



**Summary:** *Application for exception—is it permissible for a Third Party to except to a plaintiff's Particulars of Claim? –Rule 13(1) of the Uniform Rules of Court—Third party cannot directly except to a Plaintiff's Particulars of Claim—there being no lis between them—Any plea, Special plea, Exceptions or other pleading raised by the Third Party is confined to the Third Party Notice.*

**CORAM: NOWITZ AJ**

## **INTRODUCTION**

- 1 This is an Exception, which arises from an action instituted by the present Respondent ('Standard Bank') against Sizwe Asset Finance (Pty) Ltd ('Sizwe Asset Finance'). The Excipient ('Sizwe Africa') has been joined to the action as a third party.
- 2 The third party, now seeks to except to the Plaintiff's claim. On the Plaintiff's pleadings, which must be accepted as correct for purposes of this Exception, the matter arises as follows:
  - 2.1 the Third Party was awarded a contract by the Eastern Cape Department of Education ('ECDoE') for the supply of certain information and communication technology goods and services (the 'ECDoE Contract'). The ECDoE Contract was subject to public procurement prescripts, rooted in section 217 of the Constitution of the Republic of South Africa ('Constitution');
  - 2.2 the Third Party sold and ceded the ECDoE Contract to the Defendant but retained the obligation to execute same;

- 2.3 the Plaintiff and the Defendant concluded a contract in terms of which the Defendant ceded and sold to the Plaintiff the ECDDoE Contract as collateral for a loan to enable the Third Party to execute the ECDDoE Contract (the 'Agreement');
- 2.4 under the Agreement, the Plaintiff became the owner of all income collectible from the ECDDoE in terms of the ECDDoE Contract and the equipment leased out to the ECDDoE. It was a term of the Agreement that once the loan is repaid to the Plaintiff in full (per the relevant terms), and provided that the Defendant was not in breach of the Agreement, the Plaintiff will sell (cede) the equipment back to the Defendant at an agreed fee (called "Residual Value" in the Agreement);
- 2.5 in the Agreement, the Defendant warranted, represented, and undertook to the Plaintiff as follows, amongst others (in summary):
- 2.5.1. the ECDDoE Contract is valid, binding, and enforceable in accordance with its terms and will fully comply with all relevant laws. This is referred to as the "*general legal compliance warranty*" in the Plaintiff's Particulars of Claim;
- 2.5.2. the ECDDoE Contract is factually correct in every material respect. This is referred to as the factual correctness warranty in the Particulars of Claim;
- 2.6. the State Information Technology Agency has instituted judicial review proceedings to have the ECDDoE Contract set aside for contravention of public procurement prescripts. The Application was brought in two parts – Part A (interim interdict) and Part B (final order). An interim interdict was granted – and the ECDDoE Contract can no longer be implemented and/or further executed. Part B is pending. The ECDDoE has already conceded to irregularities relating to the ECDDoE Contract and has decided not to oppose the declaration of unlawfulness and invalidity of the ECDDoE Contract;

- 2.7. the Defendant has allegedly breached the warranties in that the ECDoE Contract flouted procurement prescripts, including section 217 of the Constitution;
  - 2.8. consequently, the Plaintiff has cancelled the Agreement and issued summons against the Defendant for breach of the warranties;
  - 2.9. the Defendant has joined the Third Party in the action – on the basis that the Third Party breached its agreement with the Defendant in terms of which it ceded the ECDoE Contract to the Defendant. The Third Party had also warranted to the Defendant that the ECDoE Contract complied with public procurement prescripts, amongst other things.
3. The Defendant has not excepted to the Plaintiff's Particulars of Claim. It is rather the Third Party that has excepted on the basis that the Particulars of Claim allegedly lacks averments necessary to sustain the claim for three reasons.

**IS IT PERMISSIBLE FOR A THIRD PARTY TO EXCEPT TO A PLAINTIFF'S PARTICULARS OF CLAIM**

4. A novel issue arose in these proceedings, ie whether it is permissible for a Third Party to except to a Plaintiff's Particulars of Claim.
5. It has been recognised that after service upon him of the Third Party Notice, the Third Party becomes a party to the action. Nonetheless,

“The third party, however, does not become a defendant *vis-à-vis* the plaintiff since there is no *lis* between plaintiff and the third party<sup>1</sup> and the court cannot therefore give judgment against him in favour of the plaintiff; the court's judgment is more in the nature of a declaratory order and the result is therefore different

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<sup>1</sup> *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E); *Geduld Lands Ltd v Uys* 1980 (3) SA 335 (T).

from a claim under section 2(2) of the Apportionment of Damages Act 34 of 1956. The rule is silent regarding the power to make an award of costs, but it has been held that a court has jurisdiction to order a plaintiff to pay the third party's costs and that an order of costs may be made in favour of the plaintiff against the third party joined by a defendant. It follows from this that a third party notice is a pleading, which is independent of the main claim and of any response thereto"<sup>2</sup>

6. In ***Participation Bond Nominees (Pty) Ltd v Mouton (1)***,<sup>3</sup> Coetzee J, as he then was (in the context of provisional sentence proceedings in which a third party was joined by the defendant) said:<sup>4</sup>

“Once the position is seen in this light all objections to the issue of a third party notice at this stage disappear as they are based on the invalid assumption that every party to an action must or is always entitled to take part in *all* interlocutory proceedings. Clearly in every case of multiple plaintiffs or defendants there may be numerous instances of interlocutory proceedings which are contested but which concern only some of them to the exclusion of the others, although the latter must be served with all such documents and notices. A few random examples are exemptions by a plaintiff to one of the defendants' pleas, an application by one of the defendants for further particulars, better discovery or particulars for trial and so forth. Similarly, in the case of provisional sentence proceedings proper, i.e. the filing of affidavits, the hearing and the provisional judgment itself, the only parties affected thereby and to take part therein are the plaintiff and specifically those parties against whom he seeks provisional sentence. The third party waits on the sidelines for the conclusion of this interlude in the same way as other parties may have to do when they in turn become involved in interlocutory proceedings later during the course of the action – but even more so in the case of provisional sentence because of the many technicalities surrounding this particular remedy. This means that there is no room for the filing of affidavits by the third party unless he does that in a supporting role at the instance of one of the parties actually involved therein. He only participates actively if and when the action proceedings after provisional sentence has been granted or refused. That he is called upon in the notice to plead within 14 days is irrelevant. There is nothing in the Rule itself which compels him to do so.”

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<sup>2</sup> Harms, *Civil Procedure in the Superior Courts, Absa Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa third party)* 1997 (2) SA 415 (W), 419l. cf *Africon Engineering International (Pty) Ltd v Taxing Master NO* 2005 (6) SA 397 (C).

<sup>3</sup> 1978 (4) SA 498 (W).

<sup>4</sup> At 502A/B.

7. In **Geduld Lands Ltd**<sup>5</sup> Myburgh J said in the context of a request for further particulars directed by a plaintiff to the third parties:

“He submitted [on behalf of the third parties] that plaintiff was in law not entitled to request further particulars from the third parties and further that on procedural principles it was not entitled to the particulars requested. The reason for the assertion that the plaintiff was not in law entitled to the further particulars is that there is no *lis* between the plaintiff and the third parties which requires neither definition or to be clarified and that a *fortiori* the plaintiff does not require, in terms of Rule 21(1),

*‘such further particulars as may be strictly necessary to enable him to plead thereto or to tender an amount in settlement’.*

It was further contended that, although in terms of Rule 13(5) the third party after service upon him of the third party notice becomes ‘a party to the action’, it cannot and does not create a *lis* between the plaintiff and the third party where Rule 13 is invoked by a defendant.

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The indemnity claimed by the defendant from the third parties does not create a *lis* between the plaintiff and the third parties. The plaintiff does not claim any relief from the third parties. See *Shield Insurance Co Ltd v Zervoudakis* ... from which I quote the relevant passage at 739A of the report of the judgment by Munnik J which reads as follows:

*‘The fallacy inherent in Mr Solomon’s argument is that it proceeds on the assumption that the respondent, by using the procedure of Rule 13, has made the joint wrongdoer a joint defendant with himself vis-à-vis the plaintiff, which in fact he is not. A study of the provisions of Rule 13 satisfies me that the trial Court could not, in the case like the present, give a judgment against the third party in favour of the plaintiff. Vis-à-vis each other they are not plaintiff and defendant. All the trial Court could do is to apportion the degree of fault between the defendant and the third party in the form of a declaratory order.*

*The view that the third party is not a defendant vis-à-vis the plaintiff is fortified by the fact that the third party is precluded by Rule 13(6) from claiming in reconvention against any person other than the party who issued the third party notice.’”*

8. On the basis of the foregoing, the Plaintiff (hereinafter referred to as “the Respondent”) submits that relying upon the general principle that there is no

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<sup>5</sup> *Supra* at 340-341.

*lis* as between a Plaintiff and a Third Party. A Third Party may not seek a dismissal of the Plaintiff's claim against the Defendant where the Defendant itself does not seek this remedy. The consequence of upholding an Exception at the instance of the Third Party would be to interfere with the process as between the Plaintiff and the Defendant where the Defendant has not raised an objection to the Particulars of Claim. *In casu* the Defendant has in fact delivered a Plea and a Conditional Counterclaim to which the Plaintiff has pleaded.

9. Both the Respondent and the Third Party (hereinafter referred to as "the Excipient") referred to the unreported decision in ***Khan NO v Maxprop Holdings (Pty) Ltd (Garlicke & Bousfield Incorporated Third Party)***<sup>6</sup> where the Court *a quo* upheld an Exception at the instance of a Third Party to the Plaintiff's Particulars of Claim. However, no express attention was given to whether this is a permissible procedure and the Court was concerned primarily with the Plaintiff's Application for leave to amend in terms of Rule 28(4), albeit that this was consequent upon a Notice of Exception delivered by the Third Party.
10. This decision of the Court *a quo* proceeded to the Supreme Court of Appeal, ***Khan NO v Maxprop Holdings***<sup>7</sup> where the Court was concerned with whether the Court *a quo* was correct in finding that the amendment should be disallowed on the grounds that it would not cure excipiability and secondly, with whether the Court *a quo* had been incorrect in dismissing the Plaintiff's Claim rather than in affording the Plaintiff an opportunity to amend its Particulars of Claim. It was on this latter issue that the appeal succeeded.
11. Since neither the Court *a quo* nor the Supreme Court of Appeal embarked upon a discussion of whether there is a *lis* between the Plaintiff and Third Party *entitling* the Third Party to except to the Particulars of Claim *vis-à-vis* the Plaintiff, the Respondent submits that these decisions are *obiter* and do not preclude this Court from considering that matter anew.
12. The Respondent further submits that Rule 13(6) makes express reference to "*plead or except to the third party notice*" as between the party issuing the Third Party Notice and the Third Party whereas as between the Plaintiff and

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<sup>6</sup> 2017 JDR 1525 (KZD).

<sup>7</sup> 2018 JDR 2114 (SCA).

the Third Party the Rule provides that the third party may “*contest the liability of the party issuing the notice on any ground notwithstanding that such ground has not been raised in the action by such latter party*” “... by filing a plea or other proper pleading ...”.

13. The Respondent accordingly submits that having regard to the fundamental principle that there is no *lis* as between the Plaintiff and the Third Party, the Third Party cannot deliver an Exception directly at the Particulars of Claim such that the Plaintiff is forced to react to that Exception *vis-à-vis* the Third Party. This, the Respondent submits, would otherwise result in an anomaly where the action continues as between the Plaintiff and its chosen Defendant whilst in parallel the Third Party seeks an Order upholding its Exception and in due course striking out or dismissing the Plaintiff's Claim.
14. In response, the Excipient submits that the Respondent should have raised its objection by way of an exception to the Third Party's Exception, and not informally coupled with Supplementary Heads of Argument. The Excipient accordingly urges that the Court should not entertain same.
15. I am of the view that the point, which is of importance, has not been raised frivolously and that there has been a change of Counsel *vis a vis* the Respondent, which has resulted in a different perspective. As such, I believe that it is necessary to address the point.
16. Rules 13(6) and (7) provide as follows:

**“13. Third party procedure.**

.....

*(6) The third party may plead or except to the third party notice as if he were a defendant to the action. He may also, **by filing a plea or other proper pleading, contest the liability of the party issuing the notice** on any ground notwithstanding that such ground has not been raised in the action by such latter party: Provided however that the third party shall not be entitled to claim in reconvention against any person other than the party issuing the notice save to the extent that he would be entitled to do so in terms of rule 24.*

***(7) The rules with regard to the filing of further pleadings shall apply to third parties as follows:***

*(a) In so far as the third party's plea relates to the claim of the party issuing the notice, the said party shall be regarded as the plaintiff and the third party as the defendant;*

***(b) In so far as the third party's plea relates to the plaintiff's claim the***



***third party shall be regarded as a defendant and the plaintiff shall file pleadings as provided by the said rules.*** [Emphases added]

17. The Excipient submits that in terms of Rule 13(6), a third party may raise any objection to contest the liability of the party issuing the Rule 13 notice (*in casu*, the Defendant) by way of a plea or “...*other proper pleading*”.  
By way of example, a plea of prescription by a Third Party to the Plaintiff’s claim would be competent under Rule 13(6).
18. The Excipient submits that the phrase “...*other proper pleading*” includes an exception by a Third Party to a Plaintiff’s claim. A contention to the contrary (i.e. that “...(another) *proper pleading*...” which would not include an Exception, would leave this phrase meaningless. The Excipient further submits that Rule 13(7)(b) makes it clear that the Third Party, vis-à-vis the Plaintiff, is deemed to be a Defendant.
19. Accordingly, it is submitted by the Excipient that Rule 13, as it applies between the Third Party and the Plaintiff, should be read in the broader context of the Uniform Rules, in particular the provisions of Rule 23 dealing with Exceptions, the purpose of which:

*“...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...”*<sup>8</sup>

and relies on ***JP Hendrick Pretorius v Transport Pension Fund and others***, where the Constitutional Court stated that:

*“...the object of an exception is to dispose of a case or a portion of it in an expeditious manner by weeding out cases without legal merit, regardless of the complexity of the legal question.”*<sup>9</sup>

20. The Excipient contends that because the SCA (and the court *a quo*) dealt with an Exception by a third party to a plaintiff’s particulars of claim without

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<sup>8</sup> Pretorius and Another v Transport Pension Fund 2019 (2) SA 37 (CC) at [15]. See also: Telematrix (Pty) Ltd v Advertising Standards Authority SA (459/2004) [2005] ZASCA 73 at [3].

<sup>9</sup> JP Hendrick Pretorius v Transport Pension Fund and others, case no CCT 95/17 CC at paragraph 44.3.

questioning the third party's right to have excepted, this is indicative of the fact that a Third Party can in fact except to a Plaintiff's Particulars of Claim.<sup>10</sup> The Excipient further relies on the commentary in Herbstein and Van Winsen, in support hereof.

21. I am of the view that the Respondent's argument has merit, for the reasons advanced by the Respondent, as also for the following reasons:

25.1. Rule 13(1) identifies the narrow parameters in terms of which the Third Party is joined, ie

***(1) Where a party in any action claims:***

***(a) as against any other person not a party to the action (in this rule called a "third party") that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or***

***(b) any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party, and should properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them,***

***such party may issue a notice, hereinafter referred to as a third party notice, as near as may be in accordance with Form 7 of the First Schedule hereto, which notice shall be served by the sheriff.***

25.2. the Third Party's involvement derives from the contribution or indemnification sought from it and it is open to the Third Party to put up a Plea or other proper pleading to the Third Party Notice, setting out why it isn't liable, eg, because the Plaintiff's claim against the Defendant has prescribed, or because no cause of action has been established against the Defendant and accordingly, the Defendant is not entitled to a contribution or indemnification from the Third Party;

25.3. as such, the Third Party can plead, raise a Special Plea or raise an Exception, but it is to the Third Party Notice and not, in my view, to the Plaintiff's Particulars of Claim, there being no *lis* between the Plaintiff and the Third Party. The fact that the Third Party may become a Defendant in terms of Rule 13 doesn't create a *lis* between itself and

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<sup>10</sup> Khan NO & another v Maxprop Holdings (Pty) Ltd & another (084/2018) ZASCA 171 at [5] (unreported). For the court *a quo's* judgment, see: Khan NO and Another v Maxprop Holdings (Pty) Ltd (5419/2012) [2017] ZAKZDHC 32 (unreported).

the Plaintiff. Moreover, the issue was clearly not addressed in Khan N.O *supra*.

26. For the reasons set forth above, I find that the point in limine is well taken and should be upheld, namely, that a Third Party cannot directly except to a Plaintiff's Particulars of Claim, there being no *lis*, between them. Any Plea, Special Plea, Exception or other pleading raised by the Third Party is confined to the Third Party Notice.

### **THE EXCEPTIONS**

27. Notwithstanding my findings as set forth in **4** to **26** above, I nonetheless deem it necessary to address the Exceptions raised as well.
28. The Excipient contends that the Respondent's claim lacks material facts to sustain a cause of action.<sup>11</sup>

### **Summary of the Grounds of Exception**

29. The First Ground of Exception relates to the Respondent's allegations of the Defendant's breach of the "*general legal compliance warranties*".
30. Under the First Ground, the Excipient raises objections on three fronts, to wit:
- 30.1. the Plaintiff pleads the alleged breach by Defendant of specific statutory prescripts without pleading the contractual warranty to comply with those specific statutory prescripts or without pleading facts to that extent; and
- 30.2. the Respondent pleads that the ECDoE Contract is invalid, not binding, or unenforceable without pleading the grounds for and without pleading a causal link between the invalidity and the alleged non-compliance with the specific statutory prescripts.
31. The Second Ground of Exception concerns the alleged Respondent's failure to plead that the specific statutory prescripts are those referred to in the

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<sup>11</sup> Page 257, the introductory paragraph of the Exception.

Agreement as “*legislative, regulatory or internal requirements and controls applicable to that agreement*”.

32. The Third Ground of Exception concerns alleged non-compliance with Rule 18(10) in that the Respondent has failed to make the necessary allegations to show its calculation of the alleged damages suffered.

### **General Legal Principles**

33. Rule 18(4) provides that:

*“Every pleading shall contain a clear and a concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”*

34. Where an Exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the Excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed.<sup>12</sup>

35. Recently, in ***Tembani v President of the Republic of South Africa and another 2023 (1) SA 432 (SCA) para 14***, the Supreme Court of Appeal summarised the general principles relating to, and the approach to be adopted regarding, adjudicating exceptions as follows:

*“Whilst exceptions provide a useful mechanism ‘to weed out cases without legal merit’, it is nonetheless necessary that they be dealt with sensibly. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law, in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be*

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<sup>12</sup> First National Bank of Southern Africa Ltd v Perry N.O. 2001 (3) SA 960 (SCA) at 965C-D

*attached to it, the pleading is excipiable. The test is whether on all possible readings of the facts no cause of action may be made out, it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.”*

<sup>13</sup> (Footnotes omitted, emphasis added)

36. It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. The *facta probanda* necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the *facta probantia*) but every fact which is necessary to be proved.<sup>13</sup>
37. Where the plaintiff sues for cancellation of a contract because of a breach of the contract by the defendant, the contractual obligations must be alleged, and it should be stated in terms of the contract or at least in words co-extensive with it.<sup>14</sup>

### **First Ground of Exception**

38. **Firstly**, the Respondent pleads that the Defendant has breached the Agreement and the “*general legal compliance warranty*” in that –

*“The ECDōE Contract was concluded in contravention of section 217 of the Constitution of the Republic of South Africa and/or the PFMA and/or the Preferential Procurement Policy Framework Act 5 of 2000 (“PPPF”) and/or the State Information Technology Agency Act 88 of 1998 (“SITA Act”) and/or Regulation 16A of the Treasury Regulations issued in terms of the PFMA (“Treasury Regulations”)...” (paragraph 12.1.1 of the Particulars of Claim) (hereinafter referred to as the “statutory prescripts”).*

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<sup>13</sup> McKenzie v Farmers’ Co-Operative Meat Industries Ltd 1922 AD 16 at 23.

<sup>14</sup> Beck’s Theory and Principles of Pleadings in Civil Actions, Author: H Daniels Judge of the High Court of South Africa, Last Updated: 6ed 2002, with reference to Transvaal Cold Storage Co v SA Meat Export Co Ltd 1917 TPD 413; Britz v Du Preez 1950 (2) SA 756 (T); Park v Bank of Africa (1883) 2 HCG 66; Alfred Mc Alphine & (Pty) Ltd v Transvaal Provincial Administration 1977 (4) SA 310 (A), and see Beck v Du Toit 1975 (1) SA 366 (O)

39. The Respondent pleads the terms of the *general legal compliance warranty* as follows:
- 39.1. *“The Defendant warrants represents and undertakes to the Plaintiff that the ceded contracts and any document relating thereto will be valid, binding, and enforceable in accordance with the terms and will comply fully with all relevant laws...”*<sup>15</sup>
- 39.2. *“The Defendant warrants, represents and undertakes to the Plaintiff that it will pass good, valid, free, and unencumbered transferable right, title and interest in and to the ceded contract, the relevant goods, and related documents...”*<sup>16</sup>
40. The Excipient alleges that the Respondent has failed to make necessary allegations foreshadowing the specific statutory prescripts (that the Defendant allegedly failed to comply with) as part of the alleged contractual warranties pleaded under paragraphs **4.3** and **4.4** of the Particulars of Claim.
41. The Excipient also alleges that the Respondent has failed to make necessary factual allegations from which the conclusion can be drawn that the statutory prescripts fell within the ambit of the warranty provision in the Agreement.
42. **Secondly**, the Respondent pleads, *“The ECDoE Contract is invalid and/or not binding and/or unenforceable...”*.
43. The Excipient alleges that the Respondent has pleaded that the ECDoE Contract is invalid, not binding, or unenforceable without pleading the grounds for and without pleading a causal link between the invalidity and the alleged non-compliance with the specific statutory prescripts.
44. As such, the Excipient avers that the Respondent’s claim lacks the necessary allegations to sustain a cause of action.
45. It does not appear that the Excipient is complaining that the Respondent should have pleaded the specific sections of the statutes relied upon and rightly so, as the Respondent was not required to do this.<sup>16</sup> The complaint is that it

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<sup>15</sup> Bundle page 6, Clause 9.1.1 of the Agreement, pleaded as paragraph 4.3 of the POC.

<sup>16</sup> Bundle page 6, Clause 9.1.3 of the Agreement, pleaded as paragraph 4.4 of the POC.

is not pleaded as a term of the Agreement that the statutes relied upon by the Respondent were in the parties' minds when the warranties were given (as these statutes are not specifically mentioned by name in the Agreement).

46. The Respondent submits that as pleaded in paragraphs **4.3** and **4.4** of the Particulars of Claim, the Defendant warranted that the ECDDoE Contract complies fully with all relevant laws. The Respondent has, in paragraph 12.1.1, pleaded the relevant laws that it says the ECDDoE Contract did not comply with (in breach of the general legal compliance warranty). Further:

46.1. the statutory precepts relied upon by the Respondent in paragraph 12.1.1 are patently, on the reading of the Particulars of Claim as a whole, the relevant laws to the ECDDoE Contract. The Respondent further submits, that no law can be more relevant to a contract than a law that renders the contract invalid and/or not binding and/or unenforceable if not complied with;

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<sup>14</sup> *Naidoo and another v Dube Tradeport Corp and others* 2022 (3) SA 390 (SCA) para 16.

<sup>15</sup> *M&J Da Costa Brothers (Pty) Ltd and another v Karan* 2023 JDR 0082 (GJ) para 23, relying on *Dettmann v Goldfain and Another* 1975 (3) SA 385 (A) at 400A.

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<sup>16</sup> *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* [1997] 1 All SA 644 (A).

46.2. the Respondent pleaded in paragraph **16** of the Particulars of Claim that it was entitled to monies payable under the ECDoE Contract (if it complied with all the relevant laws as warranted by the Defendant). Because the ECDoE Contract did not fully comply with the relevant laws relied upon by the Respondent in paragraph 12.1.1 of the Particulars of Claim, the Respondent is not able to collect monies under the ECDoE and has consequently suffered damages. That is how the relevant laws apply to the Respondent's claim (and that is pleaded, on a reasonable interpretation of the Particulars of Claim as a whole).

47. Second, the Excipient complains that the Respondent failed to plead the grounds upon which it relies for the allegation that the ECDoE Contract is invalid or not binding or unenforceable, and to establish causality between the alleged non-compliance with statutory prescripts and the alleged invalidity, non-binding nature, and unenforceability of the ECDoE Contract. However, the Respondent submits that:

47.1. in paragraphs 12.1.1 of the Particulars of Claim, it has pleaded the ground upon which it relies for the allegation that the ECDoE Contract is invalid or not binding or unenforceable. It is that the ECDoE Contract contravenes the pleaded statutory prescripts;

47.2. the alleged invalidity, non-binding nature, or unenforceability of the ECDoE Contract is a legally imposed consequence of the contravention of the pleaded statutory prescripts by the ECDoE Contract;

47.3. the causality is a matter of law. In fact, in relation to the contravention of section 217 of the Constitution (pleaded in paragraph 12.1.1 of the Particulars of Claim), courts are, in terms of section 172(1)(a) of the Constitution, obliged to declare invalidity once it is found that a contract is inconsistent with the Constitution, as was recently reiterated by the Supreme Court of Appeal in ***The Special Investigating Unit***:



*“The high court granted the declaration because the approval to contract was subject to a complete needs assessment being conducted prior to signature. As mentioned above, this was not complied with and the conduct in concluding the lease accordingly failed to comply with the Supply Chain Management Policy of the DPW. This implicated s 172(1)(a) of the Constitution. The high court was thus obliged to make the declaration of invalidity.”<sup>17</sup> (Emphasis added)*

48. Third, the Excipient complains that the Respondent should have pleaded that the ECDoE Contract was set aside by a court because, without it being set aside by a court, it is valid. In this regard, the Respondent submits that:

48.1. the Excipient is misapplying the so-called *Oudekraal* principle<sup>18</sup> and misconstruing the Respondent’s claim;

48.2. the *Oudekraal* principle is, amongst others “*about the continued existence of an unlawful administrative act for as long as it has not been set aside by a court*”.<sup>19</sup> (Emphasis added). It does not validate an unlawful or invalid administrative act until set aside by a court. If an administrative act is invalid, it remains invalid, but allowed to remain binding and enforceable until set aside by a court;

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<sup>17</sup> *The Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* (Case no 1329/2021) [2023] ZASCA 45 (3 April 2023) para 5

<sup>18</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) (“*Oudekraal*”). See also *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) (“*Kirland*”).

<sup>19</sup> *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO and others* 2020 (4) SA 375 (CC) para 40.

- 48.3. the Respondent's claim is not founded on the ECDoE Contract being set aside. The Defendant did not warrant that the ECDoE Contract will not be set aside – it warranted its validity (amongst other things) – which, in law, is not dependant on the Agreement being set aside;
- 48.4. if the ECDoE Contract is not set aside, that may only affect the *quantum* of the Respondent's claim, but not the cause of action.
49. Having considered both arguments and mindful of the provisions of Rule 18(4) as also the test to be applied in considering Exceptions, I find that the Excipient's first ground of exception must fail.

### **Second Ground of Exception**

50. The Respondent pleads that the Defendant has breached the "*factual correctness warranty*" in that-
- 50.1. "*In the ECDoE Contract, it stated that the ECDoE fully complied with all legislative, regulatory or internal requirements and controls applicable to that agreement, its conclusion and the subject matter thereof and that there is no contravention of any such requirement...*" (paragraph 12.2.1 thereof).
- 50.2. "*However, when purporting to conclude the ECDoE Contract, the ECDoE did not comply with the requirements of section 217 of the Constitution and/or the PFMA and/or PPPFA and/or the SITA Act and/or Regulation 16A of the Treasury Regulations and contravened these requirements...*" (paragraph 12.2.2 thereof) (the "statutory prescripts").
- 50.3. "*Therefore, contrary to the factual correctness warranty, the ECDoE Contract was not "in every material respect factually correct" ...*" (paragraph 12.2.3 thereof).
51. The Respondent pleads the terms of the "*factual correctness warranty*" as follows:
- "Defendant warrants, represents and undertakes to the Plaintiff that the ceded contract will in every material respect, correctly reflect the intention of the parties and will in every material respect be factually correct..."* (paragraph 4.5 thereof).

52. The Excipient alleges that the Respondent has failed to plead:
- 52.1. as express, alternatively, tacit, further alternatively, implied term of the Agreement, the *factual correctness warranty* and the *“legislative, regulatory or internal requirements and controls applicable to that agreement”* included the specific statutory prescripts;
  - 52.2. necessary facts from which the conclusion can be drawn that the statutory prescripts apply to the Respondent’s alleged claim.
53. As such, the Excipient contends that the Respondent’s claim lacks the necessary allegations to sustain a cause of action.
54. The Respondent submits that there is no merit in this complaint, in that:.
- 54.1. in the ECDoE Contract, it is stated that the ECDoE fully complied with all legislative, regulatory and/or internal requirements and controls applicable to the ECDoE Contract;
  - 54.2. the pleaded statutory prescripts are applicable to the ECDoE Contract and it is clear from the Particulars of Claim, reasonably interpreted as a whole (e.g. it is pleaded that their contravention invalidated the ECDoE Contract). The pleaded statutory prescripts are therefore some of the *“legislative, regulatory and/or internal requirements and controls applicable to the ECDoE Contract”* that the ECDoE Contract states were fully complied with by the ECDoE. That this is a material term of the ECDoE Contract is made clear by the pleaded consequences of this statement turning out to be false;
  - 54.3. as the pleaded statutory prescripts are some of the laws that the ECDoE Contract states, as a material term of the ECDoE Contract, were fully complied with by the ECDoE (as explained above), it is clear that the factual correctness warranty (which is pleaded) also included the specific statutory prescript. The Respondent need not have pleaded this separately;
  - 54.4. a holistic reading of the Particulars of Claim makes it plain that the pleaded statutory prescripts are applicable to the Respondent’s claim.

55. I am in agreement with the Respondent's submissions and in the circumstances, mindful of the provisions of Rule 18(4) as also the test to be applied in considering Exceptions, I find that the Excipient's second ground of exception must fail.

### **Third ground of exception**

56. In the Particulars of Claim, the Respondent alleges that:
- 56.1. *"...Had the Defendant not breached the Agreement, the Plaintiff would have been entitled to, and received, the amount of R587,552,819.24, in terms of the Agreement, being the total income collectable from the ECDoE under the ECDoE Contract and the Agreement plus Residual Value (as defined in the Agreement) where applicable."*<sup>17</sup>
- 56.2. *"...As a result of the Defendant's breach of the Agreement, the Plaintiff has suffered damages in the amount of R587,552,819.24, being the balance of the collectable income payable to the Plaintiff in terms of the Agreement plus Residual Value (as defined)."*<sup>18</sup>
- 56.3. *"...A certificate prepared in terms of clause 31.2. of the Agreement reflecting the amount owing by the Defendant to the Plaintiff is attached hereto marked "PC 2"..."*<sup>19</sup>
57. The "CERTIFICATE OF BALANCE" (Annexure "PC 2" to the POC) which constitutes prima facie proof reads as follows:
- "... I the undersigned... do hereby certify that as at 6 October 2022... [Description of the Defendant]... is indebted to [description of Plaintiff] in the sum of R587,552,819.24 together with interest thereon..."*
58. Rule 18(10) provides as follows:
- "A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof..."*
59. The purpose of this rule is to enable a defendant to assess the quantum of the claim and to make a reasonable tender or payment into court, which,

<sup>17</sup> Page 12, paragraph 16 of the POC.

<sup>18</sup> Page 12, paragraph 17 of the POC.

<sup>19</sup> Page 12, paragraph 18 of the POC.

upon acceptance, will bring the litigation to an end.<sup>20</sup>

60. The Excipient submits that the Respondent does not set out its alleged damages, to any degree, in a manner that enables the Defendant or the Third Party reasonably to assess the *quantum* thereof, as required by Rule 18(10).
61. According to paragraph 16, the amount of R587,552,819.24 includes the Residual Value "...if applicable...", which qualification is omitted from the contents of paragraph 17. Thus, the Excipient contends that the Respondent failed to make allegations to clarify this apparent contradiction. The Defendant or the Third Party will never be able to assess whether or not the Residual Value was included in the claim amount and the value thereof.
62. Thus, the Excipient contends that the Respondent's pleading is excipiable because it lacks the necessary allegations to sustain a cause of action.
63. In response, the Respondent submits that the Excipient does not complain that the alleged failure by the Respondent to particularise the *quantum* of its damages renders the Particulars of Claim vague and embarrassing. The Excipient did not deliver a notice in terms of Rule 23(1)(a) in this regard. Counsel for the Excipient effectively conceded that the alleged failure to particularise the *quantum* of damages did not mean that the Particulars of Claim lacks averments which are necessary to sustain an action (as contemplated in Rule 23). Further, Rule 18(12) prescribes how a complaint of this nature ought to be raised.
64. The Respondent contended that it is trite that:

*"Respondent is not required to set his claim out in such a manner as will enable the defendant to ascertain whether or not the plaintiff's assessment of the quantum is correct; the defendant has a duty himself to work out what is a reasonable assessment of the damages sustained by the plaintiff."*<sup>20</sup>

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<sup>20</sup> Durban Picture Frame Co (Pty) Ltd v Jeena 1976 (1) SA 329 (D); and see Cape Diving and Salvage (Pty) Ltd v Viljoen 1979 (1) SA 871 (C); SA Mutual Fire and General Insurance Co Ltd v Alberts 1976 (3) SA 612 (SE); Cete v Standard and General Insurance Co Ltd 1973 (4) SA 349 (W).

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65. The question is therefore not whether the *quantum* is correctly calculated. Rather, it is whether the Excipient, acting reasonably, can ascertain the formula used to calculate the *quantum* – in case it wished to do the calculations itself.
66. The Respondent has explained the formula, in paragraphs 16 and 17, by pleading that the amount claimed is “*the total income collectable from the ECDoE under the ECDoE Contract and the Agreement plus Residual Value (as defined in the Agreement) where applicable.*” (Emphasis added)
67. As explained above, the pleaded “*Residual Value (as defined in the agreement)*” is the value of the relevant goods payable by the Defendant to the Respondent if the Respondent sells (cedes) the goods to the Defendant in future.
68. The pleaded “*where applicable*” is a reference to clause 15.1 of the Agreement (pleaded in paragraph 4.8 of the Particulars of Claim) which provides that the Respondent will only sell (cede) the goods to the Defendant if the Defendant is not in breach of any of its obligations under the Agreement.
69. In paragraph 12 of the Particulars of Claim, the Respondent pleads that the Defendant has breached the Agreement in several pleaded respects. This means, on the pleaded facts, that “*Residual Value (as defined in the agreement)*” is not applicable at this stage.
70. What is therefore claimed by the Respondent, as clearly ascertainable from the Particulars of Claim, is “*the total income collectable from the ECDoE under the ECDoE Contract and the Agreement*” which, as pleaded in paragraph 16, the Respondent would have been entitled to in terms of the Agreement had the Defendant not breached the Agreement.

71. The Respondent's damages are therefore set out in such a manner as will enable the Excipient to reasonably assess the quantum thereof, in compliance with Rule 18(10).
72. A further problem for the Excipient is that the Respondent and the Defendant agreed (which agreement is binding on the Excipient) that the Respondent's calculations of any amount owed to it (as set out in a certificate of balance) will be *prima facie* proof of the amount in question for all purposes including pleadings. The relevant clause is pleaded in paragraph 4.1 of the Particulars of Claim. There has been no suggestion that the certificate of balance attached to the Particulars of Claim is somehow invalid or incorrect in any way. As such, the Excipient is bound by it, for exception purposes.
73. In the circumstances, the Excipient's third ground of exception must fail as well.

### **CONCLUSION**

74. In the premises, the point *in limine* is upheld and all 3 (three) of the Exceptions raised must fail.

### **ORDER**

1. The Point in *limine* is upheld, namely, a Third Party may not except directly to a Plaintiff's Particulars of Claim, other than in the form of a Plea to the Third Party Notice.
2. The Exceptions are dismissed with costs, including the costs of two counsel.

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**M NOWITZ**  
**ACTING JUDGE OF THE HIGH COURT**  
**OF SOUTH AFRICA GAUTENG DIVISION, JOHANNESBURG**

**8 FEBRUARY 2024**

**APPEARANCES**

**FOR EXCIPIENT : Adv Korf**

**FOR RESPONDENT : Adv A Subel SC  
: Adv Gwala**