IN THE HIGH COURT OF SOUTH AFRICA

(KWAZULU-NATAL LOCAL DIVISION, DURBAN)

Case No: D3385/2023

In the matter between:

ADV MODISE GEOFFREY KHOZA	Plaintiff
and	
IFA FAIR-ZIM HOTEL AND RESORT (PTY) LTD	First Defendant
FHP ZIMBALI RESIDENCE NO 3 SHARE BLOCK COMPANY (PTY) LTD	Second Defendant

HEARD TOGETHER WITH

Case No: D6433/2023

In the matter between:

PIETER FRANCOIS THERON BURGER N.O.	First Plaintiff
ILSE LOUISE BURGER N.O.	Second Plaintiff
GISELLE MARLÉ DU PLESSIS N.O.	Third Plaintiff
(in their capacities as the duly authorised trustees of the F & J BURGER FAMILY TRUST)	
and	
IFA FAIR-ZIM HOTEL AND RESORT (PTY) LTD	First Defendant
FHP ZIMBALI RESIDENCE NO 3 SHARE BLOCK COMPANY (PTY) LTD	Second Defendant

---

JUDGMENT

in both matters in respect of the second defendant's exceptions and in respect of the plaintiffs' applications to amend

---

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 4 July 2024.

Vahed J:

[1] This judgment applies to both case number D3385/2023 ("Khoza") and case number D6433/2023 ("Burger"), which were heard together and concern the same grounds of exception, save for the first ground in Khoza which was confined to that matter. That first ground of exception was abandoned at the commencement of the hearing and will not be dealt with further.

[2] The second defendant has excepted to the particulars of claim in both matters on the basis that they do not disclose a cause of action. The plaintiffs apply for certain amendments in both matters, which are said to be minor in nature. The second defendant has objected thereto, the basis of objection being that the amendments do not cure the exceptions. The parties are in agreement that the exceptions and the applications to amend be heard together.

[3] Counsel have furnished me with extensive and helpful heads of argument. I am grateful and wish to avoid any disservice to the assistance provided me therein and thus borrow freely from them.

[4] The particulars of claim in both matters allege that the plaintiffs purchased shares in the second defendant from the first defendant. The second defendant is a share block company and is one of 18 companies owning immovable property in the Fairmont Heritage Place Zimbali ("FHPZ"), a luxury residential timeshare development situated in Zimbali on the north coast of KwaZulu-Natal. In essence this afforded the plaintiffs the right to use a particular residence for 14 days of each year, with FHPZ to be maintained and operated to the standards of a luxury and upscale development.

[5] The plaintiffs plead that the second defendant was a party to the contract of sale, alternatively that the first defendant acted as the agent of the second defendant in concluding the contract of sale.

[6] The plaintiffs plead *inter alia* that subsequent to the registration of the shares in their names:

a. FHPZ has not been managed or operated to the agreed physical and operational standards.

b. The plaintiffs do not enjoy the agreed access to a Reciprocal Use Programme (which promised holiday accommodation in luxury "sister" resorts, including in international destinations) or to Heritage Time (additional time at FHPZ).

c. FHPZ and the second defendant have been financially mismanaged.

d. The first defendant has not paid certain monies due to the second defendant.

e. Unfair, unreasonable and unjust annual operating fees have been levied against the plaintiffs.

f. The plaintiffs' shares in the second defendant are worth 50% of the purchase price paid.

[7] The plaintiffs claim from the defendants on the basis of the common law, contract, delict, the Consumer Protection Act 68 of 2008 ("the CPA") and s 163 of the Companies Act, 2008 ("the Companies Act").

[8] Against that the second defendant has raised divers exceptions on divers grounds, all relating to the failure to disclose a cause of action. In such regard, and considering generally the law relating to exceptions:

a. Rule 18(4) of the Uniform Rules of Court requires every pleading to contain a clear and concise statement of the material facts upon which the pleader relies for his claim and Rule 20(2) requires a declaration to set forth the nature of the claim and the conclusions of law which the plaintiff shall be entitled to adduce from the facts stated therein. It is generally accepted that this in fact requires the particulars of claim to

explicitly disclose a cause of action (See *Makgae v Sentraboer (Koöperatief) BPK* 1981 (4) SA 239 (T) at 244 C).

b. In *McKenzie v Farmer's Co-Operative Meat Industries Ltd* 1922 AD 16 at 23 '*cause of action*' was defined by the Appellate Division as follows:

> "...every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

c. That definition has been repeatedly endorsed (See *inter alia Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A); *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC));

d. The following passage from the judgment of Heher J in *Jowell v Bramwell-Jones* 1988 (1) SA 836 (W) at 903 A-B is particularly instructive:

> "Furthermore, in approaching these exceptions, I shall bear in mind the following general principles:
> *(a)* minor blemishes are irrelevant;
> *(b)* pleadings must be read as a whole; no paragraph can be read in isolation;
> *(c)* a distinction must be drawn between the *facta probanda*, or primary factual allegations which every plaintiff must make, and the *facta probantia*, which are the secondary allegations upon which the plaintiff will rely in support of his primary factual allegations. Generally speaking, the latter are matters for particulars for trial and even then are limited. For the rest, they are matters for evidence;
> *(d)* only facts need be pleaded; conclusions of law need not be pleaded;
> *(e)* bound up with the last-mentioned consideration is that certain allegations expressly made may carry with them implied allegations and the pleading must be so read: cf *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 377, 379B, 379G--H. Thus, an allegation of negligent conduct, especially where the negligence is particularised, implies that a reasonable person would not have so acted or would have acted otherwise. So, in a case involving a motor vehicle collision, it is sufficient to plead that the defendant acted negligently in

particular respects. This implied that a reasonable person would not have so acted. If damage is alleged to flow therefrom, this implies in turn that there was a breach of a legal duty not to act so."

[9] Drawing those threads together in order to consider the approach to exceptions generally, it is convenient to refer to the summary and analysis in *Merb (Pty) Ltd and Others v Matthews and Others* [2021] ZAGPJHC 693 (16 November 2021):

"*General principles applicable to exceptions*

7. The parties are in agreement about the relevant legal framework that governs the determination of exceptions. ... For purposes of this judgment, I need mention only a few of the pertinent principles.

8. These were conveniently summarised by Makgoka J in [*Living Hands (Pty) Limited and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) at 374G, para 15] as follows:

> 'Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:
> (a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
> (b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.
> (c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.
> (d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
> (e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
> (f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.
> (g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.' (footnotes omitted)

9. Exceptions are also not to be dealt with in an over-technical manner [See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465H], and as such, a court looks benevolently instead of over-critically at a pleading [See *First National Bank of Southern Africa Ltd v Perry N.O.* 2001 (3) SA 960 (SCA) at 972 I].

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 [See *Francis Sharp* 2004 (3) SA 230 (C) at 240 E-F and 237 D-I].

11. Courts have been reluctant to decide exceptions in respect of fact bound issues [See, for example, *Klokow v Sullivan* 2006 (1) SA 259 (SCA)].

12. 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 [See *First National Bank of Southern Africa Ltd v Perry N.O.* 2001 (3) SA 960 (SCA) at 965C-D]. 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 (facta probanda). 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 [See *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23].

13. An exception to a pleading on the ground that it is vague and embarrassing requires a two-fold consideration [See *Trope v South African Reserve Bank and Another and Two Other Cases* 1002 (3) SA 208 (T) at 211B]: (i) whether the pleading lacks particularity to the extent that it is vague; and (ii) whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced in the sense that he/she cannot plead or properly prepare for trial. The excipient must demonstrate that the pleading is ambiguous, meaningless, contradictory or capable of more than one meaning, to the extent that it amounts to vagueness, which vagueness causes embarrassment to the excipient [See *City of Cape Town v National Meat Suppliers Ltd* 1938 CPD 59 at 65]."

[10] It is also appropriate to refer to the passage at 706A-G in *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A):

"As far as I am aware there are no Rules of Court in the other Provinces similar to Rule 55 of Natal. In spite of this fact the position in the other Provinces appears to be no different from that in Natal. The Transvaal case of *Goller and Others v van der Merwe*, 1903 T.S. 157, was followed in the Orange Free State in the case of *Sugden Baron St. Leonards v Kannemeyer*, 1921 OPD 121, and both these cases were followed in the Cape in the case of *Stein v Giese*, 1939 CPD 336. In the last-mentioned case JONES, J., stated the legal position as follows at p. 338:

> 'Now it has been laid down, and, I think, if I may say so, correctly laid down by the Orange Free State Provincial Division, and by a full Court in the Transvaal, that it is not open to a defendant to except to one of several claims arising out of one and the same cause of action. What I mean is this, that where a cause of action is the breach of a contract for instance, and there are several separate claims made because of that breach, an exception to the summons that it discloses no cause of action in respect of one of those claims, cannot, and will not be sustained.'

In Beck on *Pleadings, loc. cit.*, it is stated that the case of *Stein v Giese* has been approved by the Appellate Division. That statement is, however, not correct; in the case of *du Plessis v Nel*, 1952 (1) SA 513 (AD), the case of *Stein v Giese* was

referred to with approval by only one of the Judges in a dissenting judgment. The other members of the Court did not deal with the particular point which necessitated reference to that case. In my opinion, however, the three cases to which I have referred were correctly decided. The main purpose of the exception that a declaration discloses no cause of action is to avoid the leading of unnecessary evidence. That purpose cannot be served by taking exception to a declaration on the ground that it does not support one of several claims arising out of one cause of action. In the present case, for instance, the upholding of the exception that the declaration does not support the minor claim would make no difference whatever to the evidence to be led at the trial. All the averments in the declaration would have to be proved by evidence in order to establish the major claim. Even assuming that the declaration does not support the minor claim, I cannot see in what way the defendant will be embarrassed in pleading, in view of the fact that it is bound to plead to the declaration as framed in order to meet the major claim. The legal point raised by the exception can be argued at the trial. If there are indeed circumstances which would make it more convenient that this point should be decided before evidence is led, the defendant could apply to the Court in terms of Rule 59 for an order directing the question of law to be decided before evidence is led."

[11] In *Tembani and Others v President of the Republic of South Africa and Another* 2023 (1) SA 432 (SCA) Ponnen JA recently summarised the correct approach to exceptions as follows (footnotes omitted):

"[14] 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 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."

[12] Turning next to consider aspects of the law relating to amendments it will be recalled that the primary role of pleadings is to ensure that the real dispute between the parties is adjudicated on. In *Media 24 (Pty) Ltd v Nhleko & Another* (Case no 109/22) [2023] ZASCA 77 (29 May 2023) the following was said in this regard (footnotes omitted):

"[16] In coming to its conclusion to refuse the application for amendment, the high court paid scant regard to the purpose of pleadings, which is to define the issues between the parties. Because the primary role of pleadings is to ensure that the real dispute between litigants is adjudicated upon, courts are loathe to deny parties the

right to amend their pleadings, sometimes right up until judgment is granted. An exception is made when the amendment is *mala fides* or will result in an injustice which cannot be cured by a costs order. Thus, the power of a court to refuse amendments is confined to considerations of prejudice or injustice to the opponent.

[17] Even where an amendment has led to the re-opening of a case, this has been allowed where the reason was the state of the pleading rather than deliberate conduct on the part of an applicant. Prejudice has been found to occur only in situations where the opponent is worse off than he was at the time of the amendment, for example the withdrawal of an admission can have a detrimental effect in certain circumstances. The fact that an amendment may lead to the defeat of the other party is not the type of prejudice to be taken into account. Here the court refused the amendment because it did not go into sufficient detail. That could only be a ground for objection if it fails to comply with the rules as to pleadings or is otherwise excipiable.

[18] It is not for the courts to impose their views as to the true nature of the case. It is the pleadings, and the pleadings alone, that define and determine the issues upon which the court will adjudicate. The sole requirement of the application for amendment was to ensure that the plea advanced encapsulates the defence to the particulars of claim, not to the article itself. As has often been stated by our courts, it is the *facta probanda* that must be pleaded, not the *facta probantia*. A litigant is not required to prove its case in the pleadings, nor to describe the evidence to be led, but to state the material facts on which it relies and which it intends to prove at the trial.

[19] Trial courts are reminded that an adherence to the fundamental principles of pleadings should be observed and parties should be allowed to ventilate their case as they determine, within the bounds of these well understood principles."

[13] In general, an amendment will be permitted unless mala fide or if it will result in an injustice which cannot be cured by a costs order, or unless the parties cannot be put back in the same position as they were when the pleading in question was filed. See *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29.

[14] I turn now to consider the exceptions raised.

Second ground (Khoza) & first ground (Burger): parties to the agreements

[15] In this exception the second defendant submits that the contract of sale does not reflect that it is a party to the agreement or that the first defendant acted as its agent in concluding the agreement.

[16] The essence of this exception is the second defendant's submission that:

> "[a]bsent facts confirming the Second Defendant as being a party to the Contract of Sale, or the First Defendant as agent for the Second Defendant, the underlying basis for the action against Second Defendant is legally unsustainable and therefore excipiable."

[17] The plaintiffs retort that this submission on the part of the second defendant exposes a number of fundamental defects which, each on their own, and cumulatively, destroys this ground of exception:

a. First, the *facta probanda* have been pleaded. The facts to be dealt with to establish or negate this pleading are the *facta probantia*, which are a matter for evidence to be dealt with at trial.

b. Second, if the plaintiffs can prove at trial that in concluding the contract of sale the first defendant was acting as the agent of the second defendant, then the plaintiffs will have an election to sue the (then disclosed) principal, or the agent for their contractual remedies. See *SA Metal & Machinery Company (Pty) Ltd v Klerck NO and Others* [2005] 1 All SA 44 (E) at p57 & pp62-63. There are no further *facta probanda* required to plead the issue of agency in this context. It is not a requirement for the validity of the contract of sale for the first defendant to be identified *ex facie* the written agreement as the second defendant's agent. Rather, the evidence presented at trial will either prove or disprove that the first defendant acted as the second defendant's agent. It is therefore a triable issue. The second defendant's exception implicitly recognises that evidence (referred to as "facts") will be required to prove this allegation, and that such evidence could establish (or confirm) that the first defendant acted as agent for the second defendant.

c. Third, whether what has been pleaded by the plaintiffs is correct, is *inter alia* a matter of interpretation of the contract itself. Courts are reluctant to determine this in an exception.

d. Fourth, the factual matrix concerns "Zimbali" related entities, including the developer (the first defendant) and the property holding share block companies (such as the second defendant) which are all intimately involved in the Zimbali luxury development. In the case of each particular purchaser, the applicable share block company has an integral, material and intimate part to play (in these matters, the second defendant). It is therefore a reasonable approach to adopt that Second Defendant is a party to the applicable agreements or that First Defendant acted as its agent.

e. Fifth, the interpretation of contracts is now a unitary exercise which involves evidence in relation to and the consideration of context. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]. While the words used are the starting point, they are not the end point. "Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise". See *Endumeni* at para [25]. Or, "[w]ords without context mean nothing". See *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at para 28. Words must be read in light of context including the textual context, the broader legal context and the factual context. In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Ply) Ltd* 2007 (6) SA 199 (CC) the Constitutional Court said at para [53] that "[a]lthough the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous". It is useful to conclude this fifth aspect to quote from *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) (footnotes omitted):

> "[25] Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings' consent was indeed required. The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer

guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, '(t)he inevitable point of departure is the language of the provision itself'.

...

[44] The opposing position, powerfully articulated by Corbin, is this. The parol evidence rule simply reflects the agreement between the parties that the written document constitutes their exclusive agreement. It supersedes earlier agreements, whether written or oral, and excludes evidence of such agreements. The parol evidence rule is not a rule as to the admission of evidence for the purpose of interpreting the meaning of the written agreement that constitutes the parties' exclusive agreement. If the plain meaning of a contract is rejected conceptually or enjoys no primacy in the interpretative exercise, then extrinsic evidence as to meaning will enjoy a very considerable remit, and the parol evidence rule's exclusionary force will be greatly reduced.

[45] There is logical force in the observation that the identification of a contract is one thing, its meaning another. However, the practical consequence of this distinction is that the evidence excluded under the parol evidence rule as contradicting, adding to or varying the written contract is then admitted for the purpose of interpreting the contract. This has led some courts to seek a via media. Under this formulation, extrinsic evidence will only be admitted if the contract is reasonably susceptible of the meaning for which the evidence is tendered or amounts to objective evidence to show ambiguity.

[46] The Constitutional Court has placed our law firmly within the realm defined by Corbin's position. The Constitutional Court has rejected the idea of the plain meaning of the text or its primacy, since words without context mean nothing, and context is everything. It has given a wide remit to the admission of extrinsic evidence as to context and purpose so as to interpret the meaning of a contract. Reasonable disagreements as to the relevance of such evidence should favour admitting the evidence and the weight of the evidence may then be considered.

[47] I offer a few observations, as to the implications of what the Constitutional Court has decided in *University of Johannesburg*. First, it is inevitable that extrinsic evidence that one litigant contends as having the effect of contradicting, altering or adding to the written contract, the other litigant will characterise as extrinsic evidence relevant to the

context or purpose of the written contract. Since the interpretative exercise affords the meaning yielded by text no priority and requires no ambiguity as to the meaning of the text to admit extrinsic evidence, the parol evidence rule is likely to become a residual rule that does little more than identify the written agreement, the meaning of which must be determined. That is so for an important reason. It is only possible to determine whether extrinsic evidence is contradicting, altering or adding to a written contract once the court has determined the meaning of that contract. Since meaning is ascertained by recourse to a wide-ranging engagement with the triad of text, context and purpose, extrinsic evidence may be admitted as relevant to context and purpose. It is this enquiry into relevance that will determine the admissibility of the evidence. Once this has taken place, the exclusionary force of the parol evidence rule is consigned to a rather residual role.

[48] Second, *University of Johannesburg* recognises that there are limits to the evidence that may be admitted as relevant to context and purpose. While the factual background known to the parties before the contract was concluded may be of assistance in the interpretation of the meaning of a contract, the courts' aversion to receiving evidence of the parties' prior negotiations and what they intended (outside cases of rectification) or understood the contract to mean should remain an important limitation on what may be said to be relevant to the context or purpose of the contract. *Blair Atholl* rightly warned of the laxity with which some courts have permited evidence that traverses what a witness considers a contract to mean. That is strictly a matter for the court. *Comwezi* is not to be understood as an invitation to harvest evidence, on an indiscriminate basis, of what the parties did after they concluded their agreement. The case made it plain such evidence must be relevant to an objective determination of the meaning of the words used in the contract.

[49] Third, *Endumeni* has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations. Neither *Endumeni,* nor its reception in the Constitutional Court, most recently in *University of Johannesburg*, evince skepticism that the words and terms used in a contract have meaning.

[50] *Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the

> interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.
>
> [51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."

It would accordingly be incorrect to determine this question on exception.

f. Sixth, and finally, this ground of exception relates only to the contractual alternatives (Claims D and E), two of various alternatives pleaded effectively for the termination of the agreements and payment to the plaintiffs in consequence thereof. Thus, if upheld, it will not dispose of the claims. This ground is therefore hamstrung by the principle that an exception will not be allowed unless it disposes of a claim – i.e. an exception to one of various bases pleaded for a particular claim will not be upheld. See *Dharumpal's case, supra*.

[18] The second defendant has argued that *Dharumpal* is not applicable to the present exceptions because it concerned two claims arising out of a single cause of action, which is suggested not to be the case here. To support the argument that it was competent for me to deal on exception with separate claims I was referred to the following passage in *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC And Others* 2006 (3) SA 434 (N) (footnotes omitted):

> "[18] Mr *Farlam* has further argued that the exclusion of para 55 of the particulars of claim would not materially shorten the proceedings. Striking out the said para 55, he has submitted, would have no material effect on the evidence that would be led at the trial. In support of this submission, he has relied on the judgment of Hoexter JA in the case of *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A). At 706E - H it was held:
>
> > 'The main purpose of the exception that a declaration discloses no cause of action is to avoid the leading of unnecessary evidence. That purpose cannot be served by

taking exception to a declaration on the ground that it does not support one of several claims arising out of *one* cause of action.'

(My emphasis.) In *Stein v Giese* 1939 CPD 336 (quoted with approval in *Dharumpal Transport (Pty) Ltd v Dharumpal*) it was held (at 338):

'(I)t is not open to a defendant to except to one of several claims arising out of one and the same cause of action. What I mean is this, that where a cause of action is the breach of a contract for instance, and there are several separate claims made because of that breach, an exception to the summons that it discloses no cause of action in respect of one of those claims, cannot, and will not be sustained.'

It is, however, noted that, *in casu*, the plaintiffs' claim is not based on one cause of action. Paragraph 55 is clearly distinguishable from the rest of the particulars of claim in that it is an action based not only in the alternative but also on statute, the plaintiffs' main claim being based on contract. This further distinguishes the present case from the authorities relied upon by Mr *Farlam* as set out above. See *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC) at 181F - G. I am of the opinion, therefore, that to uphold the exception would have a material effect on the trial, as evidence and argument based on the statutory provisions of the Act would be dispensed with. Contrary to Mr *Farlam's* submissions, the proceedings will certainly be shortened."

[19] That matter was in large part reversed on appeal (See *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC And Others* 2008 (1) SA 67 (SCA)) but it might be possible to suggest that the paragraph referred to in the judgment of the court *a quo* survived unscathed. Be that as it may, I am not convinced that the argument finds application here.

[20] For the reasons articulated earlier this ground of exception must fail.

Third ground (Khoza) & second ground (Burger): the CPA

[21] This ground of exception relates to the alternative relief sought grounded in the CPA. In this regard the second defendant contends that:

a. there is no allegation that the alternative remedies have been exhausted as required by section 69 of the CPA;

b. No supplier/consumer relationship has been established.

[22] Dealing firstly with alternate remedies s 69 of the CPA provides as follows:

"**69 Enforcement of rights by consumer**

A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

(a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;

(b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;

(c) if the matter does not concern a supplier contemplated in paragraph *(b)*-

(i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or

(ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;

(iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or

(iv) filing a complaint with the Commission in accordance with section 71; or

(d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted."

[23] There have been conflicting decisions on s 69 of the CPA. A few of the cases are similar to *Joroy 4440 CC v Potgieter and Another NNO* 2016 (3) SA 465 (FB) where it was held that s 69 of the CPA requires that alternative remedies first be exhausted. In an obiter dictum in *Motus Corporation (Ply) Ltd t/a Zambezi Multi Franchise and another v Wentzel* [2021] 3 All SA 98 (SCA) the appeal court indicated that this was the incorrect approach (footnotes omitted:

"[25] [Section 69] has caused considerable difficulty and is the source of conflicting judgments in the High Court. The authors of *Commentary on the Consumer Protection Act* say that "the various entities that can be approached for purposes of redress are not indicated in section 69 in an order that presents a clear picture of the exact route that a person has to follow in this quest for redress". Nonetheless they suggest that the section contemplates a hierarchy of remedies and they make a valiant effort to describe such hierarchy. The difficulty posed by the notion that the section creates a hierarchy of remedies is illustrated by cases where the route taken by the dissatisfied consumer has avoided the applicable ombudsman with jurisdiction in terms of section 69(b). Requiring dissatisfied consumers to pursue other remedies under section 69 before approaching the High Court under section 69(d) has resulted in the consumer being non-suited. In the present case [the Motor Vehicle Ombudsman of South Africa] did not deal with Ms Wentzel's complaints until 10 September 2018, when it wrote to her saying that it had no jurisdiction, because the complaint needed to be received by it before the institution of legal action. The reference to it preceded the present litigation so it was incorrect to reject jurisdiction.

> [26] The need for us to address the scope of section 69(d) fell away in argument, because Mr *Botes* SC, who appeared for Renault and Renault SA, indicated that he would not pursue the point as his clients preferred to address the issues of substance. Therefore, we did not hear full argument on the matter. The issues arising from the section will need to be resolved on another occasion. It suffices to say that the primary guide in interpreting the section will be section 34 of the Constitution and the guarantee of the right of access to courts. Section 69(d) should not lightly be read as excluding the right of consumers to approach the court in order to obtain redress. A claim for cancellation of the contract and the refund of the price of goods on the grounds that they were defective falls under the *actio redhibitoria* and dates to Roman times. Our courts have always had jurisdiction to resolve such claims and there is no apparent reason why the section should preclude a consumer, at their election, from pursuing that avenue of relief until they have approached other entities.
>
> [27] The section is couched in permissive language consistent with the consumer having a right to choose which remedy to pursue. Those in (a), (b) and (c) appear to be couched as alternatives and, as already noted, there is no clear hierarchy. Had that been the aim it would have been relatively simple to set the hierarchy out in a sequence that would have been apparent, not "implied", and clear for the consumer to follow. Furthermore, subsection (d) does not refer to the consumer pursuing all other remedies "in terms of this Act", but of pursuing all other remedies available in terms of national legislation. That could be a reference to legislation other than the Act, or to the remedies under both the Act and other applicable consumer legislation, such as the National Credit Act 34 of 2005. Given the purpose of the Act to protect the interests of the consumer, who will always be the person seeking redress under it, there is no apparent reason why they should be precluded from pursuing immediately what may be their most effective remedy. Nor is there any apparent reason why the dissatisfied consumer who turns to a court having jurisdiction should find themselves enmeshed in procedural niceties having no bearing on the problems that caused them to approach the court."

[24] The Appeal Court's remarks represent an interpretation of s 69 that is in line with s 34 of the Constitution and the intention of the legislator in the CPA read as a whole. A proper interpretation of s 69 requires a finding that the legislator did not intend to provide that an aggrieved consumer is barred from approaching a court unless all the other potential remedies referred to in the section have been exhausted.

[25] Subsection 69(d) refers only to remedies "*in terms of National legislation*". Thus, a remedy available in terms of the common law or in terms of subordinate legislation is plainly not included. It could not have been the legislator's intention to discriminate against consumers with rights in terms of national legislation on the one hand and consumers with rights in terms of the common law on the other. Such approach

also appears to conflict with a number of provisions of the CPA, including s 2(1), s 2(10), s 3(1) and s 4(3).

[26] The plaintiffs seek to enforce their alleged rights *inter alia* in terms of the common law (both in contract and in delict) and the Companies Act, in addition to those in terms of the CPA. In my view it makes no sense to suggest that the plaintiffs must first exhaust their remedies in terms of the CPA whilst at the same time being allowed to enforce rights in terms of the common law in a court.

[27] Subsequent cases have adopted the approach set out in *Motus*. See *Takealot Online (RF) (Pty) Ltd v Driveconsortium Hatfield (Pty) Ltd - Application for Leave to Appeal* (7348/2021) [2021] ZAWCHC 280 (11 October 2021) and *Steynberg v Tammy Taylor Nails Franchising No 45 (Pty) Ltd* (Case No 23655/2021, Gauteng Division, Pretoria, unreported, 21 June 2022).

[28] This ground of exception (as based on alternate remedies) must therefore fail.

[29] Turning next to the question as to whether a supplier and consumer relationship has been established it is contended by the second defendant that the relationship between the plaintiffs and the second defendant is that of shareholder and company, and "...patently...not a consumer and supplier relationship contemplated in the CPA". In that regard the second defendant seems to suggest that, in effect, and regardless of the peculiar circumstances of any particular matter, a company and its shareholder cannot be engaged in a consumer and supplier relationship as envisaged by the CPA. The plaintiffs argue that common sense dictates that this cannot be so, and that each matter ought to be determined on its own facts. To my mind that much must be plain.

[30] In any event the plaintiffs pertinently plead in their particulars of claim (in para 11.10 in Khoza and in para 14.10 in Burger) that, *inter alia*, the second defendant provided goods and services to the plaintiffs as consumers. For the rest, it is for the evidence at trial to resolve that question and is plainly not a matter for exception.

[31] In the exception the second defendant complains that the wrongful conduct outlined in the particulars of claim does not relate to it. The plaintiffs disagree therewith, and without conceding the complaint, they have, *ex abundanti cautela*, in the proposed amendment, sought to reinforce the averments concerning the consumer and supplier relationship by specifically and expressly including both defendants as being party to the conduct complained of as follows. The amendment sought to be introduced to reinforce that both defendants allegedly failed to manage and operate FHPZ to the alleged agreed standard, would, in my view, fit in with the CPA's related definitions in with regard to both defendants. Again, and for the rest, it is for the evidence at trial to resolve that question and is plainly not a matter for exception.

[32] The second defendant's objection to plaintiffs' proposed amendment is therefore without merit, and, in addition, this ground of exception (as based on the question of a supplier and consumer relationship) must also, and further, the amendment, it follows, must be allowed.

Fourth and fifth grounds (Khoza) & third and fourth grounds (Burger)

[33] These grounds of exception relate to:

a. aspects of the second defendant's status as a party to the agreement or as the first defendant's principal; and

b. whether wrongful conduct has been attributed to the second defendant in the particulars of claim.

[34] Those grounds have already been dealt with earlier and on that basis these grounds must likewise fail.

[35] Although to a lesser extent, the proposed amendments have an impact here too and must also be allowed.

Sixth ground (Khoza) & fifth ground (Burger): s 163 of the Companies Act)

[36] This ground of exception concerns:

a. whether wrongful conduct is attributed to the second defendant in the particulars of claim; and

b. the plaintiffs are prevented from proceeding by way of action for relief in terms of s 163 of the Companies Act.

[37] The first of these aspects (wrongful conduct) has already been disposed of earlier.

[38] As for the second aspect, sub-sections 163(1) and (2) of the Companies Act provide as follows:

> "**163. Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company.** –
>
> (1) A shareholder or a director of a company may apply to a court for relief if –
>
> (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
>
> (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
>
> (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.
>
> (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including –
>
> (a) an order restraining the conduct complained of;

(b) an order appointing a liquidator, if the company appears to be insolvent;

(c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131 (4) (a) apply;

(d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;

(e) an order directing an issue or exchange of shares;

(f) an order –

(i) appointing directors in place of or in addition to all or any of the directors then in office; or

(ii) declaring any person delinquent or under probation, as contemplated in section 162;

(g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;

(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;

(i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;

(j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;

(k) an order directing rectification of the registers or other records of a company; or

(l) an order for the trial of any issue as determined by the court."

[39] The plaintiffs assert oppressive conduct on the part of the defendants and claim, in broad terms, appropriate relief in terms of s 163(2) of the Companies Act including that the defendants (or either of them) acquire the shares and refund to the

plaintiffs the purchase price paid. The exception concerns the plaintiffs' failure to proceed by way of application.

[40] This ground of exception is flawed in two fundamental respects:

a. First, it relates to a question of procedure or irregular proceeding and does not fall within the scope of the exception mechanism, and

b. Second s 163 of the Companies Act does not require motion proceedings to be utilised to the exclusion of action proceedings. In other words, the plaintiffs are entitled to proceed by way of action.

[41] Dealing with the first (that an exception is not available for type of complaint):

a. The complaint embodied in this ground of exception is one which ought to be raised by way of objecting to the regularity of the proceedings in terms of Uniform Rule 30, rather than by way of exception;

b. The essence of the complaint is that plaintiffs are being told that they ought to have advanced their cases in motion proceedings and not by way of an action;

c. That is not a challenge to the legal competence of the cause of action advanced which is the purpose of an exception.

d. In proper context, the complaint is an objection to the procedural step taken by the plaintiffs which is considered as being irregular.

e. The second defendant is therefore not entitled to bring an exception and should have utilised the procedure afforded by Uniform Rule 30. 46.6.

[42] It is perfectly clear that s 163 of the Companies Act does not require motion proceedings to be employed to the exclusion of action proceedings. The section uses

the words "apply" and "application", but the Companies Act does not define either of those words.

[43] The cases have been consistent over the years that such terminology does not preclude action proceedings. See *Food & Nutritional Products (Pty) Ltd v Neuman* 1986 (3) 464 (W) at 477G, *Fourie's Poultry Farm (Ply) Ltd v KwaNatal Food Distributors (Ply) Ltd (in liquidation) and Others* 1991 (4) SA 514 (N), *Cassim v The Master & Others* 1960 (2) SA 347 (D) at 349F, *Armitage NO v Valencia Holdings 13 (Pty) Ltd and Others* (638/2022) [2023] ZASCA 157 (23 November 2023). *Armitage*, which involved a claim founded squarely on s 163 of the Companies Act, served before the High Court as the court of first instance, the Full Court and the Supreme Court of Appeal. The claim was pursued as an action, and while the point appeared not to have been raised, those courts voiced no concern in that regard. That is indeed significant.

[44] This ground of exception is devoid of merit and fails.

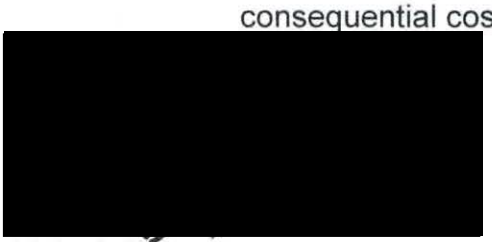
[45] As a general proposition across all the grounds of exception raised it is my view that the proposed amendment is central to their assessment, and must be considered in the context of the principles established in *Dharumpal*.

[46] Turning to the question of costs it follows that the costs relating to the exception must follow the result. I am also persuaded that in that regard allowing the costs of two counsel is not unreasonable. The costs relating to the amendment and the application therefor must be placed on a different footing. The amendment, in large part, was clearly sought to address the complaints, even if out of an abundance of caution. Thus the costs relating to the amendment and its consequences, on a unopposed basis, must be borne by the plaintiffs. The costs associated with the application to amend present a slightly different case. The costs involved in preparing for the opposed hearing (including the heads of argument and practice note) and of the hearing itself were in no way affected by the application to amend. All those costs fall quite properly into the mix of the exception. As for what is left over and connected purely to the application to amend, such costs are best left where they lie.

[47] I make the following orders in each of the Khoza (Case No. D3385/2023) and Burger (Case No. D6433/2023) matters:

a. The exception is dismissed with costs, such costs to include those of two counsel.

b. The application for leave to amend the particulars of claim is granted with the plaintiff/s to pay the costs of the amendment (and any consequential costs) on an unopposed basis.



Vahed J

CASE INFORMATION

Date of Hearing:	14 March 2024
Date of Judgment:	04 July 2024
Plaintiffs' Counsel:	P J Wallis SC with B Wharton (Heads of Argument by A Kantor SC with B Wharton)
Plaintiffs' Attorneys:	Trudie Broekmann Attorneys Cape Town (Ref: T Broekmann/TB1363/ Khoza / F&I Burger Family Trust) email: admin@broekmann.co.za Locally represented by: Goodrickes Attorneys 1 Nollsworth Park Nollsworth Crescent La Lucia Ridge (Ref: MAT 20856) Tel: 031 301 6211 email: legal2@goodrickes.co.za
Excipient's Counsel:	J F Nicholson
Excipient's Attorneys:	Cliffe Dekker Hofmeyer Inc Sandton (Ref: E Bester/020637 and 0206347) email: eugene.bester@cdhlegal.com Locally represented by: Shepstone & Wylie 24 Richefond Circle Ridgeside Office Park Umhlanga Rocks (Ref: J Von Klemperer/c/CLIF18219.159) Tel: 031 575 7000 email: vonklemperer@wylie.co.za