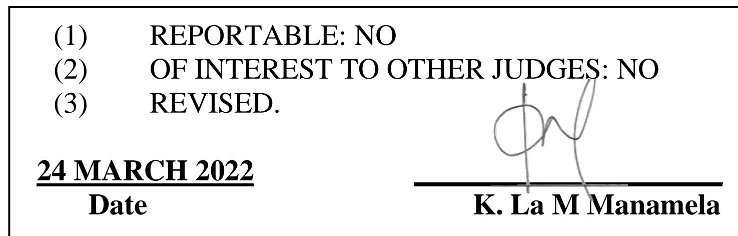
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 87615/2019



(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

24 MARCH 2022 ____________________
Date **K. La M Manamela**

In the matter between:

PKX CAPITAL (PTY) LTD Applicant
(Registration No: 1998/003584/07)

and

ISAGO AT N12 DEVELOPMENT (PTY) LTD Respondent
(Registration No: 2006/029695/07)

In re:

PKX CAPITAL (PTY) LTD Plaintiff
(Registration No: 1998/003584/07)

and

ISAGO AT N12 DEVELOPMENT (PTY) LTD Defendant
(Registration No: 2006/029695/07)

DATE OF HEARING: 25 FEBRUARY 2022

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **24 MARCH 2022**.

JUDGMENT
(APPLICATION FOR LEAVE TO AMEND)

KHASHANE MANAMELA, AJ

Introduction

[1] In this application, PKX Capital (Pty) Ltd (the Plaintiff), seeks leave to amend its particulars of claim under Rule 28[1] of the Uniform Rules of the Court. The Plaintiff caused summons to be issued against Isago at N12 Development (Pty) Ltd (the Defendant) in November 2019 for payment in the amount of R180 million for services allegedly rendered in terms on an agreement concluded between the parties. The application for leave to amend was launched amidst the hearing or trial in the action. The hearing or trial was held from 2 to 4 November 2021, but could not be concluded. Both parties have closed their cases. What remains outstanding is the closing argument by counsel[2] and judgment. The trial was postponed to 25 February 2022. But on 27 January 2022, the Plaintiff brought this application under Rule 28(10)[3] for leave to amend its particulars of claim. The application is opposed by the Defendant on the grounds to be dealt with below.

[2] This opposed motion came before me on 25 February 2022. I had directed that instead of the closing argument in the trial, counsel address the Court on the amendment sought in terms of the motion. The trial had to be further deferred. Mr I Semenya SC, jointly with Mr M Matera, appeared for the Plaintiff, whilst Mr PG Cilliers SC, jointly with Mr RG Groenewald, appeared for the Defendant. I reserved this judgment after listening to oral argument by counsel. This judgment also benefitted from the written submissions or argument by counsel, filed on behalf of their respective clients.

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[1] See footnote 16 below, for a reading of the material part of Rule 28.

[2] Rule 39(10) of the Uniform Rules provides: "[u]pon the cases on both sides being closed, the plaintiff or one or more of the advocates on his behalf may address the court and the defendant or one or more advocates on his behalf may do so, after which the plaintiff or one advocate only on his behalf may reply on any matter arising out of the address of the defendant or his advocate."

[3] See footnote 16 below, for a reading of Rule 28(10).

[3] During the hearing of the application I, extemporaneously, granted the Plaintiff leave to amend its notice of motion. This amendment was rather technical in nature. The notice of motion had to be adjusted to reflect the exact particulars (i.e. paragraphs in the particulars of claim) sought to be introduced by the amendment. In its unamended form, the notice of motion had merely sought “leave to amend [the] particulars of claim within the meaning of Rule 28(10) of the Uniform Rules of Court”. In their written argument counsel for the Plaintiff had urged the Court to accede to their client’s request in the replying affidavit for a rewording of paragraph 1 of the notice of motion to include reference to the terms of amendment spelled out in paragraph 6 of the founding affidavit. Mr Semenya SC, for the Plaintiff, assured the Court for purposes of the order granted, that the amended notice of motion will precisely reflect the material in paragraph 6. Mr Cilliers SC, for the Defendant, pointed out that although the Defendant was not opposing the granting of leave to amend the notice of motion, the Defendant would hold back its final view in this regard until the amended notice of motion is furnished. To avoid doubt, I will reflect this order as part of the ultimate order made in this application to amend the particulars of claim. Next, I deal with the issues I consider material for the determination required, before turning to the submissions.

Memorandum of agreement, Plaintiff’s particulars of claim and Defendant’s plea

[4] The amendment sought by the Plaintiff seeks to incorporate, as a basis for liability in respect of the fee payable for services rendered, further terms of the memorandum of agreement concluded between the Plaintiff, the Defendant and other entities on or about 27 October 2017 (the Agreement).[4]

[4] See par 7 below.

[5] It is important to also point out – for completeness - that according to the Defendant the Agreement "was superseded" by another agreement concluded with the Plaintiff during or about April 2018 which "rendered [the Agreement] of no force and effect". But the present skirmish between the parties does not directly involve this aspect.

[6] Summons was issued in November 2019. The cause of action pleaded in the particulars of claim to the summons is premised on the Agreement.

[7] The Agreement was concluded amongst the Plaintiff, the Defendant and other three entities, namely, Anglo Saxon Developments Proprietary Limited (Anglo Saxon); Moedi Bosele Investors Proprietary Limited (Moedi) and Bembridge Minnaar Attorneys Partnership. Evidently, the latter three entities are not cited as parties and, therefore, are not taking part in both the action and this motion proceedings. The material part of the Agreement for current purpose is located in paragraph 4 thereof.[5]

[5] Paragraph 4 of the Agreement, in its full stretch including its caption, reads as follows:
"**4. PAYMENT OF TRANSACTIONAL ADVISOR FEES**
4.1. The Parties record that PKX is the proximate cause and effect of the Transaction and the successful application for the funding of the Transaction from the PIC.
4.2. In the event that the Transaction is successfully executed on the basis that SANMVA Trust (and any co-purchaser) purchases shareholding in Isago from the Isago Shareholders for the shares purchase price of R680 000 000.00 (six hundred and eighty million Rand), then the Isago Shareholders shall be liable to pay PKX the sum of R240 000 000.00 (two hundred and forty million Rand) inclusive of VAT ("**the Transactional Advisor Fee**") *pro rata* their respective shareholding.
4.3. Should the shares purchase price, for any reason, be less than the amount of R680 000 000.00, then the Transactional Advisor Fee shall be reduced *pro rata*.
4.4. Alternatively, in the event that the Transaction is successfully executed on the basis that SANMVA Trust (and any co-purchaser) purchases immovable property from Isago for the purchase price of R680 000 000.00 (six hundred and eighty million Rand), then Isago shall be liable to pay PKX the Transactional Advisor Fee.
4.5. Should the purchase price for the immovable property, for any reason, be less than the amount of R680 000 000.00, then the Transactional Advisor Fee shall be reduced *pro rata*.
4.6. The Transactional Advisor Fee payable to PKX shall be paid immediately upon the proceeds of the Transaction becoming available and into such account/s as the PKX may specify and shall, save where otherwise provided for in this Agreement, be made free of exchange, any other costs, charges or expenses without any deduction, set-off or counterclaim whatsoever."

[8] In the action, the Plaintiff seeks payment of the fees or fee for services rendered. The fee is defined in the Agreement as "Transactional Advisor Fee".[6] The Defendant denies liability in respect of the fee on a multifaceted basis. The defence includes a special plea based on the provisions of the Estate Agency Affairs Act 112 of 1976 to the effect that the Plaintiff is prohibited from receiving the fee as remuneration without possessing a valid fidelity fund certificate for estate agents. But the merits of the main matter will be dealt with below, only to the extent deemed necessary for determining this application. Suffice for now to state, again, that the current amendment concerns the cause of action of the Plaintiff's claim, set out in paragraph 3 of the particulars of claim. The proposed amendment is directed at that paragraph 3.[7] As already mentioned, pleadings had closed in the action, the pretrial procedures had been finalised and the trial was held on 2, 3 and 4 November 2021, when this application ensued.

<u>The trial and postponement for closing argument</u>

[9] The pre-trial and trial proceedings were in terms of the Commercial Court Practice directives of this Division. The directives require, among others, the filing of witness

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[6] *Ibid.*

[7] Paragraph 3.3 of the Plaintiff's particulars of claim reads as follows in the material part:

"3.3. The material terms of the agreement, whether express, alternatively implied, further alternatively tacit, included the following terms:

3.3.1. the Plaintiff was appointed by the Defendant to render services to the Defendant under the terms and conditions of the agreement in terms of clauses B; D; 4.1; 4.2; and 4.3;

3.3.2. the Plaintiff would provide and did render the following services delineated in the memorandum to the Defendant in furtherance of the transactional advisory role hereinafter incorporated as **Annexure PKX2**:

3.3.2.1. Pre-deal internal process evaluation;

3.3.2.2. Transaction evaluation;

3.3.2.3. Identification of stakeholders and Black empowerment groups as part of the beneficiation(*sic*).

3.3.2.4. Contract assistance;

3.3.2.5. Integration and post-deal implementation;

3.3.2.6. Assessing the basis of the transaction and negotiate with stakeholders on behalf of (our) clients …"

Further, paragraphs 3.8 and 3.9 of the particulars of claim state the following:

"3.8. Clause 4.3 of the [Memorandum of Agreement] states that should the capital amount raised by the Plaintiff be less than **R 680 000 000.00 (Six hundred and eighty million rands)** in that instance, the Transactional Advisory Fee shall be so reduced *pro rata.*

3.9. The Plaintiff successfully raised a capital amount of **R510 000 000.00 (Five hundred and ten million rands)** for the Transaction (as defined in terms of the "MOA") on behalf of the Defendant..."

statements which constitute, save with the leave of the Court, the evidence-in-chief of the particular witness.

[10] The Plaintiff called, as witnesses to testify in the trial, Colonel PM Kubu and General MR Fihla. The Defendant called, as witnesses, Mr C Crause, Mrs D Crause, Dr RM Khunou and Ms N Dippenaar. The parties closed their respective cases. On the third day of trial after the Defendant had closed its case the trial was postponed to 25 February 2022. The Court was to listen to closing argument by counsel on that date. The parties were directed, in the meantime, to exchange and file written closing argument.

Application for leave to amend

General

[11] Instead of filing its written closing submissions or argument, the Plaintiff on 07 January 2022 launched this application for leave to amend its particulars of claim under Uniform Rule 28. The Plaintiff says that the need to amend came to the fore whilst preparing the written submissions directed by the Court.

[12] The material part of the application is located in paragraph 6 of the founding affidavit, predicating the application.[8] The Defendant objected to the amendment proposed by the

[8] Paragraph 6 of the founding affidavit to the application reads in the material part:
"6. The plaintiff now seeks leave of this Court to amend its particulars of claim in the following manner:
6.1 By inserting between 3.3.1 and 3.3.2 a new paragraph 3.3.1A to read:

"*4.4 alternatively, in the event that the Transaction is successfully executed on the basis that SANMVA Trust (and any co-purchaser) purchases immovable property from Isago for the purchase price of R680 000 000.00 (six hundred and eighty million Rand), then Isago shall be liable to pay PKX the Transactional Advisor Fee".*

6.2 By inserting between 3.3.1 and 3.3.2 a new paragraph 3.3.1B to read:

"*4.5 should the purchase price for the immovable property, for any reason, be less than the amount of R680 000 000.00, then the Transactional Advisory Fee shall be reduced pro rata."*

6.3 By inserting between 3.3.1 and 3.3.2 a new paragraph 3.3.1C to read:

Plaintiff and raised a number of issues in support of its objection. In the main, the Defendant argues that the amendment sought does not raise a triable issue and that it would be prejudiced by such amendment, were it to be granted. I deal with the full grounds and submissions for and against the amendment, next.

Plaintiff's case

[13] The Plaintiff says during January 2022 whilst its legal team was working on the written closing argument it dawned on them (my own choice of words) that the cause of action relied upon by the Plaintiff in the matter was not properly pleaded or expressed, although the cause of action appears in the Agreement annexed to the particulars of claim. The Plaintiff decided to seek leave to amend its particulars of claim.[9]

[14] The Plaintiff emphasised that the amendment sought, if permitted, would not require further evidence to be adduced on its side. This means that there will be no need for the Plaintiff to reopen its case in order to call or re-call any witness. The Plaintiff would rely on the recorded evidence for purpose of its case, including in the amended respect.

[15] Perhaps as a measure intended more to assuage the Defendant against objecting to the proposed amendment, the Plaintiff made it clear that no similar constraints ought to apply to the Defendant's case. The Plaintiff would have no objection to the re-opening and recalling of

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"*4.6 The Transactional Advisory Fee payable to PKX shall be paid immediately upon the proceeds of the Transaction becoming available and into such account/s as the PKX may specify and shall, save where otherwise provided for in this Agreement, be made free of exchange, any other costs, charges or expenses without any deduction, set-off or counterclaim whatsoever*."

6.4 By inserting between 3.8 and 3.9 a new clause 3.8A to read as paragraph 6.1; 6.2 and 6.3 above."

[9] See footnotes 7 and 8 above.

witnesses by the Defendant precipitated by the amendment, should the Defendant be so minded.

[16] Regarding the likelihood of prejudice to the Defendant, the Plaintiff says no prejudice would ensue as the proposed amendment does not seek to introduce "an entirely new cause of action". Secondly, the amendment sought, if granted, derives from the Agreement, already attached to the particulars of claim. Thirdly, the Agreement deals especially with the terms and conditions for the payment of the Transactional Advisory Fee predicating the Plaintiff's claim. Fourthly, the amendment sought simply introduces an alternative basis for liability by the Defendant in terms of the Agreement. Fifthly, the proposed amendment will rest on the admitted and "canvassed" witness statements by the Plaintiff and the Defendant. Sixth, the issues in the amendment are closely linked to the matters canvassed during the trial. Seventh, part of the evidence led foreshadowed the proposed amendment. Eighth, the amendment sought is *bona fide*. Ninth, any prejudice on the part of the Defendant may be remedied by the award of costs and the directions by the Court as to the future conduct of the matter.

Defendant's case

[17] The Defendant raised a number of issues in its objection to the proposed amendment. It says whilst the Agreement makes provision for the payment of the Transaction Advisory Fee for two eventualities, these eventualities or possibilities are distinct from each other. The one possibility is envisioned in clauses 4.2 and 4.3,[10] as well as clause 1.25 of the Agreement.[11] In this possibility the fee will become due if the SANMVA Trust (and any co-purchaser)

[10] See footnote 5 above for a reading of clause 4 of the Agreement in the material respect.

[11] Clause 1.15 defined "transaction" as follows: "the transaction entered into amongst *inter alia* SANMVA Trust (and/or PIC and/or GEPF and/or any co-purchaser), Anglo, Moedi and/or Isago, whereby SANMVA Trust (and any co-purchaser) acquire either immovable property owned by Isago and/or shareholding in Isago, which acquisition is funded through application made to the PIC…"

purchase(s) shareholding in the Defendant from the latter's shareholders (i.e. Anglo and Moedi). In terms of the other possibility, the payment of the fee is to be triggered as envisioned in clauses 4.4 and 4.5 of the Agreement.[12] The latter clauses are sought to be introduced by the Plaintiff in terms of the proposed amendment. The possibility in terms of clauses 4.4 and 4.5 of the Agreement provides for the fee to become due in the event of SANMVA Trust (and any co-purchaser) purchasing immovable property from the Defendant.

[18] The Defendant says that the two possibilities or eventualities (i.e. one for the purchase of shareholding and the other for the purchase of the immovable property) are not only distinct from each other, but are mutually exclusive. The agreed outcome of the two possibilities is provided for differently in terms of the Agreement. In the event of the first possibility for the sale of shares (as envisaged by clauses 4.2 and 4.3 of the Agreement) materialising, Anglo and Moedi, as the Defendant's shareholders, would be liable for the payment of the Transaction Advisory Fee. The Defendant, itself, is not liable for the fee under the first possibility, according to the Defendant. Should the second possibility arise, in that there is a sale of the immovable property of the Defendant, the Defendant is solely liable for the fee. The latter is provided by clauses 4.4 and 4.5 of the Agreement and is the possibility currently not pleaded in the particulars of claim and sought to be brought in through the proposed amendment. Both scenarios are dependent on the Plaintiff being found to be the "effective cause" of the transaction.[13]

[19] The Defendant points out that the Plaintiff's claim, as pleaded, is based on the sale of shares. The case pleaded by the Plaintiff places no reliance on the second possibility (i.e. the

[12] *Ibid.*
[13] Clause 4.1 of the Agreement refers to "the proximate cause and effect of the Transaction". See footnote 5 above.

payment of the fee arising from the sale of the immovable property) provided for in terms of clauses 4.4 and 4.5 of the Agreement. The Plaintiff explicitly relied on clauses 4.2 and 4.3, it is further contended by the Defendant.[14]

[20] According to the Defendant, the available evidence (i.e. the written statements and the evidence adduced at the hearing) only support a cause of action for the sale of shares. References made by Colonel Kubu to clause 4.4 of the Agreement, when he testified before the Court, were only in passing, with no substantive content regarding the claim. Further, the objective evidence (in the form of a letter of 5 April 2018 by the Public Investment Corporation or the PIC) provides "uncontested evidence on the nature and structure of the ultimate transaction". The evidence also points to the ultimate transaction between the parties. Besides, the money paid in the transaction is in an escrow account and it is not available, which on the version of the Plaintiff, suggest the claim or liability is not yet due, the Defendant's contention is concluded in this regard.

[21] Regarding the timing of the amendment, the Defendant says that the Plaintiff has been aware that its claim is "misconstrued" from the first day of the trial. There was no need to delay the amendment now sought.

[22] Also, the Defendant's other grounds of objection against the amendment include the following. Firstly, the amendment is not made *bona fide*. It will cause prejudice to the Defendant incapable of remedy through the grant of a costs order. Secondly, the amendment sought is not clearly delineated or identified in the notice of motion. Obviously, the latter

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[14] *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C: "The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed".

ground fell off when the amendment of the notice of motion was extemporaneously authorised by the Court at the hearing of this application.[15] Next, I deal further with the legal submissions on behalf of the parties against the applicable legal principles.

Submissions and applicable legal principles (discussed)

General

[23] The cardinal legal principle in this application is Uniform Rule 28 itself.[16] This application is primarily premised on Rule 28(10). In this part, the Uniform Rule refers to "at any stage before judgment" regarding the timing of (or stage until when it is conventionally permissible for the Court to grant) leave to amend.[17] I consider it common cause between the parties that this application was brought within the period contemplated in Rule 28(10).

[24] It is also common cause that in this application evidence has already been adduced and only closing argument is outstanding, before judgment is handed down. But this is not the same as saying that the Plaintiff's timing of the application or amendment is proper or meritorious. Such pronouncement would form part of the overall determination still to be made.

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[15] See par 3 above.
[16] Uniform Rule 28 reads as follows in the material part:
"(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
(3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
…
(9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.
(10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit." [underlining added for emphasis]
[17] *Ibid.*

Basic principles applicable to amendments

[25] There are principles derived, in the main, from decided cases governing the amendment of pleadings and other documents before our courts. The submissions by counsel on behalf of the parties referred to most of these principles when urging the Court to find in their respective client's favour. I deal with the principles, next.

[26] In *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and another*[18] and *Commercial Union Assurance Co Ltd v Waymark NO*,[19] the basic principles to affect the exercise of the discretion of the Court whether to grant or refuse leave to amend were accurately summarised.[20] It is trite that the discretion – as always – is to be exercised judicially in the light of all the facts and circumstances before a Court.[21] The basic principles, set out below, will be referred to in the discussion of the submissions on behalf of the parties.

[27] An amendment will be allowed so that there is a "*proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done*".[22] (italics added) This is the primary principle or factor for the amendment of court documents

[18] *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and another* 1967 (3) SA 632 (D) at 640H-641C.

[19] *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk) at 77F-I.

[20] *Caxton Ltd and others v Reeva Forman (Pty) Ltd and another* 1990 (3) SA 547 (A) at 565G and *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 957G-H. See generally Cilliers, AC, Loots, C and Nel, HC. *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5th edition, Jutastat e-publications (last updated: 30 November 2021) (hereafter *Herbstein & Van Winsen Civil Practice*) at 675-693.

[21] *GMF Kontrakteurs (Edms) Bpk and another v Pretoria City Council* 1978 (2) SA 219 (T) at 222B–D; *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n ander* 2002 (2) SA 447 (SCA) *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 SA 447 (SCA) at par 33. See generally *Herbstein & Van Winsen Civil Practice* at 676.

[22] *Trans-Drakensberg Bank v Combined Engineering* at 638A (partly relying on *Whittaker v Roos and another* 1911 TPD 1092 at 1102) and 640E-F. See also *Benjamin v Sobac* at 957I; *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ) at par [7]; *Commercial Union Assurance v Waymark* at 76-77; *Kasper v Andrè Kemp Boerdery CC* 2012 (3) SA 20 (WCC) at pars 66-77.

and represents a positive endeavour which has shaped the policy of our courts on the determination of applications for leave to amend.[23]

[28] But the objective regarding the granting of amendments is to do justice between the parties; to provide the Court with a true account of the facts in a matter and not to create an environment where a mistake made by the one party would result in a claim of forfeiture by the other.[24] For, in the drafting of pleadings, mistakes, errors of judgment or misreading are possible even where there was abundance of diligence in the drafting of the particular pleadings. These, ought to dissuade the Court from being occupied by matters of a technical nature and to have its focus on the real position.[25] Also, an amendment ought not be intended to obtain a tactical advantage in the proceedings.[26]

[29] The granting of leave to amend remains an indulgence always to be justified by the party seeking same.[27] But the party seeking leave to amend "*does not come as a suppliant, cap in hand, seeking mercy for his mistake or neglect*".[28] Applications for leave are determined on the bedrock disposition that prejudice to the opposing party is "*the touchstone for the grant or refusal of the application*".[29] (italics added) Our courts have entrenched the position, correctly so in my view, that amendment of documents ought not be allowed if it would result in prejudice or injustice to the opposing party, where such prejudice is incapable of cure or elimination by an award of costs and, where appropriate, a postponement of the matter.[30] The

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[23] *Benjamin v Sobac* at 957I.
[24] *Whittaker v Roos* at 1102. See also *Trans-Drakensberg Bank v Combined Engineering* at 638 and 640E-F.
[25] *Ibid.*
[26] *Middleton v Carr* 1949 (2) SA 374 (AD) at 386, cited with approval in *Trans-Drakensberg Bank v Combined Engineering* at 641B.
[27] *Benjamin v Sobac* at 957J-958A.
[28] *Trans-Drakensberg Bank v Combined Engineering* at 640-641.
[29] *Benjamin v SOBAC* at 957J-958A. See also *Trans-Drakensberg Bank v Combined Engineering* at 640.
[30] *Trans-Drakensberg Bank v Combined Engineering* at 638A (partly relying on *Whittaker v Roos* at 1102) and ; 640E-F. See also *Moolman v Estate Moolman and another* 1927 CPD 27 at 29; *Cross v Ferreira*, 1950 (3) SA 443 (C) at 447 and *Randa v Radopile Projects* at pars 7 and 12.

elimination of prejudice may be totally so, but otherwise at least materially or substantially so.[31] The test for prejudice is applicable even for applications for leave to amend the relief sought in a matter or a cause of action, as in this matter.[32]

[30] The presence or absence of *bona fides* play a role in determining whether or not to allow an amendment. Put differently, an amendment ought to be allowed unless it is *mala fide*.[33] In this regard the Court ought to guard against the abuse of its process. The hallmarks of an application which is *bona fide*, include where material new facts have arisen or have become known by the applicant for leave to amend rendering the application necessary; whether the application was made timeously, and whether the amendment would result in an injustice which cannot be avoided by a postponement or an award of costs.[34]

[31] There has to be a reason and *prima facie* "something deserving of consideration, a triable issue" for the amendment, otherwise any such amendment would only serve to harass the opposing party where it is without a foundation.[35] For an amendment ought to be disallowed if it does not contribute to the real or genuine issues between the parties adjudicated by a court.[36] An amendment which does not contribute to the real or genuine issues between the parties serves no other purpose than to simply prolong and complicate the proceedings to the prejudice of the opposing party called upon to expend time and money on the issues in such an

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[31] *Benjamin v Sobac* at 957H.
[32] *Benjamin v Sobac* at 957J-958A.
[33] *Moolman v Estate Moolman* at 29, cited with approval in *Trans-Drakensberg Bank v Combined Engineering* at 640. See also *Benjamin v Sobac* at 957H and *Randa v Radopile Projects* at par [12], where reference is made to several authorities.
[34] *Greyling v Nieuwoudt* 1951 (1) SA 88 (O) at 91, after referring to in *Trans-Drakensberg Bank v Combined Engineering* at 640H.
[35] *Trans-Drakensberg Bank v Combined Engineering* at 641A, relying on *Cross v Ferreira* at 450. See *Caxton v Reeva Forman* at 565G-566B.
[36] *Benjamin v Sobac* at 958A-C.

amendment.[37] There should also be supporting evidence for such an issue, where evidence is required for an issue placed on record by the amendment.[38]

[32] Besides the requirement to introduce a "triable issue", a proposed amendment should not render a pleading excipiable, save perhaps in exceptional circumstances.[39] In other words, the amendment sought should not introduce a claim which is hopeless or not viable in law, incapable of sustaining the relief sought.[40] The exceptional circumstances are where the balance of convenience or some similar reason renders another course desirable.[41]

[33] Where an amendment introduces a new factor into the case it would be disallowed if it would prejudice the opposing party, for example, if it would involve the calling of a witness who had not yet been called.[42]

[34] Another principle concerning the amendments is the stage at which the amendment is sought to be effected. Obviously, Uniform Rule 28(10) allows (in principle) a court to sanction amendments at any stage of the proceedings before judgment.[43] This is the position of our law in general and amendments of pleadings may even be allowed on appeal,[44] although litigants are warned not to delay amendments until after the close of the case or on appeal.[45] This means

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[37] *Benjamin v Sobac* at 958A-C.

[38] *Trans-Drakensberg Bank v Combined Engineering* at 641A-B, relying on *Cross v Ferreira* at 450. See *Caxton v Reeva Forman* 565G-566B.

[39] *Trans-Drakensberg Bank v Combined Engineering* at 641A-B, relying on *Cross v Ferreira* at 450. See further *Caxton v Reeva Forman*565G-I; *Benjamin v Sobac* at 958E; *Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C) at 310E-311A; *Krische v Road Accident Fund* 2004 (4) SA 358 (W) at 363A and *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (NmS) at 364H-I.

[40] *Benjamin v Sobac* at 958D-E.

[41] *Cross v Ferreira* at 450E-F.

[42] *Randa v Radopile Projects* at par [6], citing with approval from *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173.

[43] Uniform Rule 28((10).

[44] *Shill v Milner* 1937 AD 101 at 105, referred to in *Pennefather v Gokul* 1960 (4) SA 42 (N) at 51A.

[45] *Middleton v Carr* at 386, referred to in *Pennefather v Gokul* at 51B.

that the timing of an amendment matters. For example, as a party seeking an amendment should not knowingly refrain or delay to propose an amendment until late in the proceedings so that it catches an opponent off guard.[46] But there is authority to the effect that objections to amendments solely based on the delay in seeking an amendment would always fail.[47] For, an approach entrenched against amendments made late in the proceedings are agitating for "an overly formal approach" which ought to be avoided, lest substance of the process would yield to form.[48]

[35] Although the delay alone is not decisive in determining whether or not to grant leave to amend, the further away from the trial the leave to amend is sought the easier it is to obtain such leave. In *Randa v Radopile Projects CC*[49] it was held by Willis J (as he was then) *"the commencement of a trial is the fulcrum upon which the courts' stance in respect of applications for amendments to pleadings should be balanced.*"[50] (my italics) Late amendments sought at the trial court may be viewed as *mala fide* as opposed to amendments sought earlier before in the motion court prior to the commencement of trial.[51] For example, where the amendment is made at the stage when a court is listening to closing argument, the court ought to be satisfied

[46] *Trans-Drakensberg Bank v Combined Engineering* at 641B, relying on *Florence Soap and Chemical Works (Pty) Ltd v Ozen Wholesalers (Pty) Ltd* 1954 (3) SA 945 (T) at 947H-948B.
[47] *Randa v Radopile Projects* at par [13], relying on *Bankorp Ltd v Anderson-Morshead* 1997 (1) SA 251 (W) at 253E- F.
[48] *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) at par 19 and *J R Janisch (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 169H.
[49] *Randa v Radopile Projects* at pars 4-5.
[50] *Randa v Radopile Projects* at par 4. This is so because amendments sought closer to a trial or even after commencement of a trial have some implications, including with regard to the increment of costs; logistical difficulties in timeously securing the court attendance by a witnesses; the adjudicating court having already formed impressions of witnesses and developed a sense of the direction the issues in the matter are taking, where the trial is at an advanced stage. See *Randa v Radopile Projects* at par 5. Also, it is inappropriate for a trial judge to express an opinion on the credibility of a witness before the parties close their respective cases and commenced closing argument. See *Randa v Radopile Projects* at par 17 and *Vilakazi v Santam Assuransie Maatskappy Bpk* 1974 (1) SA 23 (A) at 26G-27A.
[51] *Randa v Radopile Projects* at par 17.

that the issues raised have already been fully canvassed, apart from the basic principle of avoiding the injustice or prejudice to the opposing party ensuant from the amendment.[52]

Submissions on behalf of the parties

<u>General</u>

[36] As mentioned above, Mr Semenya SC, assisted by Mr Matera, appeared on behalf of the Plaintiff. Their submissions included that the notable theme in the jurisprudence applicable to applications for leave to amend pleadings is that the default position is to allow an amendment. Deviation from this default position by the Courts is warranted if the amendment is sought *mala fide* or would cause prejudice to the opponent incurable by an order of costs, the submission concludes. Further, an important object of allowing an amendment is "to obtain a proper ventilation of the disputes".[53] Overall, the jurisprudence confirms that the test is onerous on the objector to a proposed amendment. But I hasten to point out that, the Defendant joined issue with the latter assertion by the Plaintiff and pointed out that there is no "*onerous test*" on the Defendant objecting to the proposed amendment. I will deal further with this towards the end.

[37] Mr Cilliers SC, supported by Mr Groenewald, appeared on behalf of the Defendant. Their submissions on behalf of the Defendant included that what the Plaintiff's proposed amendment is essentially meant to achieve is the introduction of a fresh alternative cause of action, belatedly so. Further, the amendment is sought when the parties have already closed their cases, heading towards the delivery of closing argument and expressly with no intention by either of the parties to re-open their cases.

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[52] *Pennefather v Gokul* at 51A-B.
[53] See par 27 above.

[38] I deal with the rest of submissions by counsel under the grounds of objections adopted as subheadings, next. I start with the Defendant's submissions as I find this approach or sequence practical.

Ground of objection: cause of action sought to be introduced is not supported by the evidence adduced

Submissions on behalf of the Defendant

[39] It is submitted on behalf of the Defendant that as currently phrased the Plaintiff's particulars of claim explicitly refer and specifically rely on clauses 4.2 and 4.3 of the Agreement, dealing exclusively with the possibility of the payment of the "Transactional Advisor Fee" on the basis of the sale of shares in the Defendant by Anglo Saxon and Moedi, as the Defendant's shareholders. Nowhere in the particulars of claim is any reliance placed on clauses 4.4 and 4.5 of the Agreement, now sought to be introduced, which deal with the possibility of the payment of the fee on the basis of the sale of the Defendant's immovable property. The latter possibility, the Defendant's counsel pointed out, is distinct from a sale by the Defendant's shareholders of the shares in the Defendant.

[40] Counsel further submitted that the Plaintiff's focused attention in its claim on clauses 4.2 and 4.3, as opposed to clauses 4.4 and 4.5,[54] means that the cause of action is founded solely on the alleged sale of shares in the Defendant to the SANMVA Trust (and any co-purchaser) by Anglo Saxon and Moedi, as the Defendant's shareholders. Therefore, the potential contractual liability to pay the impugned fee rests solely on Anglo Saxon and Moedi, and not with the Defendant. Under this scheme of things, it is submitted, the Defendant is merely the

[54] *Imprefed v National Transport Commission* at 107.

company whose shares - held by Anglo Saxon and Moedi - were required to be sold to trigger the provisions of clauses 4.2 and 4.3 of the Agreement.

[41] Further, counsel for the Defendant submitted that this method of pleading is improper, as under the aforementioned context of this matter "a pleading ought not to be positively misleading by referring explicitly to certain clauses of the contract as identifying the cause of action when another is intended or will at some later stage - in this case at the last possible moment - be relied upon".[55] Put differently, "a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another".[56] For the amendment sought by the Plaintiff is meant to introduce an alternative cause of action fundamentally different (in import and effect) from the current cause of action, counsel further argue.

[42] Regarding the position on the evidence, counsel argued as follows. The evidence already adduced at the trial is that Colonel Kubu did not deny that the Defendant's property was sold to the GEPF (which acquired a 60% undivided share in the property) and a Newco (Isago Property Holdings (Pty) Ltd) acquired the remaining 40%. This means there is no evidence to support the proposed amendment. The evidence at the trial by the Plaintiff only supports a cause of action founded on the sale of shares contemplated by clauses 4.2 and 4.3 of the Agreement. Also the witness statements of General Fihla and Colonel Kubu pointed to a Plaintiff's case based on a sale of shares. The objective evidence in terms of the approval letter by the PIC of 5 April 2018 directly contradicts a cased based on a sale of the immovable property and provides, according to the Defendant's counsel, "uncontested evidence on the

[55] *Imprefed v National Transport Commission* at 107G-G.
[56] *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A.

nature and structure of the ultimate transaction". This was not challenged by Colonel Kubu when he was under cross-examination. The Plaintiff, belatedly, realised that its pleaded claim has no prospect of success and wants to steer away from the conundrum by introducing a cause of action based on the sale of the immovable property envisaged in clauses 4.4 and 4.5 of the Agreement.

Submissions on behalf of the Plaintiff

[43] Counsel for the Plaintiff, further from what is stated above, submitted that the Defendant did not back this ground of objection by the reasons as to how the alleged prejudice is occasioned and the nature and extent or manner of such prejudice. The onus to establish prejudice, as opposed to merely alleging it, is borne by the Defendant. Therefore, this ground is without substance both in law and in fact.

[44] Further, counsel for the Plaintiff submitted that the Defendant has not stated how this application to amend is not *bona fide*. The *bona fides* of this application are intact for the following facts: (a) the proposed amendment is derived from the Agreement which form the bases of the Plaintiff's claim; (b) the proposed amendment is an alternative basis of the Defendant's liability in terms of the Agreement; (c) the issues raised and the evidence canvassed at the hearing are closely linked to the proposed amendment, and (d) the Plaintiff will not resist any application by the Defendant to reopen its case and recall any witness it deems necessary. Therefore, the Defendant's objection to the amendment is not reasonable and detracts from the primary principle to allow amendments in order to obtain a proper ventilation of the dispute between the parties.

[45] Also, there is no prejudice presented by the leave to amend incapable of cure by a costs order or any other order that may be necessary. The objection by the Defendant is without merit and finds no support in law. A refusal of the leave to amend by the Court would cause the Plaintiff irreparable prejudice regarding the ventilation of the controversy between it and the Defendant, whilst any prejudice likely to be suffered by the Defendant can still be cured by recalling any witness which the Defendant deems necessary to call.

Ground of objection: no triable issue is raised in the proposed amendment

Defendant's submissions

[46] The other ground for the Defendant's objection, labelled "the core objection", is that the amendment does not raise any triable issue. Counsel for the Defendant emphasised, in both written and oral submissions, the legal principle that an amendment will not be allowed when no triable issue is raised.[57] In its full extent, the submission is to the effect that the proposed amendment does not raise a triable issue and has no foundation, but is simply meant to harass the Defendant.[58]

[47] It is submitted that the Plaintiff's argument that the amendment ought to be allowed in order to obtain a proper ventilation of the dispute between the parties essentially presupposes that the Court should ignore the evidence presented in favour of the adoption of this wide general principle. This is not even borne by the various judgments relied upon by the Plaintiff in which, unlike with the amendment sought by the Plaintiff, the amendments sought raised a triable issue.

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[57] See par 31 above.

[58] *Trans-Drakensberg Bank v Combined Engineering* at 641A- B, confirmed by Corbett CJ in *Caxton v Reeva Forman* at 565G-I and in *Ciba-Geigy v Lushof Farms* at 462-463. See par 31 above.

[48] On the authority of the decision in *Ciba-Geigy v Lushof Farms* and the requirements set out therein,[59] it was submitted for the Defendant that there is no evidence adduced at the trial to support the cause of action which the Plaintiff seeks to introduce and, therefore, there is no triable issue raised. The Plaintiff has not met the requirements in *Ciba-Geigy v Lushof Farms*. I must add that I have also noted the other decisions relied upon by the Defendant for the submissions under this part, even if not specified by name.

[49] Overall, it is submitted that, the application is devoid of merit and doomed to fail, as it only serves to harass the Defendant.[60] This, in itself, is prejudice to the Defendant and it renders the application not *bona fide*.

[50] Also, the Defendant, rather tentatively in my respectful view, joins issue with the delay in bringing the application or seeking the amendment when the issues during the trial or even long before the commencement of the trial clearly showed the nature of the ultimately concluded transaction.

Conclusion

[51] I must commence this part on conclusions with the issue of the location of onus. It is submitted on behalf of the Plaintiff that the jurisprudence confirms that the test is onerous on the party objecting to a proposed amendment, as with the Defendant. This assertion is rejected on behalf of the Defendant not only on the basis that there is no such "*onerous test*" on the Defendant, but also that the *onus* is on the party seeking the amendment to establish that the objecting party will not be prejudiced by the amendment were it to be granted. But, with respect

[59] *Ciba-Geigy v Lushof Farms* at 462-463.
[60] See par 31 above.

– counsel appear to be talking past each other, in this regard. I don't think there should be any confusion about the so-called an "onerous test" and the location of onus in this application. As I have it, the Plaintiff has the overall onus for the amendment to be allowed, bearing in mind, among others, the principles stated above.[61] But the Defendant will have to comply with the basic rule of evidence that "he who asserts must prove".[62] It is trite that the point of departure of our law is that a litigant requesting a remedy ought to prove that he is entitled to the remedy, often this being the position occupied by a plaintiff or an applicant.[63] But where a defendant or a respondent goes beyond just denying the allegations by the plaintiff or an applicant and make his or her own positive allegations in order to refute the plaintiff's or applicant's claim, the defendant or respondent as the party which has raised the particular issue would have the onus of furnishing proof. Put differently, it is not always the plaintiff or the applicant who bears the burden of proof, but the party who asserts (and not the one who denies) who has the onus.[64] The Defendant in this matter has assumed the latter position regarding various aspects of the objection raised. This is not the same as saying the Defendant has the onus regarding the overall determination by this Court on the amendment. That is the duty placed on the Plaintiff.

[52] Now to the specific grounds of objection. The first ground is that the cause of action sought to be introduced is not supported by the evidence adduced. The Defendant says there is no evidence adduced to support a case to be introduced in terms of the amendment based on clauses 4.4 and 4.5 of the Agreement. But the Defendant concedes that reference was made by Colonel Kubu to clause 4.4 of the Agreement when he testified before the Court, but labels this to be only in passing with no substantive content regarding the claim. I have reviewed the

[61] See pars 26-35 above.
[62] Schmidt, CWH & Rademeyer, H. 2021. *Law of Evidence.* LexisNexis (online version-last updated: June 2021), par 2.2.1.1 at p 2-11.
[63] Schmidt *Law of Evidence*, par 2.2.1.1 at p 2-11. See also *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 711.
[64] *Ibid.*

transcript (which is better than my contemporaneous notes and recollection) and found references to clause 4.4 of the Agreement in the evidence adduced before the Court, including in the following extract:

> "MR CILLIERS: We will go to 4.4 just now let us first deal with 4.2 because I want to understand your case. You tell me that the deal that you made was in terms of 4.2. I am not saying that it excludes the lines in 4.4 but you rely on 4.2 if I have the reference to your witness statement and you say you negotiated that deal in 4.2. Am I right?
> MR KUBU: All that that has been incapsulated in the agreement that is what our claims are based on …"[65]

[underlining added for emphasis, but quoted without line numbering]

[53] The references to clause 4.4 of the Agreement including in the extract quoted above suggest to me the existence of evidence directed towards the cause of action sought in the amendment. I say so on the basis that the consideration by the Court of the available evidence at this stage does not have to be at the same level or degree for purposes of proving the Plaintiff's claim on a balance of probabilities. I agree, though, that the focus of the Plaintiff's claim was on clauses 4.2 and 4.3 (the Sale of Shares Clauses) of the Agreement. But regard was also had to clause 4.4 of the Agreement and the sale of land.

[54] I must also add that I do not think that the Plaintiff in its current pleading misled the Defendant or anyone by its reference to the Sale of Shares Clauses, whilst intending or changing later to rely on clauses 4.4 and 4.5 (the Sale of Land Clauses) of the Agreement.[66] Also, the Plaintiff did not direct the attention of the Defendant to one issue (i.e. the Sale of

[65] Caselines: 078-178, lines 5-14.
[66] See par 41 above.

Shares Clauses) and then, at the trial, attempt to canvass another (i.e. the Sale of Land Clauses).[67] The amendment sought by the Plaintiff is meant to introduce an alternative cause of action or broaden the scope of the Plaintiff's current cause of action. The two causes of action may be different, but they are derived, as pointed out by counsel for the Defendant, from the same Agreement. It may well be that a proper approach should have been to include all four possible clauses from the beginning, but the drafting of pleadings is not always what it should be, hence the allowance for amendments. Counsel for the Defendant (and by extension the Defendant) appears to have been aware of this "omission", hence his probing of the witness also on the Sale of Land Clauses.[68] Counsel did not just constrain himself to the Sale of Shares Clauses, even if it was not for the reason I postulated. But all these do not suggest a party (read the Defendant) who is misled. Therefore, I agree with the Plaintiff or Plaintiff's counsel, that the amendment would allow a proper ventilation of the dispute between the parties on the basis of all four clauses in the Agreement. This, also, appears to me to respond properly to the interests of justice.

[55] The omission of references to the Sale of Land Clauses in the Plaintiff's pleading may be awkward, but it does not render the application to amend not *bona fide*, especially given the fact that the Plaintiff seeks nothing further in the trial beyond the proposed amendment. It is not insignificant that the Plaintiff also does not wish to call or recall any witness. The latter aspects suggest to me that there is no prejudice beyond the cure of an applicable order as to costs. Therefore, I find unmeritorius the Defendant's ground of objection that the cause of action sought to be introduced is not supported by the evidence adduced.

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[67] *Kali v Incorporated General Insurances* at 182A.

[68] See par 52 above.

[56] Now to the second or core ground that the proposed amendment does not raise a triable issue and has no foundation, but is simply meant to harass the Defendant.[69] What I have stated under the ground above regarding available evidence, when viewed at a *prima facie* level or degree, is applicable to this ground. In my view there is a reason and *prima facie* "something deserving of consideration": a triable issue.[70] This is so when viewed from the authorities referred to above, including the requirements set out in *Ciba-Geigy v Lushof Farms*.[71] This ground will also fail.

[57] Lastly, before I turn to the issue of costs, I think I must say something about the issue of delay. I have delayed my comments in this regard because I subscribe to the authorities above which hold that the issue of delay alone is not decisive.[72] I find the explanation offered by the Plaintiff regarding when it was decided to amend and therefore to launch this application very frugal in details and therefore cryptic. It does not go into details, especially why it was decided from the beginning when summons was prepared to exclude the alternative cause of action or whether this was only the drafter's oversight. But this is not the same as saying I don't believe what is being said. I just think more information could have been shared. But any prejudice emanating from the timing of this application is within the eradication or amelioration offered by the grant of a costs order.,

Costs

[58] On the issue of costs, I find that there is no reason to deviate from the principle or rule that the applicant for leave to amend seeks an indulgence and should be held liable for the costs

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[69] See footnote 58 above.
[70] *Trans-Drakensberg Bank v Combined Engineering* at 641A, relying on *Cross v Ferreira* at 450. See *Caxton v Reeva Forman* at 565G-566B.
[71] See par 48 above.
[72] See footnote 47 above.

relating to the amendment.[73] But I do not think a costs order is warranted at a punitive scale. I have already said enough about the *bona fides* and other aspects relating to the launch of the application. Therefore, costs will be on the normal party and party scale, but will include costs consequent upon the employment of two counsel.

Order

[59] In the premises, I make the following order:

a) leave to amend the notice of motion dated 7 January 2022 to include reference to paragraph 6 of founding affidavit, also dated 7 January 2022, is granted;

b) the application for leave to amend the Plaintiff's or Applicant's particulars of claim in terms of the notice of motion referred to in a) hereof (as amended) is granted, and

c) the Plaintiff or Applicant is liable for costs of the application, including costs consequential upon the employment of two counsel, and for costs to effect the amendment and consequential amendments.

Khashane La M. Manamela
Acting Judge of the High Court

DATE OF HEARING : 25 FEBRUARY 2022

DATE OF JUDGMENT : 24 MARCH 2022

[73] *Meintjies NO v Administrasieraad van Sentraal-Transvaal* 1980 (1) SA 283 (T) at 294H–295D and *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 679A–D.

Appearances:

For the Applicant/Plaintiff	:	Mr I Semenya SC Mr M Matera
Instructed by	:	Mabuza Attorneys, Johannesburg c/o Ledwaba Mazwai Attorneys, Pretoria
For the Respondent/Defendant	:	Mr PG Cilliers SC Mr RG Groenewald
Instructed by	:	Van Hulsteyns Attorneys, Johannesburg c/o Lee Attorneys, Pretoria