



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

Appeal No: A169/2022

In the appeal between:

CHRISTO STRYDOM NUTRITION

Appellant

and

UNIVERSITY OF THE FREE STATE

Respondent

CORAM: VAN ZYL, J *et* NAIDOO, J *et* CHESIWE, J

JUDGMENT BY: VAN ZYL, J

HEARD ON: 12 JUNE 2023

DELIVERED ON: 12 DECEMBER 2023

- [1] In this matter an exception served before the court *a quo* (a single judge of this Division).
- [2] The respondent (the plaintiff in the court *a quo*) issued summons against the appellant (the defendant in the court *a quo*) based on the appellant's alleged breach of contract by his failure to pay monthly royalties/levies to the respondent. The appellant duly filed a plea in response to the respondent's declaration. The respondent subsequently filed a Notice of Exception against the appellant's plea, which exception was upheld by the court *a quo*, with costs.
- [3] This is an appeal directed at the upholding of the exception by the court *a quo*. Leave to appeal was granted by the court *a quo*. Adv SJ Reinders appeared for the appellant and Adv C Snyman for the respondent.
- [4] For the sake of clarity I will henceforth refer to the parties as in the court *a quo*, save where quotations from the record or from the written agreement read differently.

The pleadings and the exception:

- [5] For ease of reference, I deem it apposite to quote extensive parts of the pleadings and the exception.
- [6] The applicable allegations in the declaration read as follows:

“On the 17th day of September 2015, the plaintiff and the defendant entered into a written agreement in respect of quality standards with the plaintiff represented by Mr Gerhardus Verhoef and the defendant represented by Mr Christo Strydom. A copy of the agreement is attached hereto marked Annexure ‘A’.

5.

The material terms of the agreement were *inter alia* as follows:

- 5.1 The defendant, who is a supplier of nutrition supplements was desirers (*sic*) to make use of the Plaintiff's seals (hereinafter referred [to] as seals).
- 5.2 The agreement commenced on the date of signature being September 2015, where after it could be terminated by either party giving 3 calendar months written notice of termination.
- 5.3 The Plaintiff (*sic*) had the right to make use of the seals as contemplated in the provisions of the agreement, subject to periodic evaluations and inspections to be performed by the Plaintiff for (*sic*) its nominees, to enable the plaintiff to determine the quality of the products provided and/or distributed by the Defendant, to enable it to ascertain whether the products distributed or supplied by the Defendant complies by (*sic*) the standards supplied by the Plaintiff.
- 5.4 The Defendant was entitled to make use of and display the seals, following the obtainment of written approval by the Plaintiff to apply the seals to any specific batch of products, of which batches the samples were tested, contemplated in this agreement, and subject to the procedure, having been followed and subject to the Defendant:
 - 5.4.1 Making payment to (royalties) the Plaintiff of a levy of 3% (excluding VAT) on/or before the last day of each calendar month for the duration of this agreement, whether sold directly to the consumer or to wholesalers, retailers or any person;

- 5.4.2 Performing the administration to the satisfaction of the UFS;
- 5.4.3 Providing the Plaintiff with a detailed schedule, confirming all products sold, during a calendar month as contemplated in the provisions of the agreement to which the seals were affixed, on/or before the last day of such calendar month, in order to circulate (*Sic*) the total amount of the levy payable by the Defendant to the Plaintiff;
- 5.4.4 Providing the Plaintiff with samples from each production and/or distribution batch, prior to such production/the submission (*Sic*) batch leaving the premises of the Defendant, and prior to being sold or distributed, which sample must be provided and transported to the Plaintiff, immediately after arrival at the premises of the Defendant, at the cost of the Defendant, clearly marked with the batch number, the date and the products type, as well as such reasonable other information as the Plaintiff may describe (*Sic*);
- 5.4.5 The amounts referred to as payable of the levy shall escalate annually with the same average percentage increase as the sale prices of the relevant products;
- 5.4.6 The Defendant shall keep full, clear and accurate factual find (*Sic*) reports to be submitted to the Defendant's external auditors with respect of sale of products;
- 5.4.7 The Defendant shall report on a monthly basis to the Plaintiff of any amounts payable by the defendant to the Plaintiff in terms of the provisions of the agreement in respect of each calendar month.

The Plaintiff has duly abided by its obligations in terms of the agreement by allowing the Defendant to use the seals as contemplated in terms of the agreement.

7.

Breach:

7.1 The Defendant has failed and/or refused to abide by his obligations in terms of the agreement in that the Defendant has failed and/or refused to make payment to the Plaintiff of the agreed amount of 3% of the monthly levy (royalties), excluding VAT. ...

7.2 ...

7.3 ...

7.4 The amount of R768 330.25 is currently due, owing and payable by the Defendant to the Plaintiff in that the monthly levies (royalties) were not paid by the Defendant in accordance with the provisions of the agreement.

7.5 ...

WHEREFORE the Plaintiff prays for judgment against the Defendant for:

1. Payment in the amount of R768 330.25;
2. Plus, interest thereon at the rate of 10% *a temporae (sic) morae*;
3. Costs of the suit."

[7] In terms of the written agreement the parties thereto are described as the "*University of the Free State ('UFS')*" and "*Christo Strydom Nutrition ('CSN')*".

[8] The relevant averments pleaded in the defendant's plea to the declaration, are the following:

"2.

AD PARAGRAPH 4 THEREOF:

- 2.1 On the 17th September 2015 the Plaintiff then and there represented by G Verhoef, the Director of Contracts, and a company, Silkblaze 11 (Pty) Ltd with registration number 2007/001392/07 entered into a written Agreement. A copy of the Agreement is attached to the Declaration as Annexure 'A'.
- 2.2 Silkblaze was represented by the Defendant.
- 2.3 Annexure 'A' does not reflect the common intention of the parties correctly in that it reflects defendant as the contracting party instead of Silkblaze.
- 2.4 At the time when the Agreement was reduced to writing, the common intention was that the Plaintiff and Silkblaze would enter into the written agreement.
- 2.5 The Plaintiff drew up the Agreement and mistakenly prepared the said document reflecting Defendant as the contracting party. The mistake was a result of a *bona fide* mutual error, alternatively an intentional act of the Plaintiff.
- 2.6 Annexure 'A' should therefore be rectified to reflect the contracting parties wherever it may occur therein to refer to the contracting parties as the University of the Free State and Silkblaze 11 (Pty) Ltd (registration number: 2007/001392/07).
- 2.7 Save as aforesaid the remainder of the allegations are denied.

3.

Without derogating from what is pleaded above and in the event it being found that the Defendant entered into the agreement, Defendant avers:

AD PARAGRAPH 5 THEREOF:

- 3.1 At all relevant times before the parties entered into the contract it was to the knowledge of the Plaintiff that Silkblaze, alternatively Defendant is a supplier of nutrition supplements and, intends to

distribute the aforementioned nutrition to amongst others, wholesalers, retailers and third parties worldwide.

- 3.2 It was to the Plaintiff's knowledge that Silkblaze, alternatively Defendant as such, was desirous that the Plaintiff, being a University would test the aforementioned products to confirm that same is of the highest quality standards as prescribed by the applicable standards as well as applicable law to enable Defendant to distribute and/or sell the nutrition supplements as aforesaid.
- 3.3 As such, it was in the contemplation of the parties, that the Plaintiff, being a University be properly accredited to do the aforementioned tests and as such be recognised not only in South Africa but worldwide. Wherefore it was a tacit term of the agreement that Plaintiff's laboratory be duly accredited and registered to do the tests it undertook to do.
- 3.4 On the aforementioned basis and understanding, the parties concluded the aforementioned agreement. More in particular Defendant avers:

AD PARAGRAPHS 5.1 – 5.4.7 THEREOF:

- 3.5 This is admitted in as far as it corresponds with the contents of annexure 'A'.
- 3.6 Defendant avers that the aforementioned agreement was a reciprocal agreement with reciprocity of obligations.

4.

AD PARAGRAPH 6 THEREOF:

- 4.1 The Plaintiff has not complied with its obligations. More in particular, the Plaintiff was not accredited nationally (and/or internationally) to do the periodic evaluations and inspections and/or to determine the quality of the products provided and/or distributed and/or the periodic testing of samples or evaluations thereof as agreed upon.

- 4.2 The Plaintiff in any event failed to continuously monitor the products, the testing of samples and/or determine the quality of the products provided.
- 4.3 As a direct consequence of the Plaintiff's breach of the agreement, Defendant's international contracts were cancelled and defendant had to appoint an international accredited entity to do the aforementioned tests, evaluations, inspections, monitoring and testing.
- 4.4 Save as aforesaid the remainder of the allegations are denied.

5.

AD PARAGRAPH 7 (7.1 – 7.5) THEREOF:

- 5.1 It is admitted that Defendant has failed to make the payments as aforesaid.
- 5.2 Defendant avers that the Plaintiff has breached the agreement, alternatively did not comply or could not comply with the agreement reached between the parties and that tests performed by Plaintiff were worthless as Plaintiff's Laboratory was not accredited.
- 5.3 Save as aforesaid the remainder of the allegations are denied.

WHEREFORE Defendant prays that the Plaintiff's claim as rectified be dismissed with costs, alternatively that Plaintiff's claim be dismissed with costs."

- [9] The plaintiff subsequently filed a notice in terms of Rule 23(1) in terms whereof it indicated that it intends to note an exception to the defendant's plea on the basis that it is vague and embarrassing and/or lacks averments which are necessary to sustain a defence. In terms of the notice the defendant was afforded the opportunity to remove the cause of the aforesaid

complaints within 15 days from date of receipt of the said notice, failing which the plaintiff will note an exception as stated.

[10] The defendant did not respond to the aforesaid notice of exception, whereupon the plaintiff filed the following exception to the defendant`s plea:

“1.

AD PARAGRAPH 2.3 AND 4 THEREOF:

1.1 The Plaintiff's cause of action which the Defendant attempts to answer and/or respond in these paragraphs, is premised on a written agreement concluded on the 17th of September 2015, a copy of which is appended as annexure 'A' to the Plaintiff's declaration (hereinafter 'the written agreement').

1.2 The written agreement stipulates and/or provides in:

1.2.1 clause 4, 5 and 6 thereof, *inter alia*, that the Plaintiff undertakes to perform continuous monitoring, which includes, periodic testing and evaluation of the Defendant's/CSN's samples and/or products in order to solely ascertain and/or determine the quality of the products provided and/or distributed by Defendant/CSN, to enable the Plaintiff to ascertain whether the products distributed or supplied by the Defendant/CSN complies with the standards prescribed by the Plaintiff as contemplated in the written agreement, and to establish whether and to what extent Defendant/CSN complies with the objectives of the Plaintiff and the Defendant/CSN be allowed and/or authorised to use and display the seals of the Plaintiff on its products; [Original emphasis reflected in pleading as filed.]

- 1.2.2 clause 7 thereof, *inter alia*, that the Defendant agrees and undertakes that for the duration of the written agreement (*which Defendant does not aver, has been cancelled or terminated to date*), will allow any of its products to be analysed and/or tested by any third party; [This is incorrectly recorded, since the clause in the contract reads “will **not** allow” - my remark and my emphasis.]
- 1.2.3 clause 11 thereof, *inter alia*, provides that the written agreement contains all the terms and conditions of the agreement between the parties concerning the subject matter hereof and no terms, conditions, warranties or representations whatever apart from those contained in this agreement had been made or agreed to by the parties, while
- 1.2.4 clause 12 thereof, *inter alia*, states that no variation or consensual termination of this agreement of any part thereof shall be of any force or effect unless in writing and signed by or on behalf of the parties.
- 1.3 Apart from the Defendant seeking an order for rectification of the written agreement in respect of one of the contract entities (*other than the Defendant in person as cited in the Plaintiff's declaration*), the Defendant admits that the written agreement was concluded with the Plaintiff (*except as already stated, with Silkblaze 11 (Pty) Ltd as supposed to the Defendant as cited as contracting party with the Plaintiff*).
- 1.4 Notwithstanding the above, the Defendant then further, *inter alia*, avers that to the Plaintiff's knowledge, without such terms being stated and/or contained in the written agreement, that '*...Silkblaze, alternatively, Defendant as such, was desirous that Plaintiff, being a University would test the aforementioned products to confirm that same is of the highest quality standards as prescribed by the*

applicable standards as well as applicable law to enable Defendant to distribute and/or sell the nutrition supplements aforesaid. ...’ and ‘...[a]s such, it was in the contemplation of the parties, that the Plaintiff, being a University be properly accredited to do the aforementioned test and as such be recognise not only in South Africa but worldwide. Wherefore it was a tacit term of the agreement that Plaintiff’s laboratory be duly accredited and registered to do the tests it undertook to do...”

- 1.5 The tacit term averred by the Defendant *supra*, is in more than one way not only inconsistent with the written agreement or instrument and the express terms of the written agreement, but is furthermore specifically excluded from any operation or legal consequence between the parties by clauses 11 and/or 12 of the written agreement.
- 1.6 The Defendant thereafter further relies on such alleged tacit term, to aver that the Plaintiff breached the agreement and then in particular, the alleged tacit term thereof, alternatively, did not comply or could not comply with the agreement reached between the parties and then specifically, the purported tacit term, and is Defendant seemingly excused from any obligation or performance under the agreement (*reciprocity of obligations*) as a result of which, the Defendant seeks the dismissal of the Plaintiff’s claim with costs.
- 1.7 In the premises, the Plaintiff contends that the Defendant’s plea is vague and/or embarrassing and/or lacks averments which are necessary to sustain a defence.

WHEREFORE the Defendant (*sic*) prays for an order that:

- (a) The Exception is upheld with costs;
- (b) The Defendant’s plea be struck out; and

- (c) Alternatively to prayer (b) that the Defendant be granted an opportunity to remove the cause of complaint within fifteen days (15) from the date of the granting of the Order to amend its Plea, with the Defendant ordered to pay the costs of the Exception.”

[11] The crux of the exception therefore lies in the objections that the pleaded tacit term that “***it was a tacit term of the agreement that plaintiff`s laboratory be duly accredited and registered to do the tests it undertook to do...***” is “***in more than one way not only inconsistent with the written agreement or instrument and the express terms of the written agreement, but is furthermore specifically excluded from any operation or legal consequence between the parties by clauses 11 and/or 12 of the written agreement***”. The plaintiff subsequently contends that the defendant`s plea is “***vague and/or embarrassing and/or lacks averments which are necessary to sustain a defence***”. (My emphasis)

The judgment of the court a quo

[12] In its judgment the court a quo stated that “*two defences were pleaded by CSN*”, the first defence being “*erroneous citing of parties to the written agreement/contract*” and the second defence being “*tacit term of the written agreement/contract not complied with*”.

[13] With regard to what the court a quo called “*the first defence*”, it found that the citing of the parties in the written agreement was clear and unambiguous and that the acronym “CSN” was used

about 67 times in the written agreement. It was consequently found at paragraph [17] of the court *a quo*'s judgment that:

"... The claim by CSN that the contracting parties are the University and Silkblaze 11 (Pty) Ltd is unbelievable on the face of the written agreement."

[14] I will later herein deal with the findings of the court *a quo* in respect of what the court *a quo* termed "*the second defence*".

[15] The court *a quo* delivered its judgment on 18 July 2022 and made the following order:

- "1. The exception is upheld with costs on both defences.
2. The respondent/defendant is granted leave to amend the pleadings to remove the cause of the complaints(s)/exception(s) within fifteen (15) days of the granting of this order, failing which, leave is granted to the excipient/plaintiff, after proper notice to the respondent/defendant, to apply for judgment on the claim in the main action."

Notice of appeal:

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[16] The defendant's grounds of appeal are set out as follows in the Notice of Appeal:

- "1. The Trial Court misunderstood (with respect) what it had to adjudicate. The first defence pleaded by the Appellant was a Plea and defence of rectification. This defence did not form part of the exception lodged by the Respondent in its Notice of Exception dated the **19th January 2022**, nor did it form part of the Heads of Argument before Court, nor was the Court addressed on this defence. The Respondent did not seek an order that the aforementioned Plea of Rectification (the first defence)

must be struck or to be found legally untenable or that same was excipiable. On the contrary, the Exception was directed at the second defence only.

2. The Court, therefore (with respect) never had jurisdiction or legal basis upon which it could struck (*Sic*) the first defence, nor was the Appellant requested to address the Court on the possibility that the first defence could be struck by the Court *mero motu*. The defence in any event is good in law for purposes of plea.
3. In coming to the aforementioned finding (in respect of the first Plea) the Court was wrong to find the plea to be '*unbelievable*'. The Court at Exception stage, had to accept the aforementioned allegations to be the truth.
4. Wrong findings that the Appellant's plea was '*unbelievable*', that the appellant had to refer the matter to arbitration conflated the Judgment and the tenure of the Court's view of the Appellant, which resulted therein that the Court did not apply its mind to the question at hand namely whether the tacit term averred by the Appellant (Defendant) was inconsistent with the written agreement or the instrument as a whole, and the express terms of the written agreement in particular whether clauses 11 and 12 of the written agreement had the legal consequence that the tacit term was to be excluded from any operation or legal consequences. In this respect the Court should have found that the tacit term pleaded at this stage was clear and unambiguous, did not prejudice the Respondent and was not in conflict with the agreement read as a whole bearing in mind that the Respondent is a registered University and avers that it has a laboratory to do the tests it undertook. Therefore, with respect, the Trial Court should have found that in so far as the second plea is concerned, the silent term pleaded by the Appellant was not in conflict with the terms of the written contract and in fact, should the innocent bystander have been asked whether the silent

term should be read into the contract, such response would have been 'of course'.

5. The Court erred in not dismissing the exception with costs."

THE MERITS OF THE APPEAL AGAINST THE COURT A QUO'S FINDINGS IN RESPECT OF THE PLEA OF RECTIFICATION AS THE SO-CALLED "FIRST DEFENCE":

[17] An excipient is confined to his complaint as stated in the grounds of his exception. In **Feldman N.O. v EMI Music SA (Pty) Ltd; Feldman N.O. v EMI Music Publishing SA (Pty) Ltd** 2010 (1) SA 1 (SCA) at para [7] this principle was stated as follows:

"The debate about the first exception in the court below appears to have focused on a contention that the infringement claims were excipiable because the appellant had not joined the joint authors in the action. Jajbhay J referred to various authorities to the effect that a joint owner should join his co-owner(s) in litigation concerning the joint property. As authority for the proposition that non-joinder may be raised as a matter for exception, the learned judge referred to *Collin v Toffie* 1944 AD 456 and *Smith v Conelect* 1987 (3) SA 689 (W). 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." (My emphasis)

- [18] The defence and plea of rectification raised by the defendant in its plea which the court *a quo* called “*the first defence*”, was not raised in the plaintiff’s exception and did not form part of the grounds of the exception.
- [19] It is, therefore, evident that the court *a quo* erred in even addressing the plea of rectification and moreover so erred in upholding the “exception” against the said plea, since the plaintiff did not except to it.
- [20] Mr Snyman correctly conceded same during the hearing of the appeal.
- [21] The appeal should therefore succeed in respect of the upholding of the exception against the plea of rectification as the so-called “first defence”.

THE MERITS OF THE APPEAL AGAINST THE COURT A QUO’S UPHOLDING OF THE EXCEPTION AGAINST “THE SECOND DEFENCE” IN RESPECT OF THE TACIT TERM PLEADED BY THE DEFENDANT:

The nature of a tacit term:

- [22] A tacit term, or term inferred from the facts, was described in **McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration** 1974 (3) SA 506 (A) at 531 – 532 to be the following:

“...an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. ...”

[23] A tacit term is one which the parties did not specifically agree upon, but which (without anything being said) both or all of them expected to form part of their (oral or written) agreement. It is a wordless understanding, an unarticulated term, having the same effect as an express term. See **Botha v Coopers & Lybrand** 2002 (5) SA 347 (SCA) at para [22].

[24] In **Wilkens v Voges** 1994 (3) SA 130 (A) at 136 I the following was said with regard to a tacit term:

“The paramount issue is the alleged tacit term. A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate a future one.”

[25] In **Christie`s The Law of Contract in South Africa**, GB Bradfield, Eighth Edition, at p. 217 – p. 218, the following relevant principles are also stated with reference to applicable case law:

“Since the court is concerned with the states of minds of the parties (subject to what have been said above about the objective nature of the officious bystander test) at the time they entered into their contract, the relevant facts to investigate are the express terms of the contract and the context in which the contract was concluded. ...All that needs to be added is that it can be accepted that the way in which the parties to a contract carried out their

agreement may be considered as part of the contextual setting to ascertain the meaning of a disputed term. ...

When the context is in issue it may be difficult to dispose by exception proceedings of a claim to import a tacit term..." (My emphasis)

- [26] A tacit term sought to be imported into a contract, must not conflict with the express terms of the agreement, since a tacit term only supplements the contract by providing a term which the parties failed to agree upon. A tacit term can also only be imported into a contract if it is necessary in a business sense to give efficacy to the contract. Much will depend on the express terms of the agreement and the surrounding circumstances at the time it was entered into. The tacit term must further be capable of clear and exact formulation. See The Law of Contract in South Africa, D. Hutchinson *et al*, at p. 245.

Applicable principles in considering an exception:

- [27] It is trite that in considering an exception the court must accept, as true, the allegations pleaded by the relevant party. It is also trite that when an exception is based on the ground that a pleading lacks averments necessary to sustain a cause of action or a defence, the excipient is required to show that upon every interpretation which the pleading in question can reasonably bear, no cause of action or defence is disclosed.

[28] The aforesaid principles were again confirmed in the judgment of **Trustees, Burmilla Trust v President of the Republic of South-Africa** 2022 (5) SA 78 (SCA) at para [16]:

“It is trite that in deciding an exception a court has to accept the facts alleged in the relevant pleading (save for those that are palpably untenable). It is for the excipient to satisfy the court that, upon every reasonable interpretation of those facts, the pleading is excipiable. An interpretation that disregards the context in which the factual allegations are made would generally not qualify as a reasonable one.” (My emphasis)

[29] In **Erasmus: Superior Court Practice**, DE van Loggerenberg, at RS 20, 2022, D1-29, the following two principles are also stated:

“10. An excipient must satisfy the court that it would be *seriously prejudiced* if the offending pleading were allowed to stand, and an excipient is required to make out a very clear, strong case before the exception can succeed.

11. Courts have been reluctant to decide exceptions in respect of fact bound issues.”

The judgment of the court a quo:

[30] When the judgment of the court *a quo* is considered; it is evident that it dealt at length and pedantically at paragraphs [10] – [15] with the importance of one of the basic principles of the law of contract in South-Africa, namely *pacta sunt servanda* “*which decrees agreements, freely and voluntarily concluded, must be honoured*”, with reference to applicable case law in support of “*the paramount importance of upholding the sanctity of contracts...*” as stated in one of the cases quoted at paragraph

[15] of the judgment. The court *a quo* did, however, in conjunction therewith, correctly and duly also deal with the principle and case law pertaining to the “... *impact of the Constitution on the enforcement of contractual terms through the determination of public policy...*” as stated in one of the other cases quoted at paragraph [15] of its judgment, namely **Beadica 231 CC and Others v Trustees, Oregon Trust and Others** 2020 (5) SA 247 (CC). The court *a quo* referred to the principle of “*ubuntu*” dealt with at paras [207] and [208] of the one dissenting judgment delivered in the said case, where it is stated that the said principle is to be applied in adjudicating contractual fairness “*especially where there is inequality in the bargaining power between the parties*” as a means of addressing, for example, “*the economic positions or bargaining powers of the contracting parties*”. The court *a quo* further referred to the principles enunciated at paras [87] and [88] of the majority judgment delivered in the aforesaid case by stating that the principles of “*pacta sunt servanda and perceptive restraint must be balanced on the facts of the case*”. In the said judgment at para [88] it is explained that the principle of “*perceptive restraint*” entails the following:

“[88] ... According to this principle a court must exercise 'perceptive restraint' when approaching the task of invalidating, or refusing to enforce, contractual terms. It is encapsulated in the phrase that a 'court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases'.”

The court *a quo* then concluded [with emphasis] as follows at para [15] of its own judgment:

“The onus is on the party that claims a court must deviate from the pacta sunt servanda to proof (sic) that the facts of the case justify this grave divergence.”

[31] As previously stated, the subsequent paragraphs [16] and [17] of the judgment of the court *a quo* dealt with the plea of rectification. Thereafter, at paragraphs [18] to [25] of its judgment the court *a quo* dealt with the exception in respect of the tacit term. I deem it necessary to quote the said paragraphs:

“[18] In clause 2; ‘Recordal’, it is stated that: ‘2.1 CSN is a supplier of nutrition supplements as listed in the schedules hereto and is desirous to make use of the UFS seals (‘Seals’).

[19] At clause 2.3 “Seals” is described to mean: “As tested by the UFS laboratories”, together with the UFS logo, as approved by the Department of Marketing”. There can be no ambiguity that the agreement *does not* include any specific national or international accreditation; it is as tested by the UFS laboratories and as approved by the Department of Marketing. Clause 4.2 refers to the “... standards prescribed by the UFS, ...” (Emphasis added by the court *a quo*)

[20] The written agreement consists of 17 clauses and the word “international” or implication of internationality do not feature anywhere. The alleged tacit term averred is specifically excluded from any operation or legal consequence between the parties in, for instance, clauses 2, 11 and 12.

- [21] Christo Strydom may have botched the negotiations and the agreement when he failed to demand the now commanded terms be in the written agreement. He will have to carry the responsibility and consequences of the reality that eventuated, not the University. He was on an equal footing with the University during the signing of the written agreement and is not a frail participant. As said; he seems to be an experienced, knowledgeable and international businessman. The written agreement could not be clearer.
- [22] It will be a travesty of justice to allow the matter to go to trial. The prejudice to the excipient is clear; it will be a waste of resources of which time and money count for the most. As pointed out; the law is that an exception is a valuable part of the system of procedure. Its principal use is to raise and obtain a speedy and economical decision on questions of law which are apparent on the face of the facts in the pleadings.
- [23] There is nothing more to do by the excipient than to produce the written agreement and it speaks for itself. It is valid and constitutionally enforceable as it is. The defences averred by CSN are bad in law in comparison.
- [24] Apart from the above, clause 10 decrees that should any dispute arise between the parties to this agreement with regard to the interpretation, implementation execution or termination of this agreement, such shall be submitted to arbitration. It seems as if this was not complied with by CSN in terms of the agreement. Litigation in the High Court on the defence itself of CSN may thus be premature and illegal in terms of the written agreement.

[25] The defendant`s plea is bad in law, without merit and not triable (*sic*) without severe prejudice to the excipient and the administration of justice.”

[32] In my view, although regard is to be had to the nature of and the principles applicable to tacit contractual terms for purposes of the adjudication of this exception, one has to be mindful of the very important fact that what served before the court *a quo* was an exception, hence, the court should decide whether the pleaded tacit term made the plea excipiable on the basis of the plea being vague and/or embarrassing and/or on the basis of it lacking averments which are necessary to sustain a defence. The determination thereof should therefore entail the question whether the plea pertaining to the alleged tacit term should be allowed to remain in the defendant`s plea, or not. It should not, at exception stage, entail a determination of whether the defendant proved the existence of the alleged tacit term and/or the merits of the defendant`s defence based on the alleged tacit term. That would be for the trial court to eventually decide after the hearing of evidence, which will include admissible evidence of surrounding circumstances, should the exception not be upheld. One has to differentiate between the pleading of a tacit term and the eventual proving thereof. The mere fact that a party be allowed to plead a tacit term, does not mean that the relevant party will necessarily be able to prove it during the eventual trial.

[33] Considering the relevant principles of the law of contract which the court *a quo* dealt with in its judgment as its point of departure, read in conjunction with the above quoted paragraphs of the

judgment, it unfortunately seems to me that the court *a quo* wrongly, although probably unintentionally so, approached and adjudicated the exception on the basis of the aforesaid contractual principles and adjudicated the merits of the plea based on those principles, instead of having adjudicated the merits of the exception. From all of the aforesaid and the conclusions at paragraphs [23] and [25] of the judgment, it is in my view evident that what the court *a quo* in actual fact concluded was that the defendant should be held to the terms of the written agreement on the basis of *pacta sunt servanda*. The effect of the said conclusion is that the court *a quo* actually found that the defendant failed to prove the existence of the pleaded tacit term and that the merits of the defendant's defence based on the pleaded tacit term is bad in law, which findings were not only made without having applied the principles applicable to tacit terms, but the court *a quo* was also not called upon to have adjudicated same at this stage. The court *a quo* misdirected itself by not having applied the principles applicable to exceptions and by having failed to determine the merits of the exception as such, as it was called upon to do.

[34] It is, however, also trite that an appeal lies against an order and not the reasons for the order. As a court of appeal we are consequently still called upon to determine the correctness of the order of the court *a quo* upholding the exception.

The merits of the exception:

[35] I have indicated above that the one ground of the exception is that the pleaded tacit term is “*specifically excluded from any operation or legal consequence between the parties by clauses 11 and/or 12 of the written agreement*”. This was also the main submission in support of the exception made by Mr Snyman, who appeared on behalf of the plaintiff.

[36] The court *a quo* found accordingly at paragraph [20] of the judgment that “*the alleged tacit term averred is specifically excluded from any operation or legal consequence between the parties in, for instance, clauses 2, 11 and 12*”.

[37] I will deal first with this finding in respect of the said clauses 11 and 12 of the written agreement.

[38] These clauses are very common and are included in most written agreements, often referred to as “entire agreement clauses” and “non-variation/Shifren clauses”. In the present instance they read as follows:

“11. ENTIRE AGREEMENT

This agreement contains all the terms and conditions of the agreement between the parties concerning the subject matter hereof and no terms, conditions, warranties or representations whatever apart from those contained in this agreement have been made or agreed to by the parties.

12. NON-VARIATION

No variation or consensual termination of this agreement or any part thereof shall be of any force or effect unless in writing and signed by or on behalf of the parties.”

[39] In the judgment of **Adhu Investments CC v Padayachee** [2019] JOL 42043 (SCA) the Supreme Court of Appeal re-confirmed the following principle at para [17] of the judgment:

“[17] A sole testimonial clause or non-variation clause does not necessarily, of itself, exclude the existence of a tacit term.”

[40] In **Caney’s: The Law of Suretyship in South Africa**, 6th Edition, CF Forsyth *et* JT Pretorius at ch6-p92 the said principle was stated as follows:

“It is important to note that while a tacit term can obviously not contradict an express term, clauses which provide that the written document contains the ‘entire agreement between the parties’ and that no variation or modification of the contract shall be possible unless ‘reduced to writing and signed by the parties’ do not prevent the court from inferring a tacit term. As Nienaber JA said in *Wilkins NO v Voges*:

‘A tacit term in a written contract, be it actual or imputed, can be the corollary of the express terms - reading, as it were, between the lines- or it can be the product of the express terms read in conjunction with evidence of admissible surrounding circumstances. Either way, a tacit term, once found to exist, is simply read or blended into the contract: as such it is ‘contained’ in the written deed. Not being an adjunct to but an integrated part of the contract, a tacit term does not fall foul of terms [such as those mentioned]”.

[41] The finding of the court *a quo* in paragraph [20] of its judgment, that the alleged tacit term is specifically excluded from any

operation or legal consequence between the parties because of the “entire agreement” and “non-variation” clauses, is consequently clearly wrong.

[42] As also indicated earlier, the other ground of the exception is that it is “*inconsistent with the written agreement or instrument and the express terms of the written agreement*”.

[43] Although based on different principles to those applicable to tacit terms and the adjudication of an exception, the court *a quo*, as referred to earlier, found that the agreement did not include any reference to national or international accreditation, and concluded that the entire agreement made no reference to “international or implication of internationality”.

[44] Upon consideration of Mr Snyman’s arguments on this second basis of the exception, as set out in his Heads of Argument and presented during the hearing of the appeal, it is in my view evident that in essence his arguments were actually again only based on clauses 11 and 12 of the written agreement. His argument is, with reference to the parol evidence, that considering that the pleaded tacit term is not expressed and contained in the written agreement, it will be inconsistent with the written agreement and its specific terms should it be included in the agreement, which is prohibited by clauses 11 and 12.

[45] In my view the court *a quo* (and Mr Snyman) misunderstood and/or failed to consider the nature of a tacit term since it precisely entails a term which the parties agreed upon or which

they would have agreed upon, depending on the applicable circumstances, but which term was not expressed in the written agreement; hence, “an unexpressed provision” or “an unarticulated term” of an agreement. (See the case law already cited above.) If it had been contained in the written agreement, it would not have been a tacit term and the pleading of the existence of a tacit term would not have been necessary. Its absence from the written agreement necessitates it being categorized as a tacit term. Its absence from the written contract can therefore not serve as a bar to it being pleaded and relied upon as part of the terms of the written agreement. I have also already found that clauses 11 and 12 do also not serve as such a bar.

[46] From a reading of the totality of the written agreement, it is evident from the explicit terms that the written agreement was concluded between the parties in circumstances where the parties, at the time of the conclusion of the written agreement, agreed that:

1. CSN was a supplier of nutrition supplements, which it sold and distributed;
2. CSN sought to make use of and display the UFS seal in respect of the foresaid products, which right was granted to him, subject to certain conditions;
3. The UFS was to conduct periodic testing and evaluation of samples of the products;

4. CSN was to ensure that all products were *“of the highest quality standards as prescribed by the applicable standards as well as applicable law”* (clause 6.1.1), whilst the aforesaid testing and evaluation were to be done to enable the UFS to ascertain whether the products *“comply with the standards prescribed by the UFS”* (clause 4.2), *“comply with the objectives of the UFS”* (clause 5.1.1.2) and *“comply with the requirements”* (clause 8).
5. CSN was to pay the UFS the percentage levy per month calculated as agreed upon in the written agreement;
6. CSN was not to allow any of its products to be analysed and/or tested by any third party.

[47] When the contents of the defendant`s plea in respect of the tacit term are considered, it is very important to apply the trite principle that the alleged facts are to be accepted for purposes of the adjudication of the exception.

[48] Mr Reinders submitted that upon a proper reading and interpretation of the written agreement as a whole it is evident that the spirit and purpose of the agreement were that the defendant wanted to sell and distribute the products and sought to use and display the UFS seal on the products as prove of and to confirm that the products are of the highest quality standards as prescribed by the applicable standards as well as applicable law, the plaintiff, a university, were to perform testing and evaluation of

the products and if satisfied with the standard of a specific batch of products, the plaintiff was to approve the use of the UFS seal on those products, in return for which the defendant was to pay the agreed levy. I agree with his submission. Therefore, in my view, based on the acceptance of the pleaded facts, in order not to undermine the purpose of the written agreement and for it to be a sensible agreement with business efficacy, the pleaded tacit term "*that the plaintiff's laboratory be duly accredited and registered to do the tests it undertook to do*" goes without saying, otherwise the testing of the products and the displaying of the seal would have been meaningless and worthless.

[49] It was for the excipient to satisfy the court that, upon every reasonable interpretation of the aforesaid accepted facts, they contradict the explicit terms of the written agreement and cause an inconsistency in the plea. Like I have already found earlier in the judgment, other than for incorrectly relying upon clauses 11 and 12 of the written agreement, the excipient failed to do so. More importantly, the court *a quo* also failed to make any finding (based on the correct principles) in this regard.

[50] In my view the pleaded tacit term does not contradict the explicit terms of the written agreement and does not cause any inconsistency in the plea. The tacit term, as pleaded, is also clear and unambiguous and does not prejudice the plaintiff in any way. The defendant's plea as a whole, in its present form, is therefore not vague and embarrassing, nor does it lack averments which are necessary to sustain a defence.

[51] The court *a quo* should consequently have dismissed the exception, with costs. The appeal should therefore be upheld.

Costs:

[52] There is no reason why the usual order that the costs follow the outcome, should not be made.

Order:

[53] The following order is made:

1. The appeal is upheld, with costs.
2. The order of the court *a quo* is set aside and substituted with the following order:
“The exception is dismissed, with costs.”

I concur:

C. VAN ZYL, J

I concur:

S. NAIDOO, J

S. CHESIWE, J

On behalf of the appellant: Adv. S. J. Reinders
Instructed by:
Hendré Conradie Inc
BLOEMFONTEIN
(e-service@rossouws.com)

On behalf of the respondent: Adv. C. Snyman
Instructed by:
Phatshoane Henney Inc
BLOEMFONTEIN