

SOUTH AFRICA / JUDGMENT

## Estabiz (Pty) Ltd v Starflash (Pty) Ltd (Appeal) (CIV APP MG32/24) [2025] ZANWHC 108 (26 June 2025) [2025] ZANWHC 108

COURT

North West High Court, Mafikeng

BEFORE

Reddy, Maodi

CASE / FILE NUMBER

CIV APP MG32/24

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

Appeal

Case No: CIV APP MG32/24

Court

a quo case number: 2818/2023

Reportable: YES / NO

Circulate to Judges: YES

/ NO

Circulate to Magistrates:

YES / NO

Circulate to Regional

Magistrates: YES / NO

In the matter between: ESTABIZ (PTY) LTD  
APPELLANT  
and  
STARFLASH (PTY) LTD  
RESPONDENT  
CORAM: REDDY J &  
MAODI AJ  
Date  
judgment reserved: 06 February  
2025  
The judgment was handed  
down electronically by circulation to the parties'  
representatives via email. The date and time for  
hand-down is deemed  
to be 26 June 2025 at 10H00 am.  
ORDER  
1.  
The appeal against the order of the court a quo is upheld.  
2.  
The order of the court a quo is set aside and replaced by an  
order in the following terms:  
(a)  
The respondent's (defendant in the court a quo's)  
exception on the four grounds is dismissed.  
3.  
The respondent is ordered to pay the costs.

## JUDGMENT

MAODI AJ:

### Introduction

[1] This is an appeal against the judgment and order delivered on the 12 July 2024 by Magistrate L Tsengiwe (the court a quo). The respondent had raised various exceptions to the appellant's particulars of claim, which exceptions were upheld by the court a quo. However, the appellant was granted leave to amend its papers. Instead of amending its papers, the appellant sought to approach this Court on appeal. I propose to use the citations of the parties as cited in this appeal.

### Background

[2] On 23 May 2023 the appellant issued combined summons out of the Magistrates' Court for the District of Matlosana held at Klerksdorp. This summons was served on the respondent on the 14 July 2023. The following are the salient clauses of the particulars of claim:

*"The offer to purchase*

...

4. On or about 1 February 2023, and at or near Sandton, alternatively

Klerksdorp, Estabiz duly represented by its director, Joe Takalani, and Starflash duly represented by Jacobus Gideon Mosterd, concluded a written offer to purchase the name and the good will attached to Kanana Service Station (“Kanana”) belonging to Estabiz.

The offer to purchase, which reference is made to below, is attached and marked “OTP1”.

5. The material terms of the offer to purchase included the following:

5.1 The purchase price payable by the Starflash to Estabiz for the name and goodwill of Kanana is the sum of R 2 400 000, 00 (Two Million Four Hundred Thousand Rand) (inclusive of Value Added Tax (if applicable)).

5.2 Clause 3.2 makes provision for various amounts that would be set off against the purchase price which amounts were as follows:

5.2.1 An amount of R 400 000, 00 (Four Hundred Thousand Rand) to be paid by Starflash to the Motor Industry Bargaining Council (“MIBCO”), on behalf of Estabiz, for arrear contributions;

5.2.2 An amount of R 73 000, 00 (Seventy Three Thousand Rand) previously paid by Starflash to the City of Matlosana on behalf of Estabiz for arrear municipal accounts will be set-off against the purchase price;

5.2.3 An amount of R 104 000, 00 (One Hundred and Eleven Thousand Rand) previously paid by Starflash to Engen on behalf of Estabiz will be set-off against the purchase price;

5.2.4 An amount of R 173 000, 00 (One Hundred and Seventy Three Thousand Rand) for the replacement of the generator at the Kanana, will be set-off against the purchase price; and

5.3 The balance of R 1 650 000, 00 (One Million Six Hundred and Fifty Thousand Rand) will be paid to Estabiz within 48 (Forty Eight) hours of signature of this agreement by the Estabiz.

5.4 The Starflash purchases the name on a voetstoets basis.

6. It was a tacit term of the agreement that, in the event of the arrear contributions due by Estabiz to MIBO being less than the amount indicated in clause 3.2.1, Starflash would be obliged to pay Estabiz the difference between the amount paid by Starflash to MIBCO, and the amount actually due and payable to MIBCO.

7. Estabiz complied with the terms of the agreement by handing over the name and goodwill of Kanana to Starflash after it received payment in the amount of R 1 650 000, 00 (One Million Six Hundred and Fifty Thousand Rand) to the Estabiz within 48 (Forty Eight) hours of signature of the agreement by the Estabiz.

Breach

8. On or about 1 February 2023, MIBCO provided a statement to Kanana, which was received by Estabiz indicating that the outstanding amount due to MIBCO is R 305 621, 22 as opposed to R 400 000, 00 as set out in paragraph 3.2 of the agreement.
9. On or about 22 February 2023, Starflash made payment to MIBCO in the amount of R 305 621, 22, however in breach of the tacit term of the agreement, Starflash failed to make payment of the difference between the amount actually due and payable of R 305 621, 22 and R 400 000, 00 to Estabiz in the amount of R 94 378, 78. The statement from MIBCO and proof of payment is attached and marked “OTP2” and “OTP3”.
10. Notwithstanding demand, Starflash has failed to make payment to Estabiz in the amount of R 94 378, 78.”
- [3] On 27 July 2023 the respondent delivered its notice of intention to defend. On 10 August 2023 the respondent delivered a notice in terms of rule 19(1) of the Magistrates’ Court Rules. On 4 September 2023 the respondent

delivered a Notice in terms of rule 19 of the Magistrates’ Court Rules.

#### Grounds for exception

- [4] The rule 19 notice provides as follows:

*“PLEASE TAKE NOTE that the Defendant herewith excepts to the Plaintiff’s particulars of claim for being vague and embarrassing and for lacking averments which are necessary to sustain an action, for the following*

#### reasons:

1.1 The Plaintiff alleges that the parties concluded a written offer to purchase and refers to annexure OTP1 in this regard. The latter document is, however, not signed by the Plaintiff, rendering the particulars of claim vague and embarrassing.

1.2 The Plaintiff alleges in clause 5.2 of the particulars of claim that various amounts would be set off against the purchase price. OTP1 however makes no reference to any set off, but rather refers to payments to be made by the Defendant. The latter document is, however, not signed by the Plaintiff, rendering the particulars of claim vague and embarrassing.

1.3 In clause 6 of the particulars of claim the Plaintiff impermissibly seeks to import a tacit term which is irreconcilably at odds with the express terms of OTP1, as contained in clauses 3 and 7 thereof. The

particulars of claim thus fail to disclose a cause of action against the Defendant.

1.4 The Defendant is unable to plead, given the vague and embarrassing nature of the said pleadings and same not containing a cause of action against the Defendant.”

- [5] The appellant opposed the said exception. Judgment by the court a quo was delivered on the 12 July 2024 upholding the exception on all four grounds with costs.

## Judgment

on exception

- [6] The court a quo made the following findings:

*“6.1 In this matter before court, the contract does not bear the signature of the plaintiff but bears the signature of the defendant only, although the plaintiff has alleged in the particulars of claim that the parties concluded a written offer to purchase and referred to OTP1 (contract) which is attached to the particulars of claim.*

6.2 The court in the Government Employees Medical Scheme case further held that the attachment of the particulars of claim do not support the averments and upheld the exception. The court is of the view that

in this case also, the attachment of the particulars of claim do not support the averments and the exception is upheld.

6.3 The defendant has also submitted that the plaintiff alleged in clause 5.2 of the particulars of claim that various amounts would be set off against the purchase price, however OTP1 makes no reference to any

set off but rather refers to payments. It is the court's view that the OTP1 on page 31 paragraph 3.2 states that the purchaser will make payment of the purchase price, not that various amounts would be set off or that set off would apply.

6.4 The defendant has also submitted that the plaintiff impermissibly seeks to import a tacit term which is irreconcilably at odds with the express terms of OTP1 in clause 6 of the particulars of claim as contained in clauses 3 and 7 therefore (OTP1), thus failing to disclose a cause of action against it. It is the court's view that a statement of the facts and the circumstances constituting the implied contract relied upon is required. The facts and circumstances

from which such an implied contract is inferred must be set out. It is further the court's view that the tacit term referred to in clause 6 of the particulars of claim is at odds with clause 3 and 7 of the attached agreement.

6.5 Accordingly, the exception on grounds 1 to 4 were upheld with costs.

6.6 The appellant was granted leave to amend its particulars of claim within 30 days.”

The notice and grounds for appeal

- [7] The grounds of appeal are set out in the Notice of appeal as follows:

7.1 “The learned Magistrate erred in concluding that the attachment “OTP1” to the plaintiff’s particulars of claim does not support the averments therein rendering the particulars of claim vague and embarrassing.

7.2 The learned Magistrate erred in finding that the particulars of claim does not disclose a cause of action, because the existence of a non-variation clause in the agreement “OTP1” precludes the importation of a tacit term. The learned Magistrate should have found that a non-variation clause does not exclude the importation of a tacit term into an agreement.

7.3 The learned Magistrate erred in finding that the plaintiff, relying on a tacit term, ought to have set out the facts and circumstances from which the alleged term can be inferred.

7.4 The learned Magistrate erred in finding that the tacit term referred to in paragraph 6 of the particulars of claim is at odds with clause 3 and 7 of “OTP1.”

The exception being delivered late

[8] The parties referred to some extent to this issue which was raised by the appellant. However, it seems the issue was not pursued further in the court a quo and the court a quo made no pronouncement on this issue. The appellant also did not note an appeal in respect of this issue. Therefore, nothing turns on it.

The authorities and reasons for judgment

[9] From the Notice of appeal and the record of the court a quo, it is clear that the main bone of contention between the parties is the importation of the tacit clause as contained at paragraph 6 of the particulars of claim. The authorities are clear that the words “implied term” or “tacit term” are used interchangeably and therefore

reference to either one is acceptable. In that regard I refer to rule 6 (7) of the Magistrates’ Court Rules which provides that, “It shall not be necessary in any pleading to state the circumstances from which an alleged implied term can be inferred.” The implied term as contained in the particulars of claim should be read with the whole of the particulars of claim and the annexure “OTP1”. The reading of paragraphs 5 to 5.4 of the particulars of claim shows that, except for modifications for pleading purposes, the clauses are a mirror image of clauses 3.1 to 3.3 of “OTP1”.

[10] In *Naidoo and Another v Dube Tradeport Corporation and Others* 2022 (3) SA 390 (SCA) at paragraph 35 it was held that:

*“In sum, the main flaw in the judgment of the high court is the failure to apply the established approach in respect of exceptions, namely to accept as true and correct, the factual averments in the particulars of claim, unless clearly false and untenable.”*

[11] In the case of *Al Mayya International Limited (BVI) v DPP Valuers (Pty) Ltd* (A166/2022) [2024] ZAGPPHC 757 (31 July 2024) at paragraphs 11 to 13 it was said that:

*“[11] A plaintiff is required to plead his/her case in terms that are lucid, logical and intelligible. A plaintiff must only plead the facta probanda and not the facta probantia.*

- [12] A plaintiff should plead the outline of his case. That does not mean a defendant is entitled to a framework like a crossword puzzle where every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the appellant will have satisfied the requirements.
- [13] In an exception premised on the grounds of a failure to disclose a cause of action, the onus is on the excipient to demonstrate that ‘upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence (as the case may be) is disclosed’.”
- [12] The appellant in its particulars of claim, has to set out its case with sufficient particularity to enable the other party to plea thereto. These are the facta probanta of the case. The first step and question is, reading the pleading of the appellant as contained in its particulars of claim, is it vague and embarrassing and does it establish a cause of action? The second step or question is, is the respondent able to plead to it? The final step is, has the court a quo misdirected itself or erred on the approach to the mentioned questions?
- [13] The applicable general principles on exceptions were set out in the case of *Living Hands (Pty) Ltd NO and Another v Ditz and Others* (42728/2012) [2012] ZAGPJHC 218; 2013 (2) SA 368 (GSJ) (11 September 2012) at paragraph 15 thereof as follows: “(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.”

- [14] In casu, the purchase price has been pleaded as per paragraph 5.1 of the particulars of claim read with paragraph 3.1 of the “OTP1”. The particulars of claim and the agreement “OTP1” are clear on the full price and deductions to be made against the full purchase price. In fact the “OTP1” itself makes reference to “set-off”. Now, once the deductions (set-offs) have been made and there is excess or short-fall on the side of either party, surely that excess or short-fall must be accounted for, and the aggrieved party is entitled to enforce its rights in respect of same. I do not see any other way to address this issue, in casu, than to have an implied or tacit term as pleaded by the appellant. Whether the appellant will succeed in proving its claim and the tacit term, is a matter for evidence. It is not something that can be dealt with through an exception. Other issues can be cured by way of further particulars and a pre-trial procedure.
- [15] I therefore find that the court a quo erred in finding that the appellant alleged at paragraph 5.2 of particulars of claim that various amounts would be set off against the purchase price, whereas the “OTP1” makes no reference to that, but rather refers to payments. I have already stated that the reading of the terms of agreement between the parties as per particulars of claim is a mirror image of the “OTP1” except for the modifications necessary for pleading purposes.
- [16] I further find that the court a quo erred in finding that the appellant tried to import a tacit term at clause 6 of its particulars of claim which is at odds with express terms of “OTP1”. The reading of the whole of particulars of claim clearly sets out the reasons why the tacit term has to be imported into the agreement between the parties. As stated in the *Living Hands supra*, 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.
- [17] The next issue is whether the failure by the appellant to sign the agreement “OTP1” renders its particulars of claim not to disclose a cause of action, as found by the court a quo. The answer to this lies in the case of *Pillay and Another v Shaik and Others* 2009 (4) SA 74 (SCA) at paragraph 50 as quoted by the appellant in its heads of argument and reads as follows: “I do not agree with the court a quo’s conclusion that there could be no binding contracts between the parties unless each was signed by or on behalf of the buyers and the sellers. In my opinion it is clear from *Godblatt v Freeman, supra* and the authorities cited therein that, in the absence of a statute which prescribes writing signed by parties or their authorised representatives as an essential requisite for the creation of a contractual obligation (something that does not apply here), an agreement between the parties which satisfies all the other requirements for contractual validity will be held not to have given rise to contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract comes into existence.”
- [18] The *Pillay* case at paragraph 53 goes further to state as follows: “This raises the question as to whether the doctrine of quasi-mutual assent can be applied in circumstances where acceptance does not take place in accordance with a prescribed mode but the conduct of the

offeree is such as to induce a reasonable belief on the part of the offeror that the offer has been duly accepted according to the prescribed mode. Viewed in the light of basic principle, the question must surely be answered in the affirmative because the considerations underlying the application of the reliance theory apply as strongly in a case such as the present as they do in cases where no mode of acceptance is prescribed and the misrepresentation by the offeree relates solely to the fact that there is consensus.”

- [19] The Pillay case is actually similar to this case because the appellant sold its interests in a business called Kanana Service Station to the respondent. The respondent went ahead and made all payments including the purchase price and deductions (set offs) in line with the agreement and also took possession of the business sold, save for the shortfall which is the lis in this matter. This gives credence to the principle of quasi-mutual assent. There is no statutory requirements or formalities known to me for such contracts to come into force.
- [20] I therefore find that the court a quo erred in finding that the agreement “OTP1” which does not bare the signature of the appellant but only that of the respondent and therefore does not disclose a cause of action.
- [21] It follows in my view that the Learned Magistrate erred in upholding the respondent’s exceptions.

Order

- [22] In the circumstances I make the following order:

J. T. MAODI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

I agree

A. REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION MAHIKENG

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Date Judgment Reserved : 06 February 2025

Date Judgment Delivered : 26 June 2025

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Prepared on 8 October 2026 · Esheria