23 Exceptions and applications to strike out

RS 23, 2024, D1 Rule 23-1

(1) 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: Provided that —

(a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice; and

(b) the party excepting shall, within 10 days from the date on which a reply to the notice referred to in paragraph *(a)* is received, or within 15 days from which such reply is due, deliver the exception.

[Subrule (1) amended by GN R2164 of 1987, by GN R2642 of 1987, by GN R1262 of 1991 and substituted by GN R1343 of 18 October 2019.]

(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter, and may set such application down for hearing within five days of expiry of the time limit for the delivery of an answering affidavit or, if an answering affidavit is delivered, within five days after the delivery of a replying affidavit or expiry of the time limit for delivery of a replying affidavit, referred to in rule 6(5)*(f)*: Provided that —

(a) the party intending to make an application to strike out shall, by notice delivered within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of delivery of the notice of intention to strike out; and

(b) the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.

[Subrule (2) substituted by GN R1343 of 18 October 2019.]

(3) Wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated.

(4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.

Commentary

General. In *Merb (Pty) Ltd v Matthews* [1] the following useful summary of some of the general principles applicable to exceptions is made by Maier-Frawley J (footnotes omitted):

RS 23, 2024, D1 Rule 23-2

'8. These were conveniently summarised by Makgoka J in *Living Hands* [2] 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, and as such, a court looks benevolently instead of over-critically at a pleading.

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

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

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. 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.

13. An exception to a pleading on the ground that it is vague and embarrassing requires a two-fold consideration: (i) whether the pleading lacks particularity to the extent that it is vague; and (i) 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.'

RS 22, 2023, D1 Rule 23-3

An exception is a legal objection to the opponent's pleading. It complains of a defect inherent in the pleading: admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admission the pleading does not disclose either a cause of action or a defence, as the case may be. [3] It follows that where an exception is taken, the courtmust look at the pleading excepted to as it stands [4] together with facts agreed to by the parties, if any: [5] no facts outside those stated in the pleading can be brought into issue — except

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in the case of inconsistency [6] — and no reference may be made to any other document. [7] This is precisely the difference between exceptions on the one hand, and pleas in bar, dilatory pleas, pleas in abatement and dilatory special pleas, on the other: the latter usually introduce fresh matter which requires to be proved by evidence. [8] It would seem that if, as a consequence of an alleged non-joinder, the impugned pleading is vague and embarrasing or lacks averments which are necessary to sustain a cause of action, the exception procedure could be followed. Where the pleading concerned, however, 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. [9] The objection that the court has no jurisdiction, if raised by

the defendant, must ordinarily be raised by special plea. There is no exception 'that the court has no jurisdiction'. However, if the fact of lack of jurisdiction appears from the summons, the defendant is entitled to except to the summons on the ground that no cause of action is disclosed. Lack of standing is ordinarily raised by special plea. If the fact of *non locus standi in judicio* appears from the summons, the defendant is entitled to take an exception that no cause of action is disclosed. A defendant must raise prescription by way of special plea. For the relevant case law in this regard, see the excursus to rule 22 s v 'Particular Defences' above.

In order to succeed an excipient has the duty to persuade the court 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 is disclosed; failing this, the exception ought not to be upheld. [10]

The object of an exception is to dispose of the case or a portion thereof in an expeditious manner, or to protect a party against an embarrassment which is so serious as to merit the costs even of an exception. [11] An exception provides a useful mechanism for weeding out

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cases without legal merit. [12] Thus, an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial. [13] If it does not have that effect the exception should not be entertained. [14] A dismissal of an exception, however, save an exception to the jurisdiction of the court, presented and argued as nothing other than an exception, does not finally dispose of the issue raised by the exception and is not appealable. [15]

The point could be re-argued at the trial in the event of the exception being dismissed. [16] The position would have been different if the court had at the request of parties or of its own accord, made an order in terms of rule 33(4) of the rules directing that the issue raised by the exception be finally disposed of. [17]

An exception can be taken to particular sections of a pleading provided that they are self-contained and amount in themselves to a separate claim or a separate defence, as the case may be. [18]

An exception cannot be taken to a declaration or particulars of claim on the ground that it does not support one of several claims arising out of one cause of action. [19] The unjustifiable claim is a *plus petitio* and its deletion will not result in the pleading not disclosing a cause of action. [20]

If the same claim is based on alternative causes of action, an exception can be taken against one or more of the alternatives. [21]

An excipient is obliged to confine his complaint to the stated grounds of his exception. [22]

In so far as there can be an onus on either party on a pure question of law it rests upon the excipient who alleges that a summons discloses no cause of action or that a plea discloses no defence; the excipient has the duty to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it. [23] The pleading must be looked

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at as a whole. [24] If there is uncertainty in regard to a pleader's intention, an excipient cannot avail himself thereof unless he shows that upon any construction of the pleadings the claim is excipiable. [25]

Save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed. [26] As stated above, an excipient has the duty to persuade the court that upon every interpretation which the particulars of claim (or declaration) could reasonably bear, no cause of action was disclosed. [27] Furthermore, a commercial document executed by the parties with the clear intention that it should have commercial operation would not lightly be held to be ineffective. A similar approach would be adopted to oral commercial agreements. By way of example, it has been held [28] that the court is reluctant to decide the relaxation of the *par delictum* rule on public policy grounds on exception, since the issue is invariably fact-bound. Courts have not adopted an overly technical approach to pleadings. In general, where public policy considerations do not favour either party, the *par delictum* rule will operate against the plaintiff. At exception stage, however, the *par delictum* rule will generally defeat a plaintiff's claim only in the clearest of cases.

An exception should be dealt with sensibly and not in an over-technical manner. [29] Thus, it is 'only if the court can conclude that it is impossible to recognize the claim, irrespective of the facts as they might emerge at the trial, that the exception can and should be upheld'. [30]

The aforegoing considerations do not, however, apply to an exception that a pleading is vague and embarrassing — an exception may be taken to protect oneself against embarrassment. [31]

Whilst there is no general rule that issues relating to the development of the common law cannot be decided on exception, where the 'factual situation is complex and the legal position uncertain', it will normally be better not to do so. [32]

In *Tembani v President of the Republic of South Africa* [33] the Supreme Court of Appeal, in a case involving an unprecedented and novel delictual claim, summarized the position regarding an exception in such an event as follows (footnotes omitted):

> '[19] *H v Fetal Assessment Centre* [34] also confirmed the judgment of this Court in *Children's Resource Centre Trust* [35] that if a novel or unprecedented claim is "legally plausible" then it 'must be determined in the course of the action'. *Children's Resource Centre* was concerned with a delictual claim based on a novel legal duty not to act negligently. As was explained "the existence of such a duty depends on the facts of the case and a range of policy issues", which required the Court to be "fully informed in regard to the policy elements" and therefore "the enquiry militates against that decision being taken without evidence". This, so it was held, renders it impossible to arrive at a conclusion except upon a consideration of all the circumstances of the case and every other relevant factor.
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> [20] Accordingly, a court must be satisfied that a novel claim is necessarily inconceivable under our law as potentially developed under s 39(2) of the Constitution before it can uphold an exception premised on the alleged non-disclosure of a cause of action. Citing *H v Fetal Assessment Centre*, the Constitutional Court held in *Pretorius* [36] that the dismissal of an exception does not deprive the respondents of the opportunity of raising the same defences as substantive defences in their respective pleas and for their merits to be determined after the leading of evidence at the trial, which is probably, in any event, a better way to determine the potentially complex factual and legal issues involved.'

If the exception is successful, the proper course for the court is to uphold it. When an exception is upheld, it is the pleading to

which exception is taken which is destroyed. The

remainder of the edifice does not crumble. [37] The upholding of an exception to a declaration or a combined summons does not, therefore, carry with it the dismissal of the summons or of the action. [38] The unsuccessful party may then apply for leave to amend his pleading. [39]

It is, in fact, the invariable practice of the courts, in cases where an exception has successfully been taken to an initial pleading that it discloses no cause of action, to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time. [40] It has been held that it is doubtful whether this practice brooks of any departure; in the rare case in which a departure may be permissible, the court should give reasons for the departure. [41] This practice *a fortiori* also applies where an exception is granted on the ground that a pleading is vague and embarrassing, a ground which strikes at the formulation of the cause of action and not its legal validity. [42]

Leave to amend is often granted irrespective of whether or not at the hearing of the argument on exception the plaintiff applied for such leave. If the court does not grant leave to amend when making an order setting aside the pleading, the plaintiff is entitled to make application for such leave once judgment setting aside the pleading has been delivered. [43] If the unsuccessful party does not take any timeous steps, the excipient may take steps to bar him and apply to the court for absolution from the instance. [44]

Where an exception is taken to particulars of claim in which two forms of relief are sought and where such particulars reveal a cause of action for one of the forms of relief but not for the other, the court may uphold the exception *pro tanto*. [45]

Fundamentally defective pleadings of a plaintiff and defendant should be treated on an equal footing. [46] The rules in relation to the defective pleading of claims therefore apply *mutatis mutandis* to the flawed pleading of defences. [47] Consequently, if a defendant's plea is struck down in its entirety on exception, the defendant should be given an opportunity to amend the plea. [48]

A court has the power to defer consideration of an exception to the trial, [49] and will do so where the question raised by the exception seems to be interwoven with the evidence which will be led at the trial. [50] Thus, for example, where the whole of a contract is not before the court, it will not assign a meaning to particular words or clauses thereof at the exception stage if there is room for a contention, *ex facie* the pleadings, that the omitted terms, whether considered with or without additional evidence of surrounding circumstances, might have a significant bearing on the issue before the court. [51]

If a pleading is bad in law, the answer is to except; [52] if it is vague and embarrassing, notice to cure may be given or further particulars (for purposes of trial) may be requested; and if the legal representative for a party has been genuinely taken by surprise by his opponent's reference to the cause of action in the opening address, he should take the opportunity to say so at the outset and object to the evidence if it does not accord with the pleadings. What a party cannot do, is to sit back, say nothing and then complain that the pleading is defective and that he was taken by surprise. [53]

Appeal. See s 16 of the Superior Courts Act 10 of 2013 and the notes thereto in Volume 1 third edition, Part D.

Subrule (1): 'Where any pleading.' An exception may be raised against any pleading, including a replication or any subsequent pleading. In *Faischt v Colonial Government* [54] and in *De Beer v Minister of Posts and Telegraphs* [55] an exception was raised to a replication. See further the notes to rule 25 below.

A simple summons is not a pleading and accordingly cannot be attacked by way of an exception. [56]

'Is vague and embarrassing.' The exception is intended to cover the case where, although a cause of action appears in the summons there is some defect or incompleteness in the manner in which it is set out, which results in embarrassment to the defendant. [57] An exception that a pleading is vague and embarrassing strikes at the formulation of the cause of action and not its legal validity. [58]

In *Jowell v Bramwell-Jones* [59] it was held that an exception that a pleading is vague and embarrassing is not directed at a particular paragraph within a cause of action: it goes to the whole cause of action, which must be demonstrated to be vague and embarrassing. The aforesaid

approach was not followed in *Paulsmeier v Media 24 (Pty) Ltd*, [60] where it was pointed out, amongst other things, [61] that in practice rule 23(1) continues to be widely used where individual paragraphs lack particularity, as illustrated by *Trope v South African Reserve Bank*, [62] where exceptions were upheld to some paragraphs but rejected in relation to others. That approach, formulated by McCreath J in the *Trope* case, [63] which does not include a requirement that the entire cause of action should be vague and embarrassing, has often been cited. In the ensuing appeal, *sub nomine Trope v South African Reserve Bank*, [64] no criticism was expressed of McCreath J's approach.

If a pleading both fails to comply with the provisions of rule 18 and is vague and embarrassing, the defendant has a choice of remedies: he may either bring an application in terms of rule 30 to have the pleading set aside as an irregular step, [65] or raise an exception in terms of rule 23(1). [66] The remedies, however, are based on separate and distinct complaints requiring different adjudication. [67] The crucial distinction between this rule and rule 30 are: *(a)* an exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded; whereas *(b)* rule 30 may be invoked to strike out the claim pleaded when individual averments do not contain sufficient particularity; it is not necessary that the failure to plead material facts goes to the root of the cause of action. [68]

An exception that a pleading is vague or embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged. [69] The effect of this is that the exception can be taken only if the vagueness relates to the cause of action. [70] Such embarrassment may occur where the admission of one of two sets of contradictory

allegations in the plaintiff's particulars of claim or declaration, destroys the plaintiff's cause of action. [71] This principle also applies to a plea that contains contradictory allegations. [72] In other words, averments in a pleading which are contradictory and which are not pleaded in the alternative are patently vague and embarrassing. [73]

The test applicable in deciding exceptions based on vagueness and embarrassment arising out of lack of particularity can be summed up as follows: [74]

(a) In each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. If a statement is vague it is either meaningless or capable of more than one meaning. [75] To put it at its simplest: the reader must be unable to distil from the statement a clear, single meaning. [76]

(b) If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him by the vagueness complained of. [77]

(c) In each case an ad hoc ruling must be made as to whether the embarrassment is so serious as to cause prejudice to the excipient if he is compelled to plead to the pleading in the form to which he objects. [78] A point may be of the utmost importance in one case, and the omission thereof may give rise to vagueness and embarrassment, but the same point may in another case be only a minor detail. [79]

(d) The ultimate test as to whether or not the exception should be upheld is whether the excipient is prejudiced. [80]

(e) The onus is on the excipient to show both vagueness amounting to embarrassment and embarrassment amounting to prejudice. [81]

(f) The excipient must make out his case for embarrassment by reference to the pleadings alone. [82]

(g) The court would not decide by way of exception the validity of an agreement relied upon or whether a purported contract may be void for vagueness. [83]

The plaintiff cannot, in answering to the exception, rely on the fact that, apart from the allegations in the summons, the defendant of his own knowledge knows what case he is required to meet. In the majority of cases the defendant does know, yet this does not disentitle him to except successfully where the plaintiff's case is not conveyed to him by the summons with reasonable distinctness. [84] It must be borne in mind that the summons is for the information of the court as well as of the plaintiff. [85]

A summons will be vague and embarrassing where it is not clear whether the plaintiff sues in contract or in delict, [86] or upon which of two possible delictual bases he sues, [87] or what the contract is on which he relies, [88] or whether he sues on a written contract or a subsequent oral contract, [89] or if it can be read in any one of a number of different ways, [90] or if there is more than one claim and the relief claimed in respect of each is not separately set out. [91] Although the introduction of irrelevant matter into a summons may make it vague and embarrassing, the pleading of irrelevant matter as history does not. [92] The summons is also vague and embarrassing if there is inconsistency amounting to contradiction between the allegations in a

claim in reconvention and the plea in convention, [93] or between the summons and the documents relied upon as the basis of the claim; [94] or where the admission of one of two sets of contradictory allegations in the plaintiff's particulars of claim or declaration would destroy the plaintiff's cause of action; [95] or where a pleading contains averments which are contradictory and which are not pleaded in the alternative. [96] Omission of the date on which a contract of sale was concluded may render a summons excipiable as being vague and embarrassing. [97] If a plaintiff claims in the particulars of claim global sums for general damages and sundry expenses without indicating which portion of the sums relates to which defendant, where more than one defendant is being sued, a particular defendant is not able to assess what is being claimed against him in each case, and to that extent the pleading is vague and embarrassing. [98] Pleadings have been held to be vague and embarrassing where the plaintiff failed to plead that it was relying on a statutory provision which was tacitly implied. [99]

For purposes of deciding an exception contractual capacity is assumed. [100]

'Or lacks averments which are necessary to sustain an action.' While rule 18(4) requires every pleading to contain 'a clear and concise statement of the material facts upon which the pleader relies for his claim', 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 deduce from the facts stated therein', and this subrule warrants an exception if a pleading 'lacks averments which are necessary to sustain an action'. In *Vermeulen v Goose Valley Investments* [101] it was held [102] that it 'is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim *is* (not may be) bad in law'.

Although these rules do not explicitly require the plaintiff's particulars of claim or declaration to disclose a cause of action, it is generally accepted that this is in fact what they require. [103]

In *McKenzie v Farmers' Co-operative Meat Industries Ltd* [104] the following definition of 'cause of action' was adopted by the Appellate Division:

> '. . . 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.' [105]

It is important to bear in mind that the definition relates only to 'material facts', and at the same time to have due regard to the distinction between the *facta probanda* and the *facta probantia*. Care must be taken in any given case to distinguish the facts which must be proved in order to disclose a cause of action (the *facta probanda*) from the facts which prove them (the *facta probantia*). [106] It follows, therefore, that in order to ensure that his summons is not excipiable on the ground that it does not disclose a cause of action, the plaintiff —

> 'moet toesien dat die wesenlike feite (dit wil sê die *facta probanda* en nie die *facta probantia* of getuienis ter bewys van die *facta probanda* nie) van sy eis met voldoende duidelikheid en volledigheid uiteengesit word dat, indien die bestaan van sodanige feite aanvaar word, dit sy regskonklusie staaf en hom in regte sou moet laat slaag t a v die regshulp of uitspraak wat hy aanvra'. [107]

What the *facta probanda* are in each particular case, is essentially a matter of substantive law, and not of procedure. [108]

In general the cause of action relied upon by a plaintiff must have subsisted when the summons was issued. [109] In the absence of special circumstances, a plaintiff will not be permitted to establish a cause of action, an essential element of which came into being only after the issue of summons. [110]

In suitable cases legitimate inferences can be drawn as to the meaning of the particulars and by implication the necessary averments can be supplied. [111] However, while the court should endeavour to look benevolently instead of over-critically at a pleading, [112] it should not push that benevolence to the length of upholding a declaration or particulars of claim which as it stands discloses no cause of action, by altering its language, by reading into it what is not there, and ignoring what is, and by thus making for the plaintiff a cause of action he has not himself put up. [113]

The particulars of claim or declaration may, in some cases, disclose a cause of action even where a necessary allegation which is omitted cannot be implied. Where, because a necessary averment is omitted, it may be read in two or more possible ways, and one of these possible readings discloses a cause of action, then the particulars of claim or declaration cannot be excepted to as disclosing no cause of action. [114] It may, however, be vague and embarrassing.

It is not only a declaration or particulars of claim which omits an essential allegation that cannot be implied that discloses no cause of action. One which shows a complete defence also discloses no cause of action and may be excepted to. [115] A defendant may, for example, except if *ex facie* the declaration or particulars of claim it appears that there has been a

compromise, and there are no allegations sufficient for setting aside the compromise, [116] or if it appears *ex facie* the declaration or particulars of claim that the court has no jurisdiction. [117]

A declaration or particulars of claim (or a plea) which relies upon an allegation that cannot be proved by admissible evidence discloses no cause of action (or defence). [118] A declaration or particularsCommissioner for Inland Revenue of claim which relies upon a prior verbal agreement which is inconsistent with a subsequent written agreement discloses no cause of action. [119] If a written agreement contains a clause in terms whereof the agreement can be varied only in writing, evidence of an oral agreement varying the written agreement is inadmissible and a pleading relying upon such oral agreement is excipiable. [120] It has been held that courts are reluctant to decide upon exception questions concerning the interpretation of a contract, [121] especially where its meaning is uncertain, [122] where the whole contract is not before the court, [123] or where it appears from the contract itself or from the pleadings that there may be admissible evidence which, if placed before the court, could influence the court's decision as to the meaning of the contract. [124] It has also been held that the validity of a contract and the question whether a purported contract may be void for vagueness do not readily fall to be decided by way of an exception. [125]

It has been held that whilst it is correct that rule 18(7) provides that it shall not be necessary in any pleadings to state the circumstances from which an alleged implied term can be inferred, this clearly cannot mean that any pleading containing a cause of action or defence based on the existence of a tacit term cannot be the subject of a successful exception and must invariably go to trial, since this would render obviously specious claims or defences in contractual disputes, exception proof. [126]

If a cause of action is based on a written agreement to erect a dwelling house, the builder who institutes the action must allege that he is a registered home builder in terms of s 10(1) of the Housing Consumers Protection Measures Act 95 of 1998. [127]

In a claim for wages or remuneration, if it is to be set out with logical completeness, there should be an allegation that the services were rendered pursuant to a contract. A declaration or particulars of claim which claims a sum of money in respect of services rendered, but which omits the allegation that the services were rendered pursuant to a contract, discloses no cause of action. The allegation that the services were rendered at the defendant's request is not necessarily implied from the allegations that services were rendered by the plaintiff to the defendant.

If the allegations made in the particulars of claim do not entitle the plaintiff to claim the damages asked for, the particulars of claim discloses no cause of action and may be excepted to. [128] In an action based on negligence an allegation of negligence is a necessary allegation; failure to allege negligence renders the particulars of claim bad as disclosing no cause of action. [129] If breach of a specific duty is relied upon, the facts from which such duty arises must be stated, e g the negligent breach of a statutory duty. [130] In some cases, however, it has been held that an allegation of negligence could be implied from the other allegations in the particulars of claim, e g where the particulars of claim alleged that the defendant had lit a veld fire and 'allowed' it to spread over the plaintiff's boundary. [131] If, in an action for damages based on delictual liability, wrongfulness is challenged by way of an exception, the court assumes that the other elements of the cause of action will be capable of proof at trial so as to test the element of liability that is the subject of the challenge. [132]

Prior to the commencement of the Constitution of the Republic of South Africa Act 200 of 1993 the validity of statutes could not ordinarily be challenged. A defendant could not, therefore, rely on the invalidity of a statute as a defence. It is submitted that a defendant is now entitled to raise by way of plea (or special plea) the invalidity of a statute as a defence and pray that the issue be dealt with in accordance with the applicable provisions of the Constitution of the Republic of South Africa, 1996.

If a claim depends upon a statutory regulation which has to be proved in evidence and may itself not be valid, a claim which may possibly not be enforceable by reason of the provisions of such a regulation cannot be excepted to as disclosing no cause of action. [133]

The Appellate Division has laid down that 'as a matter of pleading, even if a pleader relies on a particular section of a statute, it is not necessary for him to state the number of the section, provided he formulates his claim clearly'. [134] It is, however, necessary for the plaintiff to allege all the facts necessary to bring his claim within the statute, [135] otherwise, if these cannot be implied, the summons discloses no cause of action. If the relevant statute contains an express prohibition, the plaintiff must plead the required facts, failing which his particulars of claim would fail to disclose a cause of action. [136] A pleader relying on an implied statutory provision must plead it clearly, i e that he is relying on an implied provision, and what the content of the provision is. [137] Where an exception arises in respect of the interpretation of statutory provisions, it was held that 'the question is not whether the meaning contended for by the appellant is necessarily the correct one, but whether it is a reasonably possible one'. [138]

'. . . or defence.' A pleading lacks averments which are necessary to sustain a defence (i) where the pleading does not justify the conclusions drawn therein; [139] or (ii) where the defence raised, though adequately pleaded, does not in law constitute a defence to the claim. [140]

'Within the period allowed for filing any subsequent pleading.' This part of subrule (1) evidently applies only to an exception that a pleading lacks averments which are necessary to sustain an action or defence. In the case of an exception that a pleading is vague and embarrassing, paragraph *(a)* of subrule (1) must first be complied with before an exception on that ground could be delivered in terms of paragraph *(b)* of subrule (1). [141]

An exception is a pleading and, in the case of an exception to a declaration or combined summons, a notice of bar in terms of rule 26 is required before the plaintiff can object to the exception on the ground that it was delivered out of time. A plaintiff

can accordingly not object to the exception on the ground that it was delivered outside the prescribed period allowed for the delivery of a plea but before the expiration of the period provided in the notice of bar. [142] Upon dismissal of an exception against a declaration or combined summons it is not necessary for a defendant to seek an order granting leave to deliver a plea. In the event of the plaintiff wanting to seek default judgment under such circumstances, the plaintiff will have to deliver a further notice of bar on the defendant, requiring the latter to plead.

Rule 26 provides for an automatic bar on failure to deliver a replication to a plea within the time stated in rule 25(1). If a plaintiff intends to deliver an exception to a plea, the exception

must be delivered within the period allowed for a replication, otherwise it will be out of time. Upon dismissal of an exception against a plea the plaintiff will have to seek an order granting leave to deliver a replication.

In the case of an exception that a pleading is vague and embarrasing, paragraph *(a)* of this subrule must first be complied with before an exception on that ground could be delivered in terms of paragraph *(b)* of the subrule. There are conflicting judgments on the question whether the service of a rule 23(1)(*a*) notice is a valid response to a notice of bar to deliver a plea. In *Steve's Wrought Iron Works v Nelson Mandela Metro* [143] the plaintiffs delivered a notice of bar to deliver a plea within 5 days as provided for in rule 26. In response to the notice of bar the defendant delivered a notice in terms of rule 23(1)*(a)* within the stipulated 5-day period, complaining that the plaintiffs' particulars of claim were vague and embarrassing and giving them 15 days to remove the cause of complaint, which they failed to do. The defendant then delivered an exception to the particulars of claim. The plaintiffs objected to the exception on the ground that it was late and fell to be struck out. In rejecting the plaintiffs' objection, Goosen J reasoned as follows: [144]

> 'In the case of all pleadings except a replication or subsequent pleading, the bar occurs only upon lapse of the notice of bar, i e within 5 days of its receipt. If within the stipulated 5 day period a pleading which the party is entitled to deliver, is delivered, there is no bar. A notice of exception is a proper response to a notice of bar. The contrary view contended for by the plaintiffs, viz that the notice of exception is not a pleading and that only the exception itself is a proper response to the notice of bar, would defeat the purpose served by the process of excepting to a pleading.'

The exception was, accordingly, allowed and upheld. In *Hill NO v Brown* [145] Rogers J, without referring to or considering the *Wrought Iron* case, and relying on *McNelly NO v Codron*, [146] held [147] that if a defendant was to avoid being barred pursuant to a notice of bar in terms of rule 26, he had to deliver a 'pleading', i e a plea or an exception within the stipulated period of bar. A rule 23(1)*(a)* notice, which is merely a precursor to an exception (which may or may not be delivered), was not a proper response. In this instance it was set aside as an irregular step.

A notice of bar which is delivered after the delivery of an exception is an irregular step. [148]

'Deliver an exception.' If an exception will have the effect of putting an end to the action it is a party's duty to except, and not wait until the trial before raising the point in issue. If he fails to do so he may only be awarded costs as if he had taken exception or even be ordered to pay the wasted costs occasioned by the hearing of evidence. [149] This rule is not inflexible [150] and it will not be applied if, for example, an amendment to the pleadings would have been granted had an exception been taken. [151]

An exception is a pleading and should be signed by both an advocate and an attorney, or by the excipient himself if he is appearing in person. [152]

'May apply to the registrar to set it down . . . within 15 days after the delivery of the exception.' An excipient who has delivered an exception that a pleading lacks averments which are necessary to sustain an action or defence is entitled to apply to the registrar to set the exception down for hearing within fifteen days after the delivery of the exception. In other words, rule 6(5)*(f)*(i) is not applicable.

In the case of an exception that a pleading is vague and embarrasing, an excipient must, first, give a notice to remove the cause of complaint as contemplated in paragraph *(a)* of subrule (1), and if the cause of complaint is not removed within the stipulated period, then deliver the exception as contemplated in paragraph *(b)* of subrule (1). Thereafter such excipient is entitled to apply to the registrar to set the exception down for hearing within fifteen days after the delivery of the exception.

The fifteen days are court days and must be calculated in terms of the definition of 'court day' in rule 1.

If the excipient does not apply to the registrar to set the exception down for hearing, the exception, being a pleading, does not lapse. [153] The respondent could then apply to the registrar to have the exception enrolled or, alternatively, put the excipient to terms to enrol the

exception, under threat of an application for an order striking it out as a whole, if the excipient nonetheless persists in its failure to do so. [154]

'Provided that.' The proviso to subrule (1) is peremptory and a condition precedent to the taking of an exception that a pleading is vague and embarrassing. [155]

'By notice.' The notice calling upon the other party to remove the cause of complaint must give a proper indication of the matter complained of; it would be insufficient merely to state that the pleading is vague and embarrassing. [156]

Subrule (1)*(a)*: 'Within 10 days of receipt of the pleading.' The ten days are court days and must be calculated in terms of the definition of 'court day' in rule 1.

'Afford the party delivering the pleading, an opportunity to remove the cause of complaint.' This subrule is designed to discourage exceptions where the cause of embarrassment can be removed by the furnishing of particulars, an amendment of pleadings or any other action which removes the cause of complaint. [157] Even voluntary particulars which have not been requested may in the court's discretion be allowed to stand if they are a method of removing a cause of complaint as envisaged by the subrule. [158]

If an attempt is made to remove the cause of complaint by amending the pleading in question, a party is entitled, if not satisfied that the cause of complaint has in fact been removed, to give his opponent notice once again that he intends taking an exception that the pleading in its amended form is vague and embarrassing. [159]

If a party is of the opinion that his opponent has failed to remove the cause of complaint, he is entitled, within ten days from the date of receipt of his opponent's reply to his notice or within fifteen days from the date on which such reply is due, to deliver his exception. He is not entitled to except and at the same time to apply in terms of rule 30(1) for his opponent's reply to his notice to be struck out. [160]

Subrule (2): General. The distinction between an application to strike out matter contained in a pleading and an exception

was made clear in *Salzmann v Holmes*: [161]

> 'An exception goes to the root of the entire claim or defence as the case may be. The excipient alleges that the pleading objected to, taken as it stands, is legally invalid for its purpose. Whereas individual sections, which do not comprise the entire claim or

> defence, but are only portion of one, must if objected to, be attacked by a motion to expunge.' [162]

An application to strike out, though directed at individual paragraphs, may involve the destruction of the whole pleading. [163]

It will probably be found that in many cases the introduction of any scandalous, vexatious or irrelevant matter will render the pleading concerned vague and embarrassing, and so justify an exception. There will, however, be cases in which the introduction of such matter, while not rendering the pleading vague and embarrassing, will cause prejudice. It is in these cases that the provisions of this subrule will be found useful. The purpose of an application to strike out is to reduce the issues that will have to be canvassed in the pleadings and, more particularly, at the trial. The defendant may find himself embarrassed or prejudiced in some way if the pleading is allowed to stand, and he is thus afforded a means of asking that the position be remedied.

A decision whether or not to strike out is discretionary in nature. [164]

'Averments which are scandalous, vexatious, or irrelevant.' The meaning of these terms has been stated as follows: [165]

(a) Scandalous matter — allegations that may or may not be relevant but which are so worded as to be abusive or defamatory.

(b) Vexatious matter — allegations that may or may not be relevant but are so worded as to convey an intention to harass or annoy.

(c) Irrelevant matter — allegations that do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter.

'Irrelevant' in this context means irrelevant to the issue. [166] The rule is one of pleading and it is not intended that on an application to strike out the court should determine preliminary points of law. [167] Thus, matter will not be struck out as irrelevant merely because it raises a point on the pleadings which is bad in law. [168] The court is not concerned with the validity of the claim, or whether it raises a cause of action: that may be matter for exception. All that concerns the court is whether the passage sought to be struck out is relevant in order to raise an issue on the pleadings. [169] Another test which may be applied, is whether or not evidence would be admissible at the trial to prove certain facts: if evidence would be admissible, those facts cannot be regarded as irrelevant when pleaded. [170]

What is relevant to raise an issue on the pleadings is not always the same as what is relevant to those issues. For example, although evidence which is pleaded is relevant to the trial generally, and to the proof of the issues raised by the pleadings, the evidence is not relevant to raising the issues on the pleadings, and is thus irrelevant to the pleadings. [171]

In order to determine whether or not matter in a pleading is irrelevant the pleading must be considered as a whole. [172]

Any fact which may prove relevant on the question of costs should not be struck out. [173]

Irrelevant matter pleaded as history will not be struck out. [174] On the other hand, facts stated not for the purpose of supporting any claim for relief, but in anticipation of a possible defence, will be struck out. [175] So will a prayer unsubstantiated by any facts in the particulars of claim. [176]

'Within the period allowed for filing of any subsequent pleading'. These words, which appeared in rule 23(2) prior to its substitution with effect from 22 November 2019, [177] are not only nonsensical but also superfluous in the light of the fact that paragraph *(a)* of the proviso to rule 23(2) now provides that the party intending to make an application to strike out must first, by notice, delivered within ten days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within fifteen days of delivery of the notice of intention to strike out (i e the notice to cure). A party who intends to deliver an application to strike out is therefore not entitled to do so before the period of fifteen days provided for in paragraph *(a)* of the proviso to rule 23(2) has expired. That paragraph technically provides for twenty-five days in total to elapse before the application could be delivered. The time periods within which pleadings subsequent to a declaration or particulars of claim must be delivered are dealt with in rule 22 (plea), rule 24(1) (claim in reconvention), rule 25(1) and (4) (replication, plea in reconvention and replication in reconvention) and rule 25(5) (further pleadings). These respective time periods are shorter than the twenty-five days mentioned above. Should it be required of a party to deliver an application to strike out 'within the period allowed for filing any subsequent pleading', as the relic requires, such requirement would be in conflict with the time periods stipulated in paragraph *(a)* of the proviso to rule 23(2). In the premises it is submitted that the words 'within the period allowed for filing any subsequent pleading' should simply be ignored. It follows that the application to strike out, which is interlocutory in nature, should then be brought within a reasonable time after the period of fifteen days provided for in paragraph *(a)* of the proviso to rule 23(2) has expired without the cause of complaint having been removed. [178] The application should be set down in accordance with the provisions of subrule (2). See further, in this regard, the notes to this subrule s v "May set such application down for hearing' below. In terms of subrule (4) no plea, replication or other pleading over is necessary until the application has been disposed of. It is submitted that, as a general rule, the time periods for the delivery of a plea, replication or other pleading, as the case may be, would commence to run on the day after the order in the application has been made.

'Apply for the striking out of the aforesaid matter.' Although there is a difference in principle between an exception and an application to strike out, [179] both forms of relief can be applied for simultaneously, either together or in the alternative. The distinction in principle should, however, be borne in mind and in an appropriate case the objector may be mulcted in the costs of an unjustified exception or application to strike out, as the case may be.

A decision whether to strike out or not is discretionary in nature. [180]

'May set such application down for hearing.' Prior to its substitution with effect from 22 November 2019, [181] subrule (2) provided that an application to strike out had to be set down for hearing in terms of rule 6(5)*(f)*. As currently framed, the subrule gives rise to (at least) two different interpretations: on the one hand the reference to rule 6(5)*(f)* in the subrule would appear to be a reference to the time limit for delivery of a replying affidavit, thus not referring to set down; on the other hand the reference to rule 6(5)*(f)* would appear to refer to set down in terms of that rule, thus providing that the application has to be set down in terms of the provisions of rule 6(5)*(f)*. It is submitted that the latter interpretation is to be preferred in the absence of any other provision in subrule (2) in regard to the set down of the application. The position would therefore seem

to be as follows: If no answering affidavit is delivered, and the other party does not intend to appear and argue the case on the applicant's papers only, the applicant should set the application down in terms of rule 6(5)*(f)*(i). If an answering affidavit with or without a subsequent replying affidavit is delivered, or if the other party intends to appear and argue the case on the applicant's papers only, the application should be set down as an opposed one in terms of rule 6(5)*(f)*(ii). In the absence of an answering affidavit it is therefore advisable that the applicant should approach the other party beforehand to determine whether the application will be opposed and argued by that party on the basis only of the applicant's papers. See further rule 6(5)*(f)* and the notes thereto above.

'Provided that.' The proviso is couched in peremptory terms and is clearly a condition precedent to an application to strike out.

Subrule (2)*(a)*: 'By notice.' See the notes to subrule (1)*(a)* s v 'By notice' above which apply *mutatis mutandis* to this subrule.

'Afford the party delivering the pleading an opportunity to remove the cause of complaint.' See the notes to subrule (1)*(a)* s v 'Afford the party delivering the pleading an opportunity to remove the cause of complaint' above which apply *mutatis mutandis* to this subrule.

'Within 10 days . . . within 15 days.' The days are court days and must be calculated in terms of the definition of 'court day' in rule 1.

Subrule (2)*(b)*: 'Unless it is satisfied that the applicant will be prejudiced.' The key consideration is that of prejudice. [182] If the court is in doubt as to the relevancy of any matter, such matter will not be struck out. [183] In *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* [184] the court

refused to strike out an alternative prayer on the ground that the applicant would suffer no prejudice by a refusal of the application to strike out since it was always open to it to argue that no order should be granted in terms of the alternative prayer.

Subrule (3): 'The grounds upon which the exception is founded.' This subrule obliges the excipient to state in clear and concise terms the particulars upon which his exception is based, and it is not sufficient merely to state that the summons discloses no cause of action or is vague and embarrassing. [185]

An excipient is bound to the grounds of exception set out in his notice of exception, and will not be permitted at the hearing of the exception to rely on different grounds or to raise a different exception. [186]

An exception which lacks a prayer is bad, but the court has the power to order an amendment to make good the defect, provided no prejudice or injustice is thereby caused to the respondent. [187] A prayer at the end of an exception normally reads as follows:

> 'Wherefore it is prayed that the exception be upheld with costs and that the [state party and pleading] be set aside.'

See further the notes to this rule s v 'General' above.

Subrule (4): 'No . . . pleading over shall be necessary.' This subrule puts an end to the controversy that has long raged in regard to the circumstances in which it is necessary to plead over when an exception is taken or application to strike out is made. It is no longer necessary to plead over (or to file a plea or replication). See also the notes to subrule (2) s v 'Within the period allowed for filing of any subsequent pleading' above.

1 Unreported, GJ case no 2020/15069 dated 16 November 2021. See also *Du Toit NO v Steinhoff International Holdings (Pty) Limited* [2020] 1 All SA 142 (WCC) at paragraphs [27]–[34]; *Steinhoff International Holdings Proprietary Limited v Jooste* (unreported, WCC case no 16919/2020 dated 27 October 2021) at paragraphs [21]–[28]; A*bb South Africa (Pty) Ltd v Leago EPC (Pty) Ltd* (unreported, GJ case no 22278/2019 dated 13 April 2022) at paragraphs [47]–[63]; *University of The Free State v Christo Strydom Nutrition (CSN) In re: University of The Free State v Christo Strydom Nutrition (CSN)* (unreported, FB case no 2433/2019 dated 18 July 2022) at paragraph [6]; *Taitz Cellular (Pty) Ltd t/a Blue Cellular v Chadez Enterprises (Pty) Ltd* (unreported, GJ case no 29643/2021 dated 3 August 2022) at paragraph 11; *Venator Africa (Pty) Limited v Bekker* [2022] 4 All SA 600 (KZP) at paragraph [31]; *Shoprite Checkers (Pty) Ltd v Premier of the Western Cape Province* (unreported, WCC case no 17531/2022 dated 1 December 2023) at paragraphs [8]–[9]; *Christo Strydom Nutrition v University of the Free State* (unreported, FB case no A169/2022 dated 12 December 2023 — a decision of the full court) at paragraph [29].

2 *Author's note: Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 374G. See also *M&J Da Costa Brothers (Pty) Ltd v Karan* (unreported, GJ case no 2021/58699 dated 13 January 2023) at paragraphs [22]–[23]; *Shoprite Checkers (Pty) Ltd v Premier of the Western Cape Province* (unreported, WCC case no 17531/2022 dated 1 December 2023) at paragraphs [8]–[9].

3 *Champion v J D Celliers & Co Ltd* 1904 TS 788 at 790–1; *Estate Edwards v Sinclair* 1918 EDL 12 at 19; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C); *Marney v Watson* 1978 (4) SA 140 (C) at 144F–G; *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244H–245A, where Ackermann J points out that, where an exception is raised against a summons, '[word] die korrektheid van die feite in die besonderhede van vordering . . . aanvaar maar die regskonklusie word betwis'. See also *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 (1) SA 624 (W) at 632C–D; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) 138 (SCA) at 143I–J; *Brooks v Minister of Safety and Security* 2008 (2) SA 397 (C) at 402F–G; *Stewart v Botha* 2008 (6) SA 310 (SCA) at 313F; *YB v SB* 2016 (1) SA 47 (WCC) at 51H–I; *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) at 44F–G; *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd* 2021 (5) SA 457 (SCA) at paragraph [14]; *Gartner v University of Cape Town* [2021] 4 All SA 143 (WCC) at paragraph [18]; *Hill NO v Strauss* (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraph [2]; *Origin Global Holdings Ltd v Acorn Agri (Pty) Ltd* (unreported, WCC case no 10317/2019 dated 30 July 2021) at paragraph [17]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [6]; *Bareon Projects Logistics CC v Ivan Stols Vervoer CC* (unreported, FB case no 2646/2021 dated 26 November 2021) at paragraph [18]; *Cornerstone Logistics (Pty) Ltd v Zacpak Cape Town Depot (Pty) Ltd* [2022] 2 All SA 13 (SCA) at paragraph [35]; *Business Connection (Pty) Ltd v Buffalo City Metropolitan Municipality* (unreported, EL case no EL 1269/2020 dated 25 January 2022) at paragraphs [8] and [9]; *Trustees, Burmilla Trust v President of the Republic of South Africa* 2022 (5) SA 78 (SCA) at paragraph [16]. In *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) it was held (at 755A) that this principle is limited in its operation to allegations of fact and that it does not extend to inferences and conclusions not warranted by the allegations of fact. It was further held (at 755B) that the principle does not oblige the court to stultify itself by accepting allegations of 'fact' that are manifestly false, allegations that are so divorced from reality that they cannot possibly be proved; the same approach was referred to in *Naidoo v Dube Tradeport Corp* 2022 (3) SA 390 (SCA) at paragraph [35]. See also *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651E–F; *Voget v Kleynhans* 2003 (2) SA 148 (C) at 151G–H; *TWK Agriculture Ltd v NCT Forestry Co-operative Ltd* 2006 (6) SA 20 (N) at 23B–C; *Brooks v Minister of Safety and Security* 2008 (2) SA 397 (C) at 402I.

4 *Salzmann v Holmes* 1914 AD 152 at 156; *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) at 52G–H; *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) at 32D–E; *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 161D–E; *YB v SB* 2016 (1) SA 47 (WCC) at 51I–J; but see *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) at 644D–645G; *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 303D–E; *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) at 44F–G; *Drummond Cable Concepts v Advancenet (Pty) Ltd* 2020 (1) SA 546 (GJ) at paragraph [7]; *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd* 2021 (5) SA 457 (SCA) at paragraph [14]; *Mamopgopa v Alexander Forbes Financial Services (Pty) Ltd* (unreported, GP case no 7271/2019 dated 27 May 2021) at paragraph [13]; *Gartner v University of Cape Town* [2021] 4 All SA 143 (WCC) at paragraph [18]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [7]; *Business Connection (Pty) Ltd v Buffalo City Metropolitan Municipality* (unreported, EL case no EL 1269/2020 dated 25 January 2022) at paragraph [8]; *Da Ribeira NO v*

Woudberg 2023 (1) SA 530 (WCC) at paragraph [18]. The approach to exceptions that the claim that the impugned pleading does not sustain a cause of action is well established. The court is to take as true the allegations pleaded by the plaintiff and to assess whether they disclose a cause of action (*Oceana Consolidated Co Ltd v The Government* 1907 TS 786 at 788; *Stols v Garlicke & Bousfield Inc* 2012 (4) SA 415 (KZP) at 421H; *Drummond Cable Concepts v Advancenet (Pty) Ltd* 2020 (1) SA 546 (GJ) at paragraph [7]; *Business Connection (Pty) Ltd v Buffalo City Metropolitan Municipality* (unreported, EL case no EL 1269/2020 dated 25 January 2022) at paragraphs [8] and [9]; *Naidoo v Dube Tradeport Corp* 2022 (3) SA 390 (SCA) at paragraph [18]; *Da Ribeira NO v Woudberg* 2023 (1) SA 530 (WCC) at paragraph [18]; *C.W v G.T* (unreported, SCA case no 867/2021 dated 13 March 2023) at paragraph [9]).

5 *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at paragraph [6] (where certain additional facts were agreed and could therefore be taken into account); *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] 4 All SA 346 (SCA) at paragraph [3].

6 *Cassim's Estate v Bayat and Jadwat* 1930 (2) PH F81 (N); *Soma v Marulane NO* 1975 (3) SA 53 (T).

7 *SA Railways and Harbours v Pepeta* 1926 CPD 45; *Umpelea v Witbooi NO* 1926 OPD 251; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893; *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265 (O) at 269A; *Johnston v Leal* 1980 (3) SA 927 (A) at 947H; *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A) at 833F and 834D; *Dilworth v Reichard* [2002] 4 All SA 677 (W) at 681*j*–682*a*; *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 303D–E; *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) at 44F–G; *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd* 2021 (5) SA 457 (SCA) at paragraph [14]; *Mamopgopa v Alexander Forbes Financial Services (Pty) Ltd* (unreported, GP case no 7271/2019 dated 27 May 2021) at paragraph [13]; *Gartner v University of Cape Town* [2021] 4 All SA 143 (WCC) at paragraph [18]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [7].

8 *Brown v Vlok* 1925 AD 56 at 58; *Edwards v Woodnutt NO* 1968 (4) SA 184 (R) at 186E; *Muller v Cook* 1973 (2) SA 247 (N); but see *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) at 644D–645G.

9 *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraphs [39] and [59].

10 *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E–F; *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F; *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183E; *Pete's Warehousing and Sales CC v Bowsink Investments CC* 2000 (3) SA 833 (E) at 839G–H; *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 965C–D; *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] 3 All SA 350 (A); *Sanan v Eskom Holdings Ltd* 2010 (6) SA 638 (GSJ) at 645D; *Mamopgopa v Alexander Forbes Financial Services (Pty) Ltd* (unreported, GP case no 7271/2019 dated 27 May 2021) at paragraph [13]; *Origin Global Holdings Ltd v Acorn Agri (Pty) Ltd* (unreported, WCC case no 10317/2019 dated 30 July 2021) at paragraph [17].

11 *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630; *Kahn v Stuart* 1942 CPD 386 at 391; *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd* 1961 (1) SA 704 (C) at 711G; *Miller v Muller* 1965 (4) SA 458 (C) at 468; *Central Merchant Bank Ltd v Oranje Benefit Society* 1975 (4) SA 588 (C) at 592A–B; *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C) at 599G; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (2)* 1976 (1) SA 100 (W) at 107D; *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC) at 181G; *Diergaardt v Africa* 1979 (2) SA 584 (SWA) at 586E; *International Combustion Africa Ltd v Billy's Transport* 1981 (1) SA 599 (W) at 601A; *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F–I; *Metwa v Minister of Health* 1989 (3) SA 600 (D) at 604B–C; *South African National Parks v Ras* 2002 (2) SA 537 (C) at 541D–I; *Francis v Sharp* 2004 (3) SA 230 (C) at 237C–F; *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 161C–D; *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) at 44F–G; *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd* 2021 (5) SA 457 (SCA) at paragraph [14]; *Gartner v University of Cape Town* [2021] 4 All SA 143 (WCC) at paragraph [18]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraphs [8] and [14].

12 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465H; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 199B; *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) at 44F–G; *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd* 2021 (5) SA 457 (SCA) at paragraph [14]; *Gartner v University of Cape Town* [2021] 4 All SA 143 (WCC) at paragraph [18]; *Hill NO v Strauss* (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraph [2]; *Origin Global Holdings Ltd v Acorn Agri (Pty) Ltd* (unreported, WCC case no 10317/2019 dated 30 July 2021) at paragraphs [17] and [30]; *Da Ribeira NO v Woudberg* 2023 (1) SA 530 (WCC) at paragraph [16]. See also *Jake Trading CC v Rambore (Pty) Ltd t/a Rambore Specialist Contractors* (unreported, WCC case no 11909/2017 dated 13 March 2019) at paragraph [32]; *Bareon Projects Logistics CC v Ivan Stols Vervoer CC* (unreported, FB case no 2646/2021 dated 26 November 2021) at paragraph [19]; *Tembani v President of the Republic of South Africa* 2023 (1) SA 432 (SCA) at paragraph [14]; *C.W v G.T* (unreported, SCA case no 867/2021 dated 13 March 2023) at paragraph [9]; *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraphs [10]–[11].
A legal issue in an action should be addressed by means of an exception or as a separate issue in terms of rule 33(4). A party should refrain from calling witnesses who cannot give evidence relevant to such an issue. If necessary, a properly formulated request for particulars for trial and a request for admissions at a pre-trial conference could be made (*MEC, Western Cape Department of Social Development v BE obo JE* 2021 (1) SA 75 (SCA) at paragraph [49]).
An exception is not the appropriate mechanism to test whether punitive damages against private persons should in principle be recognized for egregious violations of the right to dignity, which is a right protected by the law of defamation (*Paulsmeier v Media 24 (Pty) Ltd* (unreported, WCC case no 15855/21 dated 20 May 2022) at paragraph [36]).

13 *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706E; *Santos v Standard General Insurance Co Ltd* 1971 (3) SA 434 (O) at 437B; *Versluis v Greenblatt* 1973 (2) SA 271 (NC) at 274A–H; *Marais v Steyn* 1975 (3) SA 479 (T) at 486H–487G; *Van Lochen v Associated Office Contracts (Pty) Ltd* 2004 (3) SA 247 (W) at 252F–G; *Alphina Investments Ltd v Blacher* 2008 (5) SA 479 (C) at 483B; *Inzalo Communications & Event Management (Pty) Ltd v Economic Value Accelerators (Pty) Ltd* 2008 (6) SA 87 (W) at 101C–D; *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] 4 All SA 346 (SCA) at paragraph [3]; *Nedbank Limited v Muskat* (unreported, GP case no 22207/21 dated 19 April 2022) at paragraph [7]; *Paulsmeier v Media 24 (Pty) Ltd* (unreported, WCC case no 15855/21 dated 20 May 2022) at paragraph [37]; *Da Ribeira NO v Woudberg* 2023 (1) SA 530 (WCC) at paragraph [15]; and see the authorities referred to in the preceding two footnotes.

14 In addition to the authorities referred to in the preceding three footnotes, see also *Miller v Bellville Municipality* 1971 (4) SA 544 (C) at 546D; *Rumanal (Pty) Ltd v Hubner* 1976 (1) SA 643 (E) at 646C; *Diergaardt v Africa* 1979 (2) SA 584 (SWA) at 588H; *Johnston v Leal* 1980 (3) SA 927 (A) at 947; *Paulsmeier v Media 24 (Pty) Ltd* (unreported, WCC case no 15855/21 dated 20 May 2022) at paragraph [37] and the authorities there referred to (where it is pointed out that from this flows the principle that it is not permissible to except to only one of several claims made by a plaintiff on the strength of a single cause of action). An exception cannot be used to complain about a lack of sufficient information for trial (*Bareon Projects Logistics CC v Ivan Stols Vervoer CC* (unreported, FB case no 2646/2021 dated 26 November 2021) at paragraph [17]).

15 *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) at 373B–D. In *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) the Constitutional Court at 44E stated (*per* Froneman J):
'The dismissal of an exception is not usually finally dispositive of the legal issue at stake, unlike the upholding of an exception on the basis that the claim is bad in law.'

16 *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) at 373B–D; *Da Ribeira NO v Woudberg* 2023 (1) SA 530 (WCC) at paragraph [17]; *Zamakhuhle Private Hospital v Hlatswayo* (unreported, GJ case no 027168/2022 dated 15 November 2023) at paragraph [15].

17 *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) at 373B–D.

18 *Barrett v Rewi Bulawayo Development Syndicate Ltd* 1922 AD 457 at 459; *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C) at 599E–600B; *Central Merchant Bank Ltd v Oranje Benefit Society* 1975 (4) SA 588 (C) at 592C; *Oranje Benefit Society v Central Merchant Bank Ltd* 1976 (4) SA 659 (A) at 676B; *International Combustion Africa Ltd v Billy's Transport* 1981 (1) SA 599 (W) at 601A; *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F; *Tobacco Exporters & Manufacturers Ltd v Bradbury Road Properties (Pty) Ltd* 1990 (2) SA 420 (C) at 424E; *Afgri Operations (Pty) Ltd v Oberholzer* (unreported, WCC case no 1306/2020 dated 10 February 2022) at paragraph 10; *Almar Investment (Pty) Ltd v Emang Mmogo Minning Resources (Pty) Ltd* (unreported, GJ case no 1005/2020 dated 23 January 2023) at paragraph [14].

19 *Stein v Giese* 1939 CPD 336; *Du Plessis v Nel* 1952 (1) SA 513 (A) at 531H–532A; *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706E; *Versluis v Greenblatt* 1973 (2) SA 271 (NC) at 274A–H; *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1984 (1) SA 443 (W) at 456C.

20 *Thornton v Royal Insurance Co Ltd* 1958 (4) SA 171 (C) at 174G; *Santos v Standard General Insurance Co Ltd* 1971 (3) SA 434 (O) at 437E; *Marais v Steyn* 1975 (3) SA 479 (T) at 487C; *David Beckett Construction (Pty) Ltd v Bristow* 1987 (3) SA 275 (W) at 276D.

21 *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC) at 181F.

22 *Scheepers v Krog* 1925 CPD 9; *Jack Smith v Joe's (Pty) Ltd* 1929 TPD 323; *Britz v Weideman* 1946 OPD 144 at 150; *Ritchie Motors v Moolman* 1956 (4) SA 337 (T); *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 899A; *Alphina Investments Ltd v Blacher* 2008 (5) SA 479 (C) at 483D and 488G–I; *Feldman NO v EMI Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA) at 5A; and see *Cotas v Williams* 1947 (2) SA 1154 (T) and *Wicksteed v George* 1961 (1) SA 651 (FC), both cases in which an appellant was not allowed to rely on a ground of exception not raised in the court below.

23 See, for example, *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893; *Geldenhuys v Maree* 1962 (2) SA 511 (O) at 514C; *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C) at 395D–E; *Callender-Easby v Grahamstown*

Municipality 1981 (2) SA 810 (E) at 812H–813A; *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E–F; *Klerck NO v Van Zyl and Maritz NNO* 1989 (4) SA 263 (SE) at 288E; *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F; *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183E; *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 965C–D; *Shell Auto Care (Pty) Ltd v Laggar* 2005 (1) SA 162 (D) at 170D–E; *Thekweni Properties (Pty) Ltd v Picardi Hotels Ltd (and Others as Third Parties)* 2008 (2) SA 156 (D) at 158H, overruled on appeal, but not on this point, in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA); *Frank v Premier Hangers CC* 2008 (3) SA 594 (C) at 600F–G; *Stewart v Botha* 2008 (6) SA 310 (SCA) at 313E–F; *Picbel Groep Voorsorgfonds (in Liquidation) v Somerville, and Related Matters* 2013 (5) SA 496 (SCA) at 501A–B; *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 161E–F; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 199B; *YB v SB* 2016 (1) SA 47 (WCC) at 52A; *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) at 44F–G; *Drummond Cable Concepts v Advancenet (Pty) Ltd* 2020 (1) SA 546 (GJ) at paragraph [7]; *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd* 2021 (5) SA 457 (SCA) at paragraph [14]; *Gartner v University of Cape Town* [2021] 4 All SA 143 (WCC) at paragraphs [18]–[19]; *Business Connection (Pty) Ltd v Buffalo City Metropolitan Municipality* (unreported, EL case no EL 1269/2020 dated 25 January 2022) at paragraph [7]; *Trustees, Burmilla Trust v President of the Republic of South Africa* 2022 (5) SA 78 (SCA) at paragraph [16]; *Naidoo v Dube Tradeport Corp* 2022 (3) SA 390 (SCA) at paragraph [36]; *Tembani v President of the Republic of South Africa* 2023 (1) SA 432 (SCA) at paragraph [14]; *Paulsmeier v Media 24 (Pty) Ltd* (unreported, WCC case no 15855/21 dated 20 May 2022) at paragraph [51]; *Da Ribeira NO v Woudberg* 2023 (1) SA 530 (WCC) at paragraph [17]; *C.W v G.T* (unreported, SCA case no 867/2021 dated 13 March 2023) at paragraph [9].

24 *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) at 149F.

25 *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893; *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C) at 395D–E; *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 812H–813A; *Klerck NO v Van Zyl and Maritz NNO* 1989 (4) SA 263 (SE) at 288E.

26 *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630; *Kahn v Stuart* 1942 CPD 386 at 391; *Van der Westhuizen v Le Roux and Le Roux* 1947 (3) SA 385 (C) at 390; *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A; *South African National Parks v Ras* 2002 (2) SA 537 (C) at 541D–I; *Francis v Sharp* 2004 (3) SA 230 (C) at 237D–I; *Origin Global Holdings Ltd v Acorn Agri (Pty) Ltd* (unreported, WCC case no 10317/2019 dated 30 July 2021) at paragraph [17].

27 *Francis v Sharp* 2004 (3) SA 230 (C) at 237D–I; *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) at 44F–G; *Brocsand (Pty) Ltd v Tip Trans Resources (Pty) Ltd* 2021 (5) SA 457 (SCA) at paragraph [14]; *Mamopgopa v Alexander Forbes Financial Services (Pty) Ltd* (unreported, GP case no 7271/2019 dated 27 May 2021) at paragraph [13]; *Gartner v University of Cape Town* [2021] 4 All SA 143 (WCC) at paragraphs [18]–[19]; *Origin Global Holdings Ltd v Acorn Agri (Pty) Ltd* (unreported, WCC case no 10317/2019 dated 30 July 2021) at paragraph [17]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [18]; *Business Connection (Pty) Ltd v Buffalo City Metropolitan Municipality* (unreported, EL case no EL 1269/2020 dated 25 January 2022) at paragraph [7]; *Trustees, Burmilla Trust v President of the Republic of South Africa* 2022 (5) SA 78 (SCA) at paragraph [16]; *Naidoo v Dube Tradeport Corp* 2022 (3) SA 390 (SCA) at paragraph [36]; *Tembani v President of the Republic of South Africa* 2023 (1) SA 432 (SCA) at paragraph [14]; *Paulsmeier v Media 24 (Pty) Ltd* (unreported, WCC case no 15855/21 dated 20 May 2022) at paragraph [51].

28 *Klokow v Sullivan* 2006 (1) SA 259 (SCA).

29 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 465H. See also *Jake Trading CC v Rambore (Pty) Ltd t/a Rambore Specialist Contractors* (unreported, WCC case no 11909/2017 dated 13 March 2019) at paragraph [32]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [9]; *Tembani v President of the Republic of South Africa* 2023 (1) SA 432 (SCA) at paragraph [14]; *Altcoin Trader (Pty) Ltd v Basel* (unreported, GJ case no 28739/2021 dated 12 September 2022) at paragraph [6]; *Lovell v Lovell* (unreported, GP case no 24583/2009 dated 22 September 2022) at paragraph [15]; *Da Ribeira NO v Woudberg* 2023 (1) SA 530 (WCC) at paragraph [19]; *C.W v G.T* (unreported, SCA case no 867/2021 dated 13 March 2023) at paragraph [9]; *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraphs [10]–[11].

30 *Tembani v President of the Republic of South Africa* 2023 (1) SA 432 (SCA) at paragraph [16]; *Lovell v Lovell* (unreported, GP case no 24583/2009 dated 22 September 2022) at paragraph [16]; *Shopfitters Studio (Pty) v Ltd Dynamic Design Upholstery (Pty) Ltd* (unreported, GP case no 27419/2021 dated 28 November 2022) at paragraph [10].

31 *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 454–5; *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1019C.

32 *Tembani v President of the Republic of South Africa* 2023 (1) SA 432 (SCA) at paragraph [15].

33 2023 (1) SA 432 (SCA).

34 *Author's note: H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).

35 *Author's note: Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA).

36 *Author's note: H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).

37 *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1991 (3) SA 787 (T) at 791H; *Princeps (Edms) Bpk v Van Heerden NO* 1991 (3) SA 842 (T) at 845A–F. The contrary view taken in *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1991 (3) SA 795 (N) at 800F–801C was expressly rejected by the Appellate Division in *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 603C–D; *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348H–349A; *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd* 2018 (3) SA 405 (SCA) at 409C; *Thipe v City of Tshwane Metropolitan Municipality* (unreported, SCA case no 254/2019 dated 16 October 2020) at paragraph [23].

38 *Johannesburg Municipality v Kerr* 1915 WLD 35 at 37; *Berrange v Samuels (II)* 1938 WLD 189 at 190; *Santam Insurance Co Ltd v Manqele* 1975 (1) SA 607 (D) at 610C; *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1991 (3) SA 787 (T) at 791H–I; *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 603C–H; *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348C–E; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 219A–B.

39 *Santam Insurance Co Ltd v Manqele* 1975 (1) SA 607 (D) at 610C; *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D–H; *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348C–E.

40 *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D; *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269H; *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 167G–I; *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348C–F; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 219A–B; *Baliso v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 292 (CC) at 302G; *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd* 2018 (3) SA 405 (SCA) at 409C–E; *Thipe v City of Tshwane Metropolitan Municipality* (unreported, SCA case no 254/2019 dated 16 October 2020) at paragraph [23]. For a case where an exception was upheld and the plaintiff's claim dismissed without leave to amend, see *LM v DM* 2021 (5) SA 607 (GP) at paragraph [50].

41 *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 167H; *Thipe v City of Tshwane Metropolitan Municipality* (unreported, SCA case no 254/2019 dated 16 October 2020) at paragraph [23]. If there is good reason that the pleading cannot be amended, leave to amend should be refused (*Ocean Echo Properties 327 CC v Old Mutual Life Assurance Co (South Africa) Ltd* 2018 (3) SA 405 (SCA) at paragraph [8]; *MTO Forestry (Pty) Ltd v Eskom Holdings (SOC) Limited; Puggia NO v Eskom Holdings (SOC) Limited* (ECGq case nos 919/2020 and 926/2020 dated 5 September 2023) at paragraphs [51] and [53]). In the *Puggia* case (case no 926/2020) an exception was upheld but leave to amend was refused. For a case where an exception was upheld and the plaintiff's claim dismissed without leave to amend, see *LM v DM* 2021 (5) SA 607 (GP) at paragraph [50].

42 *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269H–I.

43 *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602E–H.

44 *Santam Insurance Co Ltd v Manqele* 1975 (1) SA 607 (D) at 610E; *Princeps (Edms) Bpk v Van Heerden NO* 1991 (3) SA 842 (T) at 845D–F; *Standard Bank of SA Ltd v Van Dyk* 2016 (5) SA 510 (GP) at 511F–513B where it is pointed out that the contrary view in *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1991 (3) SA 795 (N), was effectively overruled in *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A).

In *Woolf v Zenex Oil (Pty) Ltd* 1999 (1) SA 652 (W) at 654G–I the court considered the conflicting judgments but distinguished the *Natal Fresh Produce* case on the facts and held that, as the declaration was to be filed within an extended time period laid down by the court acting in terms of rule 6(5)*(g)*, the said period was a period laid down in the rules for purposes of rule 26, and a notice of bar had to be served requiring the party in default of delivering a declaration to do so within five days after the date upon which the notice of bar was delivered. In the event of continued inaction, the notice of bar could be followed by an application for absolution.

45 *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 945H.

46 *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 349A–B.

47 *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 349B.

48 *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) at 348H–349B.

49 *Hudson v Hudson* 1927 AD 259 at 269; *Minerals and Quarries (Pty) Ltd v Henckert* 1967 (4) SA 77 (SWA) at 84B; *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC).

50 *Minerals and Quarries (Pty) Ltd v Henckert* 1967 (4) SA 77 (SWA) at 84A; *Versluis v Greenblatt* 1973 (2) SA 271 (NC) at 278A–C.

51 *Baragwanath v Olifants Asbestos Co (Pty) Ltd* 1951 (3) SA 222 (T) at 230D; *Sacks v Venter* 1954 (2) SA 427 (W) at 431B; *Reed v Warren* 1955 (2) SA 370 (N) at 374C; *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (N) at 715G.

52 In such instance the excipient must show that the claim is (not may be) bad in law (*Trustee, Bus Industry Restructuring Fund v Break Through Investments CC* 2008 (1) SA 67 (SCA) at paragraph [11]; *Hill NO v Strauss* (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraph [14]; *Taitz Cellular (Pty) Ltd t/a Blue Cellular v Chadez Enterprises (Pty) Ltd* (unreported, GJ case no 29643/2021 dated 3 August 2022) at paragraph 12).

53 *MN v AJ* 2013 (3) SA 26 (WCC) at 33H and 35G–I; *ETG Agro (Pty) Ltd v Varuna Eastern Cape (Pty) Ltd* (unreported, ECG case no 5206/2016 dated 3 May 2021) at paragraph [6].

54 (1903) 20 SC 211.

55 1923 AD 653.

56 *Icebreakers No 83 (Pty) Ltd v Medicross Healthcare Group (Pty) Ltd* 2011 (5) SA 130 (KZD) at 131F–H and 134E–G. See also *Absa Bank Ltd v Janse van Rensburg* 2013 (5) SA 173 (WCC) at 175G–176F.

57 *Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 at 74; *Scheepers v Krog* 1925 CPD 9 at 11; *Cilliers v Van Biljon* 1925 OPD 4; *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777E; *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 268F; *Barloworld Logistics Africa (Pty) Ltd v Ford* 2019 (5) SA 133 (GJ) at 141F–G; *Barlow World South Africa (Pty) Ltd v Pat Malabela Electrical Contractors and Meter Readers* (unreported, GP case no 65643/2017 dated 6 May 2021) at paragraph [17]; *Kok v Botha* (unreported, ECPE case no 1494/2020 dated 5 October 2021) at paragraph [13]. In *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 902B–D Heher J held:
'When the lack of particularity relates to mere detail, the remedy of the defendant is to plead to the averment made and to obtain the particularity he requires:
(i) either by means of discovery/inspection of document procedure in terms of the Rules; or
(ii) by means of a request for particulars for trial of those particulars which are strictly necessary to enable the defendant to prepare for trial.'
See also *Hill NO v Strauss* (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraph [18].
In *Super Group Trading (Pty) Ltd t/a Super Rent v Bauer* 2022 (5) SA 622 (WCC) Binns-Ward J held that the particulars of claim were unmistakably vague and embarrassing, and very badly so. He adopted the following approach (at paragraph [22]):
'To permit the action to proceed towards trial based on it by dismissing the exception and requiring the second defendant to plead to it would only go to compound the embarrassment, and quite likely give rise to a confusing or argumentative plea. It would ultimately conduce to a situation where a case manager or trial judge would likely be faced with some difficulty in delimiting the issues for the purpose of judicially managing the conduct of the trial. It is not only the second defendant that would be prejudiced if the pleading were to stand, but also the court.'

58 *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 269I; *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 643I–644A; *Barlow World South Africa (Pty) Ltd v Pat Malabela Electrical Contractors and Meter Readers* (unreported, GP case no 65643/2017 dated 6 May 2021) at paragraph [17]; *Kok v Botha* (unreported, ECPE case no 1494/2020 dated 5 October 2021) at paragraph [13]; *Benteler South Africa (Pty) Ltd v Morris Material Handling SA (Pty) Ltd t/a Crane Aid* (unreported, ECGq case no 3354/2021 dated 16 August 2022) at paragraph [13].

59 1998 (1) SA 836 (W) at 899G; and see *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 644A; *Barlow World South Africa (Pty) Ltd v Pat Malabela Electrical Contractors and Meter Readers* (unreported, GP case no 65643/2017 dated 6 May 2021) at paragraph [17]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [10]; *Kok v Botha* (unreported, ECPE case no 1494/2020 dated 5 October 2021) at paragraph [13]; *Win Systems D.O.O. (Formerly Named Gold Club Gaming D.O.O) v DRGT Africa (Pty) Ltd (Formerly Named Simplicit-e Gaming Solutions (Pty) Ltd* (unreported, GP case no 8861/2021 dated 12 May 2022) at paragraph [7]; *Werner Stander Development CC v Aquaculture Engineering* (unreported, GP case no 30511/2020 dated 25 July 2022) at paragraph [14]; *Lovell v Lovell* (unreported, GP case no 24583/2009 dated 22 September 2022) at paragraph [30].

60 Unreported, WCC case no 15855/21 dated 20 May 2022, followed in *Hendricks v Behardien NO* (unreported, WCC case no 2872/2019 dated 26 April 2023) at paragraph 11.

61 At paragraphs [55]–[60]

62 1992 (3) SA 208 (T).

63 At 211B–E.

64 1993 (3) SA 264 (A).

65 In terms of rule 18(12) failure to comply with the provisions of rule 18 is deemed to be an irregular step and the opposite party is entitled to act in accordance with rule 30.

66 *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W) at 469F–J; *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 902D–H; *Hill NO v Strauss* (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraph [19].

67 *ABSA Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa, Third Party)* 1997 (2) SA 415 (W) at 418E–H; *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 902D–H; *Hill NO v Strauss* (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraph [19].

68 *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 902F–G; *Nasionale Aartappel Koöperasie Bpk v Price Waterhouse Coopers Ing* 2001 (2) SA 790 (T); *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) a 645B–C; *Hill NO v Strauss* (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraph [19]; and see *Benteler South Africa (Pty) Ltd v Morris Material Handling SA (Pty) Ltd t/a Crane Aid* (unreported, ECGq case no 3354/2021 dated 16 August 2022) at paragraph [13].

69 *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A; *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 166G–H; *Eskom Holdings v Lesole Agencies CC* (unreported, FB case no 2555/2016 dated 28 September 2017) at paragraph [7]; *Barloworld Logistics Africa (Pty) Ltd v Ford* 2019 (5) SA 133 (GJ) at 141F–H; *Hill NO v Strauss* (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraph [20]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [10]; *Kok v Botha* (unreported, ECPE case no 1494/2020 dated 5 October 2021) at paragraph [13].

70 *Carelsen v Fairbridge, Arderne & Lawton* 1918 TPD 306 at 309, approved in *Liquidators Wapejo Shipping Co Ltd v Lurie Bros* 1924 AD 69 at 74; *Horwitz v Hendricks* 1928 AD 391 at 393; *Factory Investments Ltd v Record Industries Ltd* 1957 (2) SA 306 (T) at 310B. See also *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777E; *Brits v Coetzee* 1967 (3) SA 570 (T) at 572A. In *Keely v Heller* 1904 TS 101 at 103 Innes CJ stated that a defendant is entitled to except to a summons which discloses no 'intelligible ground of action', and in *Getz v Pahlavi* 1943 WLD 142 at 145 Schreiner J said:
'A man who has not an explicable cause of action is in the same position as one who has no cause of action at all.'

71 *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298J–299C and 300G.

72 *EOH Mthombo (Pty) Ltd v Clarke* (unreported, GP case no 15136/2022 dated 3 November 2023) at paragraph [28].

73 *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211E; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [16]; *Benteler South Africa (Pty) Ltd v Morris Material Handling SA (Pty) Ltd t/a Crane Aid* (unreported, ECGq case no 3354/2021 dated 16 August 2022) at paragraph [14].

74 See *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777A–E; *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393F–H; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211B; *Gallagher Group Ltd v IO Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at 166H–J.

75 *Leathern v Tredoux* (1911) 32 NLR 346 at 348; *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 812H; *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1018H; *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 644A–B.

76 *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 644B.

77 *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393E–H; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211B; *ABSA Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa, Third Party)* 1997 (2) SA 415 (W)) at 421I–422A. In *International Tobacco Co of SA Ltd v Wollheim* 1953 (2) SA 603 (A) at 613B and *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777B it is said that it must be shown that the excipient will be 'substantially embarrassed' by the vagueness or lack of particularity.

78 *ABSA Bank Ltd v Boksburg Transitional Local Council (Government of the Republic of South Africa, Third Party)* 1997 (2) SA 415 (W) at

421J–422A; *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 645C–D; *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* 2010 (1) SA 627 (C) at 630B.

79 Thus, for example, the date of the transaction which forms the basis of the claim may be important in one case, but only a minor detail in another. If the claim is for damages arising from a collision between cars driven by the plaintiff and the defendant, and the date thereof is not pleaded, the defendant is unlikely to be left in doubt as to which collision is being referred to. In a summons for rent due to the plaintiff, the defendant may be embarrassed if he is not informed in respect of which month rent is being claimed.

80 *Quinlan v MacGregor* 1960 (4) SA 383 (D) at 393G; *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211B; *Francis v Sharp* 2004 (3) SA 230 (C) at 240E–F; *Standard Bank of South Africa Ltd v Hunkydory Investments 194 (Pty) Ltd and Another (No 1)* 2010 (1) SA 627 (C) at 630B; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [11]. Whether the excipient is prejudiced involves 'a factual enquiry and a question of degree, influenced by the nature of the allegations, their contents, the nature of the claim and the relationship between the parties' (*Lovell v Lovell* (unreported, GP case no 24583/2009 dated 22 September 2022) at paragraph [20] and the authorities there referred to).

81 The onus is always on the excipient to show that the pleading in question is excipiable (*Kennedy v Steenkamp* 1936 CPD 113 at 115; *City of Cape Town v National Meat Supplies Ltd* 1938 CPD 59 at 63; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893; *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777A; *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C) at 395D–E; *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 813A; *Venter and Others NNO v Barritt; Venter and Others NNO v Wolfsberg Arch Investments 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 645C–D; *Eskom Holdings v Lesole Agencies CC* (unreported, FB case no 2555/2016 dated 28 September 2017) at paragraph [7]; *Barnard v De Klerk* (unreported, ECPE case no 2015/2019 dated 22 October 2020) at paragraph [8]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [12]; *Kok v Botha* (unreported, ECPE case no 1494/2020 dated 5 October 2021) at paragraph [13]). See further the notes s v 'General' above.

82 *Deane v Deane* 1955 (3) SA 86 (N) at 87F; *Lockhat v Minister of the Interior* 1960 (3) SA 765 (D) at 777B.

83 *Francis v Sharp* 2004 (3) SA 230 (C) at 240F–G; *Eskom Holdings v Lesole Agencies CC* (unreported, FB case no 2555/2016 dated 28 September 2017) at paragraph [7]; *ETG Agro (Pty) Ltd v Varuna Eastern Cape (Pty) Ltd* (unreported, ECG case no 5206/2016 dated 3 May 2021) at paragraph [5]; *Bendrew Trading v Sihle Property Developers and Plant Hire* (unreported, MM case no 1857/2020 dated 13 August 2021) at paragraph [13].

84 *Cilliers v Van Biljon* 1925 OPD 4 at 9; *Boys v Piderit* 1925 EDL 23 at 24.

85 *Boys v Piderit* 1925 EDL 23 at 25.

86 *Brodovsky v Ackerman* 1913 CPD 996; *Wellworths Bazaars Ltd v Chandlers Ltd* 1948 (3) SA 348 (W); *Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C); *Gerber v Naude* 1971 (3) SA 55 (T); *Pocket Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd* 1966 (4) SA 238 (R); *Benteler South Africa (Pty) Ltd v Morris Material Handling SA (Pty) Ltd t/a Crane Aid* (unreported, ECGq case no 3354/2021 dated 16 August 2022) at paragraph [15].

87 *Kock v Zeeman* 1943 OPD 135.

88 *Luttig v Jacobs* 1951 (4) SA 563 (O).

89 *Herbst v Smit* 1929 TPD 306.

90 *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 454; *Callender-Easby v Grahamstown Municipality* 1981 (2) SA 810 (E) at 812H; *Wilson v South African Railways and Harbours* 1981 (3) SA 1016 (C) at 1018A; *Benteler South Africa (Pty) Ltd v Morris Material Handling SA (Pty) Ltd t/a Crane Aid* (unreported, ECGq case no 3354/2021 dated 16 August 2022) at paragraph [13].

91 *Kock v Zeeman* 1943 OPD 135 at 139; *Greyvenstein v Hattingh* 1925 EDL 308.

92 *Du Plessis v Van Zyl* 1931 CPD 439 at 442.

93 *Florence v Criticos* 1954 (3) SA 392 (N).

94 *Keely v Heller* 1904 TS 101; *Naidu v Naidoo* 1967 (2) SA 223 (N) at 226; in *Small v Herbert* 1914 CPD 273 the document relied upon was 'absolutely meaningless' and an exception taken to the summons as vague and embarrassing was upheld. If the document is ambiguous, and capable of more than one interpretation, and if on one of these interpretations the defendant may be liable on the basis alleged in the summons, the summons is not excipiable; the meaning of the document itself may be put in issue on the pleadings for decision at the trial (*Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (A) at 106; *Sacks v Venter* 1954 (2) SA 427 (W) at 431; *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A); *Van As v Van As* (unreported, GJ case no 33865/2021 dated 30 August 2022) at paragraph [15]).

95 *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298J and 300G.

96 *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211E.

97 *Horwitz v Hendricks* 1928 AD 391.

98 *Stafford v Special Investigating Unit* 1999 (2) SA 130 (E) at 137G–138C.

99 *Arun Property Development (Edms) Bpk v Stad Kaapstad* 2003 (6) SA 82 (C) at 92D–E and 93I.

100 *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) at 44F–G). In this case the defendants (i e the respondents in the appeal), in various exceptions to the particulars of claim, in essence contended that their predecessors either did not have the capacity to enter into the contract pleaded in the particulars of claim or were lawfully precluded from doing so. In reversing the upholding of the exceptions by the High Court, the Constitutional Court held (at 44G–45A and 50A–C) that the dismissal of the exceptions did not deprive the respondents of the opportunity to raise them as substantive defences in their plea and for the merits to be determined after the leading of evidence at the trial. According to the Constitutional Court it would be better to have the possible unconscionableness of state conduct thrashed out at the trial. See also *Tembani v President of the Republic of South Africa* 2023 (1) SA 432 (SCA) at paragraphs [18] and [20].

101 [2001] 3 All SA 350 (A) (emphasis added by the court).

102 At paragraph [7]. See also *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] 4 All SA 346 (SCA) at paragraph [3]; *Taitz Cellular (Pty) Ltd t/a Blue Cellular v Chadez Enterprises (Pty) Ltd* (unreported, GJ case no 29643/2021 dated 3 August 2022) at paragraph 12.

103 *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244C.

104 1922 AD 16 at 23, quoted in, *inter alia*, *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838E–F; *Minister of Law and Order v Thusi* 1994 (2) SA 224 (N) at 226H–I; *Buys v Roodt (nou Otto)* 2000 (1) SA 535 (O) at 539G–H; *Gardener's Grapevine CC t/a Grapevine v Flowcrete Precast CC* 2009 (1) SA 324 (N) at 326F–G; *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation* 2020 (1) SA 327 (CC) at paragraph [50]; *Jugwanth v Mobile Telephone Networks (Pty) Ltd* [2021] 4 All SA 346 (SCA) at paragraph [4]; *Deltamune (Pty) Ltd v Tiger Brands Limited* [2022] 2 All SA 26 (SCA) at paragraph [26]; *Business Connection (Pty) Ltd v Buffalo City Metropolitan Municipality* (unreported, EL case no EL 1269/2020 dated 25 January 2022) at paragraph [6]; *Nedbank Limited v Muskat* (unreported, GP case no 22207/21 dated 19 April 2022) at paragraph [8]; *Da Ribeira NO v Woudberg* 2023 (1) SA 530 (WCC) at paragraph [20]; *Titan Asset Management (Pty) Ltd v Lanzerac Estate Investments (Pty) Ltd* [2023] 3 All SA 589 (WCC) at paragraph [52]. This definition is derived from that given in *Cooke v Gill* LR & CP 107 and *Read v Brown* [1888] 22 QB 128 at 131. In *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 656–7 Ogilvie-Thompson JA, in delivering the judgment of the majority, stated that this definition has, in both the superior and the inferior courts, been applied on innumerable occasions, and no sufficient grounds exist for it to be reconsidered. In a dissenting judgment Rumpff JA said (at 659–60) that he could not subscribe to a so-called definition which had, years ago, been taken over from an English decision. See also *Lyon v SA Railways and Harbours* 1930 CPD 276 at 284; *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637; *Coetzee v SA Railways and Harbours* 1933 CPD 565 at 570–1; *Malherbe v Britstown Municipality* 1949 (1) SA 281 (C) at 285; *Erasmus v Unieversekerings-Adviseurs (Edms) Bpk* 1962 (4) SA 646 (T) at 648H–649A; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330B; *Marais v Du Preez* 1966 (4) SA 456 (E) at 458A; *Myerson v Hack* 1969 (4) SA 521 (SWA) at 522D; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909E–H; *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244E; *The Master v I L Back & Co Ltd* 1981 (4) SA 763 (C) at 778A–B; *Syfin Holdings Ltd v Pickering* 1982 (2) SA 225 (Z) at 232A–D; *Stols v Garlicke & Bousfield Inc* 2012 (4) SA 415 (KZP) at 421H–422A.

105 Or as expressed by Watermeyer J in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637 and quoted in *King's Transport v Viljoen* 1954 (1) SA 133 (C) at 135F; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838F–G and *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation* 2020 (1) SA 327 (CC) at paragraph [51]:
'The proper legal meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not "arise" or "accrue" until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.'
See also *Erasmus v Unieversekerings-Adviseurs (Edms) Bpk* 1962 (4) SA 646 (T) at 648H–651B; *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244D–H; *The Master v I L Back and Co Ltd* 1981 (4) SA 763 (C) at 777H–778B; *Syfin Holdings Ltd v Pickering* 1982 (2) SA 225 (Z) at 232A–B; *D & D Deliveries (Pty) Ltd v Pinetown Borough* 1991 (3) SA 250 (D) at 253G.

106 See *King's Transport v Viljoen* 1954 (1) SA 133 (C) at 138–9; *Erasmus v Unieversekerings-Adviseurs (Edms) Bpk* 1962 (4) SA 646 (T) at 649A; *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 658A; *Myerson v Hack* 1969 (4) SA 521 (SWA) at 523C; *Patterton v Minister van*

Bantoeadministrasie en Ontwikkeling 1974 (3) SA 684 (C) at 686H–687F; *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 244F–G; *Minister of Law and Order v Thusi* 1994 (2) SA 224 (N) at 226; *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 903A–B; *Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality* 2006 (2) SA 25 (T) at 30F–G; *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation* 2020 (1) SA 327 (CC) at paragraph [52]; *Hill NO v Strauss* (unreported, GJ case no 13523/2020 dated 2 July 2021) at paragraphs [17] and [19]; *Nedbank Limited v Muskat* (unreported, GP case no 22207/21 dated 19 April 2022) at paragraph [15].

107 *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 245D.

108 *Alphedie Investments (Pty) Ltd v Greentops (Pty) Ltd* 1975 (1) SA 161 (T) at 161H.

109 *Rich v Bhyat* 1913 TPD 582 at 592; *Lebedina v Schechter and Haskell* 1931 WLD 247 at 255; *Dinath v Breedt* 1966 (3) SA 712 (T) at 715F–G; *De Bruyn v Centenary Finance Co (Pty) Ltd* 1977 (3) SA 37 (T) at 42A–E; *Ngani v Mbanje* 1988 (2) SA 649 (Z) at 651H–652B.

110 *Lebedina v Schechter and Haskell* 1931 WLD 247 at 255; *Mahomed v Nagdee* 1952 (1) SA 410 (A) at 418; *Western Bank Ltd v Wood* 1969 (4) SA 131 (D) at 136F–G; *Du Toit v Vermeulen* 1972 (3) SA 848 (A) at 856H–857A; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (1)* 1976 (1) SA 93 (W) at 96G–97H; *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd (2)* 1976 (1) SA 100 (W) at 103G–105D; *Philotex (Pty) Ltd v Snyman* 1994 (2) SA 710 (T) at 715F–716E.

111 *Van Zyl v Crause* 1945 OPD 168 at 170; *Goosen v Reed* 1955 (2) SA 478 (T) at 481; *Maree v Diedericks* 1962 (1) SA 231 (T) at 233; *Brits v Coetzee* 1967 (3) SA 570 (T) at 571; *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T) at 436; *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 757; *Tuckers Land and Development Corporation (Pty) Ltd v Loots* 1981 (4) SA 260 (T) at 263.

112 *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 972I; *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) at 149F. The test is less charitable where vagueness and embarrassment are the basis of an exception (*First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 972I–J).

113 *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 453; *Brits v Coetzee* 1967 (3) SA 570 (T) at 571; *Joubert v Impala Platinum (Pty) Ltd* 1998 (1) SA 463 (B) at 471H–I.

114 *Kennedy v Steenkamp* 1936 CPD 113 at 115; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C); *Kitching v London Assurance Co* 1959 (3) SA 247 (C); *Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd* 1972 (2) SA 270 (A).

115 *Union and National and General Assurance Co of SA Ltd v Forward Fashions Co* 1929 CPD 528.

116 *Wessels v Badenhorst* 1939 TPD 465; *Mothle v Mathole* 1951 (1) SA 785 (T) at 790; *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669–70; *Antonie v Koekoe* 1966 (2) SA 610 (O); *Solson's Properties (Pty) Ltd v Baksh* 1970 (1) SA 49 (N).

117 See the notes s v 'General' above.

118 *Joubert v Steenkamp* 1909 TS 169 at 171; *F J Hawkes & Co Ltd v Nagel* 1957 (3) SA 126 (W) at 130; *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 37. The converse proposition was stated in *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526: 'It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action.'
See also *Tongaat Hulett Sugar South Africa Limited v Mayola* (unreported, KZP case no 7694/2020P dated 18 August 2022) at paragraph [12]; *Smith NO v Dabula Manzi Farmers (Pty) Ltd* (unreported, FB case no 5874/2021) dated 9 October 2023) at paragraph [23]; *Smith NO v Green Acre Farms (Pty) Ltd* (unreported, FB case no 5875/202 dated 9 October 2023) at paragraph [23].

119 *General Commercial and Industrial Finance Corporation Ltd v Pretoria Portland Cement Co Ltd* 1944 AD 444 at 452; *Du Plessis v Nel* 1952 (1) SA 513 (A); *Gerber v Naude* 1971 (3) SA 55 (T) at 59.

120 *Shifren v SA Sentrale Ko-op Graanmaatskappy Bpk* 1964 (2) SA 343 (O); *Suid-Afrikaanse Sentrale Ko-Op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A). See also *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T); *Plascon-Evans Paints (Transvaal) Ltd v Virginia Glass Works (Pty) Ltd* 1983 (1) SA 465 (O).

121 *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 186J; *Francis v Sharp* 2004 (3) SA 230 (C) at 237F–G; *ETG Agro (Pty) Ltd v Varuna Eastern Cape (Pty) Ltd* (unreported, ECG case no 5206/2016 dated 3 May 2021) at paragraph [5]; *Origin Global Holdings Ltd v Acorn Agri (Pty) Ltd* (unreported, WCC case no 10317/2019 dated 30 July 2021) at paragraph [17]; *Simoes v Vorster: In re: Vorster v Simoes* (unreported, GJ case no 45581/2021 dated 23 August 2022) at paragraphs [17]–[18]. The principle that courts are reluctant to decide issues concerning the interpretation of contracts upon exception is, however, not an all-encompassing principle. It does not apply where the meaning of the contract is certain (*Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at paragraph [18]; *Origin Global Holdings Ltd v Acorn Agri (Pty) Ltd* (unreported, WCC case no 10317/2019 dated 30 July 2021) at paragraph [18]; *BC Funding Solutions Proprietary Ltd v The Body Corporate of Eveleigh Estates* (unreported, GJ case no 51887/2021 dated 5 July 2022) at paragraph [15]; *Van Staden v Van Staden NO* [2023] 3 All SA 307 (WCC) at paragraph [27]; and see *Steer Property Services CC t/a Steer & Co v Bruch N.O.* (unreported, WCC case no 18384/2019 dated 5 September 2022)).

122 *Dettmann v Goldfain* 1975 (3) SA 385 (A) at 400A; and see *M&J Da Costa Brothers (Pty) Ltd v Karan* (unreported, GJ case no 2021/58699 dated 13 January 2023) at paragraph [23].

123 *Dettmann v Goldfain* 1975 (3) SA 385 (A) at 400A.

124 *Dettmann v Goldfain* 1975 (3) SA 385 (A) at 400A–B and the cases there referred to; *Metanza Metallurgical Laboratories (Pty) Ltd v Rados International Services SA (Pty) Ltd* (unreported, GJ case no 20/37767 dated 15 September 2022) at paragraphs [24]–[27].

125 *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455G; *Burroughs Machines Ltd v Chenille Corp of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 676F–H; *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) at 514E–F; *Francis v Sharp* 2004 (3) SA 230 (C) at 240F–G; *Eskom Holdings v Lesole Agencies CC; In re: Lesole Agencies v Eskom Holdings* (unreported, FB case no 2555/2016 dated 28 September 2017) at paragraph [7]; *ETG Agro (Pty) Ltd v Varuna Eastern Cape (Pty) Ltd* (unreported, ECG case no 5206/2016 dated 3 May 2021) at paragraph [5].

126 *Origin Global Holdings Ltd v Acorn Agri (Pty) Ltd* (unreported, WCC case no 10317/2019 dated 30 July 2021) at paragraph [30].

127 *IS & GM Construction CC v Tunmer* 2003 (5) SA 218 (W). In terms of s 10(1) of the Housing Consumers Protection Measures Act 95 of 1998 no person is entitled to carry on the business of a home builder or to receive any consideration in terms of any agreement with a housing consumer i r o the construction of a home unless such person is a registered home builder. The prohibition does not affect the validity of particular home-building agreements, but disentitles unregistered builders from receiving or claiming consideration under them. An intervening arbitration award in its favour would not aid the unregistered builder, for the court would be precluded from enforcing it. Given the clear wording of the prohibition and the illegality it contemplates, equity would not enter into the matter (*Hubbard v Cool Ideas 1186 CC* 2013 (5) SA 112 (SCA) at 118H–J and 119G–J, confirmed on appeal *sub nomine Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC); and see M Wallis 'The Common Law's Cool Ideas for Dealing with Ms Hubbard' (2015) 132 (part 4) *SALJ* 940, in which the problem of reconciling the Constitution with the common law in the light of the aforesaid decisions is addressed and a structure within which to approach the common law from a constitutional perspective is proposed).

128 *Stephens v Liepner* 1938 WLD 30; *Graham v McGee* 1949 (4) SA 770 (D); *Palmer v President Insurance Co Ltd* 1967 (1) SA 673 (O) at 679.

129 *Varty v Nixen and Unali* (1892) 13 NLR 73; *Arnagiri v Moliffe* (1908) 29 NLR 80.

130 *Fleming v Rietfontein Deep Gold Mining Co Ltd* 1905 TS 111.

131 *Walbrugh v Newmark* 1912 CPD 725; and see *Varty v Nixen and Unali* (1892) 13 NLR 73.

132 *Van der Bijl v Featherbrooke Estate Homeowners' Association (NPC)* 2019 (1) SA 642 (GJ) at 546A–F. If wrongfulness is not averred in a delictual claim against the Road Accident Fund, the particulars of claim lack an averment which is necessary to sustain a cause of action and is excipiable (*Du Toit v Farm Film Productions (Pty) Ltd* (unreported, WCC case no 14900/2020 dated 26 October 2023) at paragraphs [32]–[40]).

133 *Durr v SA Railways and Harbours* 1917 CPD 284; *Raad vir Kuratore vir Warmbad Plase v Bester* 1954 (3) SA 71 (T); *Brandfort Munisipaliteit v Esterhuizen* 1957 (1) SA 229 (O); *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265 (O).

134 *Ketteringham v City of Cape Town* 1934 AD 80 at 90, upholding the view taken in *Van Buuren v Gien* 1913 TPD 346 at 351; *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G–H; *Fundtrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 725H–I; *Swart v Heine* (unreported, SCA case no 192/2015 dated 14 March 2016) at paragraph [7]. See also *Arun Property Development (Edms) Bpk v Stad Kaapstad* 2003 (6) SA 82 (C) at 91B–D; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at 507C–D; *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) at 473A–B; *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E) at 383F; *Vosal Investments (Pty) Ltd v City of Johannesburg* 2010 (1) SA 595 (GSJ) at 603C–604A.

135 *Grey v Stip* 1916 TPD 171; *Price v Price* 1946 CPD 59; *Van der Merwe v Santam* 1947 (2) SA 440 (C); *Botha v Guardian Assurance Co Ltd* 1949 (2) SA 223 (GW); *McKay v Stein* 1950 (4) SA 692 (W); *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 634I; *Fundtrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 725H–I; *Arun Property Development (Edms) Bpk v Stad Kaapstad* 2003 (6) SA 82 (C) at 91E–92D; *Swart v Heine* (unreported, SCA case no 192/2015 dated 14 March 2016) at paragraph [7]; *Scheffer Supplier CC v Alorin International (Pty) Ltd* (unreported, GP case no 71836/2016 dated 3 August 2018) at paragraphs [10]–[13]; *Du Toit v Farm Film Productions (Pty) Ltd* (unreported, WCC case no 14900/2020 dated 26 October 2023) at paragraphs [9] and [21]–[31].

136 If a cause of action is, for example, based on a written agreement to erect a dwelling house, the builder who institutes the action must allege that he is a registered home builder in terms of s 10(1) of the Housing Consumers Protection Measures Act 95 of 1998 (*IS & GM*

Construction CC v Tunmer 2003 (5) SA 218 (W) at 220G–I). In terms of s 10(1) of Act 95 of 1998 no person is entitled to carry on the business of a home builder or to receive any consideration in terms of any agreement with a housing consumer in respect of the construction of a home unless such a person is a registered home builder. The prohibition does not affect the validity of particular home-building agreements, but disentitles unregistered builders from receiving or claiming consideration under them. An intervening arbitration award in its favour would not aid the unregistered builder, for the court would be precluded from enforcing it. Given the clear wording of the prohibition and the illegality it contemplates, equity would not enter into the matter (*Hubbard v Cool Ideas 1186 CC* 2013 (5) SA 112 (SCA) at 118H–J and 119G–J, confirmed on appeal *sub nomine Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC)).

137 *Arun Property Development (Edms) Bpk v Stad Kaapstad* 2003 (6) SA 82 (C) at 91B–D.

138 *Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd* 1972 (2) SA 270 (A) at 275G–H; Venator Africa (Pty) Ltd v Watts 2024 (4) SA 539 (SCA) at paragraph [20]; and see *Venator Africa (Pty) Limited v Bekker* [2022] 4 All SA 600 (KZP) at paragraph [32].

139 See, for example, *Miller v Muller* 1965 (4) SA 458 (C) at 467A.

140 See, for example, *Lampert-Zakiewicz v Marine & Trade Insurance Co Ltd* 1975 (4) SA 597 (C) and *Voltex (Pty) Ltd v Chenleza CC* 2010 (5) SA 267 (KZP).

141 This paragraph was referred to with approval in *Van den Heever NO v Potgieter NO* 2022 (6) SA 315 (FB) at paragraph [20].

142 See also *Hill NO v Brown* (unreported, WCC case no 3069/20 dated 3 July 2020) at paragraphs [4]–[5] and [8].

143 2020 (3) SA 535 (ECP).

144 At paragraphs [13]–[18] and the cases there referred to, not following *McNelly NO v Codron* (unreported, WCC case no 20406/11 dated 9 March 2012).

145 Unreported, WCC case no 3069/20 dated 3 July 2020, followed in *Van den Heever NO v Potgieter NO* 2022 (6) SA 315 (FB) at paragraphs [19]–[26]; *Quinn v MQ Finance (Pty) Ltd t/a Marquis Finance* (unreported, GJ case no 13330/21 dated 22 June 2022) at paragraphs [12]–16] and [23]; *Kobusch v Whitehead* (unreported, KZP case no 5217/2022P dated 15 December 2022) at paragraphs [14]–[28]; *Spar Group Ltd v Hard As Nails (Pty) Ltd* (unreported, WCC case nos 3274/2022; 3752/2022 dated 10 August 2023) at paragraphs [25] and [29]–[31].

146 Unreported, WCC case no 20406/11 dated 9 March 2012.

147 At paragraphs [4]–[11].

148 *SB v Storage Technology Services (Pty) Ltd* (unreported, WCC case no 15550/2020 dated 21 October 2021) at paragraphs [30], [31] and [37]; *EOH Mthombo (Pty) Limited v Buzz Trading 236 (Pty) Limited t/a Buzz Mobile* (unreported, GJ case no 25119/2019 dated 11 November 2021) at paragraph [25].

149 *Ngwenya v Hindley* 1950 (1) SA 839 (C).

150 *Cohen v Haywood* 1948 (3) SA 365 (A).

151 *Berezniak v Van Nieuwenhuizen* 1948 (1) SA 1057 (T).

152 *Haarhoff v Wakefield* 1955 (2) SA 425 (E); and see rule 18(1) above.

153 *SB v Storage Technology Services (Pty) Ltd* (unreported, WCC case no 15550/2020 dated 21 October 2021) at paragraph [29]. In magistrates' courts practice rule 19(2)*(d)* provides that an exception may be set down for hearing in terms of rule 55 within 10 days after delivery thereof, failing which the exception shall lapse.

154 *SB v Storage Technology Services (Pty) Ltd* (unreported, WCC case no 15550/2020 dated 21 October 2021) at paragraphs [32]–[33]. In regard to the alternative option, the court remarked (at paragraph [34] (footnote omitted)):
'While there may be no specific rule permitting such a procedure — and this is probably a matter which should be considered by the Rules Board — the High Courts nonetheless have the inherent power to protect and regulate their own process, taking into account the interests of justice in terms of s 173 of the Constitution.'

155 *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 753F; *NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (2) SA 680 (T) at 688D.

156 See *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 365D. It is, however, not necessary in the notice specially to draw attention to the time allowed by the rule for the removal of the cause of complaint (*Chapman v Proclad (Pty) Ltd* 1978 (2) SA 336 (NC) at 339F). In this case (see at 338C) the defendant was told in very precise terms in what respects its plea required amplification.

157 *Operative Furnishing Co (Pty) Ltd v Dragon Gas Services (Pty) Ltd* 1965 (4) SA 5 (E) at 10C; *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 367B; *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 268A–C.

158 *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 366A–367A.

159 See *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) at 268D.

160 *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 368A–B.

161 1914 AD 152 at 156.

162 See also *Barendse v Rattray* 1917 TPD 622 at 623–4; *Commissioner of Customs v Airton Timber Co Ltd* 1926 AD 1 at 4; *Leslie v African Life Assurance Society Ltd* 1927 WLD 151 at 155–6.

163 *Champion v J D Celliers & Co Ltd* 1904 TS 788 at 790.

164 *Stephens v De Wet* 1920 AD 279 at 282; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83E; *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 394D–E; *Flentov v Trappler* (unreported, WCC case no 16925/2021 dated 6 February 2023) at paragraph [7].

165 *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (Nm) at 566C–E; *Tshabalala-Msimang v Makhanya* [2008] 1 All SA 509 (W) at 516*e-f*; *Breedenkamp v Standard Bank of South Africa Ltd* 2009 (5) SA 304 (GSJ) at 321C–E.

166 *Meintjes v Wallachs Ltd* 1913 TPD 278 at 285; *Flentov v Trappler* (unreported, WCC case no 16925/2021 dated 6 February 2023) at paragraph [7].

167 *Bosman v Van Vuuren* 1911 TPD 825 at 831–2; *Stephens v De Wet* 1920 AD 279 at 282; *Deeley-Barnard v Thambi* 1992 (4) SA 404 (D).

168 See *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1984 (1) SA 443 (W) at 456A–E.

169 *Bosman v Van Vuuren* 1911 TPD 825 at 832; *Stephens v De Wet* 1920 AD 279 at 282; *Brown v Bloemfontein Municipality* 1924 OPD 226 at 229; *Geyser v Geyser* 1926 TPD 590 at 593–5; *Katz v Saffer and Saffer* 1944 WLD 124 at 133; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83G–H.

170 *Habib v Patel* 1917 TPD 230 at 232; *Geyser v Geyser* 1926 TPD 590 at 594; *Weichardt v Argus Printing & Publishing Co Ltd* 1941 CPD 133 at 145; *Golding v Torch Printing and Publishing Co (Pty) Ltd* 1948 (3) SA 1067 (C) at 1090. at 1090; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83H.

171 *Ahlers NO v Snoeck* 1946 TPD 590 at 594; *Du Toit v Du Toit* 1958 (2) SA 354 (D) at 356C–F.

172 *Meintjes v Wallachs Ltd* 1913 TPD 278 at 285.

173 *Levinsohn v Ferreira* 1948 (4) SA 299 (T) at 301; *Foord v Lake and Others NNO* 1968 (4) SA 395 (W) at 398G.

174 *Richter v Town Council of Bloemfontein* 1920 OPD 172 at 174; *Ahlers NO v Snoeck* 1946 TPD 590 at 594; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83I–84B.

175 *African Realty Trust v Roper* 1921 TPD 372 at 374–5; *Willemse's Curators v Leliveld* 1931 OPD 129 at 131.

176 *Taylor-Coryell Madagascar Syndicate Ltd v Madagascar Oil Development Co Ltd* 1910 WLD 265; but see *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1984 (1) SA 443 (W) at 456D.

177 By GN R1343 of 18 October 2019 (*GG* 42773 of 18 October 2019).

178 Such a procedure would probably be less costly and cumbersome than the one under rule 30A.

179 See the notes to this subrule s v 'General' above.

180 *Stephens v De Wet* 1920 AD 279 at 282; *Rail Commuters' Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83E.

181 By GN R1343 of 18 October 2019 (*GG* 42773 of 18 October 2019).

182 *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 337C and the cases there referred to; *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 394D–E; *University of the Free State v Afriforum* 2017 (4) SA 283 (SCA) at 296E–F; *Flentov v Trappler* (unreported, WCC case no 16925/2021 dated 6 February 2023) at paragraph [7].

183 *Harding and Parker v John Pierce & Co* 1919 OPD 113 at 122; *Richter v Town Council of Bloemfontein* 1920 OPD 172 at 174; *Golding v Torch Printing and Publishing Co (Pty) Ltd* 1948 (3) SA 1067 (C) at 1090; *Flentov v Trappler* (unreported, WCC case no 16925/2021 dated 6 February 2023) at paragraph [7].

184 1984 (1) SA 443 (W) at 456E.

185 See *Molteno Bros v SA Railways* 1936 AD 408 at 417; *Sydney Clow & Co Ltd v Munnik* 1965 (1) SA 626 (A) at 634*3*G; *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 368D–E; *Cook v Muller* 1973 (2) SA 240 (N) at 244A–C; *Bothma v*

Laubscher 1973 (3) SA 590 (O) at 592B.

186 *Grimbeek v Leonard* 1932 CPD 62 at 63; *Britz v Weideman* 1946 OPD 144 at 150; *Inkin v Borehole Drillers* 1949 (2) SA 366 (A) at 373; *Ritchie Motors v Moolman* 1956 (4) SA 337 (T) at 340A–C; and see *Jack Smith v Joe's (Pty) Ltd* 1929 TPD 323; *Cotas v Williams* 1947 (2) SA 1154 (T); *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 899 (A); *Alphina Investments Ltd v Blacher* 2008 (5) SA 479 (C) at 483D, 488G–I; *Super Group Trading (Pty) Ltd t/a Super Rent v Bauer* 2022 (5) SA 622 (WCC) at paragraph [20]. In *Wicksteed v George* 1961 (1) SA 651 (FC) an appellant was not allowed to rely on a ground of exception not raised in the court below.

187 *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 at 174–5; *Singleton v Shevel* 1957 (1) SA 65 (O) at 68B; *Pietermaritzburg City Council v Local Road Transportation Board, Pietermaritzburg* 1960 (1) SA 254 (N) at 256E–F; *Kistensamy v Bramdaw* 1962 (3) SA 797 (D); *Soma v Marulane NO* 1975 (3) SA 53 (T) at 55B; *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 552H. In *Marais v Steyn* 1975 (3) SA 479 (T) at 483A the absence of a prayer in an exception was called 'die toppunt van die slordigheid wat die eiser se pleitstukke kenmerk'.