



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 35967/2010

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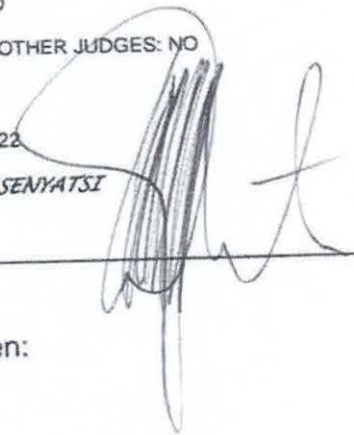
(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 29 JULY 2022

SIGNATURE: *ML SENYATSI*



In the matter between:

TRANSNET LIMITED

Applicant

and

ERF 152927 CAPE TOWN (PTY) LTD

Respondent

In Re:

ERF 152927 CAPE TOWN (PTY) LTD

Plaintiff

and

TRANSNET LIMITED

First Defendant

REGISTRAR OF DEEDS, CAPE TOWN

Second Defendant

JUDGMENT

SENYATSI J:

INTRODUCTION

- [1] This is an application for leave to amend the plea and file a counter-claim in the main case that is pending before this court. The applicant is Transnet Limited ("Transnet") and the respondent is Erf 152927 Cape Town (Pty) Limited ("Erf")
- [2] It must be mentioned that the main action was case managed and culminated into being certified trial ready. However, 14 (fourteen) days before the trial date Transnet brought an application to amend its plea and file a counter-claim and caused the trial to be postponed *sine die*. It is those two applications which are the subject matter of this judgment.
- [3] In the normal scheme of things, it would not be a problem to amend pleadings as the amendment application may also be launched on the date of trial. However, the background of this case, paints a completely different picture because effectively, the amendment application is brought some 22 years later, well after the order penned by Schabert J.

- [4] In order to be able to appreciate the application for the amendment of the plea and the counter-claim launched by Transnet, it is important to set out the chronological background of this matter which started in 1998 and culminated in 2010 which by agreement between the parties was referred to trial for oral evidence. It is the 2010 application which has been certified trial ready during case management which, despite the trial date being fixed and agreed to, had to be postponed *sine die* owing to this application.

BACKGROUND

- [5] During 1998, Erf acquired the right to purchase Erf 152927 ("the property") from Transnet by agreement and in accordance with the specified contractual process. From that date, Transnet has attempted to shy away from the obligations imposed by the agreement between the parties in so far as the exercise of option to purchase the property is concerned. In other words, Transnet has decided to take a detour from the path of allowing Erf to acquire the property as agreed.
- [6] The parties were involved in various litigious steps including an attempt by Transnet to evict Erf from the property forming the subject of this application. For the record, the eviction application failed in the Western Cape High Court and the appeal against that judgment which was in favour of Erf was dismissed by the Supreme Court of Appeal. In 2019, Moosa AJ (as he then was) dismissed the Exception application and found in favour of Erf and also restated the importance of the judgment by Schabert J ("the Schabert order") in this division which was handed down during September 2019.

- [7] It is also important to note that over many years, the property was the subject of lease to various entities by Transnet. The rights of the lessees on the option to purchase the property were ceded and assigned to those entities with the consent of Transnet. However, by February 1998, MacPhail (Pty) Ltd ("McPhail") was both lessee and option holder. On 18 February 1998, MacPhail exercised the option to purchase the property. As it was entitled to do, MacPhail nominated Erf as the purchaser of the property in respect of the sale agreement resulting from the exercise of the option. This was the position recognised during the protracted litigations between the parties leading to not only the dismissal of the eviction attempt by Transnet but also through the exception application referred to above in the present pending application.
- [8] Despite an attempt by Transnet to repudiate its obligations under the option agreement, as already stated above, Erf obtained a declaratory order in the Johannesburg High Court on 29 October 1998, confirming that Erf was entitled to enforce the agreement of sale resulting from the exercise of the option and directing Transnet to take all steps as may be required and necessary to transfer the property to Erf. The Court recorded that the property was at the time an unregistered consolidated Erf. It remains such.
- [9] That order notwithstanding, Erf has still not received transfer of the property, largely due to delays in obtaining the necessary regulatory approvals required to register the property as a consolidated erf. Transnet has since 2007 and despite the court

order which has not been assailed, adopted a stance that, on various grounds it is not obliged to transfer the property.

[10] In terms of the "Schabert Order", the following was held under case number 98/22546 that:-

- "2.1. ... McPhail (Pty) Ltd On 18 February 1998 on behalf of the applicant duly exercised the option referred to in paragraph 7, 8 and 9 of the affidavit of Solomon Slom filed in these proceedings;
- 2.2. Applicant duly ratified and adopted the exercising of the option and is entitled to enforce the resultant agreement of sale;
- 2.3. Applicant within 5 Days of the granting of this order respondent nominates and instructs available in terms of clause 6.3.1 of the option agreement;
- 2.4. In the event of applicant not electing to withdraw the exercise of its option in terms of clause 6.3.3 of the option, directing Respondent to take such steps as may be required and be necessary to transfer the immovable property being Erf 15297 Cape Town in the City of Cape Town, Cape Division, Western Cape Province in extent 5,1230 hectares as appears more fully from diagram S.G. no: 5082/1993, its being recorded that such property is at present an unregistered consolidated Erf, the component Erven of which are Erf 152926 (a portion of Erf 23303) Cape Town ("the

immovable") to applicant against payment of the purchase price and other transfer costs;

2.5. Alternatively to 2.4 and only in the event of Respondent failing to take all the necessary and required steps within 10 (ten) days after having been required to do so, ordering and directing the sheriff to take all the necessary and required steps, and to sign all documents on behalf of respondent in order to transfer the immovable property to the Applicant;

2.6. Respondent was ordered to pay the costs of this application, including the costs of two counsel save that the costs of the appearance at the hearing of the matter will be on the unopposed scale and for one Council."

[11] The Schabert order was never challenged. In fact the application leading to the order, had initially been opposed by Transnet, but opposition was later abandoned and on Transnet's own papers the opposition was abandoned on the legal advice to do so. In other words, Transnet was fully aware of the application and took part in the exchange of papers until it abandoned its defence.

[12] In the pending action Erf, seeks relief that Transnet be ordered to comply with its obligations to transfer an immovable property ("Erf 152927") to Erf at the agreed price pursuant to the exercise of an option as agreed on 18 February 1998. This will be properly dealt with by the trial court.

TRANSNET'S CASE

[13] In its application to amend its plea, Transnet seeks to insert the following paragraph after paragraph 5.3:

- "1. When it concluded the second cession, McPhail did so on its own behalf and it did not do so "as a trustee for a company to be formed" by it. When Transnet consented to the second cession, it did so on the basis that it was consenting to MacPhail being the recipient of the option rights and the purchaser of the option property if the option were to be exercised.
2. The Plaintiff did not become entitled to the benefits of the second cession and of the option agreement and did not become the purchaser of the option property.
3. The only basis on which McPhail could exercise the option rights as a trustee for a company to be formed was if it concluded the second cession as a trustee for a company to be formed and if there had been compliance with the provisions of section 35 of the Companies Act 61 of 1973 ("the 1973 Act") when the Plaintiff was incorporated and after its incorporation.
4. There was no compliance with the provisions of section 35 of the 1973 Act when the Plaintiff was incorporated and could not have

been valid compliance therewith after its incorporation as a result of which the second cession was not validly rectified and adopted.

5. In the premises:

5.1. the second cession is no a pre-incorporation contract as contemplated in the 1973 Act;

5.2. the second cession was not validly rectified;

5.3. the second cession is invalid and unenforceable against the first Defendant;

5.4. there was no valid exercise of the option in so far as the second cession is invalid.

6. The second cession is accordingly invalid and unenforceable against the First Defendant.

2. By inserting the following paragraphs after paragraph 6.5.3.

1. The Schabert order was based on false evidence which the First Defendant did not know was false at the time when it was granted.

2. The evidence placed before Justice Schabert and on the basis of which the order was granted diverged from the truth

to such an extent that Justice Schabert would not have granted the order if he knew that the evidence was false.

3. In support of its application to obtain the Schabert order, the Plaintiff alleged that there was compliance with section 35 of the 1973 Act as far as the second cession is concerned when in fact and in truth there was not compliance therewith

4. When making the aforesaid allegations, the Plaintiff knew that they were false and made them in order to induce Justice Schabert to grant the Schabert order. The Schabert order was granted on the basis that there was compliance with section 35 of the 1973 Act when in fact and in truth there was no such compliance.

5. In the premises:

- 5.1. the Schabert order ought to be set aside;
- 5.2. the First Defendant is entitled to an order declaring that the option was not validly and lawfully exercised;
- 5.3. the Schabert order is not enforceable against the First Defendant.

3. By inserting the first defendant's counter-claim at the end of the plea, a copy of which was attached to the application

[14] In support of its application Transnet now avers that the market value of the property far exceeds the option price. This in my respective view should not be permissible, for reasons that will follow later on in this judgment. It cannot be denied of course that the value of the property may well be in excess of what it was in terms of the option price given that so many years have passed since that agreement was concluded.

[15] The issue for determination is whether or not the application for amendment of the plea and insertion of the counter-claim can be permitted under the circumstances.

LEGAL FRAMEWORK

[16] The Amendment of pleadings is regulated by Rule 28 of the Uniform Rules of Court. Rule 28(10) of the Rules grants a court discretion to grant leave to amend any pleadings or documents at any stage before judgment on such other terms as to costs or other matters as the court deems it fit.

[17] It is trite that the primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real and triable issues between them, so that justice may be done.¹

¹ See *Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2020] 3 All SA 445 (GJ) at para 8; *Blaawberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 All SA 129 (SCA) at 133H-I; *Trans-Drakensburg Bank Ltd v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638 A.

- [18] The basic requisite is that an amendment will not be allowed in circumstances (*my own emphasis*) which will cause the other party such prejudice as cannot be cured by an order for costs and where appropriate a postponement.²
- [19] The applicable principles provide that amendment will always be allowed unless the application to amend is mala fide or unless the amendment would cause an injustice to the other side which cannot be compensated by costs.³
- [20] The power of courts to allow material amendments is, therefore limited by considerations of prejudice or injustice to the opponent.⁴
- [21] An amendment would cause prejudice to the other side which could not be compensate by costs if the parties cannot be put back or the purpose of justice in the same position as they were when the pleading it is sought to amend was filed.⁵
- [22] There may be cases where no terms would overcome the prejudice which the amendment would cause to the other party, such as for example, where the amendment is applied for at such a late stage in the proceedings and not timelessly raised to enable proper investigation and response thereto.⁶

² Ergo Mining (Pty) Ltd v Ekurhuleni Metropolitan Municipality (supra) at para 8; Trans- Drakensburg Bank Ltd v Combines Engineering (Pty) Ltd (supra) at 638H – 639C.

³ See Moolman v Estate Moolman 1927 CPD at 29

⁴ See Devonian Shipping Ltd v MV Luis (Yeoman Shipping (Co Ltd intervening) 1994 (2) SA 363 (C) AT 369G; Rosner v Lydia Swanepoel Trust 1998 (2) SA 123 (W) at 127 D –G

⁵ See Moolman v Estate Moolman (supra) at 29; South British Insurance Co Ltd v Glisson 1963 (1) SA 289 (D) at 295H

⁶ See Tengwa v Metrorail 2002 (1) SA

- [23] The onus is on the party seeking the amendment to show that the other party will not be prejudiced by it.⁷
- [24] If a new grounds for defence comes to the defendant's knowledge for the first time after it has filed its plea, it will be allowed to amend its plea, and provided the application is *bona fide* (*my own emphasis*) and not prejudicial to the opponent such amendment will be allowed.⁸
- [25] An admission is unequivocal agreement by one party with a statement of fact by the other party.⁹ The effect of an admission is to render it unnecessary for the plaintiff to prove the admitted fact.¹⁰
- [26] Although the test for an amendment is the same in the case of the withdrawal of an admission, the withdrawal of an admission is usually more difficult to obtain:¹¹
- (a) It involves a change of plan which requires a full explanation to convince the court of the *bona fides* thereof; and

⁷ See *Trans-Drakensburg Bank Ltd v Combined Engineering (Pty) Ltd* (supra) at 640H

⁸ See *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province* 2020 (3) SA 391 (ECB) at paras 16 and 17; *Frenkel, Wise & Co Ltd v Cuthberth* 1947 (4) SA 715 (C); *Flemmer v Ainsworth* 1910 TPD 81

⁹ See *Botha v Van Niekerk* 1947 (1) SA 696 (T) at 703

¹⁰ See *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1150D; *AA Mutual Insurance Association Ltd v Biddulph* 1976 (1) SA 725 (A) at 735; section 15 of the Civil Proceedings Amendment Act 25 of 1965

¹¹ See *JR Jamisch (Pty) Ltd v WM Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 170 C-G; *President Versekerings maatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H – 111A

- (b) it is more likely to prejudice the other party, who had, by reason of admission, been led to believe that it need not prove the relevant fact and right and, for that reason, have omitted to gather the necessary evidence.

[27] The court will therefore, in exercise of its discretion, require an explanation of the circumstances under which the admission was made and the reasons for now seeking to withdraw it.¹²

[28] A litigant who seeks to add new grounds of relief at the eleventh hour does not claim such an amendment as a matter of right but rather seeks an indulgence.¹³

[29] The applicant seeking an amendment must prove that it did not delay the application after it became aware of the material upon which it proposes to rely. It must further explain the reason for the amendment and show *prima facie* that it has something deserving of consideration; that is a triable issue.

A triable issue is:¹⁴

- (a) a dispute, which, if it is proved on the basis of the evidence foreshadowed by the applicant in its application, will be viable or relevant; or

¹² See *Bellairs v Hodnett* (supra) at 1150 F-H; *JR Jamisch (Pty) Ltd v WM Spilnanse & Co (WP) (Pty) Ltd* (supra) at 170G; *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W) at 57 C; *South British Insurance Co Ltd v Glisson* 1983 (1) SA 289 (D)

¹³ See *Goelach & Gomperts 1967 (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 9281

¹⁴ See *Consol Ltd t/a Consol Glass v Twee Jonge Gesellen (Pty) Ltd* 2005 (6) SA 23 (C) at 361-J

(b) dispute, which will probably be established by the evidence thus foreshadowed.

[30] The greater the disruption caused by the amendment, the greater the indulgence sought and the burden upon the applicant for amendment to convince the court to accommodate it.¹⁵

REASONS FOR THE JUDGMENT

[31] According to Transnet the Schabert order was granted on an unopposed basis and in its absence. This cannot be correct because Transnet was involved in the litigation and withdrew its defence on the advice of its legal representative. Consequently, the Schabert order is a final judgement to which the exception *rei judicata* rule applies. The *res judicata* principle provides that the litigant is precluded from bringing to court for adjudication the same matter based on the same facts that have already been adjudicated by another court. If the amendment were to be allowed, it will revisit what the other courts and in particular what the Schabert order has already made a determination on.

[32] Mr Tsatsawane SC, on behalf of Transnet, referred this court to *Pitelli v Everton Gardens Project (CC)* where the court said the following:¹⁶

¹⁵ See *Ciba-Geigy (Pty) Ltd v Sushol Farms (Pty) Ltd* 2002 (2) SA 447 (A) at 462J-463B; 463E & 464E-H

¹⁶ 2010 (5) SA 171 (SCA) at 176

"[27] An order is not final for the purposes of an appeal merely because it takes effect, unless it is set aside. It is final when the proceedings of the Court of first instance are complete and that court is not capable of revisiting that order. that leads one inevitably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable... it is not appealable because such an order is capable of being rescinded by the court that granted it and it is thus not final in its effect."

[33] Whilst I take note of the conclusion by the court in the *Pitelli* case, the facts in that case are distinguishable to the present case. In *Pitelli* judgment was obtained by default for amounts claimed and the counter-claim was dismissed. Leave to appeal as well as the rescission application were heard by the court of first instance simultaneously and both were refused by that Court and taken on appeal to the Supreme Court of Appeal.

[34] In the present case, Transnet was involved in the litigation before the Schabert order was obtained. It withdrew its opposition to the declaratory order which found in favour of Erf. There is no doubt that this was not an order obtained by default. I therefore disagree with the submission made on behalf of Transnet in that this court is bound to follow what the court said in *Pitelli*.

[35] Furthermore, in the present case, when the Schabert order was obtained despite being aware of the facts, Transnet failed to file opposition to the relief sought. Transnet declined to file an answer and this has led to undue delay in giving effect to that order for a period running into 22 years.

[36] I am of the considered view that the application for an amendment and counter-claim have been filed in bad faith as an attempt to revisit Transnet's failure to raise a defence in the Schabert order granted more than 22 years ago. The attempt by Transnet to explain that it came across new information as a result of the discovery process is not persuasive. I say this based on the fact that Erf was incorporated many years ago and its records are of public record and were obtainable during the marathons of legal action between the parties. Processes such as approval letters of the cessions and assignments as well as the steps to get the property subdivided were all done by Transnet as it was required to do in terms of the option agreement. The attempt to now explain the reason for the inordinate delay in filing the leave for amendment of plea and counter-claim is done to revisit what has already been decided by the courts of the Republic and should be impermissible. It follows in my respectful view that Transnet has failed to discharge the onus to show it acted bona fide in bringing an application to amend at this late stage since 2010, when the action was initiated by Erf. Its failure to do so timeously can only be ascribed to its concerted efforts to frustrate Erf and to not give effect to the Schabert order.

[37] Transnet's further submission that the President's commission report to place moratorium on the transfer of Transnet's property should not be permissible as this will clearly undermine the judicial authority and respect to an existing court order.

[38] I have also considered the fact that, when Transnet sought to evict Erf from the property, the Supreme Court of Appeal found in favour of Erf¹⁷ by dismissing the appeal against refusal of the eviction on the subject property, by the Western Cape High Court. Van Heerden JA made the following observation when handing down the judgement

"[10] The rights of the lessee and the option holder were over the years ceded and assigned to various entities. However by February 1998, McPhail (Pty) Ltd (McPhail) was both the lessee and the option holder. On 18 February 1998, McPhail exercised the option to purchase the property. As it was entitled to do (own emphasis). McPhail nominated the first respondent as the purchaser of the property in respect of the sale agreement resulting from the exercise of the option."

[39] It is evident from the passage quoted above that the courts of the Republic have pronounced on the validity of the exercise of the option. It follows therefore that to allow Transnet to amend the plea as proposed and to permit the issuing of a

¹⁷ See *Transnet Ltd v Erf 152927 Cape Town (Pty) Ltd and Others* (798/2010) [2011] ZASCA 148

counter-claim would amount to trying to unscramble the proverbial egg on which legal pronouncements have been made. This will go against the exception *rei judicata* principles already alluded to above. The argument raised by Transnet on this point stands to be rejected.

[40] It should be remembered that the action proceedings were scheduled to be heard in February 2020 after being certified trial ready, but the matter was not ripe for hearing. This was occasioned by the belated filing of the proposed amendment to the plea and the attempt to introduce counter-claim by Transnet.

[41] In its founding affidavit Transnet contends that it was only alerted to the possible defence, 22 years after the Schabert Order due to the insight into the Commission Report which it alleges was only available to it by Erf through the discovery process in December 2020. This contention cannot succeed as the option exercised is unaffected by the Commission's Report. In my respectful view, the report has no bearing whatsoever to the option exercised by Erf.

[42] Transnet also contends that there is no prejudice to Erf in it seeking to rescind the Schabert Order 22 years later. I do not agree with this submission. The perusal of the papers clearly shows that Erf will be prejudiced. The attorney who represented Erf in relation to obtaining the Schabert Order and all matters pertaining to that application is deceased. The assistant to that attorney is also deceased. It is clear, in my view, that all the documents relating to that application

are unlikely to be available. In any event, records are casually kept for 5 years and memories in fact fade over time. A period of 22 years for the purposes that Transnet is trying to justify its attack on the Schabert Order is a life time and only Erf will clearly be prejudiced. It is the view of this court that the prejudice should be avoided at all costs. Transnet therefore has failed to persuade me to exercise discretion to allow for the amendment of the plea as Erf will clearly suffer a significant prejudice.

[43] Transnet now contends that it is acting in the public interest in refusing to comply with its contractual obligations. This is not a plausible explanation. Transnet is a public body, but the windfall gain that it seeks to achieve in averting its obligations to transfer the property to Erf are reflected in its own financial statements and not those of the public coffers. It can only be concluded that Transnet is acting out of self-interest and not in the public interest. As an Organ of State, Transnet is obligated to honour its obligations and not breach them.

[44] The attempt by Transnet to introduce a counter-claim is done in bad faith, it amounts to attempt to revisit its failure to raise a defence and counter-claim 22 years after the fact and should not be permitted. On the facts, Transnet does not show that it had a valid defence to the Schabert order let alone the counter-claim in that motion proceeding. It is for that reason that the introduction of a counter-claim should not be allowed by this Court

- [45] It should be stated that the pending action was referred to trial by consent between the parties. This is an action that started in 2010. It should be further noted that in that action, *inter alia*, it plead prescription and which will be dealt with at trial in the pending application.
- [46] In addition, the defence and counter-claim that Transnet seeks to introduce did not feature in its opposing affidavit to the 2010 application. There was also no attempt, as already stated in this judgment, made to rescind the Schabert Order on the basis now proposed and Transnet is in my view acting in bad faith.
- [47] To give a proper context to the repudiation of obligations by Transnet, it should be stated that clause 5 of the option agreement obliged Transnet to ensure that all subdivision conditions necessary to effect transfer would, by the date of any exercise of the option, be fulfilled. Transnet's obligations under clause 5 of the option commenced upon conclusion of the option agreement in October 1987.
- [48] After the purchase price had been finalised between the parties, Erf expected that transfer of the property would be effected within a reasonable period as a result Erf was content that Transnet would comply with its obligations in terms of clause 5 of the option agreement. However, Transnet did not comply with its obligations.
- [49] It is evident from the papers that the subdivision of the property had not been done. In fact Transnet failed to inform Erf that it had obtained the approval from

the Cape Town City Planner for the subdivision of the property granted in terms of section 25(1) of the Land Use Planning Ordinance No15:15 of 1985.

- [50] Transnet failed to disclose the March 1993 approval to Erf and also failed to disclose the fact that it had allowed the approval to lapse. It should be remembered that the property was an unregistered Erf. Clause 5 of the option provided that anticipation of the exercise of this option, shall be incumbent on Transport Services (which later became Transnet) to procure the subdivision, including the survey, preparation and approval of sub divisional diagrams as may be necessary in order to enable the transaction to be implemented forthwith upon exercise thereof.
- [51] Erf knew about the March 1993 approval when a copy was obtained only much later in 2001 by Mr Rory Mill who had been instructed by Mr Lombard on behalf of Erf to attend to all town planning and legal requirements to be complied with by Transnet so that transfer of the property could be registered in favour of Erf.
- [52] The March 1993 approval had approved the subdivisions, the City Planner had imposed Transnet an obligation to advise the intending buyers of portion A and B (being what would be Erf 152927) in writing of the need to apply to the City to have the portions rezoned to an appropriate land use subsequent to transfer thereof. Transnet failed to provide Erf with such notification for land use requirement.

[53] Transnet was and still is in breach of its obligations as it has not done all that was necessary to complete the subdivision conditions. Furthermore, Transnet failed to take steps to ensure that the conditions to the consent first given by the City in terms of the March 1993 approval to the creation of erf 152927 were fulfilled. This led to the lapse of the March 1993 approval which now requires a fresh application. Transnet's attempts to amend its plea and the request for leave to file a counter-claim are clearly designated to frustrate efforts to give effect to the option agreement as confirmed by the Schabert order.

[54] It is clear to me that the pending action was launched by Erf as a result of Transnet's failure to comply with its obligations to take the necessary steps to transfer the property. The submission made on behalf of Transnet that the pending action was a demonstration that the Schabert Order was not final and has no factual support and legal basis. I hold this view on the basis that the courts of this Republic have pronounced on the validity of the option and the exercise thereof.

[55] Transnet has raised in the pending action, various defenses and these defenses as that stand, ought to be dealt with at trial. I have also given consideration to the judgment on exception in assessing whether this court can exercise its discretion by allowing the amendment and the filing of the counter-claim. When the exception was dismissed with costs on 31 October 2019,¹⁸ the court held as follows:

¹⁸ Erf 152927 Cape Town (Pty) Ltd v Transnet (case no 35967/2010) Gauteng Local Division (unreported)

"[12] It is common cause that Transnet did not act in accordance with the Schabert order and neither did it lodge an appeal nor seek rescission of such order. In the circumstances, the Schabert order stands, unassailed, and no contention contrary to its terms or inconsistent with its reasoning is tenable or permissible...

[28] Having carefully considered the respective arguments, as well as the contents of the Schabert order, I am inclined to agree with [Erf] that the so-called Henderson principle which is incorporated in the exception rei judicata, precludes Transnet from now seeking to open the same subject litigation in respect of matters which might have been brought forward as part of the subject in contest before Schabert J."

[56] I turn to paragraph 1 of the Schabert order which reads as follows:

'Declaring that McPhail (Pty) Ltd on 18 February 1998 on behalf of the [Erf] duly exercised the option ('the option') referred to in paragraph 7, 8 and 9 of the affidavit of Solomon Slom filed in these proceedings.'

Further, in terms of paragraph 2 of the aforementioned order, it was declared, that (Erf) duly ratified and adopted the exercising of the option and is entitled to enforce the resultant agreement of sale.'

- [57] I am of the view that such finding could not have been legitimately and ordinarily pronounced by Schabert J if he had not determined that Coalcor as trustee of a company to be formed by it ceded and assigned the rights of that company to be formed by it to McPhail and Transnet had consented thereto. To this end, (Erf) argued that Transnet is therefore precluded in terms of the exception *res judicata* from placing this in issue. As already indicated, the exception *rei judicata* raised by Erf is correct in law and the facts of this application.
- [58] In the circumstances, I am not convinced that the application for amendment of plea by Transnet raised new triable issues and should be refused.
- [59] It should be remembered that after the exception was dismissed, Transnet delivered a special plea and plea on the merits. It is evident that Transnet is persisting with most of the grounds it raised in its exception, notwithstanding that they are inconsistent with the Schabert Order and the exception judgment.
- [60] Having considered the papers, the written heads of argument and the oral submissions made on behalf of both parties, I am not persuaded that under these circumstances, that the court should exercise its discretion by allowing the proposed amendments as well as leave to file the counter-claim by Transnet. In my view, the application for leave to amend the plea and file a counter-claim cannot succeed and must be refused.

ORDER

[61] The following order is made:

- (a) The application for leave to amend the plea and file a counter-claim is refused with costs on the scale as between client and attorney.

A handwritten signature in blue ink, appearing to read 'ML. SENYATSI', is written over a horizontal line. The signature is stylized with a large loop at the beginning and a series of vertical strokes.

ML. SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 29 November 2021

Date of Judgment: 29 July 2022

APPEARANCES

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