

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

**CASE NUMBERS: 2014/40058
2014/40054**

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

A.D. STEIN

28 FEBRUARY 2024

CASE NUMBER: 2014/40058

In the matter between:

THE NATIONAL EMPOWERMENT FUND

Applicant

and

CLOVERLEAF FILMS (PTY) LTD

First respondent

PIETERSE, ANDRE

Second respondent

MA-AFRIKA FILMS (PTY) LTD

Third respondent

CLIDET NO 962 (PTY) LTD

Fourth respondent

GWAGWA, NOLULAMO NOBANBISWANO

Fifth respondent

DAKILE-HLONGWANE, SALUKAZI

Sixth respondent

MTHEMBI-MAHANYELE, SANKIE DOLLY THEMBI

Seventh respondent

In the matter between:

THE NATIONAL EMPOWERMENT FUND

Applicant

and

IRONWOOD FILMS (PTY) LTD

First respondent

PIETERSE, ANDRE

Second respondent

MA-AFRIKA FILMS (PTY) LTD

Third respondent

CLIDET NO 962 (PTY) LTD

Fourth respondent

GWAGWA, NOLULAMO NOBANBISWANO

Fifth respondent

DAKILE-HLONGWANE, SALUKAZI

Sixth respondent

MTHEMBI-MAHANYELE, SANKIE DOLLY THEMBI

Seventh respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be 28 February 2024.

JUDGMENT

STEIN AJ:

INTRODUCTION AND PRELIMINARY MATTERS

- [1] In the two applications that are before me, the applicant, which is the same in both applications, seeks leave to amend its particulars of claim in each of the respective underlying action proceedings. The applicant is the plaintiff in both proceedings and the respondents are the respective defendants. The respondents in the respective proceedings have objected to the proposed amendments on a variety of grounds under Rule 28(3). For convenience, I refer to the application of the *National Empowerment Fund and Cloverleaf Films (Pty) Limited and Others* (case no. 2014/40058) as the “**Cloverleaf Films application**” and the application of the *National Empowerment Fund and Ironwood Films (Pty) Limited and Others* (case no. 2014/40054) as the

“Ironwood Films application”. I will refer to the respective parties by their designations in the present application proceedings.

- [2] By Notice of Withdrawal the applicant withdrew its claim against the second and third defendants (second and third respondents in the present applications) and accordingly where I refer to the respondents collectively and unless otherwise indicated, this does not include the second and third respondents in each of the applications.
- [3] At the outset of the hearing I was informed that both parties agree that the issues raised in each of these applications for leave to amend, and the objections which give rise to them, are identical in all material respects. For the most part, argument was confined to the Cloverleaf Films application and the applications were argued on the basis of that application alone. It was indicated to me by counsel who appeared for both parties that what was argued in respect of the Cloverleaf Films application applied to the Ironwood Films application and that I could, and should, consider and hand down judgment in respect of both of these applications together. I consider that to be sensible and appropriate. Accordingly, my reasoning in respect the Cloverleaf Films application should be taken to apply to the Ironwood Films application, unless the contrary is stated.
- [4] The action proceedings were instituted in October 2014. Since then the matter has had a lengthy procedural history, including exceptions, amendments and an application to dismiss the action for want of its prosecution brought by the respondents, which application remains pending. I refer to this procedural history where apposite below. Suffice to observe for the present purposes that delay is not one of the grounds of objection raised by the respondents and the matter has not as yet proceeded to trial nor does it appear that any of the procedural antecedents to trial, such as discovery or requests for further particulars, has occurred.
- [5] Before addressing each of the particular objections raised by the respondents, it is necessary briefly to traverse the relevant legal principles pertaining to applications for amendment and objections to proposed amendments.

RELEVANT LEGAL PRINCIPLES

- [6] The fundamental principles governing amendments to pleadings are well-developed.¹ The court may at any stage before judgment grant leave to

¹ See generally *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC); *Moolman v Estate Moolman* 1927 CPD 27.

amend a pleading, subject to an appropriate order as to costs.² In exceptional circumstances, courts have even entertained and allowed amendments to pleadings on appeal.³ The reason for this is fundamental and was expressed as follows in the memorable passage from *Whittaker v Roos*:⁴

“This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. ... Therefore, the Court will not look to technicalities, but will see what the real position is between the parties.”

[7] The court expressed it as follows in *Rishton v Rishton*:

There is, however, another principle in our practice, and that is to allow a party, up to the very last stage of the case, the full right to amend, so that the Court may not be deceived or judgment may not be wrongly given against the party, and also to enable the Court to know exactly the nature of the dispute and the facts of the dispute in a particular case.⁵

[8] These old authorities have repeatedly been reaffirmed by our courts and the principles were recently conveniently restated by the Supreme Court of Appeal in the as yet unreported case of *Media 24 (Pty) Ltd v Nhleko* (“**Media 24**”).⁶

[9] Where the trial process is at an advanced stage, and one of the parties seeks to amend its pleadings; such as where the trial has already commenced, evidence has been led, there has been judgment on a separated issue or, in rare cases, where the matter is already on appeal, our courts have developed particular principles to guide the exercise of the court’s discretion as to whether to allow the amendment. Again, there is good reason for this. The deeper the parties are in the trial proceedings, the greater the risk of prejudice to the other party which cannot be remedied through a costs order alone. In *Caxton v Reeve Forman*,⁷ Corbett CJ endorsed the statement of the court in

² Uniform Rules of Court, Rule 28(10).

³ Superior Courts Act, 10 of 2013, section 19(d); *Ciba-Geigy (Pty) Ltd v Lushhof Farms (Pty) Ltd en ‘n Ander* 2002 (2) SA 447 (SCA) (“**Ciba-Geigy**”).

⁴ *Whittaker v Roos and Another* 1911 TPD 1092 at 1102.

⁵ *Rishton v Rishton* 1912 TPD 718 at 719.

⁶ *Media 24 (Pty) Ltd v Nhleko* (Nicholls JA, Gorven, Hughes and Goosen JJA and Unterhalter AJA) 2023 ZASCA 77 (29 May 2023), paras [16]-[19] (“**Media 24**”); and see *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638B and 641B (“**Trans-Drakensberg Bank**”).

⁷ *Caxton Ltd and Others v Reeve Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) (“**Caxton v Reeve Forman**”).

Trans-Drakensberg Bank pertaining to late amendments to pleadings as follows:

“Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles. These principles are well summed up in the judgment of Caney J in *Trans-Drakensberg Bank* [cited above] at 640H - 641C. In portion of the passage referred to Caney J states (at 641A) –

‘Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show *prima facie* that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable’.”⁸

- [10] The Supreme Court of Appeal in *Ciba-Geigy*, relying on both *Caxton v Reeve Forman* and *Trans-Drakensberg Bank* summarised the considerations that apply when a party wishes to amend his pleadings at an advanced stage of the proceedings. First, the applicant must show that it did not delay its application after it became aware of the evidentiary material upon which it proposes to rely. Second, it must explain the reason for the amendment and show *prima facie* that it has something deserving of consideration, a triable issue. The court explained further what is meant by a “trialable issue”; namely: (a) a dispute which if it is proved on the basis of the evidence foreshadowed by the applicant in his application, will be viable or relevant or (b) a dispute which will probably be established by the evidence thus foreshadowed. It is important to note that the court emphasised that in a case of a timeous and less disruptive application, it will usually not be appropriate to require the applicant to indicate how he proposes to establish his amended case. The court emphasised further that the applicant’s prospects of succeeding with its cause of action as amended will properly only be an element in the exercise of the court’s discretion where the amendment is sought at an advanced stage of the proceedings. The greater the disruption caused by an amendment, the greater the indulgence sought and, accordingly, the burden upon the applicant to convince the court to allow the amendment.⁹ These principles were again applied in *Consol Glass v Twee Jonge Gezellen* relying on the above authorities.¹⁰

⁸ *Caxton v Reeve Forman* at 565G-I.

⁹ *Ciba-Geigy* paras [34]-[43].

¹⁰ *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* (2) 2005 (6) SA 23 (C) at [21].

- [11] Against these principles, I consider the objections raised by the respondents to the proposed amendments to the particulars of claim.

THE RESPONDENTS' OBJECTIONS

- [12] The objections raised by the respondents rest on the contention that the proposed amendments do not, in certain specified respects, raise a triable issue because were they to be allowed they would render the particulars of claim excipiable. As the respondents correctly point out, our courts will not generally allow an amendment which would render a pleading excipiable.¹¹
- [13] This is not an exception. Accordingly, the court presented with an objection on this basis must make a preliminary finding on whether there is a likelihood that the proposed amendments, if allowed, would render the particulars of claim excipiable on the grounds advanced by the objecting party. The approach of the court in deciding exceptions is well known and it is not necessary to set out the relevant principles exhaustively here. The approach was encapsulated by the Constitutional Court as follows:

“In deciding an exception a court must accept all allegations of fact made in the Particulars of Claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.”¹²

- [14] The respondents raise four essential grounds of objection and I address these in turn.

First ground of objection: The absence of Ministerial approval

- [15] The applicant's primary cause of action is premised on a so-called “Facility Agreement” allegedly entered into between the applicant and the respondents whereby the applicant, on certain terms, extended loan funding for film productions. The applicant is a public funding entity whose establishment, objects and operation are governed by the National Empowerment Fund Act (**“the Act”**).¹³

¹¹ See, for example, *Krishke v Road Accident Fund* 2004 (4) SA 358 (W) at 363B.

¹² *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC), para [15].

¹³ National Empowerment Fund Act 105 of 1998.

- [16] In terms of the Act, the governance of the applicant is vested in its trustees. The trustees have the power to advance funding in accordance with the objects of the applicant.¹⁴ Amongst other statutory powers, in terms of section 16(2)(k) of the Act, the trustees have the power to:

“enter into an agreement or arrangement regarding the terms and conditions of payment of money due to the Trust and the abandonment of any claims by the 50 Trust, subject to the approval of the Minister [of Trade and Industry] with the concurrence of the Minister of Finance;”¹⁵

- [17] The first objection raised by the respondents, in essence, is that the applicant has not demonstrated that the approval and concurrence of the respective Ministers was obtained prior to the applicant extending funding to the respondents in terms of the Facility Agreement. The respondents explain this ground of objection as follows in the answering affidavit:

“The principal basis upon which the respondents oppose the application to amend the Particulars of Claim is that the applicant (“*the NEF*”) has not shown that a triable issue exists in that it has not put up any evidence to demonstrate that the NEF obtained the prior approval of the Minister of Trade and Industry and the Minister of Finance before purporting to conclude the Facility Agreement, on which agreement the NEF relies as its cause of action.”¹⁶

- [18] Elsewhere in the answering affidavit the respondents reinforce this ground of objection as follows:

“It will be argued at the hearing of this application that the failure by the NEF to put up any evidence to show that it obtained the prior approval of the Minister of Trade and Industry and the Minister of Finance before purporting to concluded the Facility Agreement with the first, third and fourth respondents, results in the inability of the NEF to show that a triable issue exists. For this reason alone, the amendment should be refused.”¹⁷

- [19] In my view there are at least three fundamental difficulties with this objection. In order to appreciate these difficulties, it is necessary to have regard to the relevant portions of the proposed amended particulars of claim.

- [20] In paragraph 3 of the particulars of claim, the applicant pleads that on the specified date, the applicant with the approval and concurrence of the

¹⁴ Act, sections 3, 4 and 16.

¹⁵ Act, section 116(2)(k).

¹⁶ Answering affidavit: para 6.

¹⁷ Answering affidavit: para 45.

respective Ministers, entered into the facility agreement with the first respondent. In paragraph 8 of the proposed amendment, the applicant pleads:

“Prior to the capital amount being loaned and advanced, as aforesaid, the advanced conditions – as set out in annexure “A” to the Facility Agreement – including the conditions precedent to the facility agreement, were duly fulfilled, alternatively waived.” (emphasis added)

[21] In paragraph 11 of the proposed amended particulars of claim, the applicant pleads:

“Alternatively to paragraph 3 above:

11.1 in the event of the court finding that the Minister of Trade and Industry, either with or without the concurrence of Minister of Finance, did not approve of the conclusion of the Facility Agreement or that the loan amount to loaned and advanced to the first defendant, then and in such event it is alleged that the Facility Agreement is and remains valid and binding, irrespective thereof whether the Minister of Finance gave prior approval, with or without the concurrence of the Minister of Trade and Industry for the finance agreement to be concluded or the loan amount to be loaned and advanced to the first defendant. ...”

[22] Having regard to the actual wording of the proposed amended particulars of claim, the first difficulty with this objection is that it is contrary to the well-established approach to excipiability as set out above. The court at the exception stage will take the pleaded allegations as proved. The plaintiff is required only to plead the essential allegations necessary to sustain a cause of action, and not the underlying evidence.¹⁸

[23] As appears from the relevant portions of the pleading (particularly paragraphs 3 and 8), the applicant’s primary allegation in this regard is that the funds were advanced with the relevant Ministerial approval and concurrence and “pursuant to and acting in terms of the facility agreement”,¹⁹ and that all conditions were duly fulfilled. This necessarily includes statutory conditions. The court will not at the exception stage go behind the pleadings in order to assess the evidence in support of the pleaded case. That is a matter for the trial court.

[24] In the course of argument, it was strongly impressed upon me by counsel for the respondents that in assessing whether the proposed pleadings raise a triable issue I may, and should, in the exercise of my discretion, have regard

¹⁸ *McKenzie v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16 at 23; see also *Goosen v Reed* 1955 (2) SA 468 (T) at 481.

¹⁹ Proposed amended particulars of claim, para 7.

to the failure by the applicant to produce evidence of the alleged Ministerial approval and concurrence in terms of the Act. In this regard, it was submitted that the applicant had had ample opportunity to present such evidence including in the answering affidavit in the application to dismiss brought by the respondents as well as in the affidavits in the present application for leave to amend. In this regard, counsel for the respondent placed particular reliance on the *Consol v Twee Jonge Gezellen* case (cited above).²⁰

- [25] The reliance on *Twee Jonge Gezellen* is, in the present circumstances, in my view misplaced. As appears from my discussion of the relevant legal principles above, *Twee Jonge Gezellen*, like *Ciba-Geigy* and *Caxton v Reeve Forman* are all cases which deal with the special circumstances where an amendment is sought at an advanced stage of the trial proceedings. In *Twee Jonge Gezellen*, for example, there had already been a trial on a separated issue and evidence had already been led. In *Ciba-Geigy*, the matter was already on appeal. In such cases particular considerations are relevant to the exercise of the court's discretion, and the court may, depending on the nature of the objection, have regard to reasons for the delay as well as whether evidence has been advanced to sustain a *prima facie* case on the proposed amended pleadings.
- [26] This, however, is not such a case. Whatever the reasons for the long procedural history, the trial has not commenced, no trial date has been set and none of the trial preliminaries have even occurred. Accordingly, in my view, this is a case where the default principle pertaining to objections applies; namely, that a court will facilitate ventilation of the true issue between the parties.
- [27] The second fundamental difficulty with this objection is that it is premised on a specific interpretation of the Act, and in particular the provision for Ministerial approval and concurrence in section 16(2)(k). In this regard, the objection rests on the premise that the concurrence and approval is peremptory in respect of the validity of the agreement, that such concurrence and approval must be extended by the respective Ministers in respect of each and every funding agreement which the applicant enters into and must be given in advance. These are all questions regarding the ultimate interpretation of the relevant provisions of the Act.
- [28] In argument, counsel for the respondents rightly conceded that the ultimate interpretation of these provisions of the Act is not a question for this court in the amendment application. That concession was rightly made. In *Twee Jonge*

²⁰ *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 23 (SCA) ("**Twee Jonge Gezellen**").

Gezellen itself the court reaffirmed that courts are reluctant to deal with ultimate questions of interpretation at the objection stage when an amendment of a pleading is being sought.²¹ In that case the court was prepared to consider the interpretative issue only because evidence had already been led.

- [29] Accordingly, unless the construction urged by the respondents is the only plausible construction of the relevant provision, this court will not readily make a final determination on this issue. As appears from the portion of the pleadings quoted above, the applicant in the proposed amended particulars of claim has pleaded in the alternative that on a proper construction of the Act, the absence of prior Ministerial approval and concurrence is not fatal to the agreement.²²
- [30] On the face of it, the applicant's is not an implausible interpretation. Our courts have previously held in relation to such statutory provisions that a subsequent contract is not necessarily invalidated by the failure of the requirement of authorisation and that a private party cannot opportunistically rely on the absence of such authorisations or approvals to escape its obligations.²³ The question of whether the absence of concurrence and consent by the relevant Ministers is peremptory and would invalidate any subsequent contract, as well as the form that such concurrence and consent must take (whether it is required to be given in each instance of funding or may be given on a more general basis; e.g. by approval of the applicant's budget or funding plans) is a question of the proper construction of the relevant provisions of this particular Act. The proper construction of this particular provision must be determined with reference to the wording of the provision itself but read in the context of the Act as a whole and with due regard to the purpose of the provisions. This will be a question for the court seized with finally determining the issue and in respect of which evidence may be relevant and admissible. I am reinforced in this view by the more recent restatements of our courts regarding the proper approach to interpretation.²⁴
- [31] The third and final reason that this objection cannot be sustained in my view is that the primary cause of action as pleaded by the applicant in the proposed amended particulars of claim, as appears above, is that the requisite conditions, including the statutory consents, were satisfied. The allegations

²¹ *Twee Jonge Gezellen* at para 59. In that case the court was prepared to consider the interpretative issue as evidence had already been led.

²² Proposed amended particulars of claim, para 11.1.

²³ See, for example, *Oilwell (Pty) Ltd v Protec International Ltd* 2001 (4) SA 394 (SCA), paras [15]-[25]. See also, *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others* [2011] 2 All SA 46 (SCA) at para [14]; *Merry Hill (Pty) Limited v Engelbrecht* 2008 (2) SA 544 (SCA) at para [23].

²⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

that Ministerial consent and approval was not required is pleaded in the alternative. As already indicated, it is not for this court to go behind that primary allegation. Accordingly, even if the applicant is ultimately wrong in the contention that Ministerial approval and consent was not a peremptory precondition to the agreement, that forms part of the alternative cause of action and its failure would not be fatal to the particulars of claim in their proposed amended form.

- [32] For each of the above reasons, I consider that the first objection cannot be sustained.

Second ground of objection: The pleaded waiver

- [33] As appears from paragraph 8 of the proposed amended particulars of claim (quoted above), the applicant pleads that the conditions precedent to the Facility Agreement were duly fulfilled. In the alternative, the applicant pleads that these conditions were waived.

- [34] The respondents' second objection is that the Facility Agreement²⁵ requires that any such waiver must be delivered by written notice at any time. The applicant has not alleged in its particulars of claim that it delivered such written notice of waiver and accordingly, on the respondents' objection, the Facility Agreement never came into existence.²⁶

- [35] In my view this second ground of objection fails for similar reasons that pertain to the first ground of objection. First, the waiver is plainly pleaded as an alternative cause of action. Our courts have repeatedly held that exceptions which strike only at an alternative cause of action will generally not be allowed.²⁷ The purpose of an exception is to short-circuit the conduct of an unnecessary trial and to obviate the leading of unnecessary evidence.²⁸ An exception to an alternative cause of action will rarely achieve this purpose. That is certainly so in the present case. Even if one were to excise the waiver cause of action, that would not remove the need for a trial on the main cause of action. Accordingly, the reliance on this alternative cause of action is unlikely to render the pleadings excipiable.

- [36] In any event, in my view, the requirement of written notice of waiver is a matter for evidence at trial. Should the applicant be unable to prove such written waiver in accordance with the agreement then the alternative cause of action is unlikely to succeed, though I obviously express no final view on this. The

²⁵ Clause 4.2.

²⁶ Objection: paras 2 - 4.

²⁷ *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 796.

²⁸ *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F-I.

respondents contend that the applicant has had ample opportunity to produce evidence of the written waiver either as an annexure to the particulars of claim or in their affidavits in the various interlocutory applications, including the present application, and that the applicant therefore has failed to raise a triable issue in this respect. For the reasons articulated in relation to the first objection, I disagree. This is not an instance where amendment is sought in the advanced stages of trial proceedings. Accordingly, the applicant was, and is, under no obligation to produce its evidence, which is a matter for trial.

Third ground of objection: Prescription

- [37] In paragraph 11.2 of the proposed amended particulars of claim, the applicant introduces a further alternative cause of action based on enrichment. In essence it is pleaded that in the event that the trial court were to find that the Facility Agreement fails for want of Ministerial approval and concurrence then the applicant entered into the agreement in the bona fide but mistaken belief that the agreement was valid and binding, that the first respondent took receipt of and retained the loaned funds, and that the first respondent was accordingly unjustifiably enriched by its receipt and retention of the loaned funds (“**the enrichment claim**”).
- [38] The respondents object to the introduction of this alternative enrichment claim on the basis that it is a new cause of action that “was not interrupted by service of summons in this action, which took place in November 2014”, and that the enrichment claim has prescribed.²⁹
- [39] In argument this objection was expanded to include the complaint that no evidence is foreshadowed in the application that the applicant entered into the Facility Agreement and advanced the funding under the *bona fide* but mistaken belief that the agreement had been validly concluded.³⁰
- [40] In my view, as counsel for the applicant contended, this ground of objection confuses the cause of action with the underlying debt. As the court in *Allied Steelrode (Pty) Ltd v Dreyer* (per Van der Linde J) stated:

“For the purposes of prescription, one is not concerned with the cause of action but instead one is concerned with a debt. That is a concept which is wider than a cause of action. It has been held to encompass ‘*whatever is due under any obligation, an obligation to do something or refrain from doing something*’.”³¹

²⁹ Objection: paras 13 - 15.

³⁰ Respondents’ heads of argument: paras 28 and 29.

³¹ *Allied Steelrode (Pty) Ltd v Dreyer* 2019 JDR 1973 (GJ), para [25]; see also *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825F-G and *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA), para [6].

- [41] In my view, the alternative enrichment claim which the applicant now seeks to introduce rests on the same alleged underlying debt as the main claim which interrupted prescription.
- [42] In addition, the further complaints regarding the failure by the applicant to produce evidence in the application in support of the alternative enrichment claim, cannot be sustained for the same reasons articulated in respect of the first two grounds of objection. The applicant was not obliged to produce evidence at this stage of the pleadings or in support of the application for leave to amend. That is a matter for trial. Moreover, in that the enrichment claim which is sought to be introduced is an alternative claim, its excision is unlikely materially to curtail any subsequent trial proceedings.

Fourth ground of objection: The calculation of interest

- [43] The final ground of objection raised by the respondents is that the calculation of interest as pleaded does not accord with the provisions for calculation of interest under the Facility Agreement.
- [44] I note in passing that this is a curious ground of objection, premised as it is on the validity of the Facility Agreement, whereas the respondents' other objections rest on the alleged invalidity of the Agreement. Be that as it may, I do not consider that this is a valid ground for objecting. The question of the correct determination of interest is a matter for the pleadings and ultimately a question of quantum at trial. This is therefore quintessentially an issue for the respondents to raise in their plea should they see fit to do so. It cannot be determined at the objection stage.

CONCLUSION AND COSTS

- [45] I find, for the reasons set out above, that none of the respondents' objections are sustainable. It follows that the applicant must be granted leave to amend its particulars of claim.
- [46] The default position in respect of costs is that the amending party will ordinarily bear the costs of the amendment unless this is opposed. The applicant duly tendered the costs of the amendment. The opposition to the amendment and the objections raised have occasioned costs that would not otherwise have been incurred. The question is which party is to bear these costs. The applicant contended that costs should follow the result.
- [47] It was urged upon me by the respondents that should I decline to uphold one or more of the objections and allow the amendment, then I should reserve the

question of costs for the trial because it may in due course, when the issues are fully ventilated at trial, become apparent that a ground of objection was not unreasonable. I do not consider that this is the correct approach. The question as to whether the objections to the application for amendment are reasonable is to be assessed by this court in the present circumstances.³²

[48] I do not, therefore, see that it is appropriate to defer this question of costs in the present application for the trial judge who will not have had the benefit of full argument on the merits of the application, as I have. Accordingly, I believe the appropriate order is that the costs of the amendment are to be borne by the applicant up until time of objection and opposition to the proposed amendments. Thereafter, costs are for the unsuccessful party, namely the respondents.

[49] In accordance with the agreement between the parties which I mentioned at the outset to this judgment, my reasoning in respect of the Cloverleaf Films application applies in all material respects to the Ironwood Films application. I accordingly make the following orders in each of the applications respectively –

Order in the Cloverleaf Films application:

1. The applicant (plaintiff in the trial action) is granted leave to amend its particulars of claim.
2. The particulars of claim are amended in accordance with the plaintiff's notice of intention to amend dated 9 May 2022.
3. The respondents are directed to pay the costs of the application, such costs to include the costs of two counsel, where employed.

Order in the Ironwood Films application

1. The applicant (plaintiff in the trial action) is granted leave to amend its particulars of claim.
2. The particulars of claim are amended in accordance with the plaintiff's notice of intention to amend dated 9 May 2022.
3. The respondents are directed to pay the costs of the application, such costs to include the costs of two counsel, where employed.

³² *Media 24* para [21].

A. D. STEIN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 20 February 2023
Judgment: 28 February 2024

Appearances:

For Applicant: Adv R Stockwell SC and Adv L Franck
Madhlopa & Thenga Inc.

For Respondents: Adv G Elliott SC
Thomson Wilks Inc.