Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 2102 / 2020

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 24 May 2023
Date of judgment: 9 June 2023

In the matter between:

TITAN ASSET MANAGEMENT (PTY) LTD	First Plaintiff
CHRISTOFFEL HENDRIK WIESE	Second Plaintiff
TITAN TRADEMARKS (PTY) LTD	Third Plaintiff
CWP WINE BRANDS (PTY) LTD	Fourth Plaintiff
TITAN PREMIER INVEESTMENTS (PTY) LTD	Fifth Plaintiff
WIESFAM TRUST (PTY) LTD	Sixth Plaintiff

and

LANZERAC ESTATE INVESTMENTS (PTY) LTD	First Defendant
(formerly Morpheus Property Investments (Pty) Ltd)	
MARKUS JOHANNES JOOSTE	Second Defendant

JUDGMENT

BINNS-WARD J:

[1] According to the particulars of claim in an action instituted by six plaintiffs against Lanzerac Estates Investments (Pty) Ltd (formerly named Morpheus Property Investments (Pty) Ltd), as first defendant, and Markus Jooste, as second defendant, an oral agreement was concluded in November 2011 between the second plaintiff, Christoffel Wiese, of the one part, and Jooste, 'purportedly representing a consortium of unnamed investors', of the other. They determined that the interests of Wiese, Titan Asset Manager (Pty) Ltd, (the first plaintiff), Titan Trademarks (Pty) Ltd (the third plaintiff), CWP Wine Brands (Pty) Ltd (the fourth plaintiff), Titan Premier Investments (Pty) Ltd (the fifth plaintiff) and Aussenkjer Boerdery (Pty) Ltd 'in various businesses, assets and entities known as "Lanzerac"' would be acquired by the consortium at their agreed 'combined value' of R220 million in exchange for a stipulated number of shares in Steinhoff Intl of equivalent value. The plaintiffs have pleaded that Jooste knew at the time that Wiese reasonably believed that the price at which the shares in Steinhoff Intl were trading on the JSE stock exchange fairly reflected their market value.

[2] The plaintiffs have pleaded that the transaction was 'reduced to writing and implemented in terms of five separate written contracts', which are identified in the pleading. Morpheus Property Investments was nominated or selected as the vehicle that would acquire "Lanzarac" from the aforementioned plaintiffs (and Aussenkjer Boerdery) pursuant to the transaction.

[3] It is alleged that at all times during the negotiation and implementation of the transaction Jooste knew that the financial records and reports of Steinhoff Intl and its subsidiaries had materially 'misstated its income, profits and assets since at least 2009'; a state of affairs that had been engineered by Jooste and his accomplices deliberately to mislead investors concerning the value of the shares of Steinhoff Intl. Jooste would therefore have appreciated that Wiese was misled by the fraudulently misstated financial information in

entering into the transactions. Furthermore, Jooste's representation that he was acting on behalf of a consortium was also a falsehood in that, in truth, he was acting on his own behalf to acquire "Lanzarac" through an indirect interest in the first defendant, of which he was at all material times the controlling mind. Jooste was at the time the chief executive officer of Steinhoff Intl. His misrepresentation that he was acting on behalf of a consortium was a device to conceal the fact that the substantial number of Steinhoff Intl shares to be exchanged in the transactions were shares of which he personally wished to dispose at or about their listed price. In short, it was alleged that the contracts, which, according to their tenor, constituted integral components of an indivisible transaction, had been induced by Jooste's fraud.

[4] The plaintiffs have pleaded that in October 2013, Wiese, acting personally, and in a representative capacity on behalf of the first, third, fourth and fifth plaintiffs, respectively, and also on behalf of Aussenkjer Boerdery, entered into a further series of agreements in terms of which the Steinhoff Intl shares that each of them had acquired in terms of the Lanzarac transaction, 'together with capitalisation issues that they had received by virtue of their respective shareholdings', were sold to the sixth plaintiff, Wiesfam Trust (Pty) Ltd, for an aggregate consideration of just over R230 million. The pleading gives the following explanation of these agreements: 'The Sales of Shares Agreements were not concluded at arms-length but represented the implementation of an intra-group reorganisation by Wiese and entities associated with him to pool [in Wiesfam Trust] the Steinhoff Intl shares owned by [him and the first, third, fourth and fifth plaintiffs] and Aussenkjer … and were concluded while the parties thereto remained tainted (*sic*) by Jooste's fraudulent non-disclosure pleaded above'.

[5] The pleading relates that on 7 December 2015, pursuant to a scheme of arrangement under the Companies Act, 2008, Steinhoff NV, of which Jooste was then the chief executive

officer, acquired all of the issued shares in Steinhoff Intl in exchange for an equal number of shares in Steinhoff NV. Accordingly, the sixth plaintiff acquired the same number of shares in Steinhoff NV as the number of shares in Steinhoff Intl purchased by it in the intra-group reorganisation described in the preceding paragraph.

[6] It is further alleged in the particulars of claim that subsequent to November 2017, and while Wiesfam still held the Steinhoff NV shares it had acquired in the manner described above, the fraudulent misstatement of Steinhoff's financial position by Jooste and his accomplices became public knowledge and the value of Steinhoff NV shares was consequently 'reduced to a negligible amount'. Elsewhere in the pleading, as described below, the shares in Steinhoff NV are referred to as having become 'valueless'.

[7] The final paragraph of the pleading sums up the basis for the plaintiffs' claims as follows:

> '31. In the premises:
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> 31.1. [First, second, third, fourth and fifth plaintiffs] and Aussenkjer:
>
> 31.1.1. are entitled to rescind the Contracts to which they were a party, which each of them save for Aussenkjer hereby do (*sic*); and
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> 31.1.2 are entitled to restitution of that which they delivered pursuant to the Contracts to which they were a party against return of the consideration they received in each case or such substitute as the Court may deem meet, and [first plaintiff, second plaintiff and third plaintiff] each hereby tender to deliver to Morpheus Steinhoff NV shares equivalent in number to the number of Steinhoff Intl shares they each received under the Contracts.

31.2. As a result of [first, second, third, fourth and fifth plaintiffs] (alternatively, any one of them) rescinding the Contract(s) to which they were a party, all of the remaining agreements forming the Contracts are *ipso facto* set aside by virtue of their interdependent nature.

31.3 If restitution is not effected then Wiesfam, alternatively, [fifth plaintiff] will have suffered damages of R220,000,000.00 as a result of the first and second defendant's fraudulent non-disclosure, same representing the difference between the value of the assets disposed of under the Contracts and the valueless Steinhoff NV shares which represent the consideration received for them and which were pooled in Wiesfam, as part of the intragroup reorganisation pleaded in paragraph 27 above.'

[8] The plaintiffs have sought relief in their particulars of claim in terms of the following prayers:

'(i) Each plaintiff severally, a declaration that the Contract(s) to which it was a party is or has been duly cancelled;

(ii) Each plaintiff severally, that the first defendant be directed to make restitution to each plaintiff of the assets such plaintiff transferred to the first defendant under any of the Contracts (subject to any adjustment that may be deemed fit having regard to the depreciation or appreciation in the said assets since they were transferred to the first defendant);

(iii) [Sixth plaintiff and first plaintiff], that the first and second defendants, jointly and severally, the one paying the other being absolved, are to pay [sixth plaintiff], alternatively, [first plaintiff]:

iii.1. R50 million, or such amount this Honourable Court may deem fit having regard to any depreciation or appreciation in the value of the assets referred to in paragraph 20.3 [ie the business sold by Aussenkjer Boerdery (Pty) Ltd to the first defendant comprising certain immovable property and water use rights in exchange for a fixed number of shares in Steinhoff Intl with an allocated value of R50 million]] since they were transferred to the first defendant, and

iii.2. the fair value of the assets transferred to Morpheus and of the Steinhoff NV shares received in exchange for those assets under any other of the Contracts in respect of which restitution is not ordered or made.

(iv) Interest on the amounts in (iii) *a temporae mora* (*sic*);

(v) Costs of suit against the first and second defendants jointly and severally, the one paying the other to be absolved; and

(vi) Such further and/or alternate relief as this Honourable Court may deem meet.'

[9] The current proceedings concern the exceptions that the first defendant has noted to the plaintiffs' particulars of claim. Four grounds of exception were set out in the notice of exception, but the first of them, premised on the arbitration clauses in the contracts, has, advisedly, not been persisted with. The grounds of exception remaining for determination are –

(i) that cancellation and rescission are precluded by the terms of the contracts ('the second exception');

(ii) that the claims for rescission and restitution are invalid because the plaintiffs on their pleaded case are unable to tender or make restitution of what they obtained in the transactions ('the third exception'), and

(iii) the non-joinder of Aussenkjer Boerdery (Pty) Ltd ('the fourth exception').

Principles applicable in the adjudication of exceptions

[10] The principles applicable in the adjudication of exceptions are well established, and it is therefore not necessary for the purposes of this judgment to rehearse them at any length.[1] Suffice it to say that a pragmatic approach is called for, bearing in mind the purposes of an exception; being to weed out claims that should not proceed to trial because a cognisable claim or defence, as the case may be, has not been made out on the pleadings, or to prevent a claim or defence being persisted with on pleadings that are vague and embarrassing. As Harms JA remarked in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at para 3, '[a]n over-technical approach destroys their utility'.

[11] In the same vein, Ponnan JA observed in *Luke M Tembani and Others v President of the Republic of South Africa and Another* [2022] ZASCA 70; 2023 (1) SA 432 (SCA) (20 May 2022) at para 14 that '[w]hilst 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.' (Footnotes omitted.)

[1] For a helpful detailed review of the applicable principles, see the commentary on Uniform Rule of Court 23 in DE van Loggerenberg, *Erasmus, Superior Court Practice* (Juta) Volume 2 from D1-293 (RS20, 2022).

The second exception

[12] The first defendant points to the following clauses in the contracts in terms of which it acquired "Lanzerac" from the plaintiffs and contends that they have the effect of precluding the rescission upon which the plaintiffs' claims in the action are founded:

> A clause providing –
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> 'The agreements constituting the Transaction form an indivisible transaction and are interdependent upon one another. If one or more of the aforesaid agreements are not implemented, do not come into existence or is cancelled or terminated for whatever reason any of the Parties may terminate the remainder of the agreements comprising the Transaction except that no agreement may be cancelled or terminated after the assets sold in terms thereof have been transferred to the purchaser thereof.'
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> And a clause providing –
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> 'Neither Party shall be entitled to cancel this Agreement:
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> 1. after the Transfer Date; or
> 2. before the Transfer Date unless the breach is breach of a material term, and the remedy of specific performance or damages would not adequately prevent the Aggrieved Party from being prejudiced and the cancellation takes place before the Transfer Date.'

(As to the second of the clauses quoted above, the first defendant's counsel acknowledge some differences between the versions of the clause in two of the contracts involved and that set out in the quotation, but rightly submit that nothing turns on the differences for the purposes of the exception.)

[13] The first defendant contends that as it appears from the particulars of claim that the contracts were implemented and that all of the obligations under them have been performed, it is evident *ex facie* the terms of the respective contracts, copies of which are attached to the pleading, that 'in the circumstances and contractually, the Plaintiffs are precluded from cancelling the Contracts and seeking the declaratory relief that the Contracts have been or are cancelled, followed by rescission, restitution and/or damages'.[2]

[14] In my judgment, there is no merit in the second exception. It is evident from the pleading (and, indeed, implicitly acknowledged by the content of the first defendant's third exception, to which I shall come presently) that the plaintiffs allege that they resiled from the contracts because they had been induced by Jooste's fraudulent non-disclosure. The effect of an innocent party resiling from a contract on that ground is that the agreement is regarded as being void *ab initio*, and the innocent party is accordingly not held bound by any of its terms; see eg *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76 (29 May 2013); 2013 (5) SA 1 (SCA); [2013] 3 All SA 291 (SCA) at para 14, where Lewis JA expressed the position as follows: 'The effect of fraud that induces a contract is, in general, that the contract is regarded as voidable: the aggrieved party may elect whether to abide by the contract and claim damages (if it can prove loss) or to resile — to regard the contract as void from inception, and to demand restitution of any performance it may have made, tendering return of the fraudulent party's performance'. In view of the plaintiffs' election to resile, the clauses on which the first defendant relies for the exception are for all practical purposes non-existent in law.

[15] Quite apart from the aforegoing consideration, even were the clauses in question treated as effective exclusion clauses, they would not be enforceable in the face of an act of cancellation by the innocent party based on fraud. In my view, a clause excluding a party's

[2] Paragraph 21 of the first defendant's heads of argument.

right to cancel a contract by reason of the other party's breach is analogous to an exemption from liability clause. Such clauses, whilst ordinarily not considered to be against public policy and therefore generally enforceable will not be enforced if their effect is to exclude liability for fraud; cf. *Wells v South African Alumenite Company* 1927 AD 69 at 72 and *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at para 9-10. In the first-mentioned case *loc. cit.*, Innes CJ said 'On grounds of public policy the law will not recognise an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other.' The first defendant's exception effectively postulates that the clauses upon which it relies exclude the innocent parties' right to terminate the contracts even when it was discovered that they had been induced by fraud. If that is indeed the import of the clauses, I cannot conceive that any court would enforce them in the circumstances pleaded in the plaintiffs' particulars of claim.

[16] The second exception will therefore be dismissed.

The third exception

[17] It will be recalled that the basis of the third exception was that the claims for rescission and restitution are invalid because *ex facie* the pleaded case the plaintiffs are unable to tender or make restitution. This exception, which must be understood in the context of the facts described earlier in the judgment, was formulated as follows in para 3-7 of the notice of exception.

> 3. In each of the contracts: the purchase consideration to be deliverable by the First Defendant, as purchaser, to the respective Plaintiff, as seller, were the Consideration Shares (as defined) as expressly contracted for, specifically:

3.1 The specified number of fully paid up ordinary shares at the stated par value image (*sic*) in the issued share capital of Steinhoff Intl Holdings Ltd up (sic); (*Definition – Considerations Shares*)

3.2 The parties agreed on the value of the Consideration Shares for the purposes of the respective contract (which per POC 3 was the value of the consideration shares on 29 November 2011, being the date when the parties orally agreed to enter into the contract) and that that value shall be allocated to the immovable properties; (*Contracts – "Purchase Consideration"*)

3.3 The First Defendant, as purchaser, was obliged to transfer the Consideration Shares before 09H00 on the defined closing date in favour of the relevant plaintiff, as seller. (*Contracts – "Settlement of Purchase Consideration"*)

3.4 In the circumstances the First Defendant delivered, alternatively paid as consideration, the Consideration Shares on an agreed date at an agreed value, which value was the value of the Consideration Shares as at the date when the parties orally agreed to enter into the contract.

3.5 The First Defendant did not warrant the value agreed.

4. Despite contending for the relief of rescission against a limited tender of restitution of the equivalent number of shares to that of the Steinhoff Intl shares delivered as the purchase consideration for the contracts:

4.1 the tender is not made with regard to the equivalent value of the Consideration Shares as agreed, determined and performed in terms of the contracts;

4.2 the tender does not constitute restitution in respect of the Consideration Shares as agreed, determined and performed in terms of the contracts necessary for the rescission claimed; and

4.3 notwithstanding their tender, the Plaintiffs are in fact unable to tender or make restitution on their own pleaded case.

5. In the above regard:

[in subparagraphs 5.1 to 5.3, the first defendant referred to the pleaded allegations concerning the intragroup sale of the 'consideration shares' to Wiesfam Trust (Pty) Ltd described above and the subsequent exchange of such shares for an equivalent number of shares in Steinhoff NV in the terms of the scheme of arrangement and the tender of the latter shares as pleaded in para 31 of the particulars of claim (which has been quoted in paragraph [7] above).]

6. In the premises, the Plaintiffs' tenders of restitution are valueless and without substance on their own pleaded version.

7. Accordingly, the Plaintiffs' particulars of claim do not in the above respects disclose a cause of action valid in law against the First Defendant.'

[18] In argument, the first defendant's counsel submitted that the pleaded tender was bad in law, being inadequate. They suggested that the tendered shares being, on the plaintiffs' own version, 'worthless', the purported tender of them may not constitute a tender at all. They argued that the pleaded tender 'neither seeks to restore what was delivered under the agreement [ie Steinhoff Intl shares] nor does it place [the first defendant] in the same financial position it was in before the agreement was concluded'.

[19] A number of answers to those contentions suggest themselves. Firstly, and possibly most importantly for determining the exception, is the fact that the particulars of claim do unmistakeably plead a tender. Accordingly, the pleading of the claim for restitution cannot be said to be bad on account of the absence of a tender by the plaintiffs to restore to the first defendant what they received from it in terms of the rescinded agreements, or something in

lieu thereof. The issue is therefore not the making of a tender, but rather its adequacy. In my view, for the reasons that follow, the adequacy of the pleaded tender is an issue for trial.

[20] The object of restitution is to restore the parties to the affected transaction to the position they were in when they implemented it. As a general rule, the innocent party cannot obtain restitution (as distinct from damages) unless it is able and willing to restore what it received under the rescinded agreement.[3] But, as acknowledged in several authoritative judgments,[4] 'since the rule is founded on equity it has been departed from in a number of varying circumstances where considerations of equity and justice have necessitated such departure'.[5]

[21] In *Davidson v Bonafede* 1981 (2) SA 501 (C) at 511A, Marais AJ observed that '[i]t seems plain that the Court is expected to do the best it can to restore the parties to their respective positions ante quo. A meticulously accurate restoration of the parties to that position will seldom be possible. Pragmatism will have to pay a large role in the process.'. In *Mackay v Fey NO and Other* 2006 (3) SA 182 (SCA) at para 10, Scott JA noted that '... there has been over the years a general relaxation of the rule that a party seeking restitution must first be willing and able to restore what he or she received'. The learned judge proceeded 'Whether the need to make restitution is excused, either wholly or partially, will now depend on considerations of equity and justice and the circumstances of each case; the occasions on which it will do so are not limited to a specified and limited number of exceptions.'.

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[3] See, for example, *Van Schalkwyk v Griesel* 1948 (1) SA 460 (A) at 470 fin -471, *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 700G-701*init*.

[4] *Marks v Laughton* 1920 AD 12 at 21; *Harper v Webster* 1956 (2) SA 495 (FC) at 499H-500B and 502D-G; *Feinstein v Niggli* supra, *loc. cit*.; *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* [1998] ZASCA 67 (17 September 1998); 1999 (2) SA 719 (SCA); [1998] 4 All SA 465 (A) at 731E (SALR) and *Northwest Provincial Government and Another v Tswaing Consulting CC and Others* [2006] ZASCA 108 (21 November 2006); [2007] 2 All SA 365 (SCA); 2007 (4) SA 452 (SCA) at para 17-18.

[5] *Feinstein v Niggli* supra, loc.cit. (per Trollip JA).

[22] In the current matter, immediately prior to the implementation of the transactions, the plaintiffs were, respectively, in possession of the interests in various businesses, assets and entities known as "Lanzerac" that, collectively, constituted the *res vendita*, and the first defendant had the given number of Steinhoff Intl shares for use as the purchase consideration. In the ordinary course restitution would be achieved by the sellers giving back the shares they had received in exchange for the interests in "Lanzerac" that they had transferred to the first respondent

[23] Does it matter in the circumstances of the current case that the shares that the plaintiffs tender are not exactly the same shares as the ones that they received from the first defendant? Not necessarily, in my view. I think there is a persuasive argument to be made that shares in a listed company are fungibles. Consider in this regard Elias Leos, '*Quasi-usufruct and shares: Some possible approaches'* (123) 2006 SALJ 126, especially at p.144, where the writer opines, 'Interchangeability is a vital requirement of a fungible. For example, if the issued share capital of XYZ Limited consists of 100 million ordinary shares, all of which have been listed on the JSE, then any one million ordinary shares in XYZ Limited would have the same features as to class and quantity as any other one million ordinary shares in that company. It is thus submitted that a fixed number of shares of the same class in a listed company could be unilaterally substituted by an identical number of ordinary shares in the capital of that company and no legal consequences could follow as a direct result of such substitution. In such an event the relevant shares would be interchangeable similar to, *mutatis mutandis*, one kilo of butter, 100 litres of petrol or twelve dozen rolls, or such other property which would be subject to a quasi-usufruct in the ordinary course.' (Footnote omitted.).[6]

[6] The statement by Van Zyl J (Kuschke AJ concurring) in *Cooper v Boyes NO and Another* 1994 (4) SA 521 (C) at 533G that '*the defendant ... is not supported by common-law authority or by contemporary legal writing in submitting that a share should be regarded as a consumable or fungible thing similar to money or a debt*', which, in isolation, might be understood to express a contrary view, must be understood in the context of what was in issue in that case. The matter in issue was whether shares were amenable to being the subject of a

[24] Thus, it would not matter if the seller-plaintiffs had in the interim, before discovery of the alleged fraud, sold the shares, whether to Wiesfam Trust (Pty) Ltd in an intragroup transaction, as alleged, or in an arms' length transaction to an outside party. It would be sufficient, by reason of their character as fungibles, if any shares in Steinhoff Intl equivalent in number and of the same class to those obtained in the impugned transaction were tendered by the seller-plaintiffs in return for their interests in "Lanzerac". The equitable principles that inform restitution would in no way be subverted by such a process. On the contrary, they would, in substance, be completely respected by it. If there were any reason for the first defendant to assert that it would be cognisably prejudiced thereby, it would be for it to plead and prove why the apparently adequate tender did not suffice to meet the equities of the case; cf. *Tswaing Consulting* (supra, note 4), at para 21.

[25] Of course, in the current case, there is a complicating factor. According to the pleaded facts, there are no longer any Steinhoff Intl shares in issue. They were substituted, on a one-for-one basis, with Steinhoff NV shares in terms of the scheme of arrangement that is mentioned in the particulars of claim. Does that necessarily imply that the plaintiffs are unable to effect restitution? I do not think so.

[26] As Corbett JA explained in *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 288H, 'A share in a company consists of a bundle, or conglomerate, of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends'.[7] It is by no means unusual for ordinary shares in listed companies to be affected by takeovers, mergers and acquisitions, and those are all eminently

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usufruct. They would not be if they were properly characterised as being consumables. It was in that context that Van Zyl J appears to have used the terms '*consumable*' and '*fungible*' as synonymous. He concluded that shares were not consumable things. Read in context, it is clear that the intended import of the learned judge's statement would not have been affected if he had omitted the words '*or fungible*'. LAWSA, sv '*Things*' (Vol. 27 – Second Edition) at para 48 states '*Things may be fungible or non-fungible depending upon whether they can replaced with identical things or not.*' It does not seem to me to be material that the thing in question might be incorporeal, rather than corporeal, property.

[7] See also *Botha v Fick* 1995 (2) SA 750 (A) at 762A-B.

foreseeable incidents of the ownership of such shares. That, moreover, is commonly done by way of schemes of arrangement that often involve shares in one entity being swapped for shares in another. Whether in such a case the tender of the substituted shares in lieu of those obtained by the innocent party in the impugned transaction would suffice for the purposes of restitution, would, in my view, depend on the extent of the equivalence of the rights conferred in terms of the originally held shares and those conferred by shares allocated in replacement of them in terms of the scheme of arrangement.[8]

[27] The plaintiffs' particulars of claim are amenable to being read to imply that the tendered shares in Steinhoff NV are the substantial equivalent of those in Steinhoff Intl that they replaced. If there is to be any dispute about the point, it stands to be ventilated in the trial of the plaintiffs' action.

[28] The notion that the required tender has to place the first defendant 'in the same financial position it was in before the agreement was concluded' seems misplaced to me. It appears to be based on a perception by the first defendant that the plaintiffs' tender must provide it with something of equivalent value to agreed purchase price of R220 million. That much is implicit in the statement in para 4.1 of the exception that 'the [pleaded] tender is not made with regard to the equivalent value of the Consideration Shares as agreed, determined and performed in terms of the contracts'. It applies what might be called 'the contractual standard' to the adequacy of the tender.

[29] The application of the contractual standard might well be appropriate in certain circumstances. So, for example, in *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* [1998] ZASCA 67 (17 September 1998); 1999 (2) SA 719 (SCA); [1998] 4 All SA 465 (A), at 733C-H (SALR), Nienaber JA conceptualised such a situation in the context of

[8] An alternative approach, one propounded in the plaintiffs' counsel's heads of argument, is to regard Steinhoff NV shares as 'the proceeds' of the Steinhoff Intl shares. It is not necessary for present purposes to express an opinion on that approach, although it is something that could engage the attention of the trial court.

the rescission of a contract of *locatio conductio operis* where the work had been fully performed and accepted before the knowledge of the inducing fraud had been acquired by the *conductor operis*. Rejecting the notion that the *conductor* was precluded from resiling in such circumstances, the learned judge noted, however, 'once the *conductor operis* has accepted the benefit of the *locator's* services, restoration in *specie* will often no longer be possible; hence the *conductor* must perforce make restitution by way of a pecuniary substitute. Since the value of that substitute may well have to be determined with reference to the contractual standard, the rescission of the contract followed by such restitution would leave the parties in exactly the same position as if the contract had been performed on both sides. The rescission would therefore have no practical effect, except to the extent that it may initiate a claim for damages.'

[30] It is clear, however, that in most cases of restitution the contractual standard does not apply. This is demonstrated for example by considering the case of the restitution by the innocent party of physical goods that have deteriorated through no fault on its part. The innocent party will not be expected in such a case to make up the original value of the goods by monetary compensation. Return of the goods in their altered state will be sufficient.[9]

[31] To apply 'the contractual standard' for the purposes of any form of substituted restitution (ie by way of Steinhoff NV shares) in the current case would be to be to make the first defendant the beneficiary of its agent's (Jooste's) inducing fraudulent non-disclosure. It would be to give it the contractually agreed value of the fraud-tainted 'consideration shares' as if they weren't so tainted. That is not what the first defendant is entitled to by way of restitution; it would be wholly inconsistent with the equitable purposes of the requirements for the restitutionary remedy. [10]

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[9] See *Feinstein v Niggli* supra, at 700A-C and the other authority cited there.

[10] In *Van Heerden en Andere v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A) at 31H, Rumpff JA remarked that depending on the circumstances the subsequent decline in the values of shares in a company that were the subject of a sale agreement could be irrelevant for the purposes of restitution. In my

[32] The first defendant is entitled only to the fraud-tainted Steinhoff Intl shares that it gave in consideration for the sellers' interests in the "Lanzerac" enterprise, or an appropriate substitute. The relevant value of the consideration given by the first defendant for "Lanzerac" for the purposes of the plaintiffs' tender of restitution is the value of the fraud-tainted shares, not the false value attributed to them by a market or contracting party that was ignorant of the fraud. On the pleading, the value of the fraud-tainted shares was negligible. If the defendants take issue with that allegation it will give rise to a triable issue. It is sufficient for present purposes merely to state that the pleaded tender is not obviously inadequate. The intragroup character of the transactions meant that it was not beyond the seller-plaintiffs' ability to make an effective tender of restitution.

[33] The matter is not affected by the sale of the consideration shares by the seller-plaintiffs to Wiesfam Trust. The indications on the pleading are that the sales were that those transactions were by way of effecting an intragroup rearrangement in respect of the holding of shares, as distinct from an alienation of them in the conventional sense. It seems from the information given in the pleading that the transactions were probably effected at the book values at which the shares had been acquired by the seller-plaintiffs from the first defendant.

[34] The first defendant also sought to make something of the fact that it has not been pleaded that Aussenkjer Boerdery rescinded the contract to which it was party as part of the discrete but indivisible transactions in terms of which "Lanzerac" was sold to the first defendant, and that there has been no tender by that company in support of the plaintiffs' claims for restitutionary relief. That, so it was contended, was a fatal deficiency in the pleaded case. There is nothing in the point in my view as the agreed indivisibility of the transactions was an incident of the contracts that have been rescinded. The seller-plaintiffs' rescission of those contracts in the circumstances has resulted in them being voided *ab initio*,

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respectful opinion, the learned judge's remark serves to confirm that the adequacy of restitution by a contracting party consequent upon the rescission of the contract depends on the facts of the given case.

including their stipulations about indivisibility. The current position concerning Aussenkjer Boerdery is in any event not clear on the papers. The claims by the first and sixth plaintiffs in respect of the property sold by Aussenkjer Boerdery in the fraudulently induced transactions imply that there must have since been some form of transfer of rights by Aussenkjer to one or both of those parties. I have been unable to discern from the particulars of claim how the first and or sixth plaintiffs are placed to make the claims for the relief sought in prayer (iii) iii.i (quoted in para [8] above). The pleading is arguably vague and embarrassing in this regard, but that is not a point that has been taken by the first defendant.

[35] For all these reasons the third exception will also be dismissed.

The fourth exception

[36] In the fourth exception, the first defendant takes the point that the plaintiffs' claims cannot be competently adjudicated without Aussenkjer Boerdery being joined as a party. Non-joinder is ordinarily a matter for a dilatory plea rather than an exception. A dilatory plea does not strike at a cause of action, it is directed rather at delaying its hearing until something happens to render it appropriate for the hearing to proceed. In the case of a successful plea of non-joinder, that something would be the joinder of another party with a legal interest in the relief being claimed. Another example of a dilatory special plea is a special plea of *lis pendens*. A dilatory plea falls to be distinguished from a declinatory special plea (eg a plea that the court lacks jurisdiction or that the claimant lacks standing) or a peremptory plea, which, if upheld, causes the action to be quashed altogether – pleas of, prescription, compromise or res judicata are examples peremptory special pleas.

[37] The exception procedure in all the divisions of the High Court has, since 1965, been uniformly regulated by Uniform Rule 23. Sub rule 23(1) provides as follows in relevant part: 'Where any pleading is vague and embarrassing, or lacks averments which are necessary to

sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception …'. The first defendant does not rely in its exceptions on a complaint that the impugned pleading is vague and embarrassing; so, to the extent that rule 23 applies, the fourth exception would qualify for consideration only if, as a consequence of the alleged non-joinder, the impugned pleading 'lacks averments which are necessary to sustain an action'.

[38] The plaintiffs' counsel emphasised that non-joinder is not one of the bases for an exception expressly provided for in Uniform Rule 23. They contended that if the first defendant wished to take the point it should plead it; the plaintiffs' would then have the opportunity to provide any answer they might have to it in a replication. They did not say so expressly, but it seems to me that it was necessarily implicit in the argument of the plaintiffs' counsel that an exception could afford an appropriate alternative procedure to advance a special defence only in cases where the nature of the relevant special plea that could be taken was of a declinatory or peremptory character; in other words, one not admitting of a possible answer on the pleaded facts. A point falling to be raised in a dilatory special plea would not be appropriately taken by way of exception because (i) it does not imply that the pleading does not sustain a cause of action and (ii) it may be seen off by an answer.

[39] The preliminary question raised in respect of the fourth exception is whether an exception was an appropriate procedural means for the first defendant to raise the point of non-joinder. Only if it was, will be it become necessary to pronounce on the merit of the non-joinder point. I shall, however, assume, for the purpose of deciding the preliminary question that the non-joinder point is, on the face of it, a good one in the context of the facts pleaded in the particulars of claim.

[40] The first defendant's counsel, relying on the observations of Tindall JA in *Collin v Toffie* 1944 AD 456 and certain remarks made in passing by Rogers J in this court in *Paulsmeier v Media 24 (Pty) Ltd and Others* [2022] ZAWCHC 85 (20 May 2022), contended nevertheless for the propriety of raising the objection by way of exception rather than in a special plea of non-joinder. Reference might also have been made to *Erasmus, Superior Court Practice* supra,[11] where several authorities are cited in support of the proposition that 'An objection of non-joinder, of *non locus standi in judicio* or lack of jurisdiction is usually taken by way of special plea, but if the fact of non-joinder or of *non locus standi in judicio* or of lack of jurisdiction appears from the summons, the defendant is entitled to except to the summons <u>on the ground that no cause of action is disclosed</u>'. (Underlining supplied for highlighting purposes.) It is therefore necessary to test the first defendant's contention upon a proper consideration of the judgments on which its counsel rely and those cited in *Erasmus*.

[41] *Collin*'s case was decided before the institution of the Uniform Rules and it did not involve the determination of a point of non-joinder on exception. The appellant's counsel in that case had, however, sought to support the exception, which had been dismissed by the court of first instance, by arguing that a non-joinder was evident on the pleaded case. The appeal court declined to consider the argument because the exception had not been founded on that ground in the notice of exception. Tindall JA nevertheless proceeded to make the following obiter remarks, which are in point: 'Where the allegations in a declaration disclose on the face of them that another party should have been joined as a party to the action, an objection of non-joinder may be raised by exception.' The learned judge cited *Amos Legane v Webb* 1917 TPD 650 and *Estate Vom Dorp v Scott* 1915 CPD 739 in support of his comment.

[11] At RS 20, 2022, D1-310A, fn 135.

[42] The case of *Amos Legane* concerned an exception on the grounds of non-joinder to the declaration in an action by certain, but not all, of the parties to sale of land of agreement for specific performance of the agreement, alternatively, in the event that the land had been sold to a bona fide third party, for damages. The court upheld the exception on the basis that the action could not be decided unless all the parties to the agreement were joined in the action. The question whether the question was properly amenable to determination on exception rather than pursuant to a special plea was not an issue in the matter, so the judgment (which, of course, also long preceded the adoption of the Uniform Rules) is of no assistance in answering the preliminary question identified in the current matter.

[43] It would appear from the other judgment cited by Tindall JA, *Estate Vom Dorp*, that the exception in that matter, which also concerned non-joinder, was considered in terms of a procedure quite foreign to that which applies to exceptions under the currently applicable Uniform Rules of Court. The exception in that case was predicated on a number of grounds, the first of which was described in the judgment of Juta JP as 'a plea in abatement on account of the non-joinder of Carl vom Dorp'.[12] It is apparent that there was an 'answer' to the exception before the court. Our current procedures make no provision for that.

[44] It is also evident from certain remarks made by the learned Judge President that there was some disharmony at the time that *Vom Dorp* was decided concerning some of the procedures related to exceptions. The special 'plea in abatement' incorporated in the exception in that case was upheld on the grounds that the joinder of all the parties to the contract in issue should be required because 'the case falls within the ordinary rule that where parties are jointly interested, they should be made parties'.[13] The question whether an exception was the proper means whereby a complaint of non-joinder should be made was not

[12] The import of the term plea in abatement is not clear in South African jurisprudence. It is taken from the English procedural lexicon and has not been used consistently in the judgments in this country; see AC Cilliers et al, *Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa* (Juta) 5th edition at p.599.

[13] Per Kotzé J in a concurring judgment.

discussed. On the contrary, as mentioned, it was accepted that the exception incorporated a plea. A plea (more especially one that is dilatory in character) is, of course, susceptible, in appropriate circumstances, to a replication. It is evident from the judgment of Juta JP that the plaintiff-respondent's 'answer' to the exception in that case included a statement that the party whom the excipient contended should be joined in the action, one Carl vom Dorp, had 'instructed his attorney to give notice that he withdraws all claims'.

[45] It is instructive to consider how Juta JP dealt with the plaintiff's 'answer' to the exception in this regard. The learned judge president said: 'But this is no answer to the exception, which is a matter of law, and the question is as to whether the pleadings are good on the papers as they stand. If there was a motion to strike out these paragraphs then the plaintiff would have been able to get Carl vom Dorp to make an affidavit setting forth that he withdrew all his claims and that he had given notice thereof to the defendant, and thus the Court would have been in a position to take that into account as being a proved fact, and deal with the costs accordingly. But upon an exception to a plea this matter of evidence does not seem to me to enter into the case at all. We cannot take notice of a statement made in answer to a legal exception that certain things have happened, which may or may not be the case, and of which we cannot judge unless upon evidence; and so, it seems to me, that that points to a very essential difference between an exception to a paragraph as being vague and embarrassing and a motion to strike it out. In the present case it would not have been so very material because the statement that Carl vom Dorp had withdrawn or abandoned his claim was not coupled with any tender of costs; but still the case seems to me to show that it would be a good thing, if it were possible, to put our practise (*sic*) on a sound foundation, that there should be some rules so that we might have a proper means of pleading and be able to deal with these questions in a proper way.' The court in Vom Dorp made no finding that the summons did not make out a cause of action, and it is plain that Juta JP was uncomfortable

about deciding the matter on exception when he appreciated that the plaintiff had an answer to the point of non-joinder. He clearly considered that that the rules of civil procedure applicable in this court at that time were deserving of revision to avoid the prejudicial situation that presented in *Vom Dorp*'s case.

[46] The import of the argument by the plaintiffs' counsel, although it was not expressly put in that way because there was no reference in it to the procedural difficulties identified by Juta JP in *Estate vom Dorp*, was that the modern rules of court address the issue by limiting the grounds for exception to those expressly set forth in Uniform Rule 23. There was no suggestion in *Vom Dorp* that the pleading was vague and embarrassing or that failed to make out a cause of action. The problems identified in *Vom Dorp* under a different procedural regime would not arise if Rule 23 were applied according to its tenor as a provision that comprehensively regulates the modern procedure in respect of exceptions. I think one is permitted to remember, when construing the Uniform Rules, that their central object was to update and universalise a system of civil procedure in lieu of the diverse procedures previously applied in the various provincial and local divisions of the Supreme Court. That object would be liable to being frustrated if some of the old procedures were treated as still being applicable notwithstanding their inconsistency with the express provisions of the revised procedural regime.

[47] I am therefore inclined to the view that the *obiter dictum* in *Collin* and the authorities with reference to which it was uttered have been overtaken by subsequent historical developments.

[48] The remarks of Rogers J in *Paulsmeier* upon which the first defendant's counsel relied to support their contention that the complaint of non-joinder was appropriately raised in this matter by way of exception were also obiter. They were contained in in a footnote to the judgment and went as follows in relevant part: 'In *Smith v Conelect* 1987 (3) SA 689 (W) at

692D-693F and *McIndoe v Royce Shoes (Pty) Ltd* [2000] 3 All SA 19 (W) at 22e-23e,[14] it was held that the formulation of rule 23(1) has not done away with the right of a litigant to raise misjoinder or non-joinder by way of exception, provided the objection can be sustained *ex facie* the pleading to which exception is taken, without reliance on extraneous facts.' The case did not call for the learned judge to investigate the merit of the indications to that effect in the respective judgments and he did not do so.

[49] The judgment in *Conelect* in relevant part merely endorsed a passing remark made by Howard J in *Anirudh v Samdei and Others* 1975 (2) SA 706 (N), which is one of the judgments cited in *Erasmus* mentioned earlier that I shall discuss presently. The exception in *Conelect* was dismissed because the court rejected the defendant's contention in that matter that another party, which had not been joined in the proceedings, had a direct legal interest in the relief sought by the plaintiff. In other words, the particulars of claim in *Conelect* did make out a cause of action, and were not susceptible to exception in terms of rule 23 and, in addition, the joinder contended for by the defendant was not required. Strictly speaking, there was no need for the court in *Conelect* to engage with the reasoning in *Anirudh* or make a determination on the procedural propriety of the exception of the sort required by the preliminary question that has been raised in the current case.[15]

[50] In *Anirudh*, the claim to which exception was taken was for orders directing an accounting to a deceased estate. The basis of the exception was described by the judge (at p. 707A-B) as follows 'the plaintiff excepts to the claim in reconvention <u>on the ground that it lacks averments which are necessary to sustain an action</u>, in that: *(a)* the defendants purport to act on behalf of or for the benefit of Mahadav's estate; *(b)* it is not alleged that they are the

[14] The judgment is reported at the place cited *sub nom*. *McIndoe and others v Royce Shoes (Pty) Ltd* and in the SALR as *Royce Shoes (Pty) Ltd v McIndoe and Others NNO* 2002 (2) SA 514 (W).

[15] In *Feldman NO v EMI Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA), at para 7, the Supreme Court of Appeal, after referring to the judgment in *Conelect* and noting the reliance in that judgment on *Collin*'s case, declined, in the peculiar circumstances of that case, to engage with 'the proposition that non-joinder may be raised as a matter for exception'.

executors of the estate; *(c)* only the executor has legal competence to institute legal proceedings on behalf of or for the benefit of the estate; and *(d)* the defendants lack the necessary *locus standi* to make the claim and the claim in reconvention does not allege any facts which would entitle them to do so.' (Underlining supplied for emphasis.) The point taken by the excipient was that as a matter of law only the executor of the deceased estate could make the claim and that it was therefore evident *ex facie* the pleaded facts that the respondent, who did not allege that she was the executrix, lacked standing to make the claim.

[51] Mr Justice Howard held that if the particulars of claim[16] did not sustain a cause of action, the exception there in issue was maintainable in terms of rule 23 of the Uniform Rules, irrespective of the label attached to the complaint being raised,. At p. 708E-F, the learned judge expressed himself in that regard as follows: 'In the view that I take of this matter it is unnecessary to decide whether a plea in abatement on the ground of non-joinder would have been appropriate or whether it was essential to the defendant's right of action that the executor should have refused to take action himself. Even if the plaintiff's objection is really one of non-joinder or *non locus standi* I think that it was competent for him to raise it by way of exception under Rule 23 (1). The plaintiff takes the claim in reconvention as it stands and says, correctly in my opinion, that even if the defendants succeed in proving each and every averment contained therein they will not be entitled in law to any of the relief claimed. That being so, it cannot be gainsaid that the claim in reconvention "lacks averments which are necessary to sustain an action".' . (Underlining supplied for emphasis.)

[52] The late Appellate Division, following *Cook v Gill* (L.R., 8 C.P. 107), gave the following definition of 'cause of action' for the purpose of pleading in *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at 23: '…'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment

[16] In that matter the exception was against the particulars of a claim in reconvention.

of the Court'. It is a definition that has since been endorsed by the courts on countless occasions over the intervening years.[17] A founding pleading that does not set out the bases for the claimant's standing to bring the claim and the court's jurisdiction to entertain it lacks averments which are necessary to sustain an action and is susceptible to exception in terms of Uniform Rule 23; just as it would have been under the rules of procedure that were applied before the introduction of the Uniform Rules. The fact that the objection in issue could have been raised by way of a special plea rather than an exception, is no bar to it being advanced by way of an exception if it is demonstrable ex facie the pleading that it lacks averments to sustain a cause of action. That, in short, is the relevant import of the judgment in *Anirudh*. That it might be evident that a party that has not been joined might have a direct legal interest in the pleaded cause of action does not detract from the fact that a cause of action has been pleaded. Indeed, if the pleading lacked averments to sustain a cause of action, it would be difficult to argue that anyone could have a legal interest in anything affected by it. That would be so because necessarily implicit in the pleaded claim's failure to sustain a cause of action would be its lack of susceptibility to being substantively determined.

[53] There is, in my respectful opinion, no sound basis to quarrel with the reasoning in *Anirudh*. Unless the respondent in that case was able to, and did, allege that she was the executrix of the deceased estate, the pleaded claim lacked averments to sustain the action and was consequently susceptible to exception. It did not matter that the excipient could have taken the point in a special plea of *non locus standi*.[18] Averments sufficient on their face to establish the claimant's legal standing to make the claim are an essential part of the case that has to be made out in the particulars of claim if the pleading is to sustain the cause of action.

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[17] See the authorities cited in footnote 102 in Van Loggerenberg, *Erasmus, Superior Court Practice* vol 2, RS 20, 2022, D1-307, sv. Rule 23.

[18] In *Anirudh* there was a dispute between the excipient's counsel and the respondent's as to whether the point involved a question of standing (as contended by the former) or one of non-joinder (as contended by the latter). In the circumstances, it was not surprising that that the learned judge treated that characterisation debate as irrelevant.

The judge's remarks make it clear that the exception in *Anirudh* was good because a cause of action was not made out in the plaintiff's pleading. He expressly refrained from characterising the objection, and the judgment therefore does not stand as authority that a non-joinder point can properly be raised on exception. It seems to me, in any event, that the objection in *Anirudh* was founded on evident lack of standing, not joinder.

[54] The same approach was adopted in *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O), where the court's lack of jurisdiction to entertain the claim was evident *ex facie* the particulars of claim. As Harms DP remarked in *Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010 (6) SA 329 (SCA) at para 6 (also a matter in which an evident lack of jurisdiction was the basis for an exception), 'Jurisdiction means the power vested in a court to adjudicate upon, determine and dispose of a matter. Importantly, it is territorial. The disposal of a jurisdictional challenge on exception entails no more than a factual enquiry, with reference to the particulars of claim, and only the particulars of claim, to establish the nature of the right that is being asserted in support of the claim. In other words, jurisdiction depends on either the nature of the proceedings or the nature of the relief claimed or, in some cases, on both. It does not depend on the substantive merits of the case or the defence relied upon by a defendant.' (Underlining supplied for emphasis.)

[55] The reasoning in *Anirudh* was endorsed in this court by Tebbutt J (Van Heerden J concurring) in *Ahmadiyya Anjuman Ishaati-Islamlahore (South Africa) and Another v Muslim Judicial Council (Cape) and Others* 1983 (4) SA 855 (C) at 860B-H. In that matter it was evident *ex facie* the impugned particulars of claim that the first plaintiff had no standing in law to claim the relief it sought. The demonstrable defect was, on any approach, not amenable to being redressed by factual evidence of any kind. That case too therefore does not provide an answer to the preliminary question in relation to the first defendant's fourth exception in the current case.

[56] The approach taken in *Anirudh* had been foreshadowed in the judgment in *Edwards v Woodnutt NO* 1968 (4) SA 184 (R) (per Beadle CJ) in respect of the defendant in that matter's complaint on exception that the plaintiff did not have *locus standi*; see the passage at .188F-H. In *Edwards*, at 186G-H, the learned chief justice, whilst expressing the view that issues that are ordinarily raised on special plea should preferably be raised in that manner rather than on exception, nevertheless saw no reason why the 'real issues' should not be determined by the court on exception if no possible prejudice could be caused to the respondent by that form of procedure.

[57] As noted above, in the discussion of the judgment in *Vom Dorp*'s case, there would be cognisable prejudice to the respondent if a point of objection, which could be met by evidence, the nature of which could properly be adumbrated in a responding pleading, such as a replication, were entertained in exception proceedings. *A fortiori*, if the objection was not of a nature that suggested that the impugned pleading did not sustain a cause of action. In such a case dealing with the objection on exception, rather than requiring it to be specially pleaded, would be prejudicial to the respondent in the general sense postulated by Beadle CJ in *Edwards*. The plaintiffs' counsel argued in the current matter that an explanation for the absence of Aussenkjer Boerdery as a party to the litigation could be postulated. 'What if that company had been dissolved?', they mused. That is not the only conceivable answer that could be presented to a plea of non-joinder in the current case.

[58] *Van Zyl NO v Bolton* 1994 (4) SA 648 (C), another of the cases cited in *Erasmus*, was also a matter in which the plaintiff's evident lack of *locus standi* was taken by way of exception instead of in a special plea. The exception was dismissed in that matter, but an objection to the use of the exception procedure was rejected by the court because the determination of the plaintiff's standing to make the claim turned entirely on the application of a provision in the Insolvency Act to the facts on which the plaintiff had pleaded in support

of his claim. The question that the court had to answer was squarely whether the pleaded facts disclosed a cognisable cause of action.

[59] I have sought, in the course of discussing the aforementioned reported judgments, to demonstrate that the exception procedure would not be appropriate in any case where the nature of the complaint does not resort within either of the categories expressly identified in Uniform Rule 23, viz. that pleading is vague and embarrassing or lacks averments to sustain a cause of action or a defence, as the case may be. If, as in the current matter, the pleading concerned discloses a cause of action but also suggests that the cause of action should not be heard until an absent party has been joined or indicated its willingness to be bound by the judgment in the cause, then the apparent non-joinder is *not* appropriately raised by exception. It is instead a point to be specially pleaded. As the plaintiffs' counsel have justifiably stressed, the plaintiff in such a case might be able to plead facts that provide an effective answer to the point, and it would be prejudicial to it for the court to determine the point without the plaintiff being afforded the opportunity to meet it in a replication.

[60] Whilst it might well not be appropriate on the face of the facts that are apparent from the particulars of claim to try the plaintiffs' claims without the joinder of Aussenkjer Boerdery to the action, it has not been suggested in the notice of exception, save to the extent apprehended in the second and third exceptions of which I have already disposed, that the particulars of claim do not make out a cause of action.

[61] The fourth exception will therefore be dismissed.

Order

[62] An order will issue in the following terms:

1. It is recorded that the excipient abandoned 'the first exception' in terms of the notice of exception dated 7 October 2022.

2. The second, third and fourth exceptions in terms of the said notice of exception are dismissed with costs, including the fees of two counsel.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

First defendant / Excipient's counsel:	**R.H Bhana SC** **M.T. Glaeser**
First defendant / Excipient's attorneys:	**Knowles Husain Lindsay Inc** **Sandton** **Abrahams & Gross** **Cape Town**
Plaintiffs / Respondents' counsel:	**W.R.E. Duminy SC** **A.H. Morrissey**
Plaintiffs / Respondents' attorneys:	**Tinus Slabber & Associates** **Claremont, Cape Town** **Oosthuizen & Co** **Cape Town**