proof of any damages suffered by the first defendant. Therefore, the plaintiffs failed to allege the necessary allegations to sustain a cause of action.

[21] The defendants indicated that the absence of material particularity rendered the plaintiffs' particulars of Claim excipiable as it lacked necessary averments to sustain a cause of action. Moreover, that the plaintiffs had repeatedly pleaded several contradictory, unclear and or vague broad allegations. These defects and shortcomings caused the defendants prejudice and embarrassment of such a nature that the defendants were unable to plead and/or reply to the particulars of Claim. The defendant's sought that the exception be upheld and the plaintiffs' Claim be struck out or

alternatively that the plaintiffs be placed on terms to amend and/or substitute the particulars of Claim. The defendants sought costs.

[22] The plaintiffs contended that the exception was overly technical and failed to demonstrate that the particulars of Claim, upon every reasonable interpretation, did not disclose a cause of action. They submitted that the particulars of Claim must be read as a whole and that the Court was required, for purposes of the exception, to accept the pleaded allegations as true. Further that the exception was poorly taken only with the intent to delay having to plead to the plaintiffs' Claim. The particulars of Claim properly disclosed the cause of action relied upon by the plaintiffs and the defendants would not suffer any prejudice to plead to same. The plaintiffs maintained that their particulars of Claim disclosed valid causes of action.

[23] The plaintiffs highlighted the background of the matter and the subsequent instituting of proceedings against the defendants, flowing from the circumstances and conduct of the defendants following the death of Mr Stephanus Johannes Kemp on 24 May 2022. The plaintiffs brought to the attention of the Court the relevant principles applicable to exceptions and that the purpose of same was to raise a substantive question of law which could have the effect of settling the dispute in toto, which would not be the case in this matter.

[24] The plaintiffs indicated that section 9(4) of the PSIRA Code of Conduct regulated the relationship between a security service provider and its client and required that the contractual agreement for the rendering of security services be reduced to writing. According to the plaintiffs, the relevant client in the present matter was Bidvest and the relevant security service provider was the first defendant. The oral agreement sued upon was not the contract in terms of which security services were rendered to Bidvest, but rather a separate agreement between the plaintiffs, first defendant and the deceased concerning the introduction of business opportunities and the sharing of remuneration derived from those opportunities.

[25] The plaintiffs pointed out that the particulars of Claim expressly pleaded that written contracts would be concluded between the first defendant and Bidvest in respect of the rendering of security services. Accordingly, they maintained that section 9(4) had no application to the oral agreement pleaded by the plaintiffs and did not render such agreement void, unlawful or unenforceable. They therefore submitted that the first ground of exception lacked merit and ought to be dismissed.

[26] In answer to the contention that the first plaintiff was not registered as a security service provider under PSIRA, the plaintiffs relied on the pleaded allegation that the first plaintiff did not render security services. Security services were rendered by the first defendant, which was pleaded to be a duly registered security service provider. The deceased and the second plaintiff were likewise alleged to have been registered in terms of PSIRA.

[27] The plaintiffs argued that the first plaintiff's involvement consisted of facilitating opportunities and participating in the agreed remuneration structure rather than rendering security services directly. Consequently, they maintained that registration by the first plaintiff was not required. In addition, the particulars of Claim contained an alternative Claim seeking relaxation of the *par delictum* rule should the Court ultimately find that registration was required. The plaintiffs submitted that questions concerning statutory non-compliance and the equities surrounding any potential illegality were issues best determined after evidence had been led and not on exception. They accordingly contended that the second ground of exception should fail.

[28] The plaintiffs contended that the defendants had misconstrued the nature of the plaintiffs' causes of action. Although the exception alleged that the plaintiffs had failed to plead and quantify damages, Claim 1 was not a damages Claim. It was a Claim for repayment of the retained R250 000.00 which the plaintiffs alleged became due and payable upon termination of the agreement. Similarly, Claim 2 was not a damages Claim but a recognised common-law Claim for a statement and debatement of account. The particulars of Claim expressly pleaded the contractual basis giving rise to the duty

to account, the method by which the surplus was to be calculated, and the failure of the defendants to render the required account.

The plaintiffs further submitted that the exception improperly isolated individual paragraphs rather than considering the particulars of Claim as a whole. Read holistically, the pleadings sufficiently disclosed the contractual relationship, the obligation to account, the alleged breaches and the resulting entitlement to relief.

[29] In respect of Claim 1, the plaintiffs accepted that the Claim was one for specific performance. They nevertheless pointed out that the particulars of Claim specifically alleged the creation of a retention fund of R250 000.00, that no unforeseen expenses entitled the defendants to retain any portion thereof, and that the retention money became payable upon termination of the agreement. The plaintiffs therefore contended that all material averments necessary to sustain a Claim for repayment of the retention amount had been pleaded and that the fourth ground of exception disclosed no basis for striking out the Claim.

[30] The plaintiffs indicated that Claim 2 disclosed a complete and recognised common-law cause of action for statement and debatement of account. They submitted that the particulars of Claim expressly pleaded the plaintiffs' contractual right to receive monthly accounts from the first defendant and/or the deceased, the agreed method by which the surplus was to be calculated from the income generated under the Bidvest contracts after deduction of specified expenses, and the corresponding obligation resting upon the first defendant and/or the deceased to render a full account together with supporting documentation. The plaintiffs further alleged that the defendants had failed to furnish such accounts despite being contractually obliged to do so, thereby preventing the determination of the amount due to the plaintiffs. On that basis, the plaintiffs pleaded an entitlement to an order directing the rendering and debatement of the account, followed by payment of whatever surplus amount might be found to be due upon completion of the debatement process. The plaintiffs accordingly submitted that the Claim disclosed a complete and legally recognised cause of action.

[31] The plaintiffs denied that Claim 3 amounted merely to a damages Claim.

They maintained that the relief sought was a declaratory order holding the third and/or fifth defendants personally liable for liabilities arising under Claims 1 and 2. The third and fifth defendants' personal liability was said to arise from the alleged fraudulent, mala fide, dishonest or reckless conduct pleaded in the particulars of Claim. Accordingly, the plaintiffs argued that the Claim was not defeated merely because the defendants sought to label it as a damages Claim rather than a debt Claim.

[32] The plaintiffs emphasised that the third to seventh grounds of exception all related to Claim 3 and depended on the assumption that Claims 1 and 2 were defective. Since Claims 1 and 2 disclosed valid causes of action, they argued that the attacks on Claim 3 were similarly unsustainable. The plaintiffs further argued that Claim 3 sought declaratory relief aimed at holding the third and/or fifth defendants personally liable for obligations owed by the first defendant. They maintained that the Court possessed an established discretionary power to grant declaratory relief where an interested party demonstrated an existing, future or contingent right or obligation. The particulars of Claim were said to contain detailed allegations of dishonest, reckless, fraudulent and improper conduct by the third and fifth defendants, which, if accepted as true for purposes of the exception, were sufficient to sustain a Claim for personal liability and potentially for the piercing of the corporate veil.

[33] The plaintiffs rejected the contention that section 424 of the Companies Act was inapplicable. They argued that the particulars of Claim contained allegations that the third and fifth defendants knowingly attempted to circumvent the agreement, denied its existence despite knowledge thereof, interfered with the Bidvest contracts, instructed employees not to cooperate with the plaintiffs, and caused the first defendant to act in a manner detrimental to its creditors. The plaintiffs further contended that the Claim was not founded exclusively upon section 424. The particulars of Claim also relied upon common-law principles relating to personal liability and the piercing of the corporate veil, as well as the provisions of section 20(9) of the Companies Act (71 of 2008). Accordingly, they submitted that the pleaded allegations, accepted as true for purposes

of the exception, were sufficient to sustain a Claim for declaratory relief against the third and/or fifth defendants. The plaintiffs ultimately contended that the defendants had failed to establish that, upon every reasonable interpretation of the particulars of Claim, no cause of action was disclosed. They submitted that the exception was overly technical, that the particulars of Claim contained the necessary factual averments to sustain Claims 1, 2 and 3, and that any disputes concerning the merits were matters for determination at trial after the leading of evidence. Consequently, the plaintiffs sought that the exception ought to be dismissed with costs to counsel on scale B.

[34] The defendant maintained that it was improper for the plaintiffs to argue that the defendants could plea to the allegations as per the particulars of Claim as specific reference made to the provisions of paragraph 17 of the particulars were vague requiring the plaintiffs to clearly ventilate before the defendants could plead and the issue of registration with PSIRA was not a simple formality not needing attention, it was the nub of the defendants exception based on the compliance with the legality of the provisions of PSIRA. Therefore, the plaintiffs argument that the defendants could plead to the particulars as they stood was without merit and the exceptions were sought to be upheld and costs on scale C.

LEGAL PRINCIPLES AND APPLICATION:

[35] The general principles of law applicable to an exception were succinctly dealt with in **Lockhat and Others v Minister of Interior**³ as follows:

"In the first place when a question of insufficient particularity is raised on exception, the excipient undertakes the burden of satisfying the Court that the declaration as it stands, does not state the nature, extent, and, and grounds of the cause of action. In other words, he must make out a case of embarrassment by reference to the pleadings alone, Deane v Deane, 1955(3) SA (N). If an exception on the ground that certain allegations are vague and embarrassing is

³ 1960 (3) SA 765 (D) at 777 A - E

to succeed, then it must be shown that the defendant, at any rate for the purposes of his plea, is substantially embarrassed by the vagueness or lack of particularity. Jooste v Jooste, 197 NPD 305 at p. 307... The object of all pleadings is that a succinct statement of the grounds upon which a Claim is made or resisted shall be set forth shortly and concisely; and where such statement is vague, it is either meaningless or capable of more than one meaning. It is embarrassing in that it cannot be gathered from it what ground is relied on by the pleader. Leathern v Tredoux, 1911 32 NPD 346, per DOVE-WILSON, J.P., at p. 348. As long as a declaration reasonably states the nature, 355 of 1975. 4 1960 (3) SA 765 (0) at 777 A - E.

Page 11 of 29 extent, and grounds of the cause of action, the Court will not as a rule, strike out paragraphs as vague and embarrassing, provided the information given is reasonably sufficient and provided it does not appear to the Court that the paragraphs cannot be pleaded to by the defendant".

[36] In addition to the above, the pleader must plead a clear and concise statement of the material facts upon which he or she relies for the Claim Uniform Rules of Court, Rule 18 (4) stipulates that

"every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his Claim, ... as the case may be, with sufficient particularity to enable the opposite party to reply thereto".

The pleader's initial duty is to allege the facts upon which he relies on and his second duty is to set out the conclusions of law which, according to him or her follow from the pleaded facts.⁴

[37] There are two types of exceptions. The first is that the pleadings lack averments necessary to sustain a cause of action. In this instance, the excipient relies on the allegation that there were insufficient facts to sustain the cause of action. This Court

⁴ Erasmus; Superior Court Practice 2nd Edition Van Loggerenberg Volume 2 RS 11, 2019, DI-233.

appreciates that particulars of Claim must be clear in that it alerts the Court to all the issues upon which the plaintiff places its reliance, therefore, it needs to be precise. Where there are multiple Claims, each Claim must in itself, disclose a cause of action.

[38] The second type of exception is contained in Rule 18(4) of the Uniform Rules of Court, which provides that every pleading shall contain a clear and concise statement of the material facts upon which a pleader relies for his/her or its Claim with sufficient particularity to enable the opposite party to plead thereto. This is a legal objection. It therefore follows that pleadings must be clear to afford the opponent the opportunity to appropriately respond, if not, an exception may be raised.

[39] It is well established that an exception provides a useful mechanism for weeding out cases without legal merit.⁵ Thus, an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial. Even if an exception is dismissed, the point can be re-argued at the trial.⁶

[40] However, in dealing with exceptions raised, the Court will look at whether the lack of particularity would be so prejudicial to the excipient to the extent that it would not be capable of responding to each allegation in the plea. In this instance, the individual paragraphs as contained in the particulars of Claim are considered. When assessing an exception for vague and embarrassing, the Court must look at the pleading as a whole, rather than a particular paragraph therein. The exception of vague and embarrassing as raised must therefore speak to the pleading as the whole cause of action. Should the Court find that the party excepting will not suffer serious prejudice should it not uphold the exception, the exception will be dismissed.

⁵ *Telmatrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 465; H v Fetal Assessment Centre 2015 (2) SA 193 (CC) at 199 B*

⁶ *See Maize Board v Tiger Oats Ltd 2002 (5) 365 (SCA) at 373 B-D*

[41] To succeed, an excipient has the duty to persuade the Court that on every interpretation which the pleading in question can reasonably bear, no cause of action or defence is disclosed. Failing this, the exception ought not to be upheld.⁷

[42] The principles regulating exceptions are trite but are nevertheless summarized as follows:

[42.1] The facts averred on the pleading must be assumed to be correct.

[42.2] The Court hearing the exception must look at the pleadings as they stand except in the case of inconsistency and no reference may be made to any other document.

[42.3] No facts outside those stated in the pleadings can be brought into issue in consideration of the exception.

[42.4] The object of an exception is to dispose of the case or a portion thereof expeditiously. An exception should further be dealt with in a sensible and not over-technical manner⁸.

[43] In the recent decision of *Naidoo and Another v Dube Transport Corp & Others*⁹ it was reaffirmed that the Court must accept the factual averments in the particulars of Claim as truthful, unless manifestly false, and a Court could not go beyond the pleadings. The issue that this Court needs to ventilate at the exception stage was not whether the plaintiffs will ultimately succeed at trial, but whether their particulars of Claim contained sufficient factual allegations to sustain the pleaded causes of action. The defendants argued that the pleadings were legally defective, while the plaintiffs contended that every necessary fact had been pleaded and that the exception was an overly technical attempt to avoid pleading on the merits.

⁷ *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E-F

⁸ See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 465 (H)

⁹ See 2022 (3) SA 390 (SCA)

[43.1] The plaintiffs' main Claims or relief sought were in respect of Claim 1: repayment of the retention money of R250 000,00 together with interest. The plaintiffs allege that the amount was retained as security or a deposit and became repayable upon termination of the agreement.

[43.2] Claim 2 entailed the statement and debatement of account where the plaintiffs sought a full account of all Bidvest-contract income and expenditure, supporting vouchers and records, debatement of that account and payment of whatever amount was found to be due after the accounting exercise.

[43.3] In respect of Claim 3 the plaintiffs sought a declaration holding the third and/or fifth defendants personally liable for the first defendant's liabilities arising under Claims 1 and 2.

[43.4] In the alternative, the plaintiffs sought in Claim 4 that if the agreement was found to be unenforceable due to PSIRA non-compliance, the plaintiffs sought that the Court relax the par delictum rule and permit recovery based on fairness and unjust enrichment considerations.

[44] Regarding the first ground of exception being the non-compliance with Section 9(4) of PSIRA, the defendants relied on the argument that the plaintiffs' own allegations demonstrated that the agreement concerned the provision of security services to Bidvest. The plaintiffs' averments were;

[44.1] During August 2021 they concluded an oral agreement with the first defendant and the deceased regarding security services to be rendered to Bidvest;

[44.2] The plaintiffs would receive all surplus income remaining after expenses;

[44.3] The second plaintiff would oversee and manage the execution of the security services as project manager;

[44.4] The agreement was later extended to include further security service contracts with Bidvest namely Vodacom and MTN.

[45] The defendants motivated that the plaintiffs failed to comply with the provisions and content of section 9(4) of the CODE OF CONDUCT promulgated in terms of section 28 of PSIRA, in that the plaintiffs failed to reduce the full contractual agreement entered into with first defendant and/or second defendant and/or third defendant in writing, failed to sign such written agreement on behalf of the plaintiffs and failed to provide a true copy of such written agreement to first defendant and/or second defendant and/or third defendant and/or Bidvest. The defendants accordingly contended that the alleged agreements entered into by the plaintiffs were contrary to statute, unenforceable and void.

[46] The plaintiffs expressly pleaded that the first plaintiff was not required to be registered with PSIRA because it did not itself render security services simultaneously, they pleaded an alternative Claim seeking relaxation of the par delictum rule should the Court find otherwise. This alternative pleading is relied upon by the defendants as indicating possible non-compliance with PSIRA. This Court when considering the arguments of the defendants in relation to the particulars of Claim was satisfied that there were relevant averments required either regarding compliance or, alternatively why there should be a relaxation of the par delictum rule. There was merit to the first ground of exception raised by the defendant.

[47] The defendants contended that the plaintiffs' participation as project managers and recipients of profits effectively amounted to participation in the provision of security services, whereas the plaintiffs characterised their role as facilitative and managerial rather than the rendering of security services. This Court found that the plaintiffs were obliged to aver details unique to them regarding the issuing of accounts to the defendants for the amount that was to be paid over to the plaintiffs at the end of the month, in circumstances where this was pertaining to security services, rendered by the first defendant, in instances where the second plaintiff was managing the service rendered and the first plaintiff was not registered yet issuing account statements to be paid in this regard. There was need for said allegations to be clear to afford the

defendants the opportunity to plead properly to all the averments and therefore, there was merit to this ground of exception raised by the defendant.

[48] The defendants relied on paragraphs 35 to 37 of the particulars of Claim in respect of this exception indicating that the plaintiffs however failed to identify and allege what damages were caused to the plaintiffs. The plaintiffs failed to plead what damages were allegedly caused to the first defendant as well, but also failed to plead how such damages allegedly incurred by the first defendant, were calculated or quantified. In their heads of argument, the defendants expanded the complaint by alleging that the plaintiffs failed to plead:

[48.1] What income was received from Bidvest;

[48.2] What expenses were incurred;

[48.3] How the R250,000.00 became repayable;

[48.4] What amount was actually due after debatement;

[48.5] Any factual basis upon which a surplus could be calculated.

All this information was at the disposal of the plaintiffs based on the allegations as contained in the particulars of Claim concerning the details of how this arrangement worked prior to the death of the deceased and as such were relevant to establish the Claim sought against the defendants.

[49] The defendants relied on the argument that the plaintiff's Claim 1 against the first defendant and/or the second defendant was as contained in paragraphs 9 to 27 of the plaintiffs' particulars of Claim and in the prayers inserted under heading Claim 1 and was for specific performance of an oral agreement pleaded namely payment of retention amount of R250,000.00, and not for damages. The defendants contended that the pleaded facts relied upon damage-causing conduct whereas the actual relief sought was contractual enforcement. This required from the plaintiffs specificity concerning the averments and the relief sought which was as a result vague and difficult to plead to. When considering this issue raised by the defendants it was apparent that the manner

in which the framing of the pleadings could create that impression and therefore was excipitable and with merit.

[50] The defendants argued that the plaintiffs Claim 2 against the first defendant and/or second defendant was relied on by the plaintiffs in paragraphs 9 to 24 and 28 to 30 of the plaintiffs' particulars of Claim and in the prayers inserted under heading Claim 2, was for specific performance of an oral agreement pleaded namely debate of accounts and payment of surplus, if any, and not for damages. The defendants argued that the pleaded cause of action did not support the relief Claimed and lacked sufficient factual averments. When considering this issue raised by the defendants it was apparent that the manner in which the framing of the pleadings could create that impression and therefore was excipitable and with merit.

[51] In respect of grounds 6 and 7, the exception was based on the plaintiffs' Claim 3 pleaded in paragraphs 31 to 37 of the plaintiffs' particulars of Claim and in the prayers inserted under heading Claim 3, against the third defendant, which was for "damages and not for debt." The defendants relied on this distinction to argue that personal liability under section 424 of the Companies Act had not been properly invoked nor was it properly pleaded and as such required the plaintiffs to revisit the framing of the various pleadings. The provisions of section 424 of the Companies Act of 1973 were not available to the alleged damages Claim, but only to non-payment of debt where a company was under winding-up (or judicial management) which the first defendant was not and the plaintiffs had not alleged the first defendant was unable to pay its debts. The defendants argued that the plaintiffs failed to allege facts supporting reckless trading, fraudulent business conduct, or other jurisdictional facts necessary for relief under section 424. Moreover, there were no averments of conduct that caused detriment to the first defendant averred, therefore it was on this basis that the plaintiff was obliged to amend the pleadings so as to set forth allegations that were capable of a response by the defendants. These exceptions have merit and are upheld.

[52] Having had regard to the particulars of Claim and the exceptions raised, this Court was satisfied that there would be need for amendments to be made to the particulars of Claim to concisely and clearly identify the facts relied upon by the plaintiffs to succeed in respect of the Claims against the defendants, be it in respect of the main and or alternative Claims.

COSTS:

[53] Both parties sought costs in respect of these proceedings. It is an accepted principle that costs are at the discretion of the Court, I believe that at this stage it is prudent that costs in respect of the exceptions be reserved to be ventilated during the trial proceedings.

ORDER:

[54] In the result the following Order is made;

[54.1] The exception is upheld

[54.2] The Plaintiff is given leave to amend the particulars of Claim within 20 days from the date of this order.

[54.3] Costs in respect of the exception are reserved to be ventilated during the trial proceedings.

K.L. PILLAY J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE EXCIPIENT
INSTRUCTED BY

Adv. Davis
de Bruin Oberholzer Attorneys
Limpopo Polokwane

FOR THE RESPONDENT
INSTRUCTED BY

Adv. JL Verwey
Johan Steyn Attorneys
c/o van der Walt Attorneys L
impopo Polokwane