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

CASE NO: 68226/2010

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

Date: 27 March 2025

Signature: K. La M Manamela

In the matter between:

BLAIR ATHOLL HOMEOWNERS ASSOCIATION

First Plaintiff

WRAYPEX PROPRIETARY LIMITED

Second Plaintiff

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Defendant

DATE OF JUDGMENT: This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge's secretary. The date of the judgment is deemed to be 27 March 2025.

JUDGMENT

Khashane Manamela, AJ

A : INTRODUCTION

A1 *General*

[1] This judgment relates to two interlocutory applications brought by the defendant, City of Tshwane Metropolitan Municipality ('Tshwane'), the defendant in the action or main proceedings, on the eve of the trial (continuing) in a part-heard matter initiated over a decade ago by the first plaintiff, Blair Atholl Homeowners Association NPC ('Blair Atholl') and the second plaintiff, Wraypex (Pty) Limited. Wraypex is not taking part in these applications and the action.

[2] The action by Blair Atholl concerns disputes on the quantity of water supplied by Tshwane to and/or consumed by Blair Atholl estate and the charges associated therewith. The action, actually, morphed from urgent proceedings launched in December 2010 by Blair Atholl. In terms of an order granted - years later - on 17 April 2014 by Preller J the matter was referred to trial or arbitration.¹

[3] The current interlocutory applications were brought by Tshwane for leave to amend its pleadings, and for postponement of the trial. Both applications were vigorously opposed by Blair Atholl on a number of grounds. I considered it opportune and sound to deal with both applications by way of this (single) judgment. The issues in the applications are – to some considerable degree – inextricably intertwined, although I have tried my earnest to deal with the applications under separate (and, perhaps, self-explanatory) subheadings, as set out in the table of contents appearing under this paragraph. The table provides a layout or quick guide on locating the contents of the two applications, indicating their joint and divergent areas.

¹ Pars [8]-[28] below, for a brief background to the matter (i.e. Part B).

Table 3: Layout or table of contents of the material in the applications for leave to amend and for postponement

Item	Paragraphs	Issue	Leave to Amend	Postponement
1.	1-3	A: INTRODUCTION <i>A1 General</i>	✓	✓
2.	4	<i>A2 Application for leave to amend (introduced)</i>	✓	
3.	5-7	<i>A3 Application for postponement of the trial (introduced)</i>		✓
4.	8-28	B: BRIEF BACKGROUND	✓	✓
5.	29-95	C: APPLICATION FOR LEAVE TO AMEND	✓	
6.	96-101	D: APPLICATION FOR POSTPONEMENT OF THE TRIAL		✓
7.	102	E: CONCLUSION	✓	✓
8.	103-104	F: ORDER	✓	✓
9.	103	Leave to Amend Order	✓	
10.	104	Postponement Order		✓

A2 Application for leave to amend (introduced)

[4] On 30 October 2024, just over three weeks before the continuation of the trial in the action or part-heard matter, Tshwane launched the application for leave to amend its pleadings (i.e. plea and counterclaim). The application was heard on 21 November 2024, three days before the recommencement² of the ten-day trial, on 25 November 2024. Ms T Mkhwanazi appeared, jointly with Ms P Mathibela, for Tshwane and Mr P Lourens appeared for Blair Atholl. Due to the significance of the

² The trial in the matter was postponed in Term 4 of 2023 after a ten-day hearing. See pars [23], [28], [96] *et seq* below.

issues to the parties and for future disposition of the matter, as well as the need for the Court to properly reflect on same, this judgment was reserved. By that time, the postponement of the trial had become inevitable.

A3 *Application for postponement of the trial (introduced)*

[5] In addition to seeking amendment of its papers, Tshwane applied for postponement of the trial. A lead member (i.e. senior counsel) of Tshwane's legal team had withdrawn earlier in the month of November 2024. He had been involved in the matter for around ten years. Tshwane or its legal representatives have not indicated the reason for the senior counsel's withdrawal, but considerations to replace him were – at some stage - indicated.

[6] The withdrawal of senior counsel became a cumulative factor (in Tshwane's application for postponement) to the main issue: amendment of Tshwane's pleadings. Also, the timing of the application to amend rendered the issue of the postponement of the trial in November 2024 unavoidable. What remained of the application for postponement was the determination of liability for costs and associated issues. Consequently, it was agreed in one of the case management meetings before the trial that there was no need for a formal application for postponement of the trial, but only argument as to the costs occasioned by or associated with the postponement.

[7] On 25 November 2024 - at the commencement of the trial - the Court heard argument by counsel on the nature and extent of the liability for costs of postponement of the trial. The appearances were as in the application for leave to amend, referred to above. After listening to submissions by counsel, I granted an order for the trial to be postponed *sine die*. But, I considered it opportune – in the wake of the reserved judgment in the application for leave to amend – to also defer my ruling on the liability for costs of the postponement of the trial. One of the considerations in this regard was the implications of the tender of costs made by Tshwane to Blair Atholl about two weeks before date of trial. Therefore, in my view, the issues did not take a conventional form and deserved of a further reflection. Regrettably, it took longer than initially anticipated to hand down this judgment.

B : GENERAL BACKGROUND

[8] The issues to be determined in the current applications before the Court, particularly the application to amend, stretch over a decade back. Some brief narration of the background to the matter is necessary to place context on the issues. The issues are - largely - common cause between the parties, or the contrasting view would be highlighted.

[9] Blair Atholl approached this Court on an urgent basis in December 2010 after Tshwane had interrupted the water supply to the Blair Atholl estate.³ The parties were at loggerheads with each other regarding the scale of tariffs applicable for the water supplied by Tshwane to the Blair Atholl estate. Litigation ensued when, apparently, Blair Atholl had not paid its water bills received from Tshwane for about two years. In the urgent court, Blair Atholl sought relief which - primarily – was in the form of a declarator on the rate to be used by Tshwane to charge for water supplied to Blair Atholl estate in terms of the Engineering Services Agreement (the ‘ESA’), concluded between Tshwane and Wrapex, the developer of the Blair Atholl estate, on 3 February 2006. Blair Atholl claimed that - on a proper application of the terms of the ESA - it ought to be charged at the rate used by Tshwane for bulk water supply to other municipalities or local governments. The urgent application came before Webster J (now late) in December 2010, when Blair Atholl was ordered to make two specified payments to Tshwane on specified dates and with Tshwane interdicted from limiting or discontinuing water supply (as long as Blair Atholl has made the payments) until the final disposal of the matter.

[10] Following the conclusion of the ESA and development of the Blair Atholl estate, Blair Atholl, the homeowners association, was incorporated to legally succeed Wrapex, the developer, as a party to the ESA and its ramifications. Tshwane’s answer in the urgent application included a counter-application, also for declaratory relief, for Blair Atholl to be declared in arrears in respect of accounts for

³ Par [30] below on what constitutes Blair Atholl estate.

the supply of water held with Tshwane and, consequently, that Tshwane be entitled to restrict supply of water to Blair Atholl.

[11] A second urgent application in the matter later came before Preller J in February 2011 when the parties concluded an interim agreement regarding water supply. The learned judge pronounced on the application after period of more than three years has elapsed on 17 April 2014. Other than referring the matter to trial, Preller J directed that Blair Atholl pay for water supplied to its estate by Tshwane at the rate of 'bulk supply' plus 10%, pending the conclusion of the action (contemporaneously ordered) to evolve from the urgent motion. Costs of the latter were deferred for determination by the trial court hearing the action between the parties.

[12] Pursuant to the judgment by Preller J, the action ensued when pleadings were exchanged between the parties. The relief sought by Blair Atholl was the same as in the urgent application, although Blair Atholl added, as an alternative, a prayer for rectification of the ESA so that reference to 'normal rate' be altered to 'bulk normal rate' with regard to charges by Tshwane for water consumed by Blair Atholl. Essentially, Blair Atholl sought to be charged by Tshwane under the category 'bulk water supply' to other municipalities.⁴ The main reason for this comes from the history of the development of the Blair Atholl estate. Blair Atholl was responsible for construction of the water supply infrastructure to its estate and remains responsible for the internal water reticulation.

[13] Tshwane disputed Blair Atholl's claim, mainly, on the basis that the rate or scale insisted upon by Blair Atholl for water supply charges by Tshwane, was not in accordance with the statutory or legal instruments governing Tshwane's water supply. Tshwane also filed a counterclaim – in the main – seeking payment for water supplied and charged at its rate of Scale D.

⁴ Tshwane's varying scale of rates for the supply of water, including the following: (1) Scale A: 'agricultural holdings and farm portions for residential purposes excluding consumers under Scale C'; (2) Scale B: 'single dwelling-houses (metered separately by the Municipality and excluding dwelling-houses from which an unregistered business is run)'; (c) Scale D: All Consumers Who Do Not Fall Under Scale A, B, C and E'; (e) Bulk Water Supply to Other Municipalities'.

[14] Blair Atholl defended Tshwane's counterclaim, among others, and replicated that the invoked rate of water supply was in terms of special arrangements entered into in terms of the ESA and that this is permissible in terms of the Municipal Systems Act 32 of 2000, lest the impugned statutory or legal instruments are contrary to the prescript of the Constitution of the Republic of South Africa, 1996 ('the Constitution').

[15] The action ripened for trial before Murphy J. On 30 August 2017, the learned judge ordered a separation of issues in terms of Uniform Rule 33(4) and decided the issue of the applicable rate for water supply and interpretation of clause 6.16 of the ESA, whilst postponing Tshwane's counterclaims *sine die*. The learned judge held that the 'normal rate of the Municipality' referred to in the ESA is the normal rate charged for bulk water supply to other municipalities and, consequently, directed Tshwane to render accounts to Blair Atholl using that rate.

[16] Dissatisfied with the judgment by Murphy J, Tshwane approached the Supreme Court of Appeal of South Africa ('the SCA'). The SCA handed down its judgment on 3 December 2018 in favour of Tshwane and, thus, upheld the appeal. The order made by the SCA, reflected in its reported decision in *City of Tshwane Metropolitan v Blair Atholl Homeowners Association*,⁵ set aside the order by Murphy J and declared that the 'normal rate of a municipality' in the ESA is not the rate charged for bulk water supply to other local governments. The SCA remitted the remaining issues to this Court for further hearing.⁶

[17] After the SCA judgment, the parties engaged in activities to get the matter ready for trial again. In some respects, they sought to engage on some of the issues to find a resolution in what I can label curtailment of the issues. These included case management process overseen by Van der Schyff J.

[18] But the parties are said to have begun discussions around the water consumption and amounts owing by Blair Atholl to Tshwane as far back as March

⁵ *City of Tshwane Metropolitan v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA).

⁶ *City of Tshwane v Blair Atholl* [2019] 1 All SA 291 (SCA) [80].

2016. Some form of agreement was apparently reached in April 2016 between the parties (whereat Tshwane was represented by Ms Benita van Rede van Oudtshoorn (conveniently - with respect – referred to as ‘Ms VRVO’) and Blair Atholl was represented by Mr Nico Maas (‘Mr Maas’)) based on reconciliations provided by Tshwane. According to Tshwane, the agreement reached formed a basis upon which the parties agreed to a separation of issues in terms of Rule 33(4), which included the quantity of bulk water supplied by Tshwane to Blair Atholl,⁷ although the rate or tariff of the water supply charges remained a hotly contested issue between the parties. As indicated above, the judgment by Murphy J decided the matter on a limited basis and was successfully taken on appeal to the SCA by Tshwane.⁸

[19] On 7 July 2021, Ms VRVO, from the billing and invoicing department of Tshwane, sent an email to functionaries of Blair Atholl including Mr Maas with attachments in the form of figures or reconciliations for water supplied and/or consumed by Blair Atholl according to Tshwane.⁹ Mr Maas responded to the email by Ms VRVO on the same date stating the following:

Benita, from your spreadsheet, copy attached, the total consumption through all the meters at Blair Athol since inception up to 6 July 2021, the following summary:

1 Total consumption through meters for account ending in 3576

= 2 082 379 kl

2 Total consumption through meters for account ending in 4851

= 757 714 kl

3 Total consumption through both meters

= 2 840 093 kl

Are these the figures you wish us to confirm?¹⁰

[20] Ms VRVO, also, replied to Mr Maas in the evening of the same date with a ‘Yes’ and the conversation concluded on 8 July 2021 with Mr Maas saying:

⁷ Par [15] above on the separation of issues in terms of Rule 33(4).

⁸ Pars [15]-[16] above.

⁹ Founding Affidavit (‘FA’), annexure ‘ARA4’, CaseLines 029-129.

¹⁰ FA, annexure ‘ARA4’, CaseLines 029-128.

Thanks Benita, there is then not much to discuss about the monthly or annual consumption.

We accept the total consumption through all the meters from 31 March 2008 to 6 July 2021 to be 2 840 093 kilolitres (Two million Eight Hundred and Forty Thousand and Ninety Three kilolitres).¹¹

[21] The email conversation between Ms VRVO and Mr Maas is pivotal to the current application for leave to amend by Tshwane and Blair Atholl's opposition thereof. What was ultimately agreed between these two functionaries on behalf of their respective principals (i.e. Tshwane and Blair Atholl) is conveniently referred to as 'the July Agreement'.

[22] The next month in August 2021 the legal representatives for the parties held a pre-trial conference. The terms of 'the July Agreement' were confirmed at the pre-trial conference. The latter confirmation is referred to by Blair Atholl as 'the August Pretrial Agreement'. I agree with Tshwane that the so-called 'the August Pretrial Agreement', essentially, was a confirmation of 'the July Agreement', as opposed to a new agreement reached between the legal representatives. But not much would really turn on this and in a quest to comport with the adopted references, I retained references to 'the August Pretrial Agreement'.

[23] Fast forward to 2023. The matter came before me for trial scheduled to run for ten days from 13 to 24 November 2023 ('the 2023 hearing'). The trial in the 2023 hearing proceeded - albeit with conventional challenges, but on the tenth day the proceedings halted at the beginning of the day due to an unfortunate incident (outside of the Court the previous afternoon) involving Tshwane's erstwhile senior counsel. By then Blair Atholl had closed its case - in the main - save for what it labelled a rebuttal witness, still to be called. Tshwane had also tendered the evidence of two witnesses and was busy with that of its third witness. On the tenth day, on 24 November 2023, the trial in the 2023 hearing was postponed *sine die* with wasted costs of the tenth day reserved.

¹¹ FA, annexure 'ARA4', CaseLines 029-127.

[24] On 17 May 2024, I convened a case management meeting in the matter attended by both teams of legal representatives. This was to ensure that the matter will be ready to run (by way of a trial), once allocated. Of greater significance for current purposes, was the agreement reached at the meeting that any interlocutory issues or applications which may arise between the parties should be disposed of during the third term of 2024 (i.e. 22 July to 22 September 2024). The parties had confirmed availability for a hearing or trial in the matter in the fourth term of 2024. Ultimately, the matter was enrolled for ten-day trial from 25 November 2024.

[25] On 30 September 2024, Tshwane delivered a notice of intention to amend its plea and counterclaim ('the Notice to Amend'). This was objected to by Blair Atholl on 14 October 2024 ('the Objection').

[26] On 30 October 2024, the application to amend ensued. It was initially to be heard on 19 November 2024, but could not proceed on that day due to the unavailability of Tshwane's counsel. I deal with the latter aspect - for purposes of costs of the application - below.¹² As stated above, the application for leave to amend was heard on 21 November 2024, when this judgment was reserved.

[27] On 8 November 2024, Tshwane had tendered to Blair Atholl – through their respective legal representatives – the costs occasioned by the amendment sought and wasted costs for the postponement of the trial. Evidently, there was no agreement reached in this regard.

[28] On 25 November 2024, the trial in the part-heard matter was postponed *sine die*. This followed an application for postponement also at the instance of Tshwane. The postponement of the action was ordered and the only issue outstanding in that regard relates to costs occasioned by the postponement. This application is dealt with below, after the application for leave to amend, to which I turn, next.

C : APPLICATION FOR LEAVE TO AMEND

¹² Par [95] below.

C1 *Pleadings currently before the Court (i.e. prior to the amendment sought)*

[29] As indicated in the background, although Blair Atholl commenced these proceedings by way of urgent motion, the proceedings were converted into an action by an order of the Court.¹³

[30] In terms of the (consequential) declaration delivered on 30 May 2014, Blair Atholl, is the first plaintiff, and Wraypex was cited as the second plaintiff. Wraypex is the developer of the townships in the Blair Atholl estate comprising Blair Athol Extensions 1, 2, 3 and 4, situated within Tshwane's jurisdiction, and other townships in the Mogale City Municipality.

[31] In its declaration, Blair Atholl – in short – asserts that it is only liable to pay Tshwane for water and other services received from Tshwane to the extent that Blair Atholl is a consumer of such services, as envisaged by relevant legislation. Blair Atholl contends that it is not liable for water and other services provided by Tshwane to the owners of erven or residential units ('homeowners') within the Blair Atholl's estate. Also, that the ESA does not bind Blair Atholl to collect payments due by the homeowners for services provided to them by Tshwane. For such an obligation to arise Tshwane requires service delivery agreements with the homeowners. It is also argued that, Tshwane – and not Blair Atholl – has an obligation to provide municipal services to the homeowners in terms of the law. Any provisions in the ESA placing such obligation on Blair Atholl would be unlawful and, therefore, invalid. Consequently, Blair Atholl seeks declaratory relief to that effect. Another term of the relief sought by Blair Atholl is that Tshwane ought to charge for municipal services it provides to Blair Atholl and the homeowners at the 'normal rate', as well as costs of the litigation in the action (to which this application relates) and the other motion proceedings under case number 9654/2013.¹⁴

[32] Tshwane denies the assertions by Blair Atholl. It denies that the ESA is not a service delivery agreement envisaged by the relevant legislation. Tshwane says that

¹³ Pars [2] and [11] above.

¹⁴ Relating to the urgent application before Southwood J on 14 February 2013.

in February 2008 it received two written applications from Blair Atholl for the supply of water to Blair Atholl. Blair Atholl also paid the requisite deposit and the applications were approved by Tshwane. These led to the two accounts being opened for the supply of water, including account number 5[...]2 ('the 3576 account') which is of particular relevance to this application. Accordingly, the supply of water is in accordance with the terms of the two applications. Tshwane, in terms of the applications, supplied Blair Atholl with bulk water through the specific meters in respect of the two accounts (i.e. account number 5[...] and the 3576 account). After the accounts were opened, tax invoices or statements of account were issued by Tshwane to Blair Atholl for the water consumption in respect of the accounts, including those dated 6 July 2021 and 15 July 2021.¹⁵ It is the water consumption indicated in the latter statements which were admitted at the case management meeting of 16 August 2021, including the tally of 2 082 379 kl for the 3576 account for the First Period (i.e. since inception to 6 July 2021).

[33] Blair Atholl is the supplier of water to the homeowners within the estate through its own 'operated and maintained ... internal water supply system'.¹⁶ Blair Atholl, as averred by Tshwane, issued tax invoices and statements of account to the homeowners within its estate and received payment for same. Tshwane says it has always understood the dispute with Blair Atholl (until the declaration was amended) to be only about the applicable tariff to be used for the water charges and never that Blair Atholl had no agreement with Tshwane for the water supplied and the liability therefor. Therefore, according to Tshwane, Blair Atholl owes or owed Tshwane the amount of R10 186 768.63 in respect of account number 5[...], due and payable on 29 July 2021, and the amount of R44 797 243.38 in respect of the 3576 account, due and payable on 5 August 2021.

[34] Tshwane, significantly, repeats in the counterclaim what is stated in its plea. The counterclaim was amended during the 2023 hearing, consequentially, to Blair Atholl's amendment of its declaration.

¹⁵ Annexures 'CTM8' and 'CTM9'.

¹⁶ Tshwane's Plea and Counterclaim at par 28.5.4, CaseLines 018-119.

[35] Tshwane's counterclaim comprises two claims. Claim 1, set out in the latter part of paragraph [33] above, is for water supplied to Blair Atholl at Tshwane's normal tariff and for administrative fees and interest levied in terms of the by-laws. Claim 2 is for confirmation (or declaration) that Tshwane – in terms of the law – has a statutory right to restrict or disconnect the supply of water and other services to Blair Atholl estate, when Blair Atholl, as a consumer, among others, fail to make full payment on the due date or to make acceptable arrangements for the repayment of any outstanding amounts for services rendered.

[36] Blair Atholl disputes the averments in Tshwane's Plea and Counterclaim. It is also fair to mention that there are further issues (in the pleadings) than what is reflected above. I only wanted to reflect the pertinent issues in the pleadings for current purposes.

C2 Notice to amend /application to amend

[37] Tshwane's intended amendment is directed towards its plea and counterclaim. This pleading, as indicated above, was previously amended during the 2023 hearing. There were also consequential adjustments to Blair Atholl's pleadings. Blair Atholl included reliance on the July Agreement and the so-called 'August Pretrial Agreement', as part of its defence to Tshwane's amended counterclaim.

[38] Tshwane, now, wants to amend its plea to 'correct' the July Agreement and record the total water consumed by or supplied to Blair Atholl on the 3576 account for the First Period as 3 082 379 kl, instead of 2 082 379 kl. Notably, the difference between the two figures is 1 million kl of water. Tshwane says the lower figure is incorrect and was the result of a *bona fide* mistake on the part of its Ms VRVO when reaching the July Agreement with Blair Atholl's Mr Maas in respect of total consumption for the First Period. Tshwane, also, refers to the situation which led to what it calls 'incorrect' or mistaken recording of the kilolitres reading, as a 'mutual justus error between the parties'.¹⁷ According to Tshwane the total water supplied to Blair Atholl on the 3576 account from inception to 9 September 2023 (i.e. beyond the

¹⁷ FA par 26.6, CaseLines 029-44.

First Period) is 3 523 352 kl. Tshwane also wants to correct the references to annexures to its pleadings.¹⁸ The latter issue appears not to be opposed by Blair Atholl.

[39] Tshwane explains the ‘incorrect’, ‘mistaken’ or erroneous recording as being the result of ‘10 clock overs’ of 100 000 kl each on meter number 1[...] which allowed for 5 digits and consequently could only allow measuring a maximum of 99 999 kl of water before it ‘clocked over’ to zero.¹⁹ This led to an incorrect assessment of the actual consumption on the 3576 account. The so-called ‘clock overs’ were not included by the parties in calculating the water usage/consumption for the First Period in respect of the 3576 account, Tshwane continues. Accordingly, there was a mutual error or *iustus* error as the parties’ representatives were both of the view that the actual consumption on the 3576 account was 2 082 379 for the First Period, as borne by their e-mails. Tshwane, further, says that the quantity of kiloliters consumed was not in the circumstances a settlement of a disputed quantity after a negotiated bargaining process. And, on the other hand, Mr Maas did not strike a bargain in the sense that there was one or other discount in consumption units given to Blair Atholl by Tshwane. What is attempted to be placed before the Court through the intended amendment is the true consumption figures in respect of the 3576 account, the contention by Tshwane concludes.

C3 Blair Atholl’s grounds of objection

[40] Blair Atholl’s Objection to Tshwane’s proposed amendment is based on six grounds, which may be summarised as follows: (a) First ground. The July Agreement and the August Pretrial Agreement subsequently incorporated into the pleadings constitute a ‘compromise’ of Tshwane’s claim for the First Period. (b) Second ground. The proposed amendment seeks to ‘impermissibly’ ‘avoid, set aside, rescind or resile’ from the August Pretrial Agreement and constitutes a withdrawal of factual admission(s) by Tshwane. (c) Third ground. There are no allegations to sustain the *iustus* error contended for by Tshwane in respect of the August Pretrial Agreement.

¹⁸ Notice of Motion par 1 of the amendment on p 2, CaseLines 029-2.

¹⁹ The ten clock overs are said to have occurred from the 28th of October 2011 and 29th July 2015. See FA pars 31-33, CaseLines 029-52 to 029-54.*

The requirements for a defence of *iustus* error are lacking, alternatively there are insufficient allegations to establish such a defence, including in the proposed amendment. (d) Fourth ground. Rectification of the August Pretrial Agreement is impermissible. This ground was later abandoned when it became clear that it wasn't implicated in the proposed amendment. (e) Fifth ground. Any claim which Tshwane may have had based on the 1 million kilolitres of water has prescribed after a period of three years from the August Pretrial Agreement. (f) Sixth ground. The proposed amendment would introduce material in conflict with the evidence already on record and Tshwane does not have evidence to establish the allegations to be introduced by the proposed amendment. Also, the amendments sought are objectionable due to their timing (i.e. at an advanced stage of the trial and after 'extensive evidence' has been led by both parties) and implications (i.e. leading of further evidence and even the calling and recalling of witnesses). Overall, the amendment sought is not *bona fide* and would be prejudicial to Blair Atholl, if allowed.

C4 *Issues requiring determination*

[41] From what appears above, the following appears to be issues which ought to be determined to dispose of this application: (a) was 'the July Agreement' or 'the August Pretrial Agreement' a 'compromise' of Tshwane's claim; (b) is 'the August Pretrial Agreement' incapable of variation or being set aside or for Tshwane to resile from it; (c) can Tshwane's proposed amendment withdraw any factual admission made; (d) was 'the July Agreement' and/or 'the August Pretrial Agreement' concluded due to a *iustus* error and is this defence borne by the proposed amendment; (e) did a claim for the 1 million kilolitres prescribe, and (f) will the proposed amendment introduce material conflicting with the evidence already on record; (g) does Tshwane have evidence to support the proposed amendment; (h) the timing of the amendment and its implications; (i) is the amendment *bona fide*, and (j) will Blair Atholl be prejudiced.

[42] A further issue requiring determination is the recalling of Ms VRVO to testify on the correct total water consumed by Blair Atholl on the 3576 account for the First Period. Leave will only be granted in this regard if the amendment is permitted, otherwise the door is closed for Ms VRVO's return.

[43] The above issues are discussed below, in some instances jointly due to interlinkages. But I do so after looking at some of the legal principles applicable to the issues.

C5 *Applicable legal principles*

General

[44] The central legal principle to this application is Uniform Rule 28 of this Court governing amendment of pleadings and other documents, including its subrule (10) providing for amendments at any stage of proceedings before judgment.

Basic principles to amendments

[45] The basic principles on the Court's discretion whether to grant or refuse leave to amend are accurately summarised in the durable decisions in *Trans-Drakensberg Bank v Combined Engineering*²⁰ and *Commercial Union Assurance v Waymark*,²¹ some of which are dealt with below, and emulated in other decisions.²² The discretion, no doubt, is to be exercised judicially on the basis of all the facts of a matter before the Court.²³ The principles gained the endorsement of the Constitutional Court in *Affordable Medicines Trust v Minister of Health*.²⁴

²⁰ *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and another* 1967 (3) SA 632 (D) at 640H-641C.

²¹ *Commercial Union Assurance Co Ltd v Waymark* NO 1995 (2) SA 73 (Tk) at 77F-I.

²² *Caxton Ltd and others v Reeve Forman (Pty) Ltd and another* 1990 (3) SA 547 (A) at 565G; *Benjamin v SOBAC (Pty) Ltd* 1989 (4) SA 940 (C) at 957G-H; *Magnum Simplex International (Pty) Ltd v MEC Provincial Treasury, Provincial Government of Limpopo* (556/17) [2018] ZASCA 78 (31 May 2018) [9]. See also DE van Loggerenberg, *Erasmus: Superior Court Practice* (Revision Service 24, 2024, Jutastat October 2024) ('*Erasmus: Superior Court Practice*') RS 25, 2024, D1 Rule 28-6 et seq; 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 (November 2021) at 675-693.

²³ *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) [33]. See generally *Herbstein & Van Winsen Civil Practice* at 676; *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 28-5.

²⁴ *Commercial Union Assurance v Waymark* 1995 (2) SA 73 (Tk) at 76-77; *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC) [9].

[46] The primary consideration in allowing amendment of pleadings or documents is to ensure ‘proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done’.²⁵ Further principles or considerations include: (a) to do justice between the parties; (b) to provide the Court with a true account of the facts in a matter, and (c) not to elevate a mistake made by the one party to entitle the other party to a claim of forfeiture.²⁶ The focus of the Court in leave to amend is on the real position beyond the cloud of issues of a technical nature.²⁷

[47] These principles are not to be understood to be elevating leave to amend to an enforceable right. It will always be an indulgence to be justified by the seeker.²⁸ But, the seeker should not be relegated to someone approaching the Court ‘cap in hand, seeking mercy for his mistake or neglect’.²⁹ For the Court is not to refuse leave merely to punish a neglectful litigant,³⁰ lest the whole exercise is tainted by elements devoid of judiciousness.³¹

[48] The touchstone for the grant or refusal of leave to amend is prejudice.³² An amendment should be refused if it would result in prejudice or injustice incapable of being cured or eliminated by an award of costs and, where appropriate, a postponement of the matter.³³ Prejudice may be eliminated wholly or at least materially or substantially so.³⁴

²⁵ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 638A. See also *Benjamin v SOBAC* 1989 (4) SA 940 (C) at 957I; *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (TK) at 76-77; *Randa v Radopile Projects CC* 2012 (6) SA 128 (GSJ) [7].

²⁶ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 638, 640E-F and the authorities cited there; *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 928D.

²⁷ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 638, 640E-F.

²⁸ *Benjamin v SOBAC* 1989 (4) SA 940 (C) at 957I-J.

²⁹ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 640-641.

³⁰ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 639B.

³¹ *GMF Kontrakteurs v Pretoria City Council* 1978 (2) SA 219 (T) at 222B-D; *Ciba-Geigy v Lushof Farms* 2002 (2) SA 447 (SCA) [33]. See generally *Herbstein & Van Winsen Civil Practice* at 676.

³² *Benjamin v SOBAC* 1989 (4) SA 940 (C) at 957J-958A. See also *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 640.

³³ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 638A, 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; *Randa v Radopile Projects* 2012 (6) SA 128 (GSJ) [7], [12].

³⁴ *Benjamin v SOBAC* 1989 (4) SA 940 (C) at 957H.

[49] It is also material to determine whether an amendment is sought *bona fide* or not.³⁵ In determining whether an application is sought *bona fide* the following is material: (a) new material facts which arose or became known making the application to amend necessary; (b) timeous application, and (c) whether the amendment would result in injustice (as with prejudice) which cannot be avoided by a postponement or an award of costs.³⁶

[50] The amendment, also, ought to have a reason and *prima facie* ‘something deserving of consideration, a triable issue’, lest it constitutes an impermissible harassment of an opponent due to lack of a foundation.³⁷ The amendment ought to contribute to the real or genuine issues between the parties.³⁸ Otherwise, such amendment would only prolong and complicate the proceedings to the prejudice (due to expenditure of time and money) of the opposing party facing such an amendment.³⁹

[51] There ought to be supporting evidence for the issues in the amendment, where evidence is required for an issue material to the amendment.⁴⁰ In other words, the facts, as set out in the papers, ought to bear out the intended amendment, lest it constitutes an intolerable abuse of process.⁴¹

[52] An amendment which would introduce a new factor into a matter would not be allowed if it would prejudice the opposing party by, for example, requiring that a witness - who had not yet been called - be called.⁴² The Court will allow all forms of

³⁵ *Moolman v Estate Moolman* at 29, cited with approval in *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 640. See also *Benjamin v SOBAC* 1989 (4) SA 940 (C) at 957H and *Randa v Radopile Projects* 2012 (6) SA 128 (GSJ) [12], where reference is made to several authorities.

³⁶ *Greyling v Nieuwoudt* 1951 (1) SA 88 (O) at 91; *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 640H. See also *Zarug v Parvathie* NO 1962 (3) SA 872 (D) at 876B-C on necessity of an amendment.

³⁷ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 641A. See *Caxton v Reeve Forman* 1990 (3) SA 547 (A) at 565G-566B.

³⁸ *Benjamin v SOBAC* 1989 (4) SA 940 (C) at 958A-C.

³⁹ *Benjamin v SOBAC* 1989 (4) SA 940 (C) at 958A-C.

⁴⁰ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 641A-B. See *Caxton v Reeve Forman* 1990 (3) SA 547 (A) at 565G-566B.

⁴¹ *Erasmus: Superior Court Practice* RS 23, 2024, D1 Rule 28-3 and the authorities cited there.

⁴² *Randa v Radopile Projects* 2012 (6) SA 128 (GSJ) [6], citing with approval from *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173.

amendments – including drastic ones – provided they do not raise new question which the opposing party would not be prepared to meet.⁴³

[53] In addition to the principles permeating into the substance of the amendment, there are principles applicable to the timing of or stage in the proceedings at which the amendment is sought. This is foreshadowed by Rule 28(10) allowing - in principle – the granting of leave to amend at any stage of the proceedings, before judgment.⁴⁴ But, delaying an amendment sought until late in the proceedings is not without risks.⁴⁵ The mischief guarded here is catching one's opponent off guard by knowingly refraining from or delaying to propose an amendment until late in the proceedings.⁴⁶ This, however, does not entitle the opposing party to base its objection to an amendment solely on the delay or late timing of the request for leave to amend.⁴⁷ For the courts do not promote 'an overly formal approach' entrenched against amendments made late in the proceedings, as this would allow substance of the process to yield to form.⁴⁸ Again, the primary issue remains whether prejudice would be visited upon the opposing party by allowing the amendment.⁴⁹

[54] The issue of delay was authoritatively dealt with in *Randa v Radopile Projects CC*⁵⁰ where the court aptly observed that: 'the commencement of a trial is the fulcrum upon which the courts' stance in respect of applications for amendments to pleadings should be balanced'.⁵¹ Further, it was observed that an amendment which is sought late, for example, at the trial stage of the proceedings, may be considered *mala fide*.⁵²

⁴³ *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876A-B, as quoted in *Lizinex (Pty) Limited v FPC Solutions (Pty) Limited and Others* (2022/17136) [2023] ZAGPJHC 1261 (3 November 2023) [22].

⁴⁴ Pars [44]-[45] above.

⁴⁵ *Middleton v Carr* 1949 (2) SA 374 (AD) at 385-386.

⁴⁶ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) 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* 2012 (6) SA 128 (GSJ) [13] and the other cases cited there.

⁴⁸ *Four Tower Investments (Pty) Ltd v André's Motors* 2005 (3) SA 39 (N) [19]; *J R Janisch (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 169H.

⁴⁹ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 642 C-D.

⁵⁰ *Randa v Radopile Projects* 2012 (6) SA 128 (GSJ).

⁵¹ *Randa v Radopile Projects* 2012 (6) SA 128 (GSJ) [4]-[5], [17].

⁵² *Randa v Radopile Projects* 2012 (6) SA 128 (GSJ) [17].

[55] Other principles relating to the granting of leave to amend late in the proceedings include the following: (a) Leave is not to be refused solely on the ground that it would lead to the reopening of the case for further evidence to be led, unless such evidence was deliberately omitted by the applicant for leave.⁵³ (b) Leave is not to be granted 'for the mere asking', but there should be an explanation for seeking the amendment and where the amendment was not timeously sought there ought to be reasonable and satisfactory grounds for the delay,⁵⁴ which delay, as already mentioned,⁵⁵ ought not to result in prejudice to the other party.⁵⁶

[56] The above general principles reflect the so-called liberal approach to amendments.

Formal agreements, admissions and concessions made within the context of litigation

[57] Blair Atholl, also, objects to the amendment sought by Tshwane as according to Blair Atholl same would amount to the withdrawal of a factual admission made in terms of 'the August Pretrial Agreement' and even during the 2023 hearing.

[58] Admissions made in pleadings can be withdrawn similarly to any other form of amendment.⁵⁷ But, the principle relating to the withdrawal of admissions includes that a party is not permitted to withdraw an admission already made without a full and satisfactory explanation. This does not suggest a special basket made up of amendments concerning withdrawal of admissions.⁵⁸ The test or primary principle remains the likelihood of prejudice and injustice.⁵⁹

[59] Besides withdrawal of admissions, there are withdrawals of material generated at pre-trial conferences. The decision of the SCA in *MEC for Economic*

⁵³ *Myers v Abrahamson* 1951(3) SA 438 C at 451A-D.

⁵⁴ *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876C-D.

⁵⁵ Par [53] above.

⁵⁶ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 642H.

⁵⁷ *President-Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H-111A.

⁵⁸ *Ibid.*

⁵⁹ *J R Janisch v W M Spilhaus & Co (WP)* 1992 (1) SA 167 (C) at 170 *et seq.* See also *President-Versekeringsmaatskappy v Moodley* 1964 (4) SA 109 (T) at 110-111 on issue of prejudice. See also par [48] above.

*Affairs, Environment and Tourism, Eastern Cape v Kruizenga and another*⁶⁰ has useful aids. It concerned the issue whether a party may resile from an agreement entered into at a pre-trial conference by such party's attorney, without its knowledge. The SCA held that admissions of a factual nature made at a pre-trial conference amount to sufficient proof of the material facts.⁶¹ Therefore, a party may only resile from a pre-trial conference agreement deliberately concluded only on special circumstances.⁶² The principle finds more forceful application where the pre-trial conference agreement is confirmed in court and, consequently, made an order or judgment of a court.⁶³

[60] The enquiry includes whether a party desirous of resiling from an agreement led its opponent into reasonably believing that it was binding itself.⁶⁴ The fact that the impugned agreement was made over a lengthy period of time is also relevant. A defeat of the objective of pre-trial conferences of encouraging settlements ought to be vigorously avoided, so that the conduct of civil trials is not severely hampered.⁶⁵

[61] On concessions made in court, the Constitutional Court in *Seebed CC t/a Siyabonga Convenience Centre v Engen Petroleum Limited*⁶⁶ confirmed the principle that a court is not bound by a legal concession made in a matter before it, where such concession is considered by the court to be wrong in law, but concessions of fact are, generally, accepted without the court deciding on the material issues further, as they effectively place the conceded facts beyond dispute.⁶⁷ This rule also applies to legal concessions 'properly made' in the view of the court.⁶⁸ But a concession made by counsel on a point of law may be withdrawn where the

⁶⁰ *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and another* 2010 (4) SA 122 (SCA) ('MEC, EC v Kruizenga 2010 (4) SA 122 (SCA)').

⁶¹ *MEC, EC v Kruizenga* 2010 (4) SA 122 (SCA) [6].

⁶² *MEC, EC v Kruizenga* 2010 (4) SA 122 (SCA) [6]. See also *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) at 613H- 614D.

⁶³ *MEC, EC v Kruizenga* 2010 (4) SA 122 (SCA) [6].

⁶⁴ *MEC, EC v Kruizenga* 2010 (4) SA 122 (SCA) [20].

⁶⁵ *MEC, EC v Kruizenga* 2010 (4) SA 122 (SCA) [21].

⁶⁶ *Seebed CC t/a Siyabonga Convenience Centre v Engen Petroleum Limited* (CCT 290/20) [2022] ZACC 28; 2023 (12) BCLR 1535 (CC) (20 July 2022).

⁶⁷ *Seebed v Engen Petroleum* [2022] ZACC 28; 2023 (12) BCLR 1535 (CC) [49]; *Matatiele Municipality and others v President of the RSA and others* 2006 (5) SA 47 (CC) [67]; *Kruger v President of Republic of South Africa* 2009 (1) SA 417 (CC) [102].

⁶⁸ *Seebed v Engen Petroleum* [2022] ZACC 28; 2023 (12) BCLR 1535 (CC) [49]; *Kruger v President of Republic of South Africa* 2009 (1) SA 417 (CC) [102].

withdrawal causes no prejudice to the other party.⁶⁹ Concessions of fact are binding,⁷⁰ subject to what I turn to next.

Legal principles regarding iustus error in relation to agreements

[62] The principles applicable to *iustus error*,⁷¹ particularly in settlement agreements, were usefully summarised by the SCA in *MB v RM*⁷² as follows:

[62.1] Generally, settlement agreements are in the form of compromise between parties desirous of avoiding protracted and expensive litigation, as it is essentially a compromise (i.e. *transactio*)⁷³ or final settlement by agreement of uncertain or disputed rights or obligations or, where it says so, extinguishing of the disputed rights or obligations.⁷⁴ Its purpose is to avoid or terminate litigation and has the effect of *res iudicata*.⁷⁵ This, in my view, is put in a proper context by the following *dicta* from *Estate Erasmus v Church*:⁷⁶

A transaction [sic] is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing.⁷⁷

⁶⁹ *Seebed v Engen Petroleum* [2022] ZACC 28; 2023 (12) BCLR 1535 (CC) [49]; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC) [55].

⁷⁰ *Seebed v Engen Petroleum* [2022] ZACC 28; 2023 (12) BCLR 1535 (CC) [49].

⁷¹ '*Iustus error*' is described as '*reasonable, pardonable error*' in VG Hiemstra and HL Gonin, *Trilingual Legal Dictionary* (3rd edn, Juta 1992).

⁷² *M.B v R.B* (259/2023) [2024] ZASCA 116 (24 July 2024).

⁷³ '*Transactio*' is explained as '*settlement of a suit or matter in controversy* (by the parties themselves, without arbiters)' in Hiemstra and Gonin, *Trilingual Legal Dictionary*. See further par [65] below.

⁷⁴ *MB v RB* [2024] ZASCA 116 [9].

⁷⁵ *MB v RB* [2024] ZASCA 116 [9]. See also *Gollach & Gomperts (1967) v Universal Mills & Produce Co* 1978 (1) SA 914 (A) at 922C; *Blou Bul Boorkontrakteurs v McLachlan* 1991 (4) SA 283 (T) at 286F; *Mafisa v Road Accident Fund and another* 2024 (4) SA 426 (CC) [48]; *Road Accident Fund v Taylor and Related Matters* 2023 (5) SA 147 (SCA) [36]; *Eke v Parsons* 2016 (3) SA 37 (CC) [25] *et seq.* See also *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government* (432/2016) [2016] ZASCA 157 (3 October 2016) [7]; Bradfield, *Christie's Law of Contract* at 557.

⁷⁶ *Estate Erasmus v Church* 1927 TPD 20.

⁷⁷ *Estate Erasmus v Church* 1927 TPD 20 at 24. See also *Gollach & Gomperts (1967) v Universal Mills & Produce Co* 1978 (1) SA 914 (A) at 921C-D and also at 923C-D.

[62.2] The grounds upon which a party can resile from a contract on the basis of a mistake are very limited and include fraud and *iustus error* vitiating true consent and not merely concerning merits of the dispute.⁷⁸ But these are not the only grounds.⁷⁹

[62.3] An error can be said to be *iustus* where the party trying to resile has by mistake – caused by an innocent or fraudulent misrepresentation of the other party – bound itself to the agreement.⁸⁰ A mistake implies a ‘misunderstanding, misrepresentation, and resultant poor judgment’.⁸¹

[62.4] The test for withdrawal on the basis of an *error* or mistake is whether the party whose actual intention is said not to be conforming with the expressed common intention led the other party – considered as a reasonable person - to believe that its declared intention represented its actual intention.⁸² The test involves a three-legged enquiry: (a) was the intention of one of the parties misrepresented; (b) who was responsible for the representation, and (c) was the other party misled by the representation (i.e. was the party actually misled and would a reasonable person have been misled).⁸³

[62.5] No misrepresentation, which qualifies as *iustus error*, exists where a party has, subsequently had a change of heart and belief about a settlement agreement reached after protracted negotiations between the parties and made an order of court. It does not matter that the party impeaching the contract genuinely believes the agreement is based on incorrect calculations

⁷⁸ *MB v RB* [2024] ZASCA 116 [10]. See also *Gollach & Gomperts (1967) v Universal Mills & Produce Co* 1978 (1) SA 914 (A) 922-923.

⁷⁹ *Gollach & Gomperts (1967) v Universal Mills & Produce Co* 1978 (1) SA 914 (A) at 922C-923B; *Blou Bul Boorkontrakteurs v McLachlan* 1991 (4) SA 283 (T) at 284-286; *Kambaku Game Lodge BK v Joubert and another* 1999 JDR 0193 (T) at 36. See also Bradfield, *Christie’s Law of Contract* at 558-559.

⁸⁰ *MB v RB* [2024] ZASCA 116 [11]. See also *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) at [12].

⁸¹ *MB v RB* [2024] ZASCA 116 [12], relying on *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 238H.

⁸² *MB v RB* [2024] ZASCA 116 [12], relying on *Sonap Petroleum (SA) v Pappadogianis* 1992 (3) SA 234 (A) at 238H.

⁸³ *Ibid.*

and wrong legal advice on his part.⁸⁴ A mistake which is the result of a party's own fault is not *iustus* and the party which is mistaken cannot be allowed to escape liability derived from the agreement.⁸⁵ For such a mistake may constitute a unilateral error incapable of serving as a ground for variation of the settlement agreement on the basis of a common mistake.⁸⁶

C6 Was 'the July Agreement' and/or 'the August Pretrial Agreement' a 'compromise' of Tshwane's claim and can Tshwane avoid or resile from same?

Compromise or not?

[63] Blair Atholl opposes the amendment – in the main – on the ground that it would unravel the 'compromise' (as borne by the July Agreement and/or the August Pretrial Agreement), reached between the parties and, subsequently, incorporated into the pleadings, on Tshwane's claim for water supplied to Blair Atholl estate during the First Period. The agreement(s) made it no longer necessary to prove at the trial the total water consumption through all the meters at the Blair Atholl estate during the First Period.

[64] Tshwane disputes that the circumstances under which the July Agreement and/or the August Pretrial Agreement constituted a settlement of a disputed quantity after a negotiated bargaining process or that Blair Atholl – through the instrumentality of Mr Maas – struck 'a bargain' by way of some discount in the quantity of water consumed by Blair Atholl.

[65] A 'compromise' is defined as 'an adjustment of claims and disputes by mutual concession either without resort to legal proceedings or on the condition of abandoning such proceedings if already commenced'.⁸⁷ This accords with the

⁸⁴ *MB v RB* [2024] ZASCA 116 [13].

⁸⁵ *MB v RB* [2024] ZASCA 116 [13].

⁸⁶ *Ibid.*

⁸⁷ *Vena v Port Elizabeth Divisional Council* 1933 EDL 75 at 87 (also cited in RC Claassen and M Claassen, *Dictionary of Legal Words and Phrases* (LexisNexis, 2024) 'Claassen's Dictionary of Legal Words')). See also *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government* [2016] ZASCA 157 [7].

definition in *Christie's Law of Contract in South Africa*⁸⁸ that a compromise or *transactio* is a 'settlement by agreement of disputed obligations, whether contractual or otherwise'.⁸⁹ But it ought to be borne in mind that whether an obligation or dispute has been compromised is denoted by the substance as opposed to the form.⁹⁰

[66] I understand what appears above to be accommodative of both parties' assertions. The above authorities clearly define 'compromise' as 'an adjustment of claims and disputes by mutual concession' for purposes of avoiding anticipated resort to legal proceedings or where such proceedings are already under way on condition of abandoning such proceedings.⁹¹

[67] In this matter the parties agreed 'the total consumption through all the meters at Blair Athol since inception up to 6 July 2021'; the '[t]otal consumption through meters for account ending in 3576'; the '[t]otal consumption through meters for account ending in 4851' and the '[t]otal consumption through both meters'.⁹² These aspects formed part of the overall disputes (i.e. claims and counterclaims) between the parties. By reaching the aforesaid agreement the parties 'settled' or 'adjusted' their claims and disputes over the agreed aspects in order to carve same out of their future battles or litigation.

[68] Clearly, the parties wanted to prevent or end the lawsuit or litigation on the total water consumed or supplied during the First Period by agreeing on the figures for that period.⁹³ As to what they hoped to gain or feared to lose,⁹⁴ is unclear. But it may be the resources (as in time, effort and money) linked to adducing evidence to

⁸⁸ GB Bradfield, *Christie's Law of Contract in South Africa* (8th edn, LexisNexis, 2022)

⁸⁹ Bradfield, *Christie's Law of Contract* at 551 also referring to this definition in *Lawrie v Nursing Response CC and others* [2016] 3 All SA 186 [8]. See also footnote 73 above.

⁹⁰ Bradfield, *Christie's Law of Contract* at 551-552, relying on *National Employers' General Insurance Co Ltd v Springbok Timber and Hardware Co (Pty) Ltd* 1969 (3) SA 444 (W) 446-447.

⁹¹ *Vena v Port Elizabeth Divisional Council* 1933 EDL 75 at 87; *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government* [2016] ZASCA 157 [7]. See also *Claassen's Dictionary of Legal Words*.

⁹² Pars [19]-[20] above.

⁹³ *Estate Erasmus v Church* 1927 TPD 20 at 24. See also *Gollach & Gomperts (1967) v Universal Mills & Produce Co* 1978 (1) SA 914 (A) at 921C-D and also at 923C-D.

⁹⁴ *Estate Erasmus v Church* 1927 TPD 20 at 24. See also *Gollach & Gomperts (1967) v Universal Mills & Produce Co* 1978 (1) SA 914 (A) at 921C-D and also at 923C-D.

establish (for Tshwane) or to disprove (for Blair Atholl) 'the total consumption through all the meters at Blair Athol since inception up to 6 July 2021'. A good indicator of this point is the agreement reached in respect of account ending in 4851. The figures for this account are still holding firm, despite the absence of concession of the form urged upon in respect of the 3576 account. In other words, any compromise reached in respect of the account ending in 4851 does not appear to involve a discount. I do not understand Blair Atholl's case to be that a different process led to the agreement reached over the water meters for account ending in 4851 than those for the 3576 account. Therefore, the material relied upon to assert a compromise reached between the parties is the same for both accounts, both in form and substance.

Can Tshwane resile from or avoid the compromise or agreements?

[69] A 'compromise' between Tshwane and Blair Atholl would constitute a contract and, therefore, capable of being set aside on the grounds, among others, of fraud and *iustus error*.⁹⁵ Some of the principles relating to *iustus error* appear above.⁹⁶ Tshwane says there was a 'mutual iustus error between the parties'.⁹⁷ Blair Atholl urges this Court that the latter ground or defence is unavailable to Tshwane.

[70] Generally, the creation of contracts in terms of our law is objective.⁹⁸ But our law allows a party to rely on its own mistake in certain instances to escape contractual obligations.⁹⁹ The mistake (*error*), at least, would have to be reasonable (*iustus*) and be pleaded.¹⁰⁰

[71] The concept 'mistake' - in the context of contracts - may refer to a number of different factual situations.¹⁰¹ But, generally, *iustus error* or operative mistake refers

⁹⁵ Bradfield, *Christie's Law of Contract* at 558-559.

⁹⁶ Par [62] above.

⁹⁷ Pars [38]-[39] above.

⁹⁸ Bradfield, *Christie's Law of Contract* at 385 and the cases therein.

⁹⁹ *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* [1958] 3 All SA 13, 1958 (2) SA 473 (A) at 479G; *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) [9]. See also Bradfield, *Christie's Law of Contract* at 385.

¹⁰⁰ *National and Overseas Distributors Corporation v Potato Board* 1958 (2) SA 473 (A) at 479; *Gollach & Gomperts (1967) v Universal Mills & Produce Co* 1978 (1) SA 914 (A) 926H-927A; *Slip Knot Investments 777 v Du Toit* 2011 (4) SA 72 (SCA) [9]-[10]. See also Bradfield, *Christie's Law of Contract* at 385.

¹⁰¹ Bradfield, *Christie's Law of Contract* at 383.

to a factual situation concerning a mistake recognisable from a legal point of view.¹⁰² Case law suggests a very limited possibility of *iustus error*.¹⁰³

[72] The principles regarding *iustus error* include that: (a) The mistaken party ought to discharge the onus of proving that the mistake was – from a legal point of view - reasonable. A mistake ought to be shown to be *iustus*, lest it is ignored.¹⁰⁴ (b) The mistake must relate to facts having a bearing on the validity of a transaction as opposed to those pointing to ignorance of a point intended to be compromised.¹⁰⁵ (c) The scope for a defence of unilateral mistake is very narrow, if it exists at all.¹⁰⁶ This refers to where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that its offer was being accepted under a misapprehension.¹⁰⁷ (d) The other party ought to have caused the mistake or knew of the mistake or ought to have known of the mistake.¹⁰⁸ (e) The materiality of the mistake would not avail the mistaken party of an escape route from a contract where the mistake resulted from such party's own fault.¹⁰⁹

[73] But it is not only fraud and *iustus error* which serve as grounds for setting aside a compromise.¹¹⁰

[74] In this matter the parties differ on the labels they give to whatever error that may have occurred with regard to the July Agreement. Whilst Tshwane calls the

¹⁰² Bradfield, *Christie's Law of Contract* at 383.

¹⁰³ Bradfield, *Christie's Law of Contract* at 385. See also P Fvriier-Breed, 'A perspective on the *justus*-requirement in *justus-error*' (1995) 2 *Tydskrif vir die Suid-Afrikaanse Reg* ('TSAR') 300.

¹⁰⁴ Bradfield, *Christie's Law of Contract* at 386 and the authorities cited there. See also *Blou Bul Boorkontrakteurs v McLachlan* 1991 (4) SA 283 (T) at 286G.

¹⁰⁵ Bradfield, *Christie's Law of Contract* at 558-559, relying on *Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) 922–3.

¹⁰⁶ *Gollach & Gomperts (1967) v Universal Mills & Produce Co* 1978 (1) SA 914 (A) 926H-927A.

¹⁰⁷ Bradfield, *Christie's Law of Contract* at 385, partly relying on *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* [1958] 3 All SA 13, 1958 (2) SA 473 (A).

¹⁰⁸ *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA). See also Bradfield, *Christie's Law of Contract* at 385; Frier-Breed 'A perspective on the *justus*-requirement in *justus-error*' 1995 TSAR 300.

¹⁰⁹ Bradfield, *Christie's Law of Contract* at 386.

¹¹⁰ *Gollach & Gomperts (1967) v Universal Mills & Produce Co* 1978 (1) SA 914 (A) at 922C-923B; *Blou Bul Boorkontrakteurs v McLachlan* 1991 (4) SA 283 (T) at 284-286; *Kambaku Game Lodge BK v Joubert and another* 1999 JDR 0193 (T) at 36. See also Bradfield, *Christie's Law of Contract* at 558-559.

mistake a 'mutual justus error between the parties',¹¹¹ Blair Atholl vehemently denies that there was any mutual error or *iustus* error. Tshwane bears the onus of proving that the nature of mistake and its elements. But, ultimately, the substance of the agreement and not the form or tag given to it by the parties would determine what was agreed upon between the parties in respect of their obligation(s) or the dispute(s).¹¹²

[75] From the facts available to me it appears common cause between the parties that they were involved in a 'process through which an agreement could be reached regarding the quantity of water provided by Tshwane and consumed by the HOA'.¹¹³ There was litigation under way and both parties had legal representatives formally appointed in the matter. But the actual discussion on the issue was left to Ms VRVO, coming from billing and invoicing department of Tshwane and Mr Maas, from Blair Atholl or the two took the lead in this regard. Ms VRVO prepared some figures or reconciliations relating to the water supplied to and/or consumed by Blair Atholl estate and sent same to Mr Maas, 'as requested'.¹¹⁴ Mr Maas' response, among others, referred to 'the total consumption' through all the meters at Blair Athol.¹¹⁵ Mr Maas concluded this part of his email with the question: '[a]re these the figures you wish us to confirm?'.¹¹⁶ It is not inconsequential that Mr Maas, used the phrase or words 'total consumption' four times in his email. Also, he referred to 'through meters' or a phrase to that effect also four times in the email.¹¹⁷ The phrases were used again in Mr Maas' email confirming the figures.¹¹⁸

[76] It appears to me, from what is currently available, that Mr Maas was focussed on getting the 'total' or entire consumption of the water that went 'through' the meters at Blair Atholl supplied by Tshwane for the First period. Ultimately, the figures were confirmed as supplied by Ms VRVO. I agree with Tshwane that Mr Maas was

¹¹¹ Pars [38]-[39] above.

¹¹² *National Employers' General Insurance v Springbok Timber and Hardware* 1969 (3) SA 444 (W) 446-447. See also Bradfield, *Christie's Law of Contract* at 551-552.

¹¹³ FA, par 19.1, CaseLines 029-30.

¹¹⁴ FA, annexure 'ARA4', CaseLines 029-129.

¹¹⁵ FA, annexure 'ARA4', CaseLines 029-128. See also par [19] above.

¹¹⁶ *Ibid.*

¹¹⁷ FA, annexure 'ARA4', CaseLines 029-128. See also par [19] above.

¹¹⁸ FA, annexure 'ARA4', CaseLines 029-127. See also par [20] above.

not striking a 'bargain' when confirming the figures. Also, Tshwane argues that Ms VRVO entirely premised her figures or reconciliation on the kilolitres of water contemplated by the invoices and statements of Tshwane, and did not have a separate or second 'set of books or an alternative accounting system' to advance any other position. Tshwane now says only the figures for account ending in 4851 were correct and those for the 3576 account were incorrect. I have nothing before me suggesting that Mr Maas (and therefore Blair Atholl) knew that the figure for the 3576 account was 3 082 379 kl and not 2 082 379 kl as stated by Ms VRVO (and therefore Tshwane) for the First Period. This appears to me to suggest that no true or binding consensus was reached at all on the day in question in respect of the 3576 account.¹¹⁹ The error was mutual. The parties had intended to agree on total consumption of water which passed through all meters supplying water into Blair Atholl for the First Period, only to agree on an erroneous figure for the one account.

[77] Further, I deal with the issue whether the mutual error found to exist, above, was *iustus*. Ms VRVO (and Tshwane) say(s) that the error was picked up following her testimony and due to the involvement of the expert Mr Zeelie, whose report was delivered in August 2024. The explanation given is regarding the so-called 'clock overs' on meter number 1[...] relating to the 3576 account, as stated above.¹²⁰ I find this explanation, if established, would prove the material error to have been reasonable or *iustus*.

[78] Tshwane also refers to contentions by Mr Hatzkilson, on behalf of Blair Atholl, particularly that there was a discrepancy in respect of the consumption as reflected in the invoice and 'the July Agreement'. He even mentioned that the total consumption was 2 935 085 kl in respect of the 3576 account and, thus, alluding to the difference of 852 706 kl from the agreed figure. All these suggest to me that on the unamended pleadings, the parties had been ventilating the issues improperly based on wrong figures. This is so, despite Tshwane being adamant that the error in the figures has no bearing on the actual meter readings on meter 1[...] or the correctness of its invoices, and did not result in an undermeasurement of water

¹¹⁹ *Blou Bul Boorkontrakteurs v McLachlan* 1991 (4) SA 283 (T) 286G; *Van Reenen Steel v Smith* 2002 (4) SA 264 (SCA) [7].

¹²⁰ Par [39] above.

supplied by Tshwane to Blair Atholl. I agree with Blair Atholl that Tshwane bears the onus of proof in respect of its invoices, including in respect of the correct volume of water actually consumed by a consumer and the charges therefor, as based on the applicable tariffs. The amendment sought does not seek to interfere with this predisposition.

[79] My finding in the preceding paragraphs equally applies to any agreement subsequent to the July Agreement. It appears that anything after the July Agreement was simply a confirmation of the terms initially agreed between Mr Maas and Ms VRVO during July 2021. The 'August Pre-trial Agreement' and statements made in Court by the witnesses and/or legal representatives appear to owe their existence to the July Agreement and to have no basis to exist independent of or without same.

[80] It is also contended on behalf of Blair Atholl that the matter is beyond the jurisdiction of the Court as 'a full and complete compromise' was reached between the parties on the material. This appears to be on the strength of the SCA decision in *Ubisi and another v Road Accident Fund*¹²¹ which dealt with a settlement agreement reached in a personal injury matter between the parties where neither of the parties challenged the validity of the settlement agreement and, thus, the settled issues were *res judicata*.¹²² Obviously, in the current matter before this Court, Tshwane approached the Court attacking the settlement agreement. Any claim of *res judicata* can only be disposed of in terms of a ruling of this Court. Therefore, the jurisdiction of this Court is not ousted. The same applies to Blair Atholl's argument based on the principle of *pacta sunt servanda* (agreements must be honoured).¹²³

[81] The question whether Tshwane may resile from or avoid the impugned agreement(s) is also dependent on the ultimate test whether any prejudice would accrue to the other party, being Blair Atholl.¹²⁴ I do not think that any prejudice suffered or still to be suffered by Blair Atholl would be unaffected (i.e. either eliminated wholly or at least materially or substantially so) by an award of costs or

¹²¹ *Ubisi and another v Road Accident Fund* (711/2023) [2024] ZASCA 93 (11 June 2024).

¹²² *Ubisi v Road Accident Fund* [2024] ZASCA 93 [11].

¹²³ *Ubisi v Road Accident Fund* [2024] ZASCA 93 [12]-[13]; *Mafisa v Road Accident Fund* 2024 (4) SA 426 (CC) [36], [48].

¹²⁴ Pars [59]-[60] above.

the postponement of the trial.¹²⁵ The latter has already been ordered in November 2024. Consequently, on the basis of what appears above, I am of the view that Tshwane – when its pleadings are amended accordingly - may be able establish a basis to resile from or escape the material obligations in terms of the impugned agreement(s).

C7 Is the proposed amendment a withdrawal of factual admissions by Tshwane?

[82] Another ground of objection by Blair Atholl is that the proposed amendment if effected would constitute a withdrawal of factual admission(s) made by Tshwane regarding the quantity of water consumed by Blair Atholl estate for the First Period in respect of the 3576 account. Tshwane simply dismisses this as an unsound basis for an objection and, further, that it is a matter for the pleadings and determination by the trial court.

[83] Our law, as stated above, allows for admissions made in pleadings to be withdrawn similarly to any other form of amendment.¹²⁶ An admission constitutes an unequivocal agreement in terms of which party A agrees with a statement of fact made by party B.¹²⁷ An admission, effectively, renders it not necessary for a claimant or plaintiff to prove the fact which is admitted.¹²⁸ But amendment may be sanctioned by the court even when this would lead to the withdrawal of an admission in a pleading and such finding by the court is not to be preceded by a finding that there was an error involving the admission.¹²⁹

¹²⁵ Par [48] above.

¹²⁶ Pars [57]-[59] above.

¹²⁷ *Botha v Van Niekerk* 1947 (1) SA 699 (T) at 703; *Thompson Kusela CC t/a Thompson Security Group v Dewald Buys t/a Masima Block Watch* (2017/39176) [2023] ZAGPJHC 692 (13 June 2023) [15]. See also *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 28-12.

¹²⁸ *Bellairs v Hodnett and another* 1978 (1) SA 1109 (A) at 1150D; *Thompson Kusela v Dewald Buys* [2023] ZAGPJHC 692 [11]. See also *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 28-12.

¹²⁹ *Amod v South African Mutual Fire And General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614F-G. See also *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 28-12.

[84] The principles relating to the withdrawal of factual admissions made by parties in litigation appear above.¹³⁰ They confirm that there is no complete bar to the withdrawal of such admissions or any peculiar basket for such form of amendments.¹³¹ But there ought to be a full and satisfactory explanation. I am satisfied with the sufficiency of the explanation given by Tshwane. I also do not think the withdrawal of any admissions is likely to cause Blair Atholl any prejudice and injustice, at least prejudice which cannot be ameliorated by a cost order and/or the already granted postponement of the matter.¹³²

C8 *Did the 1 million kilolitres prescribe?*

[85] Blair Atholl, also, objects to Tshwane's proposed amendment because Tshwane's claim of 1 million kl of water - unaccounted for at the time the July Agreement was concluded on the basis that any claim linked to this tally of water would have prescribed. Tshwane disputes this part of the objection on the basis that the amendment does not seek to introduce a new claim, but rather to reconcile the monetary aspect of its existing claim(s). I agree with Tshwane that prescription does not feature in this regard. If the debt underlying the claim in the current pleading had not become prescribed, so would be the amended claim sought to be introduced by the amendment.¹³³

C9 *Will the amendment introduce material conflicting with the evidence already on record?*

[86] Blair Atholl's objection also include that the proposed amendment would introduce material conflicting with the evidence already on record. This may be

¹³⁰ Pars [57]-[59] above.

¹³¹ *President-Versekeringsmaatskappy v Moodley* 1964 (4) SA 109 (T) at 110H-111A.

¹³² *J R Janisch v W M Spilhaus & Co (WP)* 1992 (1) SA 167 (C) at 170 *et seq*; *President-Versekeringsmaatskappy v Moodley* 1964 (4) SA 109 (T) at 110-111; *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board, and others* 2001 (2) SA 675 (C) [24.2]-[24.3]. See par [96] *et seq* below regarding the postponement of the trial due to, among others, the amendment application.

¹³³ *Mazibuko v Singer* [1979] 1 All SA 30 (W) at 37-38.1; *Ergo Mining (Pty) Limited v Ekurhuleni Metropolitan Municipality* [2020] 3 All SA 445 (GJ) [8]; *Wholesale Housing Supplies (Pty) Ltd v Rich Rewards Trading 556 (Pty) Ltd and Others* (22189/2016) [2021] ZAWCHC 215 (29 October 2021) [7]-[17]. See also *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 28-15.

correct. Any evidence already adduced aligning with the July Agreement in as far as the water consumption for the 3576 account would be affected by the amendment, if allowed. But this is ordinary effect of an amendment which is allowed after evidence is led. It cannot serve as a reason to refuse leave to amend, unless any prejudice suffered by the opposing party in this regard is incapable of redress by way of a costs order. There appears to be no such prejudice on the part of Blair Atholl.¹³⁴ Therefore, this ground will not stifle the amendment.

C10 *Does Tshwane have evidence to establish the intended amendment?*

[87] A further point of objection by Blair Atholl is that Tshwane does not have evidence to establish the allegations to be introduced by the proposed amendment. But Tshwane is already on record with figures accompanying the so-called 10 ‘clock overs’ of 100 000 kl each which appear to tally with the 1 million kl of water allegedly left out of the July Agreement.¹³⁵ Therefore, it appears that Tshwane would have evidence to establish the allegations it seeks to introduce in terms of the opposed amendment.

C11 *Timing of the amendment and its implications*

[88] Blair Atholl, in its objection against Tshwane’s proposed amendment, also, says that Tshwane has not demonstrated that it did not delay seeking leave to amend. Tshwane denies that there was delay as the ‘clock overs’ were only discovered after the 2023 hearing during 2024 after ‘extensive investigation and verification’ by Ms VRVO and Mr Zeelie, the independent expert. Tshwane also points to the fact that it applied for condonation.

[89] It is argued on behalf of Blair Atholl that the trial in the part-heard matter was already at an advanced stage and ‘extensive evidence’ has already been led by both sides. Allowing the amendment would result in the recall of witnesses and calling of new witnesses with very serious financial implications for both parties and prejudice to Blair Atholl, the argument concludes.

¹³⁴ The issue of timing of the amendment is discussed further in pars [88]-[90] below.

¹³⁵ FA, pars 31-33, CaseLines 029-52 to 029-54. See also par [39] above.

[90] I agree that the amendment would have financial implications due to the need to adjust the pleadings and the calling or recalling of witnesses. But Rule 28(10), as indicated above, foresees such eventualities whilst allowing the granting of leave to amend at any stage of the proceedings, before judgment.¹³⁶ The authorities are clear on the applicable legal principles in this regard including those in the decision in *Randa v Radopile Projects* about the challenges in asking for leave to amend closer or during the trial.¹³⁷ Cost orders are intended to ameliorate financial strains occasioned by amendments and issues relating to delay are not decisive in this regard.¹³⁸ An amendment which arose from a reasonable cause, including a *bona fide* mistake may be necessary, despite its timing.¹³⁹ The primary issue again remains prejudice due to the amendment given the stage it was to be effected.¹⁴⁰ I have also had regard to the holdings in *JMS v MMAN*¹⁴¹ including the reiteration that amendments would be allowed unless prejudice - incapable of being 'cured by an order for costs and, where appropriate, a postponement' - would befall a party in the position of Blair Atholl.¹⁴² I do not think so.

C12 *Is the amendment sought bona fide?*

[91] Blair Atholl says the application to amend also lacks *bona fides*, a necessary requirement and, thus, constitutes an abuse of process. Tshwane denies these. Tshwane, in an almost nostalgic cry for reciprocation, refers to postponements of the trial previously granted to Blair Atholl in the 14 year lifespan of the matter. Be that as it may, I agree with Tshwane that the amendment is sought *bona fide*.

C13 *Prejudice and triable issue*

¹³⁶ Pars [44], [53] above.

¹³⁷ *Randa v Radopile Projects* 2012 (6) SA 128 (GSJ) [4]-[5]. See also *Ciba-Geigy v Lushof Farms* 2002 (2) SA 447 (SCA) at 450 A-D (i.e. headnote).

¹³⁸ Par [54] above. See also *Erasmus: Superior Court Practice* RS 25, 2024, D1 Rule 28-13.

¹³⁹ *Zarug v Parvathie* NO 1962 (3) SA 872 (D) at 876B-C.

¹⁴⁰ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 642 C-D.

¹⁴¹ *J.M.S v M.M.A.N* [2023] ZAGPPHC 2240; 40230/2020 (21 June 2023).

¹⁴² *J.M.S v M.M.A.N* [2023] ZAGPPHC 2240; 40230/2020 [10]-[15] and the authorities cited there, which form part of those appearing above.

[92] I have already dealt with the issue of prejudice under different context above. The Court's inherent great latitude in granting amendments ought to be focussed on doing justice between the parties and not to allow a mistake by a party to be always decisive of the matter, lest the matter is determined not on the true account of what actually transpired, but what is known to be wrong facts.¹⁴³ I belabour that prejudice on the part Blair Atholl will be either cured or eliminated by a costs order, to the extent that the postponement of the matter in November 2024 did not,¹⁴⁴ or at least materially or substantially so.¹⁴⁵ The remaining issue (from the postponement in November 2024) is the liability for costs and associated issues, to be dealt with below.

[93] Another issue relates to the principle that an amendment should have a reason and *prima facie* 'something deserving of consideration, a triable issue', unless it is only aimed at harassing one's opponent due to lack of a foundation.¹⁴⁶ Blair Atholl says that Tshwane has no triable issue to introduce in terms of the amendment sought. But, I am of the view that the amendment would contribute to the real or genuine issues between the parties,¹⁴⁷ regarding the ten 'clock overs' and implications thereof for Tshwane's claim.

C14 Recalling of Ms van Rede van Oudtshoorn (i.e. Ms VRVO) to testify

[94] Tshwane also seeks leave to recall Ms VRVO to testify on the issues introduced by the amendment. Her evidence, it is submitted on behalf of Tshwane, would also deal with her failure to account for the 10 clock-overs.¹⁴⁸ This would ensure that the true nature of the disputes between the parties predicate the determination of the issues by the Court. Blair Atholl, among others, argues that

¹⁴³ *Standard Bank of South Africa Limited v Davenport NO and others* (847/10) [2014] ZAECHGHC 27 (25 April 2014) [6], as quoted in *National Director of Public Prosecutions v Goqwana* (2938/2022) [2024] ZAECHMHC 50 (18 June 2024) [59].

¹⁴⁴ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 638A, 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; *Randa v Radopile Projects* 2012 (6) SA 128 (GSJ) [7], [12]. See par [48] above.

¹⁴⁵ *Benjamin v SOBAC* 1989 (4) SA 940 (C) at 957H. See par [48] above.

¹⁴⁶ *Trans-Drakensberg Bank v Combined Engineering* 1967 (3) SA 632 (D) at 641A. See *Caxton v Reeve Forman* 1990 (3) SA 547 (A) at 565G-566B. See par [50] above.

¹⁴⁷ *Benjamin v SOBAC* 1989 (4) SA 940 (C) at 958A-C.

¹⁴⁸ Pars [38]-[39] above.

what led Ms VRVO's accounting for the ten clock overs is completely irrelevant to the merits of the proposed amendment. I do not agree. The reasons on which the amendment will be allowed, significantly, motivate for the necessity to recall Ms VRVO as a witness in these proceedings. I will make an order to facilitate her recalling as a witness.

C15 Conclusion and costs

[95] The relevant principle or rule is that the applicant for leave to amend seeks an indulgence and, ordinarily, is liable for costs of the amendment.¹⁴⁹ Blair Atholl asked for punitive costs against Tshwane on a number of grounds. But I hasten to say that the application was not vexatious or frivolous. It raised *bona fide* issues with a serious and genuine bearing on the dispute between the parties.

[96] I think punitive costs are warranted for another reason: the fact that Tshwane could have brought the application earlier on the given circumstances of this matter. Nothing prevented Tshwane from delivering its notice to amend around the time when Mr Zeelie's report was delivered in August 2024. This would also have accorded with the agreement reached at the May 2024 case management meeting to dispose of interlocutory applications during Term 3 of 2024. I have also considered in this regard the cost order I will be making in respect of the application I turn to next.

[97] Therefore, leave to amend and to recall Ms VRVO will be granted with Tshwane liable for the costs on an attorney and client scale, which costs will include costs consequent upon the employment of two counsel, wherever it was the case. The costs should include those occasioned by the postponement of the application on 19 November 2024, due to the unavailability of Tshwane's counsel, as well as costs to effect the amendment and consequential amendments. I am mindful of the tender for costs made by Tshwane with regard to this application, but considers same to have no bearing on this application.

¹⁴⁹ *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. See also *J.M.S v M.M.A.N* [2023] ZAGPPHC 2240; 40230/2020 [10] on the issue of indulgence and liability for costs. See also *Erasmus: Superior Court Practice* RS 25, 2024, D5-8 and D5-10.

D : APPLICATION FOR POSTPONEMENT OF THE CIVIL TRIAL

[98] On 25 November 2024, the trial in the action was postponed *sine die*. The order made confirmed the reservation of the declaration of liability for the wasted costs occasioned by the postponement of the part-heard trial. It also catered for the administrative issue of approaching the office of the Deputy Judge President of this Division for a case management meeting. The purpose of the latter meeting is to facilitate the future disposal of the matter.

[99] Two issues are relevant to determining who should be held liable for the costs of postponement: (a) the sudden withdrawal of Tshwane's erstwhile senior counsel, and (b) the opposed application for leave to amend, dealt with above. These two issues rendered the postponement of the trial unavoidable. The indulgence sought - even in this regard - was for Tshwane. Tshwane was actually alive to this aspect. Tshwane tendered the wasted costs to Blair Atholl on 8 November 2024, but to no avail. Blair Atholl didn't think much of Tshwane's tender. Blair Atholl lamented that Tshwane's tender would hardly suffice as compensation for the prejudice occasioned by the postponement.

[100] A tender for wasted costs by a party in the shoes of Tshwane may denote a quest to ameliorate resultant prejudice of an opponent in the shoes of Blair Atholl. It is sometimes the only thing and, actually, the expected thing, such party can do. Our law does not require that a tender for costs of an opponent should always be complete indemnification of such party's expenditure. This is also not the basis on which cost orders, ordinarily, are made by the courts.

[101] Whilst, Blair Atholl was not obliged to accept the tender by Tshwane for 'reasonable and appropriate wasted costs to mitigate' prejudice arising from the postponement, I find Tshwane's tender was somewhat reasonable under the circumstances. The application for leave to amend was already on course. The tender was accompanying a request for postponement of the trial. In my view, 8 November 2024 represents a watershed point for the determination of the issue of costs in this regard. Liability for costs before that date cannot be of the same

quantum or at the same level as that following that date. Tshwane's conduct prior to making the tender for costs – no doubt – warrants being visited upon with the necessary mark of disapproval. The same cannot be said post-tender. Therefore, I will only direct that Tshwane be liable for wasted costs relating to the trial up to and including 8 November 2024 on an attorney and client scale, but thereafter on a party and party scale. I will also direct that counsel's fees be at scale C for the latter part of the order, as I find this appropriate.

E : CONCLUSION

[102] I must say that often the applications of the type of those in this judgment constitute ordinary applications, but the current ones before the Court are not. The issues in both of them, particularly the leave to amend are anything but ordinary. But this was not assisted by the issues raised by the parties in their papers and counsel in the oral argument. I am not casting any aspersions, but there was a bit of an overload on the issues raised and the grounds for and against such issues. It is no coincidence that the oral argument on the leave to amend lasted the whole day and even went beyond the normal hours of the Court. The material filed was also voluminous. These added to the delay in the handing down of this judgment.

F : ORDERS

Application for leave to amend

[103] In the premises, in the application for leave to amend, I make the order, that:

1. the application for leave to amend brought by the applicant or defendant (hereafter 'the defendant') in respect of the defendant's Consequential Plea and Claim 1 of the Counterclaim amended in Court on 21 November 2023 (CaseLines 001-1 to 001-33), to the amended Declaration, dated 30 May 2022, as fully described in paragraph 1 of the notice of motion to this application dated 30 October 2024, is granted;

2. the defendant is granted leave to recall Ms Benita van Rede van Oudtshoorn to give evidence regarding the issues related to the correct actual total water usage consumed by the respondent or first plaintiff (hereafter 'the first plaintiff') and provided by the defendant in respect of account number 5[...]2 for the period from inception to 6 July 2021;
3. the defendant is liable for costs of the application, envisaged in 1 and 2 hereof, on an attorney and client scale, including costs consequent upon the employment of two counsel, wherever employed, and
4. the costs referred to in 3 hereof shall include costs occasioned by the postponement of the application on 19 November 2024, and costs to effect the amendment and consequential amendments.

Application for postponement

[104] In the premises, in the application for postponement of the civil trial, as read with the order of the Court made on 25 November 2024, I make the order, that:

1. the applicant or defendant (hereafter 'the defendant') is liable for the wasted costs of the respondent or first plaintiff (hereafter 'the first plaintiff') occasioned as a consequence of the postponement of the hearing of the part-heard trial, which was set down for ten court days during the period 25 November 2024 to 6 December 2024;
2. the costs in 1 hereof shall be:
 - 2.1 at the scale of an attorney and client up to and including 8 November 2024, which costs shall include (where applicable) costs consequent upon the employment and/or reservation of two counsel, as well as the reasonable costs consequent upon the reservation of Mr T Hatzkilson for trial, and

2.2 at the party and party scale from and including 9 November 2024 onwards, including (where applicable) costs consequent upon the employment and/or reservation of two counsel at scale C, as well as the reasonable costs consequent upon the reservation of Mr T Hatzkilson for trial.

Khashane La M. Manamela
Acting Judge of the High Court

Date of Hearing : 21 November 2024
(Application for Leave to Amend)

Date of Hearing : 25 November 2024
(Application for Postponement)

Date of Judgment : 27 March 2025
(both applications)

Appearances (both applications):

For the First Plaintiff (i.e. Blair Atholl): Mr P Lourens (with Mr CF van der Merwe SC for heads of argument)

Instructed by : Werksmans Attorneys, Johannesburg
c/o Brazington & McConnell, Pretoria

For the Defendant (i.e. Tshwane) : Ms T Mkhwanazi (with Ms P Mathibela)

Instructed by : Diale Mogashoa Inc, Pretoria