IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

21/10/2014
DATE

SIGNATURE

Case Number: 16926/2001

21/10/2014

In the matter between:

HABAKUK MAGABUTLANE SHIKOANE	Plaintiff
and	
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Defendant
MEC HOUSING AND LOCAL GOVERNMENT LIMPOPO PROVINCE	Second Defendant
TOWN MANAGER LEBOWAKGOWU	Third Defendant
REGISTRAR OF DEEDS PRETORIA	Fourth Defendant
H M SKIKOANE NO	Fifth Defendant
S S SHIKWANE	Sixth Defendant

In the application between:

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	First Applicant
MEC HOUSING AND LOCAL GOVERNMENT LIMPOPO PROVINCE	Second Applicant
REGISTRAR OF DEEDS PRETORIA	Third Applicant

and

HABAKUK MAGABUTLANE SHIKOANE	First Respondent
SETHEPELE SALMINAH SHIKWANE	Second Respondent
H M SHIKOANE NO	Third Respondent

JUDGMENT

POTTERILL J

[1] The plaintiff has two claims against the state defendants. The main claim is for the transfer of property to the plaintiff, the alternative claim against the first, second and third state defendants is for damages for improvements effected to the property. The first, second and third defendants herein (hereinafter referred to as "the state defendants") filed a notice of withdrawal of their opposition of their plea in the main action. It was averred that the state defendants' intention with this notice was to withdraw their opposition to the main claim and to abide the court's decision thereon, on condition that the plaintiff would not proceed with the alternative claim against the state defendants. Without going into the detail the state defendants filed a notice to withdraw their notice of withdrawal.

[2] This matter was heard before Claassen J. He made the following order:

> *"It is declared that:*
>
> 1. *The First to Fourth Respondents'/Defendants' withdrawal of the plea amounted to an admission of the basic facts (res gestae) alleged in the particulars of claim;*
> 2. *It was incumbent upon the said First to Fourth Defendants/Respondents to apply to Court to have such an omission withdrawn;*
> 3. *The said Defendants/Respondents are given leave to withdraw their withdrawal of the plea to the extent that they can raise their special*

defences as raised in the original plea, but not the basic allegations of facts in respect of the Applicant's particulars of claim to the main claim (claim 1 of the particulars of claim);

4. *The First to Fourth Respondents is to pay the costs of the application;*
5. *The Sixth respondent's attorney is to pay the costs of her opposition to the application de bonis propriis."*

[3] Pursuant to the order of Claassen J the state defendants filed a notice of amendment to their plea. This notice of amendment intended:

(1) to delete paragraphs 6.8 and 6.9 and to insert new paragraphs;

(2) to add paragraphs after paragraph 7.2;

(3) to delete paragraph 7.4 and to insert new paragraphs;

(4) to substitute paragraph 8;

(5) to delete paragraph 9.10 and insert new paragraphs.

[4] The plaintiff objected to these amendments and specifically set out that the amendment that the state defendants were seeking to import into their plea was in conflict with the judgment handed down by Claassen J because it aimed at placing facts in dispute that were previously admitted. The amendment offered is accordingly *mala fide* and aimed at withdrawing a previous omission and should be

refused. This amendment is also in contradiction to the admitted facts as set out in the parties' lists setting out which facts are common cause or not.

[5] The following facts are common cause between the parties:

5.1 That an oral agreement for the sale and transfer of the property was concluded in 1976 or 1977 between plaintiff and an unknown official which was duly authorised to conclude the verbal agreement;

5.2 The relevant terms of the agreements were that the government sold the land known as sites 2, 3 and 4, Unit 3, Lebowakgomo. The purchase price for the said land was the amount of R9 725,20, alternatively R3 725,20. The plaintiff became entitled to immediately occupy and develop the land, including the subdivision and consolidation thereof. The plaintiff became entitled to delivery of the land through the registration thereof in his name within a reasonable time after his demand for delivery;

5.3 The plaintiff complied with his obligations in terms of the verbal agreement by paying the agreed purchase price;

5.4 The parties implemented the oral agreement as alleged;

5.5 The plaintiff demanded delivery of the land trough transfer in his name during December 2000;

5.6 That the state defendants failed to transfer the land to the plaintiff; and

5.7 That the third defendant transferred Erf 176 to the sixth defendant.

5.8 That the plaintiff developed the land concerned.

[6] The amendment of paragraph 6.8 relates to a dispute of claim 1 as set out in the particulars of claim on the basis that the plaintiff's non-compliance with the mandatory procedures prescribed by Proclamation R293 of 1962 (hereinafter after referred to as the Proclamation) renders the oral agreement non-enforceable.

[7] The plaintiff objected to the proposed amendment in paragraph 6 for the following reasons:

7.1 The proposed amendment sets out preconditions for the sale of the land and/or formalities;

7.2 If the proclamation is mandatory then by necessary implication of the law the proclamation forms part of the terms and conditions of the sale agreement;

7.3 The state defendants had however admitted that the plaintiff complied with his obligations in terms of the agreement and the plaintiff cannot introduce the provisions of the proclamation as a defence against the admitted existence of a valid and enforceable contract of sale;

7.4 The proposed amendment does not constitute a special plea. They may only in terms of the Claassen J's judgment prosecute the special plea.

[8] On behalf of the state defendants it was argued that the state defendants' existing plea already identified the provisions of the proclamation. The proposed paragraph 6.8.1-6.8.4 setting out the provisions are not new material facts and only has the purpose of clarifying the dispute between the plaintiff and state defendants. This defence does not dispute the express terms and existence of a verbal agreement. Only the lawfulness and the enforceability of the verbal agreement. Furthermore the final draft consolidated list (K12) set out the legal and factual disputes between the parties and the proposed amendment to the plea conforms thereto.

[9] The crux of Claassen J's judgment is to be found in paragraph 12:

"In the final analysis the case turns on two issues:

12.1 Firstly there is no law or rule of Court than an admission can only be retracted by the leave of the Court. It is purely a matter of (very good) practice. However, the Court is still in charge of its own procedures, and can thus rule accordingly.

12.2 Secondly, the special pleas raised by the Defendants are definitely not scurrilous or indefensible. It is quite clear that the initial transaction took place almost 20 years ago. That by itself, of course,

does not prove prescription, and the Court cannot raise such a plea mero motu. The prescripts of Proclamation R293 of 1962 are also mandatory and if not complied with, will affect the outcome of the case one way or another."

[10] From this judgment the issue of compliance with this Proclamation is referred to as a special plea. It was not in the plea to be amended or in the amendment set out specifically as a special plea. Claassen J however clearly refers to the defence of the Proclamation as a special plea:

"Paragraph 12.2 *"The prescripts of Proclamation R293 of 1962 are also mandatory and if not complied with, will affect the outcome of the case one way or another."*

Any plea relating to the Proclamation is thus, besides the other special pleas, a plea the state defendants can proceed with in terms of paragraph 3 of the order of Claassen J. This is of course so because the non-compliance with the Proclamation can apart from the merits destroy the plaintiff's cause of action. Although one would have thought that the state defendants would have amended the plea relating to the Proclamation as a special plea they chose not to. It is however not necessary to give the special plea a heading as such and because the defendants have chosen

not to do so does not render the plea pertaining to the Proclamation not to be a special plea.

[11] The plea of non-compliance with the Proclamation was and is not a surprise to the plaintiff. In the plaintiff's own drafted consolidated lists under the heading "The facts that are in dispute" this is set out as a dispute.

[12] The defence is thus one of formalities required by statute. A contract can be void or unenforceable for non-compliance with formalities. The entire oral agreement can thus not be in dispute but the non-compliance with the formalities can in certain circumstances be a defence. This defence was pleaded in paragraph 6.8.1. In the amendment in paragraph 6.8.1, 6.8.2, 6.8.3 and 6.8.4 the specific requirements of the Proclamation not complied with are set out. The oral contract was concluded but because there was non-compliance with the specifics of the Proclamation the plea is one of non-enforceability. In these amended paragraphs the state defendants are just specifying the procedures not complied with.

[13] In view thereof I cannot find that the amendment sought prejudices or allows for injustice to the plaintiff. The proposed amendments of paragraph 6.8.1 by substitution of paragraphs 6.8.1, 6.8.2, 6.8.3 and 6.8.4. is granted.

[14] The proposed insertion of paragraphs 6.9 and 6.10 as well as paragraph 6.17 all relate to the prerequisites prescribed by the Proclamation for the exercise of the powers bestowed on the Secretary of Bantu Administration and Development and Delegated Officials and their authority.

[15] On behalf of the state defendants it was argued that paragraph 6.9 and 6.10 do not introduce a new defence but an alternative basis of establishing the same defence of non-enforceability. It was submitted that paragraph 6.10 sets out this legal conclusion: that the representatives of the Government did not have the authority or power to sell and transfer the property by verbal agreement and that therefore the verbal agreement was not enforceable.

[16] On behalf of the plaintiff it was argued that these paragraphs seek to place the authority of the representatives of the Government in dispute. The state defendants had however pleaded that the Government was represented by a duly authorised official. The judgment of Claassen J prohibits them to set out this plea.

[17] This amendment seeks to introduce reasons why the unknown Government official could not have been authorised. The reasons for this are that without compliance to the prescripts of the Proclamation the official could not have had the authority to conclude the contract. The state defendants admitted that the official was duly authorised. They did so to a specific averment in the summons. The judgment of Claassen J did not authorise the state defendants to challenge the authority of the unknown official. Paragraphs 6.9 is not only a legal conclusion. It sets out a basis for the legal conclusion. This fact is now that the unknown official could not have had authority. This would render the plaintiff to prove that the official had authority to conclude the transaction. This is contrary to Claassen J's judgment. There would be great prejudice for the plaintiff if this amendment is allowed. The inclusion of paragraphs 6.9 is not allowed. Paragraph 9.10 is a legal conclusion, but it slips in the word "ongemagtig". This is contrary to the admitted facts.

It was argued that should the Court find that the judgment of Claassen J is a bar to this amendment the amendment should be allowed on the basis that no new evidence is required to prove or disprove the defendants' legal defence and legal conclusion that the Government was not represented by a duly authorised official when the oral agreement was concluded. It can be argued as a legal conclusion that if none of the prescripts of the Proclamation was complied with then the Government official did not have authority to conclude the contract. The problem is

that the state defendants admitted that the official had authority to conclude this. They cannot admit such and then argue that the official did not have authority; they cannot admit and deny. This alternative basis is thus also not allowed.

[18] The proposed amendments; paragraphs 6.11, 6.12, 6.13 and 6.14 read as follows:

"6.11 *In die alternatief tot paragrawe 6.8 tot tot 6.10, indien bevind word dat die beweerde mondelinge ooreenkoms adwingbaar is ten spyte daarvan dat die Eiser nie aan die formaliteite deur Proklamasie R 293 van 1962 voorgeskryf, voldoen het nie, wat steeds onteken word, pleit Verweerders dat dit van regsweë geimpliseerde terme van die mondeling ooreenkoms was dat die uitvoering en implementering van die mondelinge koopooreenkoms onderhewig was:*

6.11.1 Aan nakoming deur Eiser van die prosedures en formaliteite wat deur regulasies 7(1)(b), 7(5)(b), 9(1), 9(2)(e), 9(2)(f) van Hoofstuk 2 en/of regulasies 4(1), 4(2)(d) en 4(2)(3) van Hoofstuk 3 van Proklamasie R 293 van 1962 vir die koop van grond en vir die uitreiking van 'n grondbrief voorgeskryf is;

6.11.2 Daaraan dat die Sekretaris van Bantoe Administrasie en Ontwikkeling en sy regsopvolgers oortuig was data an al hierdie formaliteite voldoen is en die voorgeskrewe skriftelike koopooreenkoms en die uitreiking van 'n grondbrief aan die Eiser goedgekeur het;

6.11.3 Daaraan dat Eiser nie die grond sal gebruik, okkupeer of ontwikkel voordat hy aan die volgende formaliteite deur Proklamasie R 293 van 1962 voorgeskryf vir die gebruik, okkupasie en ontwikkeling van die erwe voldoen het nie:

6.11.3.1 Dat Eiser nie die were wat hy beoog om te koop sal okkupeer of enige bouwerk daarop mag oprig vir woondoeleindes voordat 'n grondbrief ten opsigte daarvan in sy naam geregistreer is nie soos regulasie 9(5) van Hoofstuk 2 bepaal nie;

6.11.3.2 Dat Eiser nie enige struktuuur op die erwe vir woondoeleindes mag of sal oprig sonder vooraf verkryging van 'n boupermit soos voorgeskryf deur regulasie 20 van Hoofstuk 2 van Proklamasie R 293 van 1962 nie;

6.11.3.3 Dat Eiser nie enige struktuur op die erwe vir handelsdoeleindes mag of sal oprig voordat sy aansoek om 'n grondbrief en om die erwe te koop goedgekeur is nie soos regulasie 9(1) van Hoofstuk 3 van Proklamasie R 293 van 1962 bepaal;

6.11.3.4 Dat Eiser nie enige struktuur op die erwe vir handelsdoeleindes mag of sal oprig tensy dit in oorsenstem met die bouplanne en spesifikasies deur die Dorpsbestuurder goedgekeur soos regulasie 9(2) van Hoofstuk 3 van Proklamasie R 293 van 1962 bepaal;

6.11.4 Daaraan dat die Eiser verplig was om binne 'n redelike tyd na die sluiting van die mondelinge ooreenkoms aansoek te doen om die erwe te koop en om grondbriewe te verkry deur aan die prosedures te voldoen waarna paragraaf 6.11.2 verwys.

6.12 Eiser het versuim om enigsins of binne 'n redelike tyd na die sluiting van mondelinge ooreenkoms aan die formalitiete in par 6.11.1 bedoel ten opsigte van Erf 3, 4 of Erf 176 Lebowakgomo E te voldoen.

6.13 Eiser het deur sy versuim om enigsins of binne 'n redelike tyd aan die formaliteite in par 6.11.1 vermeld, te voldoen, dit vir die Regering en sy verteenwoordigers onmoontlik gemaak om die mondelinge koopooreenkoms te implementer en hy was derhalwe nie geregtig op die uitreiking van 'n grondbrief ten opsigte van Erf 176 Lebowakgomo E nie.

6.14 Eiser het nie die van regsweë geimpliseerde terme van die mondelinge ooreenkoms nagekom nie en het die wesenlike terme van die mondelinge ooreenkoms derhalwe verbreek."

[19] This proposed amendment is necessary if it is found that the contract is enforceable despite non-compliance with the Proclamation. It was argued that these paragraphs did not constitute a new defence but an alternative basis of establishing the same defence. If it is a new defence then it should be allowed as it is based on the same material facts already pleaded. The Proclamation must be seen as terms implied by statutory law which had to be complied with within a reasonable time after the conclusion of the oral agreement. It was argued that the plaintiff made it impossible for the Government to implement the verbal agreement by not within a reasonable period after conclusion of the oral agreement complying with the implied terms of the contract. These implied terms is a legal conclusion and not terms based on actual or imputed intention or conduct of the parties. The facts on which this legal

conclusion rests are non-compliance by plaintiff with the mandatory procedures of the Proclamation, which already formed part of the material facts stated in the existing plea.

[20] On behalf of the plaintiff it was argued that the proposed amendment is not a special plea. but additional terms to the sale agreement implied by law and the plaintiff's failure to comply with the terms. The state defendants admitted that the plaintiff complied with all his obligations in terms of the sale agreement and thus cannot introduce these paragraphs contrary thereto. By introducing this defence they are doing so contrary to the law because by introducing this the state defendants have no factual basis for this defence. This amendment to the plea places a burden of proof on the plaintiff wherein in a special plea the burden is on the state defendants.

[21] I realise that in legal terms this alternative plea differs in that the Proclamation is now pleaded as implied essential terms of the contract not complied with. However practically this alternative plea boils down to the same thing: unenforceability of the contract due to non-compliance with the Proclamation.

[22] This alternative basis, purportedly only based in law, is however based on new facts. In paragraph 6.13 the state defendants raise impossibility of performance due

to the plaintiff's unreasonable delay. This relates to conduct of the plaintiff and the plaintiff will have to prove that he did not unreasonably delay in complying with the Proclamation. This is factual and although based on facts after the conclusion of the contract they are new facts and not allowed by the judgment of Claassen J. Paragraph 6.14 reads:

> *"Eiser het nie van regsweë geimpliseerde terme van die ooreenkoms nagekom nie en het die wesentlike terme van die ooreenkoms derhalwe verbreek".*

In essence this is a plea of breach of the agreement; the plaintiff will now have to prove that it did not breach the agreement. This proposed amendment can thus not be raised as this is a new defence not premised as a special plea.

[23] Paragraph 6.15 of the proposed amended plea in essence boils down to waiver by the plaintiff of any entitlement to Erf 2E or Erf 176 of Lebowakgomo.

[24] On behalf of the state defendants it was argued that it was an existing special plea in paragraph 6 set out in paragraph 6.8. They are thus entitled to raise it in terms

of Claassen J's judgment. The parties' draft consolidated list also confirms this as a dispute.

[25] It was argued on behalf of the plaintiff that this is not one of the special pleas which the applicant was granted leave to resurrect.

[26] This is not a new fact pleaded. Claassen J also referred to this plea of waiver in his judgment:

> *"The Applicant also asked that one erf be transferred to MRS Property Trust, which was granted by the Secretary of Internal Affairs. The Respondents submitted that it meant that the Applicant had waived any right to that erf (Erf 2E)."*

This is not a new fact, not a surprise to the plaintiff, and not disallowed by the judgment of Claassen J. This relates to facts that transpired after the agreement which was contemplated by Claassen J as being allowed (paragraph 13 of the judgment). This fact does not relate to the conclusion of the agreement. There is accordingly no prejudice to the plaintiff if this amendment is allowed.

[27] The proposed amendments in paragraph 6.16 just admit the factual allegations in paragraphs 10.1 to 10.4 of the express terms of the oral agreement and is allowed.

[28] The proposed amendment set out in paragraph 6.18 reiterates that the terms of the agreement were unenforceable as it is in conflict with the Proclamation. This amendment should accordingly be allowed.

[29] The proposed paragraph 6.19 expressly denies that the agreed purchase price of R9 725.20 or R13 725.20 was the prescribed purchase price in terms of the Proclamation. The parties agreed that the verbal agreement was concluded for one of the alternative prices above. The state defendants are entitled to plead that the purchase price agreed upon is not the prescribed purchase price in terms of the Proclamation and therefore the verbal agreement is unenforceable. This is however not how the proposed paragraph 6.19 reads. It does not state that due to the fact that the prescribed purchase price was not paid the verbal agreement is unenforceable. It denies that the prescribed purchase price was paid. This amendment will thus prejudice the defendant and boils down to on the one hand admitting the purchase price in terms of the verbal agreement and on the other hand denying that the correct purchase price was paid. The prescribed purchase price

and the non-compliance thereof is set out in the proposed paragraph 6.8.4 that is allowed.

[30] Paragraphs 7.2A and 7.2B are proposed to be inserted after paragraph 7.2. Paragraph 7.2A relates to the waiver which I have already referred to in relation to the proposed amendment by the insertions of paragraph 6.15. I am thus satisfied that there is no prejudice to the plaintiff in the insertion of paragraph 7.2A. Especially so in view of my conclusion pertaining to paragraph 6.15.

[31] The insertion of paragraph 7.2B is averred by the state defendants as being a necessary amendment due to the substitution of paragraph 6.8.2 with paragraph 6.8.1. There can in principle be no objection to the proposed amendment in as far as it only relates to non-enforceability of the oral agreement due to the non-compliance with the Proclamation.

[32] The proposed paragraph 7.4 contains a legal conclusion repeating the existing special plea contained in paragraph 6.8.4 of the existing plea which is to be substituted by the proposed paragraph 6.8 and there is no prejudice to the plaintiff in this amendment and it is accordingly allowed.

The proposed paragraph 7.5 has subsections but at the outset of the hearing the court was informed that the state defendants are not proceeding with paragraph 7.5.2 and 7.5.3. Paragraphs 7.5 and 7.5.1 set out that the plaintiff is not entitled to the delivery of Erf 176E or of Erf 2E due to the unenforceability of the oral agreement as set out in paragraph 6.8 to 6.10. There is no prejudice to the plaintiff with this proposed amendment and these amendments are allowed.

[33] Paragraph 7.5.4 sets out an alternative to paragraph 7.5.3 which has been abandoned. Paragraph 7.5.4 does however set out that the transfer of Erf 176 to the sixth defendant was not erroneous or without proper and lawful cause. This legal conclusion is linked to the special plea that the plaintiff did not comply with the mandatory procedures prescribed by the Proclamation for the purchase and transfer of the property and that the sixth defendant had complied with these procedures. I am satisfied that there is no prejudice to the plaintiff with these proposed amendments, as it is closely linked to the special plea of non-compliance with the Proclamation.

[34] The proposed paragraph 7.6 is also just a legal conclusion based on the facts set out in paragraph 7.5.4 and is accordingly also allowed.

[35] The proposed amendment of paragraph 7.7 reads as follows:

> *"Dit word ontken dat Erf 176E deur derde verweerder aan sesde verweerder oorgedra is."*

The applicant admits that in terms of the judgment of Claassen J the state defendants are not entitled to proceed with this amendment as it boils down to withdrawing an admission. This is so because withdrawal of the state defendants' plea resulted in an admission that the third defendant transferred Erf 176E to the sixth defendant. It was argued that this admission was not intended by the state defendants when they issued their first notice of withdrawal.

[36] The consolidated lists of what is agreed and in dispute cannot override the judgment of Claassen J. It is clear from Claassen J's judgment that this relates to the *res gestae*, albeit to events after the conclusion of the agreement. It is also clear from his judgment that a court must be approached to withdraw an admission. There is no such application before the court. It surfaces for the first time in the heads of argument of the state defendants. It cannot be granted by means of an amendment, especially in view of the judgment of Claassen J.

[37] There can be no objection to the amendment in terms of paragraph 8. Paragraphs 9.10 to 9.14 are to be deleted and substituted with paragraph 9.10 and its subsections as well as 9.12 and its subsections.

The proposed paragraphs 9.13 and 9.14 amendments relate to the state defendants' plea to the alternative claim for damages instituted by the plaintiff. Paragraph 9.10.1 is in accordance with the special plea in that the oral agreement is unenforceable due to the prescripts of the Proclamation. Paragraph 9.10.2 however is contrary to this court's ruling pertaining to the amendment including implied terms, impossibility of performance and breach of contract and is accordingly not allowed. The same arises pertaining to paragraph 9.10.3 as it is contrary to my ruling *supra* as well as the judgment of Claassen J. Paragraph 9.10.3 and its subsections is accordingly not allowed.

[38] Proposed paragraphs 9.11 and 9.12 state legal conclusions as to why the plaintiff's alternative claims should not succeed namely that any damages suffered by plaintiff as a result of the development of the property and the transfer thereof to the sixth defendant was not caused by the state defendants but by the plaintiff developing property unlawfully and in contravention of the mandatory procedures prescribed by

the Proclamation. It is stated that in the alternative the plaintiff made it impossible for the Government to sell and transfer the property to the plaintiff by failing to comply with the mandatory provisions of the Proclamation.

[39] The proposed paragraph 9.11 will not prejudice the plaintiff if it is granted to read as follows:

> *"Sonder om te erken dat Eiser enige skade gely het as gevolg daarvan dat die grond nie aan hom oorgedra en in sy naam geregistreer is nie en slegs indien bevind word dat Eiser wel skade gely het, kan Eiser nie die Regering aanspreeklik hou vir sodanige skade nie aangesien sodanige skade nie deur Verweerders veroorsaak is nie maar deur Eiser se ontwikkeling van die grond in stryd met die prosedures deur Proklamasie R 293 van 1962 voorgeskry, waarna paragrawe 6.8 verwys."*

[40] Paragraph 9.12 is not allowed as an alternative in view of my rulings *supra*.

[41] Paragraph 9.13 reads more or less the same as the current paragraph 9.10 and there is no prejudice in granting the amendment by inclusion of this paragraph and paragraph 9.14 is thus just a repetition of paragraph 9.13 and is not allowed.

[42] As the applicants are substantially successful in their application for amendment of their plea I cannot find that the applicants were *mala fide* in bringing this application. I also cannot find that the opposition was frivolous, vexatious or unreasonable. In ***Hart v Broadacres Investments Ltd*** **1978 (2) 47 (NPD)** on p51 at D the following was remarked:

> *"It thus appears (1) that the decision whether the amendment was to be allowed involved the decision of a point of law and substance, and (2) that on this, the only point raised by the respondent, he was unsuccessful and his opposition failed. Naturally, as has often been stated, the grant of an amendment is an indulgence to the party requiring it, which entails that he is generally liable for all the costs occasioned by or wasted as a result of the amendment. These costs have sometimes been held to include 'the costs of such opposition as is in the circumstances reasonable and not vexatious or frivolous'".*

In all the circumstances of this matter I exercise my discretion by directing that each party to pay his or its own costs. Such order would best meet the justice of the case.

[43] In summary:

(1) The proposed amendment of paragraph 6.8.1 by substitution of paragraphs 6.8.1, 6.8.2, 6.8.3 and 6.8.4 is granted.

(2) The proposed insertion of paragraphs 6.9, 6.10 and 6.17 is dismissed.

(3) The proposed amendments in paragraphs 6.11, 6.12 and 6.14 are dismissed.

(4) The amendment as set out in paragraph 6.15 is granted.

(5) The amendment as set out in paragraph 6.16 is granted.

(6) The amendment as set out in paragraph 6.18 is granted.

(7) The amendment to include paragraph 6.19 is dismissed.

(8) The proposed insertions of 7.2A and 7.2B are granted.

(9) The proposed paragraph 7.4 is granted.

(10) The proposed paragraphs 7.5, 7.5.1 and 7.5.4 are allowed.

(11) The proposed paragraph 7.6 is granted.

(12) The proposed paragraph 7.7 is dismissed.

(13) The proposed paragraphs 8, 9.10 and its subsections and 9.12 are granted.

(14) Paragraph 9.10.1 is allowed.

(15) Paragraphs 9.10.2 and 9.10.3 are dismissed.

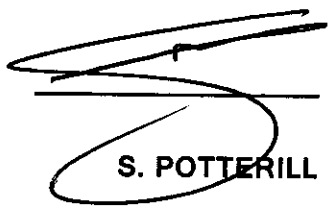
(16) Paragraph 9.11 is granted as amended by the court in paragraph 39 of the judgment.

(17) Paragraph 9.12 is dismissed.

(18) Paragraph 9.13 is granted.

(19) Paragraph 9.14 is dismissed.

(20) Each party to pay their own costs.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 16926/2001

HEARD ON: 8 August 2014

FOR THE APPLICANTS: ADV. L.B. van Wyk SC

INSTRUCTED BY: State Attorney, Pretoria

FOR THE 1st and 3rd RESPONDENTS: ADV. S.D. Wagener SC

INSTRUCTED BY: Coetzer and Partners Attorneys

DATE OF JUDGMENT: 21 October 2014